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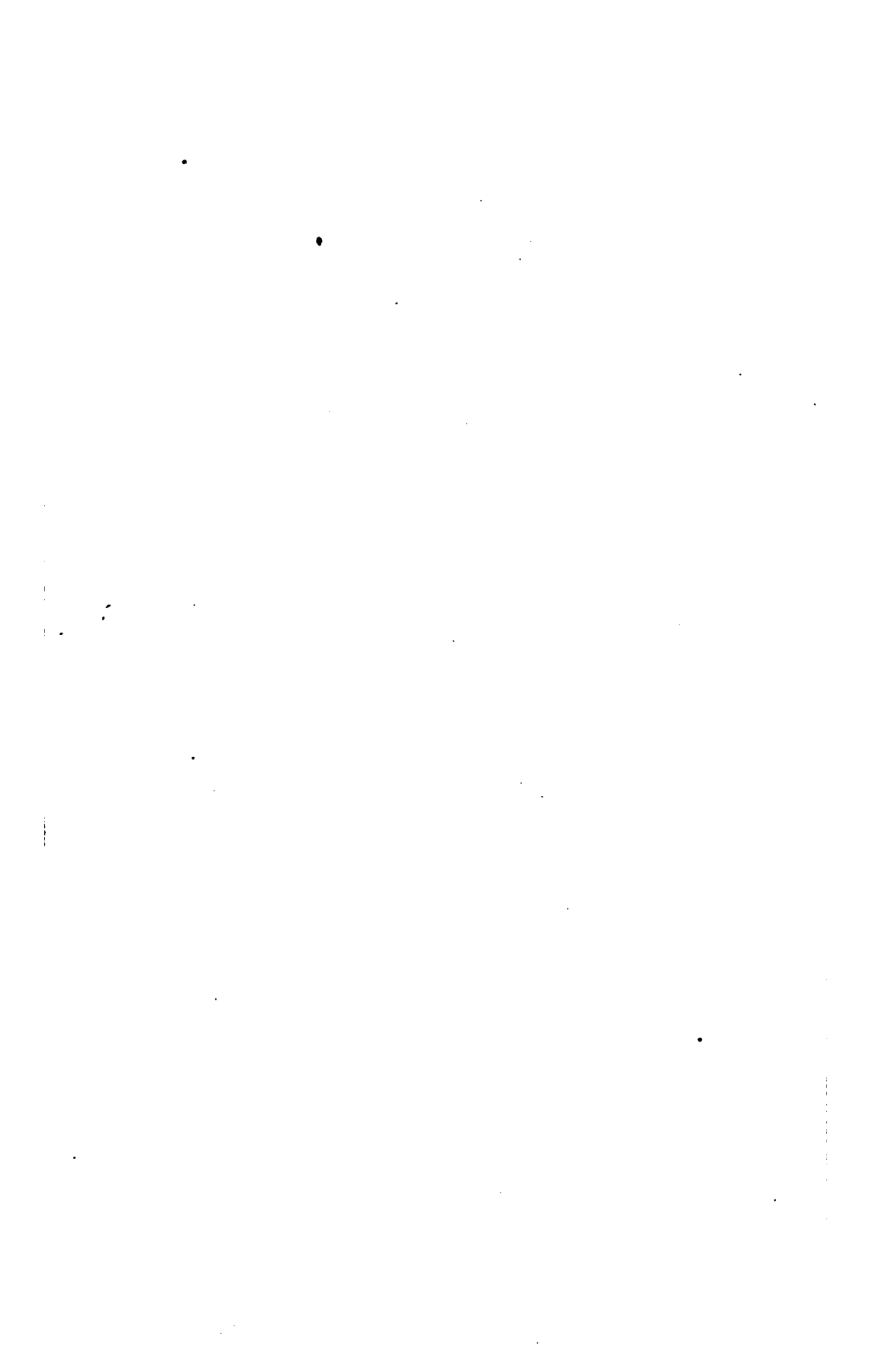
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THE
LAWYERS' REPORTS
ANNOTATED

BOOK VII.

ALL CURRENT CASES OF GENERAL VALUE AND
IMPORTANCE WITH FULL ANNOTATION
ROBERT DESTY, EDITOR

BURDETT A. RICH, HENRY P. FARNHAM,
ASSISTANTS.

1890.

EXTRA ANNOTATED EDITION

WITH L. R. A. CASES AS AUTHORITIES.

ROCHESTER, N. Y.

THE LAWYERS' CO-OPERATIVE PUBLISHING COMPANY.

1905.

122069

JUL 29 1942

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OF ALL

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THE HISTORY OF THE UNITED STATES

1. The first part of the history of the United States is the period from the discovery of the continent by Christopher Columbus in 1492 to the establishment of the first permanent settlements in the early 17th century.
2. This period is characterized by the exploration of the continent by Spanish, French, and English explorers, and the establishment of the first permanent settlements in the eastern part of the continent.
3. The second part of the history of the United States is the period from the establishment of the first permanent settlements to the American Revolution in 1776.
4. This period is characterized by the growth of the colonies, the struggle for independence from Britain, and the establishment of the United States as a new nation.
5. The third part of the history of the United States is the period from the American Revolution to the Civil War in 1861.
6. This period is characterized by the expansion of the United States across the continent, the struggle over slavery, and the Civil War itself.
7. The fourth part of the history of the United States is the period from the Civil War to the present.
8. This period is characterized by the Reconstruction era, the Gilded Age, the Progressive Era, the Great Depression, and the modern era.
9. The fifth part of the history of the United States is the period from the present to the future.
10. This period is characterized by the challenges of the 21st century, including globalization, climate change, and technological advancement.

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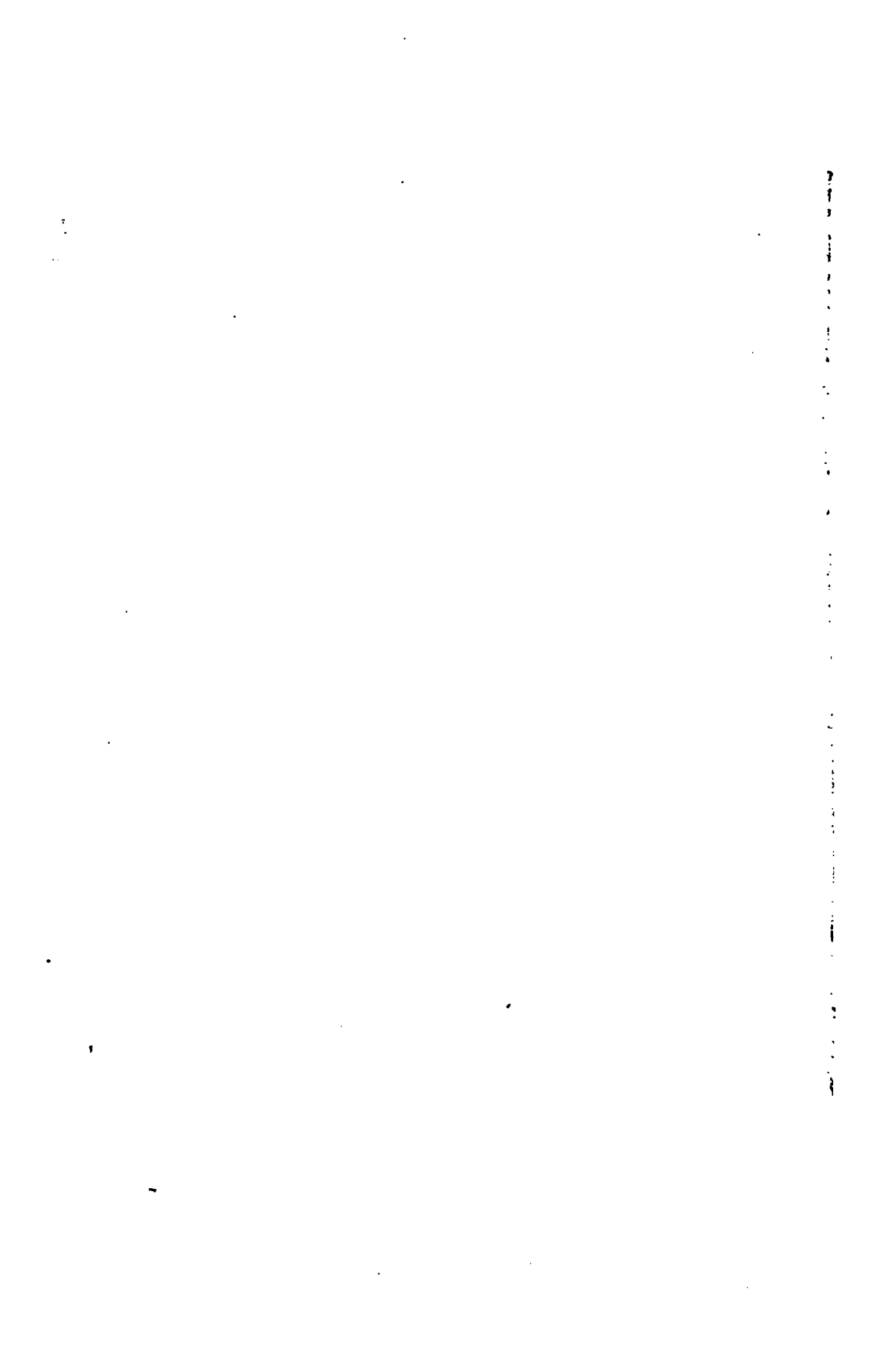
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LAWYERS' REPORTS,

ANNOTATED.

TENNESSEE SUPREME COURT.

Fannie R. O'CONNER, Admx. of Thomas
O'Conner, Deceased, *Appt.*,

v.
James O'CONNER *et al.*

(....Tenn....)

1. A purchaser of land expressly assuming and agreeing to pay off certain purchase-money notes given by his vendor and secured by a vendor's lien, which agreement is contained in his deed, which retains a lien for the payment of this sum as well as the balance of the purchase price to his vendor, becomes personally responsible to the creditor holding the original lien.

2. An incumbrance consisting of a vendor's lien which is expressly assumed by a subsequent purchaser as part of the purchase price, as well as the remainder of the purchase money, which is payable directly to his

immediate vendor, who in his deed retains a lien for both sums, is such purchaser's personal debt; and in case of his death both sums are a charge upon his personal estate, and not a burden on the land in the hands of the heirs.

(Turner, Sp. J., *dissentis*.)

(October 19, 1899.)

APPEAL by complainant from a decree of the Chancery Court of Knox County in favor of defendants in an agreed case submitted to the court for the purpose of determining whether the personal representative or the heir was liable for unpaid purchase money due upon land purchased by decedent. *Affirmed*.

The facts are fully stated in the opinions.

Messrs. Webb & McClung, for appellant:

Where a man purchases land already incumbered with a purchase-money lien, and assumes to pay off the lien, but dies before it

NOTE.—*Incumbrances on decedent's real estate; from what payable.*

Purchase money due on a contract for the purchase of land by a decedent is payable out of the personal estate. *Wright v. Holbrook*, 32 N. Y. 587; *Broome v. Monck*, 10 Ves. Jr. 587; *Livingston v. Newkirk*, 3 Johns. Ch. 312; *Cogswell v. Cogswell*, 2 Edw. Ch. 231; *Johnson v. Corbett*, 11 Paige, 266; *Lampont v. Beeman*, 34 Barb. 239.

This rule is not affected by the New York Statute, which, changing the common law, has made mortgages a charge on the real estate of a decedent unless he has expressly provided otherwise. *Wright v. Holbrook*, 32 N. Y. 587.

A mortgage for a debt of the mortgagor's own contracting, although given for the purchase price of the land mortgaged, is chargeable on the personality. *Sutherland v. Harrison*, 86 Ill. 363; *Cumberland v. Codrington*, 3 Johns. Ch. 229; *Ruston v. Ruston*, 2 U. S. 2 Dall. 243 (1 L. ed. 365); *Hewes v. Dehon*, 3 Gray, 205; *Plimpton v. Fuller*, 11 Allen, 139; *Cope v. Cope*, 2 Salk. 449 and *note*; *Howel v. Price*, 1 P. Wms. 291, and *note*.

A different rule applies as to mortgages assumed by a purchaser. On the death of a purchaser who had assumed the payment of an outstanding mortgage, the land, and not the personal estate of the decedent, is primarily liable. *Coudert v. Coudert*, 4 Cent. Rep. 132, 43 N. J. Eq. 407; *Cumberland v. Codrington*, 3 Johns. Ch. 229; *McLenahan v. McLenahan*, 18 N. J. Eq. 101.

Where part of the realty is incumbered by a mortgage, the executors should pay the mortgage first out of the personality as far as that will go. *Wood v. Hammond*, 16 R. I. 37, 193.

A mortgage given in discharge of a judgment for a debt created by a contract of the mortgagor's ancestor, and which constituted an equitable lien on

the land, on the mortgagor's death, is not chargeable on the personality, but is to be paid out of both funds, where the mortgage covers both the real and personal property. *McLearn v. Wallace*, 35 U. S. 10 Pet. 625 (9 L. ed. 558).

Although mortgages are chargeable upon the realty incumbered under the Statutes of New York, an action against an administrator on his intestate's bond is not barred by the fact that it is secured by a mortgage on land. *Thompson v. Sullivan*, 60 How. Pr. 71.

Where real estate is expressly charged with debts, the proceeds of sales for that purpose cannot be applied to a mortgage upon lands not sold, to the prejudice of other creditors. *Van Vechten v. Keator*, 68 N. Y. 52.

Vendee assuming incumbrance personally liable for the debt.

The grantee of premises subject to an incumbrance is not personally liable therefor, without words importing, with reasonable certainty, a personal assumption of the debt. *Davis v. Hulett*, 2 New Eng. Rep. 123, 58 Vt. 90.

Where a purchaser expressly and in terms agrees to pay off an incumbrance out of the purchase price, such agreement inures to the benefit of the creditor, and may be enforced in equity; but where there is no promise to pay, but simply an agreement that, if the vendor fails to release the incumbrance within a certain time, the purchaser shall have the privilege to discharge it, it is otherwise. *Ayres v. Randall*, 7 West. Rep. 64, 108 Ind. 595.

An agreement, consented to by a mortgagee, whereby the grantee of the mortgaged premises assumes payment of the mortgage note as part of the purchase money, constitutes a novation which discharges the original mortgagor, and renders the

is paid off, as between his heir and personal representative, in a court of equity, the land itself is the primary fund for the payment of said lien, and the promise of the decedent to pay the lien is a mere collateral security.

Cumberland v. Codrington, 8 Johns. Ch. 252; *McLearn v. Wallace*, 35 U. S. 10 Pet. 625 (9 L. ed. 558); 1 Story, Eq. Jur., §§ 574-576; 2 Story, Eq. Jur. § 1248 and note, §§ 1248a, 1248b, 1248c, 1248d, 1248e; *Duke of Ancester v. Mayer*, 1 Lead. Cas. in Eq. 922, note; 2 Sharsw. Bl. 512, note 27; *Snyder v. Summers*, 1 Lea, 541.

As between the heir and personal representative in a court of equity all purchase-money liens resting on the ancestor's lands at the time of his death are a primary charge on such lands, and not on his personal estate, because the liens were created for the benefit of the real and not the personal estate.

McLearn v. Wallace, 35 U. S. 10 Pet. 644 (9 L. ed. 566), and cases cited; *Waring v. Ward*, 7 Ves. Jr. 834; 2 Washb. Real Prop. 4th ed. 566, top p. 197; 1 Sharsw. Bl. bk. II, 512, 157; *Masson v. Swan*, 6 Heisk. 457; *Franklin v. Armfield*, 2 Sneed, 856.

Mr. R. N. Hood, for appellees:

That the personal estate is liable to exonerate the real estate from payment of sums assumed by decedent as part of the purchase price, is established by the fact that in suits to enforce the vendor's lien, etc., the personal representative is a proper party.

Townsend v. Champervaine, 9 Price, 180; Story, Eq. Pl. §§ 160, 174-177; *Knight v. Knight*, 3 P. Wms. 333; *Smith v. Hibbard*, 2 Dick. 780; Mitf. Eq. Pl. 176; Cooper, Eq. Pl.

88; *Gawler v. Wade*, 1 P. Wms. 99; *Warren v. Stowell*, 3 Atk. 125; *Galton v. Hancock*, Id. 488; Pom. Spec. Perf. § 488.

Lurton, J., delivered the opinion of the court:

Thomas O'Conner died in 1882, intestate, and without issue, leaving a large real and personal estate. Under the Statute of Descents and Distributions, his widow, who is likewise his administratrix, is his sole distributee, and entitled, after payment of his debts, to his entire personal estate. The heirs at law, to whom the real estate descends, are the brothers and sisters of the intestate, and the representatives of such as are dead. Thus the heirs and distributees are not the same persons, and the fact has given rise to a controversy as to whether the personal estate is, in equity, the primary fund for the discharge of certain incumbrances upon lands of the intestate. The parties in interest have submitted to the chancery court an agreed case, as provided by the Statute, and from the decree of the chancellor the administratrix has appealed.

The agreed case shows, first, that at the time intestate acquired one of the tracts of land which he owned at his death it was subject to a vendor's lien to secure certain purchase-money notes made by the immediate vendor of Mr. O'Conner; that Mr. O'Conner, as a part of the consideration for the purchase, expressly assumed and agreed to pay off the incumbrance, and to pay to his immediate vendor an additional sum of \$3,000. This agreement was contained in the deed to O'Conner; and, to se-

grantee the sole debtor. *Brown v. Kirk*, 3 West. Rep. 762, 20 Mo. App. 524.

A mortgagee has a right to proceed in equity against one who has assumed and agreed to pay his mortgage. *Burr v. Beers*, 24 N. Y. 178. See *Garnsey v. Rogers*, 47 N. Y. 236; *Trotter v. Hughes*, 12 N. Y. 74; *Russell v. Pistor*, 7 N. Y. 171; *Cornell v. Prescott*, 2 Barb. 16; *Marsh v. Pike*, 10 Paige, 597; *King v. Whitely*, 10 Paige, 466; *Halsey v. Reed*, 9 Paige, 448; *Curtis v. Tyler*, 9 Paige, 432. See also note to *Gifford v. Corrigan*, 6 L. R. A. 610.

The word "assumes" imposes a liability on the grantee. *Schley v. Fryer*, 1 Cent. Rep. 5, 100 N. Y. 71; *Braman v. Dowse*, 12 Cush. 227; *Drury v. Tremont Imp. Co.* 13 Allen, 168; *Locke v. Homer*, 131 Mass. 98; *Stout v. Folger*, 34 Iowa, 71; *Sparkman v. Gove*, 44 N. J. L. 252.

The element which lies at the bottom of such assumption is the fact that the mortgage debt is included in the purchase price, as a constituent part thereof, and the grantee actually pays or secures to his grantor only the balance of the gross price after deducting such debt. It is sufficient that the language shows unequivocally an intent on the part of the grantee to assume the liability of paying the mortgage debt, which intent must clearly appear. *Strong v. Converse*, 8 Allen, 567; *Drury v. Tremont Improvement Co.* 13 Allen, 168, 171; *Weed Sewing Machine Co. v. Emerson*, 115 Mass. 554; *Trotter v. Hughes*, 12 N. Y. 74; *Belmont v. Coman*, 22 N. Y. 438; *Blinse v. Paige*, 1 Abb. App. Dec. 138; *Collins v. Rowe*, 1 Abb. N. C. 97; *Stebbins v. Hall*, 29 Barb. 524; *Miller v. Thompson*, 34 Mich. 10; *Fowler v. Fay*, 63 Ill. 375; *Dunn v. Rodgers*, 43 Ill. 280; *Comstock v. Hitt*, 37 Ill. 542, 546; *Hull v. Alexander*, 26 Iowa, 569; *Johnson v. Monell*, 13 Iowa, 300; *Bumgardner v. Allen*, 6 Munf. 430; 3 Pom. Eq. Jur. 191.

The acceptance of a conveyance, containing a statement that the grantee is to pay off an incum-

brance, binds him as effectually as though the deed had been *inter partes*, and had been executed by both grantor and grantee. *Curtis v. Tyler*, 9 Paige, 432; *Halsey v. Reed*, 9 Paige, 448; *King v. Whitely*, 10 Paige, 466; *Thompson v. Bertram*, 14 Iowa, 476; *Corbett v. Waterman*, 11 Iowa, 86; *Miller v. Thompson*, 34 Mich. 10; *Crawford v. Edwards*, 33 Mich. 354; *Huyler v. Atwood*, 26 N. J. Eq. 504; *Trotter v. Hughes*, 12 N. Y. 74; *Burr v. Beers*, 24 N. Y. 178; *Spaulding v. Hallenbeck*, 35 N. Y. 204; *Ricard v. Sanderson*, 41 N. Y. 179; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; *Lennig's Estate*, 53 Pa. 135; *Hoff's App.* 24 Pa. 200; *Converse v. Cook*, 8 Vt. 164; *Bishop v. Douglass*, 25 Wis. 696.

A purchaser of premises, agreeing to pay an outstanding purchase-money mortgage, is estopped to deny its validity, and cannot, while in possession, defend against the mortgage because of failure of title. *McConihe v. Fales*, 10 Cent. Rep. 232, 107 N. Y. 404.

Where a purchaser of an equity of redemption takes it subject to the mortgage, which he agrees to pay as part of the consideration of his purchase, he will be held personally liable to the mortgagee, and will be regarded as the principal debtor, the mortgagor standing as his surety. *Flagg v. Munger*, 9 N. Y. 490; *Blyer v. Monholland*, 2 Sandf. Ch. 480; *Marsh v. Pike*, 10 Paige, 596; *Ferris v. Crawford*, 2 Denio, 595; *Cornell v. Prescott*, 2 Barb. 16.

The mortgagee is entitled to the benefit of the agreement made by such purchaser. *Higman v. Stewart*, 38 Mich. 523.

As between the original parties, the promise by the grantee to the grantor is not collateral, but primary, and, in equity, the grantee is held to be the principal debtor, and the grantor the surety. *Huyler v. Atwood*, 26 N. J. Eq. 506; *Klapworth v. Dressler*, 18 N. J. Eq. 68; *Jarman v. Wiswall*, 24 N. J. Eq. 269; note to *Boone v. Clark*, 5 L. R. A. 276.

enre the payment of both sums, a lien was retained on the face thereof. Notes were executed and delivered for the sum to be paid his immediate vendor; but there was no substitution of intestate's notes for those of the seller, and no communication whatever between Mr. O'Conner and the creditor. At Mr. O'Conner's death no part of the purchase money due on this tract of land had been paid,—neither that which was due directly to his immediate vendor, nor that which he had assumed and engaged to pay for his vendor. The lien of the original purchase money, as well as that due immediately from intestate to his vendor, was subsequently enforced in a suit against the heirs to whom the incumbered land had descended, to which the administratrix of O'Conner was not a party, and these incumbrances have been paid by a sale of the land. The heirs now ask to have the sums thus enforced against the lands reimbursed out of the personal estate of the intestate, which, it is admitted, is sufficient for this purpose. A second tract which descended to the heirs was incumbered with a lien to secure purchase-money notes made by the intestate. This lien has been likewise enforced under a bill against the heirs, and the land sold for its satisfaction; and for this sum they likewise seek reimbursement out of the personalty. Two questions arise from these facts: *First*. Is the personal estate the primary fund, as between the distributees and the heirs, for the satisfaction of a lien, or charges upon the lands, at the time they were acquired by the intestate; the lien not being to secure a debt originally created by the intestate,

but one assumed by him as a part of the consideration to be paid for the land, when there has been no communication between the intestate and original vendor, to whom the debt thus assumed was due? The *second* question is whether a debt created by the intestate for the purchase of land is, as between the distributee and heirs, a primary charge on the personal estate, or do the heirs take the land *cum onere*?

It may be, at the outset, admitted that where lands descend subject to a charge, or mortgage, or lien, not created by the intestate, which was never his personal debt, or one for which he could have been held personally liable by the creator, the heir, in such case, would take the land subject to the incumbrance, and could not call upon the personal estate to have his lands exonerated from the burden. This would follow for the obvious reason that the incumbrance was never the debt of the intestate, and his administrator could not therefore be called upon to discharge it.

The first matter to be determined, before we can reach a solution of the first question, is to decide whether the intestate had made himself personally responsible for the incumbrance. The agreed case states that in the deed accepted by the intestate there was a clause whereby the vendee assumed the unpaid purchase money, and agreed to pay the same. It is true, this promise or assumption is not made directly to the creditor, but only to the vendor, who was the debtor. The payment of this incumbrance was, however, a part of the consideration for the land. The undertaking, in ef-

If a grantee in purchasing part of the mortgaged premises assumes payment of part of the mortgage he becomes personally and primarily liable only for such part. *Snyder v. Robinson*, 36 Ind. 311; 3 Pom. Eq. Jur. 194.

Where an owner conveys a part to one who assumes a mortgage on the whole tract, and subsequently said owner conveys the remainder thereof to a third party, and the mortgage is foreclosed and the said remainder of the tract is sold in the foreclosure action, the grantee of such remainder can recover damages from the grantee who assumed the mortgage. *Wilcox v. Campbell*, 8 Cent. Rep. 687, 106 N. Y. 325.

Purchaser of mortgaged land liable for mortgage debt. See *note* to *Boone v. Clark*, 5 L. R. A. 276.

Remedies of mortgagees. *Knoll v. N. Y. Chicago & St. L. R. Co.* 1 L. R. A. 366, 121 Pa. 467.

Remedies after default. *Gifford v. Corrigan*, (N.Y.) 6 L. R. A. 610.

Vendor's Lien, enforcement of.

The lien of the vendor is only another mode of expressing his equitable interest; and so far as it has any distinctive signification, it simply means his right of enforcing his claim for the purchase money against or out of the vendee's equitable estate, by means of a suit in equity. *Lewis v. Hawkins*, 90 U. S. 23 Wall. 119 (23 L. ed. 118); *Lingan v. Henderson*, 1 Bland, Ch. 236; *Tuck v. Calvert*, 33 Md. 209; *Richards v. Fisher*, 3 W. Va. 55; *Hadley v. Nash*, 69 N. C. 162; *Harvill v. Lowe*, 47 Ga. 214; *Scroggins v. Hoadley*, 66 Ga. 165; *Relfe v. Relfe*, 34 Ala. 500, 504; *Shinn v. Taylor*, 28 Ark. 523; *Lewis v. Perkins*, 27 Ark. 61; *Holman v. Patterson*, 29 Ark. 367; *Cochran v. Wimberly*, 44 Miss. 508; *Money v. Dorey*, 7 Smedes & M. 15, 22; *Taylor v. Eckford*, 11 Smedes & M. 21; *Roberts v. Francis*, 2 Helsk. 127; *Carter v. Sims*, 2 Helsk. 166; *Cleveland v. Martin*, 2 L. R. A.

Head, 128; *Sits v. Deihl*, 55 Mo. 17; *Seits v. Union Pac. R. Co.* 16 Kan. 133; *Smith v. Moore*, 26 Ill. 362; *Greene v. Cook*, 29 Ill. 190, 58 Ill. 338; *Grove v. Miles*, 71 Ill. 376; *Button v. Schroyer*, 5 Wis. 568; *Merritt v. Judd*, 14 Cal. 59; *Purdy v. Bullard*, 41 Cal. 444; 3 Pom. Eq. Jur. 272.

It is an equitable lien arising in favor of the grantor upon an actual conveyance of the land where the purchase price in whole or in part is left unpaid. *Bizzell v. Nix*, 60 Ala. 231; *Neel v. Clay*, 48 Ala. 252; *Johnson v. Nunnerly*, 30 Ark. 153; *Hilli v. Grigsby*, 32 Cal. 55; *Armory v. Reilly*, 9 Ind. 490; *Stevens v. Chadwick*, 10 Kan. 406; *Smith v. Rowland*, 13 Kan. 245; *Hall v. Jones*, 21 Md. 439; *Haughwout v. Murphy*, 22 N. J. Eq. 531; *Servis v. Beatty*, 32 Miss. 52; *Whitehurst v. Yandall*, 7 Baxt. 228; *Yancey v. Mauck*, 15 Gratt. 800; *English v. Russell*, 1 Hempst. 35; *Smith v. Evans*, 28 Beav. 59.

It is not even, in strictness, an equitable lien until declared and established by judicial decree. *Gilman v. Brown*, 1 Mason, 191; *Hutton v. Moore*, 28 Ark. 382; *Campbell v. Rankin*, 28 Ark. 401, 406; *Moore v. Anders*, 14 Ark. 623, 634.

The lien of the vendor is *in rem*, and he may resort to equity in the first instance to enforce it, without first resorting to a suit at law to recover the amount due. *Vall v. Drexel*, 9 Ill. App. 439; *McCaslin v. State*, 44 Ind. 151; *Moore v. Anders*, 14 Ark. 623, 634; *Hutton v. Moore*, 28 Ark. 382; *Pitts v. Parker*, 44 Miss. 247; *Wells v. Smith*, Id. 298; *Driver v. Hudspeth*, 16 Ala. 348; *Recce v. Burts*, 39 Ga. 565; *Hines v. Perkins*, 2 Helsk. 305; *Sparks v. Hess*, 15 Cal. 185, 194; *Church v. Smith*, 39 Wis. 492, 496.

Where a note for purchase money has been assigned, the assignee may not only enforce the lien against the vendee, but may have appropriate relief against the vendor-assignor. *Church v. Smith*, 39 Wis. 492.

fact, was that the vendee should pay the vendor the sum of \$3,000, and, in addition, should assume and pay off his lien upon the land. The price the vendee was to pay for the land was the sum of \$3,000, plus the lien debt. That this was the plain intent and meaning is most manifest from the fact that the covenant in the deed is not merely that he took the land subject to the incumbrance, or that the vendor was to be indemnified against personal liability on account thereof; but that he expressly agrees to assume and pay off the outstanding notes for purchase money due from his grantor to the vendor of the latter; and these notes, and their dates, and amounts, and payer, are precisely described. To secure the grantor against default either in the payment of the lien debt thus assumed, or in the payments directly made to him, an express lien is retained on the face of the deed accepted by the purchaser. This was therefore not a promise to pay the debt of another, or to be answerable for the debt, default or miscarriage of another; but was a promise, rather, to pay his own debt to a third person designated by his creditor. That the intestate, by the acceptance of the deed containing this assumption of the lien debt, made himself personally responsible to the creditor holding the lien, will not at this day admit of doubt. Upon this subject, Mr. Pomeroy says: "The mortgagor may not only convey the premises 'subject to' the mortgage. He may also convey them in such a manner that the grantee assumes the payment of the mortgage debt, and thus renders himself personally liable therefor. The element which lies at the bottom of such assumption, and which alone gives it efficacy, according to the theory held by some courts, is the fact that the mortgage debt is included in the purchase price, as a constituent part thereof, and the grantee actually pays or secures to his grantor only the balance of the gross price, after deducting such debt. No particular form of words is necessary to create a binding assumption. It is sufficient that the language shows unequivocally an intent on the part of the grantee to assume the liability of paying the mortgage debt; but this intent must clearly appear. When the deed executed by the grantor contains a clause sufficiently showing such an intent, the acceptance thereof by the grantee consummates the assumption, and creates a personal liability on his part which inures to the benefit of the mortgagee, as though he had himself executed the deed." 8 Pom. Eq. Jur. § 1206.

The person who thus assumes a mortgage on his debt becomes, as to the mortgagor or lienor, the principal debtor, and the mortgagor a surety. Upon such a promise, the original vendor could have maintained an action at law. *Moore v. Stovall*, 2 Lea, 543.

This is upon the ground that the original vendor, in adopting the act of the vendee for his benefit, is brought into privity with the promisor, and may enforce the promise as if it were made directly to him. *Lawrence v. Fox*, 30 N. Y. 268; *Burr v. Beers*, 24 N. Y. 178; *Thompson v. Bertram*, 14 Iowa, 476; *Thompson v. Thompson*, 4 Ohio St. 833.

But it is insisted that if it be admitted that the intestate had made himself personally liable to the owner of the incumbrance for the as-

sumption of the debt, in the manner heretofore shown, this promise and liability is only collateral. That, the debt being one not originally contracted by him, his liability, growing out of the promise to pay it, only makes it his debt with respect to the land, which continued to be charged with the lien, and which was therefore the primary fund for its payment; and that the rule in equity in respect to incumbrances upon lands described is that, if the incumbrance was not created by the ancestor, the heir takes the land *cum onere*, and cannot call upon the personal estate to exonerate it; and that the rule is not affected by the fact that the ancestor has made himself personally liable, unless there be something, in addition, indicating a clear intention that the personal estate shall be the primary fund for the payment of the debt.

This presents a question concerning the marshaling of assets, which is altogether *res integra* in this State. It is a general rule at common law, and in equity, that debts shall be primarily payable out of the personal estate, and that the land shall only be subjected as auxiliary to the personality. In this State, by statute, both the personality and the lands of an intestate are assets for payment of debts; but the latter cannot be subjected until the former is exhausted. These principles are fundamental, and need no elaboration. When, therefore, a creditor, whose debt is secured upon the land, elects to go upon the latter, as he may, the heir will be reimbursed out of the personality. This is the undisputed rule where the debt was the personal debt of the intestate, and one originally created by him. In every such case the election of the creditor to enforce his mortgage is not suffered to disappoint the heir; for, the personality being the primary fund for payment of such debts, it must reimburse the heir for the loss of the land, the latter being entitled to exoneration. Therefore there is no room for controversy. Neither can it be seriously denied that in the case under consideration the creditor could, at his election, have recovered the debt secured by him from the personal representative. But it is insisted that, if such a creditor should, at his election, rely upon his right to satisfaction out of the personality, rather than pursue his remedy by enforcement of his lien, in that event the personal representative could call upon the heir for reimbursement, upon the ground that, as to the debt thus paid, the land, as between the personal representative and the heir, was the primary fund, and the personality the auxiliary; in other words, that the land must ease the personality, in case of debts of this character. The rule heretofore stated as to the primary liability of the personality to the payment of the debts of an intestate is likewise the general rule as to the payment of legacies and of the debts of a testator. But this is a mere rule for the determination as between those to whom the land may be devised and those to whom the personality may be bequeathed, when the testator has made no other direction as to which shall be the fund primarily liable. The testator may, undoubtedly, entirely or partially change the natural order of liability, either by express words or by a plain indication of such intention.

It has been lamented by a long line of judges that the rule governing the construction of wills had not been that nothing but "express words" would be held sufficient to alter the course and order of the law concerning the primary liability of the personality to pay both debts and legacies. *Duke of Lancaster v. Mayer*, 1 Lead. Cas. Eq. 4th Am. ed. 892.

The question here presented is not arising under a will claimed to alter the natural order of liability, for there is no will. But it is, nevertheless, an analogous question, the alteration of the usual order of liability arising, it is claimed, from acts *in pais* of the testator, whereby the land, and not the personality, is the primary fund for the payment of this debt. It may be here premised that the doctrine here invoked arises only where the testator or intestate has acquired, by purchase or otherwise, lands which at the time were subject to mortgage or other incumbrance. The incumbrance being for a debt not originally created by the purchaser, he is generally presumed not to intend to subject his personal estate as the primary fund for its payment, but, rather, to intend that the land shall discharge the burden.

This doctrine, as stated by Chancellor Kent, is this: "When a man," says he, "gives a bond and mortgage for a debt of his own contracting, the mortgage is understood to be merely a collateral security for the personal obligation. But when a man purchases, or has devised to him, land with an incumbrance on it, he becomes a debtor only in respect to the land; but, if he promises to pay it, it is a promise, rather, on account of the land, which continues, notwithstanding, in many cases, to be the primary fund. The same equity which in other cases makes the personal estate contribute to ease the land, as between the real and personal representatives, will here make the land relieve the personal estates. There is," says he, "good sense and justice in the principle; and I feel the force of the doctrine that it requires very strong and decided proof of intention before the court can undertake to shift the natural course and order of obligation between the two estates." *Cumberland v. Codrington*, 3 Johns. Ch. 257.

The doctrine just quoted is the deduction of the learned chancery after reviewing the English equity cases, though in other points of his opinion he recognizes certain important distinctions and qualifications, which will hereafter be noticed. See also Story, Eq. Jur. 571-577, 1248 *et seq.*

The American editors of White & Tudor's Leading Cases in Equity thus sum up the doctrine: "The weight of authority would therefore seem to be that the personal estate is not primarily liable, unless the testator has not merely made himself answerable for the payment of the mortgage, but has made the debt directly and absolutely his own; or has in some other way manifested an intention to throw the burden on the personality in ease of the land." Volume 1, pt. 2, p. 928 (4th ed.).

The question in all the cases has been whether or not the facts and circumstances showed such an adoption of the debt as to make the personality the primary fund for its payment. A careful examination of the reported English

decisions makes it exceedingly difficult to extract any distinct rule by which it may be determined when a purchaser has so manifested his intention to adopt the debt as to take a particular case out of the general rule, which makes the really the primary fund for the payment of an incumbrance existing upon lands purchased by a decedent. By all the cases it is held that a mere dry covenant, by which the purchaser agrees to indemnify his vendor against an incumbrance, is insufficient. *Cumberland v. Codrington*, 3 Johns. Ch. 229.

This case presented no other question, the learned judge distinctly stating that in the deed conveying the incumbered estate there was only a naked and dry covenant of indemnity. Id. 254.

All that is said in the case as to the rule under any other circumstances is nothing but dicta. So there are cases holding that when lands are purchased subject to a mortgage, and the vendor enters into bond at the time, or subsequently, to pay off the incumbrance, this alone, without other circumstances, will not be regarded as a sufficient demonstration of his intention to make it his personal debt, with respect to the fund primarily liable for its payment. *Dillinghurst v. Walker*, 2 Bro. Ch. 604; *Evelyn v. Evelyn*, 2 P. Wms. 664, and a number of other cases cited in the very full note of Mr. Cox to the case last cited.

These cases proceed upon the notion that the assumption of the incumbrance was only by way of collateral security, the land remaining the principal debtor and primary fund for its payment. Very slight circumstances, however, will, it seems, suffice to take a case of the latter class out of the rule; as, for instance, in the case of *Earl of Oxford v. Lady Rodney*, 14 Ves. Jr. 418, where the purchaser of the equity of redemption at the same time covenanted with the mortgagor to pay his debt, and agreed upon new terms and conditions of payment. This was held to distinguish the case from *Treddell v. Treddell*, 2 Bro. Ch. 101, and to make the personal estate primarily liable.

Waring v. Ward, opinion by Lord Eldon, presents another case where slight circumstances, in addition to a covenant to pay, were held enough to make the debt the personal debt of the vendee. 7 Ves. Jr. 338. See also *Woods v. Huntingford*, 8 Ves. Jr. 128.

Another rule may be deduced from the decided cases with a good deal of certainty, which is this: That when the incumbrance is assumed as a part of the purchase price, and the vendee makes himself, in any way, directly liable to the creditor for the amount of the incumbrance, in such case the personal estate is the primary fund for the payment of the incumbrance. To satisfactorily show the ground upon which this conclusion is reached, it becomes necessary to briefly consider some of the adjudged cases.

Treddell v. Treddell is termed a leading case, and is certainly the most extreme of the many cases touching upon the doctrine. That case was this: An estate was purchased subject to a mortgage. The purchaser covenanted to discharge the mortgage debt, and to indemnify the vendor, and to pay the agreed purchase price, less amount of the mortgage, to the vendor. Lord Thurlow held the land the primary

fund, and refused to exonerate it, on bill of the heir, out of the personal estate. Now, that case, in all of its particulars, is like the one under consideration, and it might be well assumed to be a very commanding authority. But the reasoning of the learned judge, when examined, shows most conclusively it is not, in view of our own decisions as to the effect of a covenant to pay the incumbrance as a part of the purchase price, of any weight whatever. He put his decision distinctly upon the grounds that the personal estate is not chargeable in equity when it is not at law, saying: "The land was the original debtor, and the mortgagee could not bring his action against the executor of any other party, but merely against the original debtor." He proceeds: "Where it is a debt payable by executors at law, this court will relieve the heir by turning the charge upon the executors, provided it does not interfere with other debts and legacies, or any more substantial claims." 2 Bro. Ch. 101.

Upon the reasons of the chancellor, the decree should have been the other way, for the creditor clearly could have maintained a direct action at law against the vendee. Chancellor Kent himself questioned this case, suggesting that the rule was not applicable in that case, saying: "When the indentures between the mortgagor and purchaser recited an agreement by which A had agreed to pay out of the purchase money, to the son and heir of the mortgagee, the principal and interest due on the mortgage, being 2,155 pounds, and the residue of the purchase money, being 1,845 pounds, to the mortgagor, it might be a question whether the son and heir could not have sued at law for that money, as so much received for his use. It has been held that if one person makes a promise to another, for the benefit of a third person, that third person may maintain an action at law on that promise." 8 Johns. Ch. 254.

That an action at law would lie on such a promise has been expressly decided in this State. *Moore v. Stocall*, 2 Lea, 545.

This case, in the subsequent case of *Woods v. Huntingford*, 8 Ves. Jr. 128, was commented on by Lord Alvanley as follows: "*Troddell v. Troddell* amounts only to this: That where a man buys subject to a mortgage, and has no connection, or contract, or communication with the mortgagee, and does no other act to show an intention to transfer that debt from the estate to himself, as between his heir and executor, but merely that which he must do if he pays a less price in consequence of that mortgage,—that is, indemnifies the vendor against it,—he does not by that act take the debt upon himself personally." Again, he says: "There was no communication with the mortgagee, but upon the sale there was a mere covenant of indemnity against the mortgage by the vendee." This case, thus limited, and the facts changed from those stated in the report of the case, becomes a sound opinion, but is no authority for the contention of the administratrix; and its reasoning is altogether against the rule involved.

The case of *Butler v. Butler* was decided in 1800. It was a case of a purchase of a mortgaged estate, the vendee merely covenanting with his vendor that he would indemnify him

against the mortgage. The briefs of counsel admit that the vendee had not made himself personally liable to the mortgagee by a mere covenant of indemnity, and the decision was put upon the ground that he had not made himself personally liable. 5 Ves. Jr. 534.

The case of *Billinghurst v. Walker*, 2 Bro. Ch. 604, was this: A rectory, subject to a charge, was devised. The devisee subsequently assigned the devised estate, and executed his bond to the person in whose favor the charge was, to pay interest during his life, and that his executor and heirs should pay off the principal within three months after his death. The bearing this case has upon the one at bar is not on account of its facts, or of the decision, but for the reasoning of Lord Thurlow as to what facts and circumstances would show such an adoption of an assumed debt as to make the personally the primary fund for its discharge. Lord Thurlow said: "I agree that, if the testator has shown an intent to take the debt upon himself, it will become his debt; but here the old security remained, and he merely gave a collateral security. If there was anything in the marriage contract which bound him to exonerate this estate from the debt, it would become his personal debt; but there is nothing in the contract like that. Where a man transfers a mortgage, which is not his own debt, his executing a bond as a collateral security does not vary the nature of the charge. It is only a necessary act in the transfer. I do not mean that it does not make him liable personally to the creditor, but it does not throw the charge on his personal estate. Nothing passed here to vary the charge. All the cases of sale have turned upon this,—whether the charge was considered as part of the price. The mere purchase of an estate, subject to charges, as an equity of redemption, does not make the personal estate of the purchaser liable to the charge; but, if the charge is part of the price, then the personal estate is liable." This clear announcement, that "if the charge is part of the price" the personal estate is liable, is but an announcement of the rule as stated by the English editors of *Leading Cases in Equity*, vol. 1, pt. 2, p. 904, citing *Cope v. Cope*, 2 Salk. 449, and *Belvidere v. Rochfort*, decided by House of Lords, Wallis, 45-52, 5 Bro. P. C. 209.

The case of *Cope v. Cope* is not accessible. But the case of *Belvidere v. Rochfort*, having been decided by the highest English court, and before the independence of these United States, is one of very high authority. The case is one of a sale of premises subject to a mortgage, the deed stating that the mortgage debt and interest were to be paid and discharged by the purchaser out of the consideration agreed to be paid. On the back of the deed was indorsed a receipt for the £600 paid as a consideration, in this manner, viz.: "450 pounds on the perfection of the deed, and 450 pounds allowed on account of the mortgage." The purchaser, Lord Rochfort, died, never having paid the mortgage debt. By his will, he devised the mortgaged estate. The devisee, upon bill filed, obtained a decree that the mortgage should be paid by the personal representative. This decree was affirmed by the House of Lords. Another case directly in point, and of the same high authority, because decided long before

our independence, is that of *Parsons v. Freeman*, decided in 1751 by Lord Hardwicke. As the case is reported by Cox in his note to *Boelyn v. Boelyn*, 2 P. Wms. 664, it was this: A purchased an estate for £90 which was at that time mortgaged for £86, and he covenanted to pay £86 to the mortgagee and £4 to the vendor. The Lord Chancellor held that, although the covenant was with the vendor only, and the vendee's personal estate was not therefore liable in that respect to the mortgagee (which would not be the law in this State), yet the words were sufficiently strong to show an intention in the vendee to make it his personal debt. It was accordingly held that the personal estate must exonerate the heir.

These three earlier cases are not by any subsequent cases overruled. When we analyze the reasons upon which they rest, it will be seen that the subsequent cases are not even in conflict. The ground upon which the land, in any case, is held to be the primary fund is not that the contract is a contract concerning realty, or even for the benefit of realty. In some of the cases the courts, in endeavoring to get at the intention of the purchaser, in order to determine whether the one fund or the other should be the primary fund, have, as a circumstance, referred to the fact that the engagement which had been entered into was for the benefit of the incumbered land. The suggestion in argument that the intent is to be determined by an inquiry as to whether the debt assumed, or the promise to pay, or the covenant to discharge was for the benefit of the vendee's personality or realty, is not supported by the cases. If it were so, then money borrowed to buy land, and secured by a mortgage on land, would be primarily a charge on the land. So the notes of the vendee, executed to his immediate vendor for the purchase price, would be a debt incurred for benefit of the land, and hence primarily a charge on the land. This extreme has never, it is believed, been held by any court. On the contrary, the English notes to Leading Cases in Equity say: "Again, if a person bought an estate, and thereby contracted a debt with the vendor, and for the purpose of securing it gave a charge on the estate, and entered into a covenant to pay it, it would be the personal debt of the purchaser, and his personal estate would be primarily liable to pay it; and it will make no difference whether the purchase money was to be paid in a gross sum, or from time to time, by way of annuity for life. It is equally a debt and charge upon the personal estate, and in either case the personal estate is the primary fund to pay it." Volume 1, pt. 2, p. 904 (4th ed.); *Yonge v. Pearce*, 20 Beav. 880, 883.

So, under the English Act of 1854, declaring mortgaged land in all cases the primary fund for the discharge of such mortgages, unless the decedent, by will, expressly declared otherwise, it was held not to make a vendor's lien a primary charge upon the land. *Hood v. Hood*, 26 L. J. N. S. Ch. 616; *Barnwell v. Iremonger*, 1 Drew. & S. 255. The Act was subsequently amended so as to include such liens.

A debt created for purchase money of land not, therefore, being within the rule contended for, it would seem to follow, without discussion, that a debt assumed as a part of the purchase

price would be just as decidedly the personal debt of the vendee as that part of the purchase money covenanted to be paid directly to his immediate vendor. There is no distinction between the two engagements; and the early English cases, cited heretofore, holding that, where the incumbrance is to be paid off as a part of the purchase price, the incumbrance becomes a charge primarily upon the personal estate, are unquestionably to be regarded as sound upon principle, and commanding as authorities upon this court.

We have not deemed it necessary in this opinion to consider how far we would be willing to be governed by the highly artificial rules by which an incumbrance is held to be primarily dischargeable out of one fund or the other. It would seem, then, when the vendee has assumed the debt in such a way as to give to the creditor a right of action against him or his representatives, that this, of itself, would be a sufficient adoption, and sufficient demonstration of his intention to put such a debt on the footing of a personal liability. But this is not now decided, under the well-settled principles of equity, as administered in courts of equity. When all these artificial distinctions as to the origin of the debt have been adopted, the debts which have been paid by a resort to a lien on the land of the heir were the personal debts of Mr. O'Conner, and the personal estate was the primary fund for their payment. The costs taxed to the heir in the foreclosure suit are properly payable by the administratrix. It was the duty of the administratrix to have exonerated the heirs' land. These costs have been thrown upon the heirs by reason of the failure of the administratrix to relieve the heirs before suit. The costs of this cause will be paid by the administratrix, and the decree of the chancellor in all respects affirmed.

Hon. B. J. Turner sat, upon the hearing of this case, in the room and stead of the Chief Justice, who was absent; and he, taking part in the decision of this cause, did not agree with the conclusions here reached, and has filed a dissenting opinion.

Turner, Sp. J., dissenting:

The complainant's assignment of errors correctly states the material facts involved in this controversy, and the same is here copied, viz.: "Thomas O'Conner died intestate, in Knoxville, October 19, 1832, without issue, leaving a widow (the complainant), his sole distributee, and his brothers and sisters (the defendants), his heirs-at-law. He left a valuable real and personal estate, and was in debt about \$500,000. His widow administered on his estate, and has paid all the debts, except about \$10,000 and some interest; and the balance of the personal estate is merely nominal, having no market value. The defendants have realized over \$200,000 in cash from the real estate, and will realize \$50,000 more. At the time of said O'Conner's death three parcels of his real estate were incumbered with purchase-money liens, as follows: *first*, Sanborn lot, about \$1,100; *second*, the Moffatt farm, about \$5,000; *third*, the one-half interest in the Williams McKinney place, about \$13,000. About \$10,000 of the lien upon the third purchase was resting upon

it at the time O'Conner purchased it, and was for purchase money due from O'Conner's vendors to Samuel McKinney, from whom said vendors had purchased it. The \$3,000 was the amount which said O'Conner owed his vendors upon this purchase, who conveyed the interest held to O'Conner, retaining in the deed a lien for the payment of the \$3,000, also a recitation that said O'Conner assumed and agreed to pay the \$10,000 incumbered on the land to McKinney. O'Conner accepted the deed, and went into possession. The other liens were for purchase money due direct by said O'Conner to his vendors, and said liens were retained in the deeds conveying him said real estate. The administratrix did not pay off said liens out of the personal estate, but the lienholders foreclosed them by sale of the property, and the proceeds of the sales were applied in discharge of said liens. The heirs demand that the administratrix shall reimburse them to the extent that proceeds of said lands were applied to the discharge of said liens," etc. The chancellor decreed that the administratrix was bound to reimburse said heirs this money out of the personal estate, and rendered judgment against her for about \$24,000, and all the costs of the several causes in which said liens were enforced. The complainant has brought the case here, and has assigned three errors to the action of the court below. Complainant's second assignment of error is: "The \$10,000 purchase money due from O'Conner's vendors to McKinney was a primary liability resting upon the land; and that O'Conner's understanding as to said incumbrance was merely secondary; and, as between the heirs and personal representatives, his personal estate is not liable."

This precise question has not heretofore been before this court, and is particularly an open one in Tennessee. Our code system for administering estates of decedents does not provide for the state of facts presented by this assigned error. We have the opportunity of determining this question under the light of adjudged cases in courts of last resort, and gaining from them whatever of wisdom they may afford. The Chancery Court of England, more than two centuries ago, held, where one acquired real estate already incumbered, if he did no more than assume or undertake to discharge it, as between himself and his vendor, that the real estate so acquired contained the primary fund for its payment, and the personal liability of the purchaser was auxiliary, merely. This proposition received the approval of its finest judicial minds, and was never questioned by them. Some uncertainty and collision in the adjudication of the English High Court of Chancery came in when it was attempted to determine what amount of contracting with the owner of incumbrance by the purchaser would make his (purchaser's) personal liability primary, and not secondary. Some of the judges held that the last purchaser or taker entered into a contract with the prior incumbrancer, and bound himself to discharge it; or, if the incumbrance was deducted from the gross price,—at which price he purchased,—then his liability was primary. But, though the last proposition was supported by many fine lawyers, the weight of the adjudged cases in England was against it. The better opinion held

the purchaser's liability merely secondary, and the real estate—the burden bearer—primarily liable for the discharge of the incumbrance. We refer to the able and exhaustive opinion of Chancellor Kent in *Cumberland v. Codrington*, 8 Johns. Ch. 252 *et seq.*, in which he collects and reviews the English adjudged cases bearing on this question during a period of more than a century.

The most distinguished law-writers in England concur with Chancellor Kent in the result reached by him in his review of the cases. Mr. Spence says: "The rule" (the one making personality the primary fund) "only applies to those debts which were properly the debts of the testator. In all other cases, where the real estate was the original debtor, and came to the possessor as such, it must continue to bear the burthen. Even though testator, when he purchased the estate, entered into a collateral contract or covenant, or gave a security for payment of the debt, the estate burthened must first be resorted to." 2 Spence, Eq. Jur. 335.

Mr. Powell, on Mortgages, says: "A purchaser an estate subject to a mortgage, and covenants with the mortgagee to discharge the same. A's personal estate is not liable to exonerate the land purchased" (this author, continuing, in the same connection adds), "the personal estate not having received any addition to its funds by reason of the mortgage."

These citations from Powell and Spence are approved by Sir William Grant in *Hancox v. Abbey*, 11 Ves. Jr. 179.

It will be noted, these two eminent masters of the law go further than the case in hand. It does not appear from the record that the intestate gave any bond, covenant or other obligation to the incumbrancer, McKinney, to discharge his debt.

Williams, on Executors, says: "Again, if a man buys an estate subject to an existing mortgage, the lands remain the proper fund for its discharge, and the heir or devisee cannot throw the debt upon the personality, as the primary fund for its payment." 2 Williams, Exrs. 1535, 1536; 2 Roper, Legacies, 957, 958; 8 Jarm. Wills, 477; Adams, Eq. 529.

2 Redfield, on Wills (p. 878), after stating the rule making the realty, incumbered when acquired, the primary fund for its payment, says: "In order to make the purchaser's personality primarily liable, the purchaser must by contract make himself personally liable, and directly liable, to the owner of the incumbrance; and even a covenant or bond for the purpose will not be sufficient, unless accompanied with circumstances showing a decided intention to make it thereby personally his own. This rule prevails in most of the States of this Union. Only three have attempted to vindicate a different rule, and in those three States there is no separate chancery court." *Coudert v. Coudert*, decided in 1887, and reported in 43 N. J. Eq. 407, 4 Cent. Rep. 132, is to the same effect. See also *Mount v. Van Ness*, 33 N. J. Eq. 264; *Sutherland v. Harrison*, 86 Ill. 386; *Hirst's App.* 92 Pa. 494; Bisph. Eq. § 848; 8 Pom. Eq. Jur. 1206; Story, Eq. Jur. §§ 574-576, 1248, 1248c; 2 Lomax, Exrs. 413; 1 Lead. Cas. in Eq. pt. 2, p. 922.

In the case in hand, the intestate had no negotiations with the owner of the incumbrance

touching it in any particular. He gave no note or other obligation to his vendors for the payment of the debt upon the land, or its purchase. The deed conveying him the land contains a recital of the existence of the incumbrance, and intestate's assumption and promise to pay it; and the intestate accepted the deed, and went into possession of the land under it. "This is the head and front of his offending" in this direction. It will be noticed that the principle applicable to these facts has not been questioned in England or the States of this Union, excepting this, during a period of 200 years, and that there has been no conflict upon it, but only upon the question, What acts of the purchaser will make the incumbrance his debt, and his personal estate primarily liable for its payment?—and that the weight of authority upon this phase of the question was adverse to the primary liability of the purchaser.

Sir William Grant, in *Lechmere v. Charlton*, 15 Ves. Jr. 198, says: "Where a person becomes entitled to an estate subject to a charge, and then covenants to pay it, the charge still remains primarily on the real estate, and the covenant is only a collateral security, because the debt is not the original debt of the covenantor."

It is well settled by the ablest courts and law-writers in this and the mother country that the personal estate will not be primarily liable unless the testator has not merely made himself answerable for the payment of the mortgage, but has made the debt directly and absolutely his own, and has in some other way manifested an intention to throw the burden on the personality, in case of the land.

We are aware that it has been objected that the high authorities cited to sustain the principle laid down above are not Tennessee authorities, and therefore are not binding on this court; that we have a system of statutes of our own regulating the administration of decedents' estates, and the system, as explained by our adjudged cases, should determine and settle the question raised by the second error of complainant's assignment. Is this objection well taken? There is no provision of our Code touching the administration of estates that provides for a case circumstanced as is the one in hand. It is not a creditor seeking, under these laws, to subject realty to sale, in order to pay his debts, nor an administrator or executor, for the creditor, seeking to reach realty as a means of paying a debt of a decedent. The creditor enforced his lien for purchase money in the courts, and had sale and payment of his debts from the proceeds of the realty. The heir-at-law now asks to be reimbursed the sum paid from the proceeds of this land. The question of his prayer depends upon the equity of his case, and whether his land was the primary fund for the payment of the debt paid by his inheritance. Our Code makes both real and personal property assets for the payment of debts,—the latter the primary, and the first the auxiliary, fund for payment,—unless this order has been changed by the decedent in his life, as between legatee or distributee on the one hand, and the devisee or heir at law, on the other. Our Code and the adjudged cases of this court permit the decedent to determine which shall be the primary, and which the auxiliary, fund for paying debts and legacies. His intention or pur-

pose thereupon, either express or by necessary implication, is sufficient to control the question, provided its latitude is reasonably apparent. We are not shut up to a will alone for this intent. We may get it from the *res gesta*, the facts of the transaction connecting the decedent with the incumbrance, it may be express or by necessary implication. Bisph. Eq. §§ 847, 848.

It is to be noted that the judges in the cases cited considered and interpreted the facts as transactions, to find proper evidence of the decedent's intentions to charge his personality in case of the burdened realty. Lord Cowper, in *Bagot v. Oughton*, 1 P. Wms. 847, after detailing the facts of the transaction, said: "The covenant . . . was an additional security, for the satisfaction only of the lender, and not intended to alter the nature of the debt."

Chancellor Kent (3 Johns. Ch. 262), after saying there must be a direct dealing with the owner of the lien debt, adds: "And even that is not enough, unless the dealing with the mortgagee be of such a nature as to afford decided evidence of an intention to shift the primary obligation from the real and personal fund."

2 Story, Eq. Jur. § 1248b, on the same point, has this language: "And even a covenant or bond for the purpose will not be sufficient, unless accompanied with circumstances showing a decided intention to make thereby the debt personally his own."

Redfield, on Wills, in nearly identical language, lays down the same rule.

The inquiry is not, Did the decedent charge the McKinney land primarily with the \$10,000 incumbrance? This debt had been fastened upon it before intestate's purchase, but it is said that O'Conner intended to relieve the land by throwing upon his personality the primary liability of its payment. If we are precluded from considering and interpreting the facts of the purchase for the answer to the question (he dying intestate), we have no evidence of an intention to exonerate the land with his personality; and, however, clearly, the heir cannot call on the distributees to reimburse him for the discharge of the McKinney debt. But, considering the facts of the purchase of the McKinney land by the intestate, is there proper evidence of intent to exonerate? The vendor's lien in favor of McKinney was fastened on the land, being retained on the face of the deed to intestate's vendors. O'Conner made no contract with the lienholder; gave no note or other obligation to him for it. He merely accepted a deed from his vendors, which recited the existence of the incumbrance, and that intestate assumed and agreed to discharge it; but nothing was said or done by him in the direction of its discharge. This fixed lien was left by the parties undisturbed,—a primary charge upon the land.

It is clear this purchase was made for the benefit or increase of the real estate. This fact, under the old rule, which will be discussed below, was evidence of an intention and purpose on the part of the purchaser that the land purchased should be the primary source of its payment. Evidently, the intestate intended his personality to be in aid of the realty merely, for the reasons stated under the high authorities cited. I hold that the McKinney land was first liable for the payment of the McKinney

\$10,000, and interest, and cost, and that the heir is not entitled to a recovery against the administratrix for reimbursement therefor.

We feel less certain in disposing of the three 1,000-dollar notes given by the intestate to his vendors on the purchase of the McKinney land. These notes are for an additional sum, needed to acquire the half of the McKinney land, were in aid of the purchase, and come under the rule laid down by Mr. Lomax, as follows: "So, in cases where the land comes to the deceased by descent or devise [will per chance vary the rule], his concurrence in the mortgage deed, and his personal covenant for the payment of the money, on the assignment or transfer of the mortgage, will not alter the burden, as between his real and personal representatives. And the same principle applies if other estates are added to the security, on a further sum lent, or if there be a covenant on his part increasing the rate of interest. And it seems that, if the sum borrowed by him and added to the original mortgage be comparatively small, equity will not consider that he had different intentions as to these different terms, but will charge the real estate with the whole." See 2 Lomax, Exrs. marg. note, 227, 228.

The sum covered by the three notes is small, compared with the incumbrance debt, being a little less than one third its size. Alluding to the rule above given, equity will not consider he had a different intention as to these terms, and, therefore, the real estate should be charged with both sums, as the primary source of payment. Complainant's first error assigned denies the right of the defendant to reimbursement on these facts: The intestate bought of Sanford real estate at the price of \$1,650; paid \$550 cash, and gave notes for balance. He purchased of Moffatt real estate at \$4,500, and gave his notes therefor. Each vendor made a deed of the real estate sold by him to intestate, retaining lien for purchase money upon the land conveyed. Each enforced his lien upon the real estate against the heir-at law, and had his debt paid from the proceeds thereof. These proceedings were after death of intestate, and the realty so sold was situated in or near the City of Knoxville. The presumption is that this realty was bought by the intestate on speculation, and he intended and proposed to pay the sums due thereon from the proceeds thereof when sold. Complainant insists that no case has been passed upon by this court identical in its facts and defenses with the one in hand.

We have found none determined by courts of last resort in the United States, except one or more adjudged by the Supreme Court of Massachusetts, wherein the court briefly held that the contract of purchase was a personal one, upon which the purchaser might have been sued, judgment had, and the debt collected from his personal estate; and for that reason held the personality the primary fund for payment, and the realty in aid of it, merely.

Complainant admits that the non-lien creditor cannot subject the land to sale for the payment of his debt until he shows complete exoneration of the personality, or its insufficiency to pay debts. She insists the lien creditor can proceed to enforce his lien upon the realty in the first instance, without reference to the personality; that there is neither statute

nor decision of this court settling the identical question presented here; that the question is equitable, to be settled by deciding where the superior equity is; that complainant's contention is supported by the superior equity, the controversy being between the heirs at law and distributees, creditors and legatees having no interest therein. On the last analysis, lying back of the fact of a "personal contract," on which the Massachusetts cases put the primary liability on the personality, is this inquiry: Was the contract for the increase and benefit of the realty, or of the personality? Its answer determines which estate is first liable. If the realty is first in liability, the contract made for the purchase money, though capable of being turned into a personal judgment against the purchaser, is secondary in its character, and in aid of the realty. This rule was formulated and used by the courts of England more than 200 years ago, in settling questions identical with those now before this court, and since its introduction into the judicial history of the mother country we remember no decision of her courts questioning its soundness. It should be stated that at the date of its first use personality constituted the only fund for the payment of debts in England. A favoritism, the outgrowth of the old feudal system, so completely hedged the realty about that it was rarely made to pay debts of decedents. In the United States property of a decedent, of all kinds, is and has been applicable to the payment of his debts. It has been made so now in England. Our constitutions and laws constitute a soil more favorable to the growth and vigor to this old rule than that of its origin, and in this country we would expect to see it oftener applied, and its authority less questioned, than in the land of its nativity. This old rule has been cited and approved by the Supreme Court of the United States in *McLarn v. Wallace*, 35 U. S. 10 Pet. 644 [9 L. ed. 566]. Judge McLean, delivering the opinion of the court, quotes Lord Eldon as saying, in *Waring v. Ward*, 7 Ves. Jr. 386, that "the principle upon which the personal estate is first liable in general cases is that the contract, primarily, is a personal contract, the personal estate receiving the benefit." Judge McLean, continuing, says: "And so, if the contract was in regard to the realty, the debt is a charge on the land. It is in this way that a court of chancery, by looking at the origin of the debt, is enabled to fix the rule between distributees."

We state generally that many of the state courts and law-writers in the United States cite and approve this "rule;" but they need not be referred to here with more particularity. When the rule was adopted in England, personal property did not have its present volume or importance. The mortgages upon real estate were nearly without exception for borrowed money. Vendor's liens were very rare, and cut no figure in the current litigation of that day. The courts, in that formative period, explained the parts of the transaction from which grew the debt, to ascertain the interest of the debtor to charge his real or personal estate with its payment. Those able judges had little of precedent to guide them, but had good common sense, and large acquaintance with and understanding of the motives and purposes moving

to action in the affairs of every-day life. To this circumstance is largely due the excellency of those early decisions. These fathers of our inherited jurisprudence, guided by their practical good sense and level-headed wisdom, interpreted the making of the debt for the increase of and benefit to the personalty to mean that the debtor intended that estate should be burdened primarily with the payment. Hence all debts for personal property, services, loaned money and mortgaged debts, which make up the consideration supporting the great bulk of the indebtedness of that period, were held to be for the benefit of the personalty; and consequently it was first chargeable with their payment. These judges were too clear-headed not to know that the converse of this rule, when applied to real estate, was axiomatically true, also; but, as the occasion of its application was rare, there being few land transactions, there are few rulings of the courts upon it to be found in the early reported cases. If the personalty receiving the benefit coming from the creation of a debt means that the debtor intended that it should first be chargeable, why does not the result follow to the realty? When it gets the benefit, why should it be true as to personalty and untrue as to realty? The courts proceeded in principle and reason upon the same line when they left the facts to determine the relative liability, *inter partes*, of two or more persons jointly and severally bound upon the same instrument. If it is reasonably certain, upon weighing the facts, that one signed with the intention to be bound as principal, and the others as sureties, the courts do not hesitate to so define their rights, and to enforce them accordingly. Likewise, the determination of the many questions arising in the settlement of partnerships, involving the conflicting rights of firm and individual creditors as to their priorities of payment from firm and individual means, is largely controlled by the intention and purpose of the parties, impressed upon the particular transaction. In fact, the rule giving several priorities is the outgrowth and fruitage of the expressed or presumed intent of the parties to the transaction, or in relation thereto. Death and intestacy do not affect the question; and the personal contract idea, though a prominent fact, is silent, while the courts give expression to the intent of the parties, in settling and fixing the relative liability of persons and funds in the two classes of cases hereinbefore referred to. Also, if a tract of land subject to a lien is sold by the lien debtor surreptitiously, in separate parcels, at different times, and conveyed by deeds registered when made, the lien, if enforced by rule of the land, must be in the inverse order of alienation. The first sub-purchaser may force this order in the sale of the parcels. This equity grows out of the presumed intention of the several sub-purchasers, and may be enforced, notwithstanding death and intestacy have intervened.

Other contentions might be cited wherein the expressed or presumed intention of the parties, impressed upon the transaction, is the controlling fact with the courts in fixing the liability of persons or funds; but those named are deemed sufficient for this purpose, to show the constant practice of the courts in giving a controlling influence to the intent of parties in settling the

large part of the covenant litigation of the day. Where the claims of creditors have been paid, with no opposing statute nor adjudication of this court, and when the title to both realty and personalty flows from the same source,—the intestate,—why should not his intent, impressed upon his property, control the question which shall enrich his heir or his distributee? What good reason is there for making this an anomaly,—an exception to a rule of such general application?

This court, in *Masson v. Swan*, 6 Heisk. 451, 457, goes far to sustain this rule. Swan sold a lot to Masson, by parol, who put valuable improvements on it, but did not pay purchase money. Swan died, and Masson disaffirmed the contract, and sued for the value of the improvements. This court held the lot the primary fund for the payment. Judge Nicholson, speaking for the court, said: "The real estate, and not the personal, is benefited by the improvement; and equity necessarily fixes the liability for the benefit on the real estate." The principle of *Masson v. Swan* has been applied to similar facts by nearly all the courts of this Union; and the reason of the rule, whenever applied, is the same, viz.: The realty, having received the benefit, must be held first liable for the payment therefor. The personal contract on the part of Swan had no bearing in the decision.

John Marshall, of Franklin, Tenn.,—a great name in the law,—sat as a special judge in *Franklin v. Armfield*, 2 Sneed, 356, 357. This great lawyer held the executor, who had paid off an incumbrance upon a parcel of land, partly with his own means, and partly with the assets in his own hands, was entitled to be reimbursed therefor; and that the land, relieved from the burden resting on it when it came to the devisee, was chargeable therewith, as the primary fund.

The "personal-contract" theory, as a test to determine which estate is to be first chargeable with a debt, has been shifting and unfixed in its nature, as may be seen in the overruling of *Campbell v. Findley*, 8 Humph. 380, after an interval of half a century, by *Moore v. Stovall*, 2 Lea, 543, by a divided court, and a century of discordant opinions in England, and to some extent in New York, as to what makes a binding personal contract, in the sense of the rule. It should be observed that these two prominent States in intelligence, wealth and culture have cleared up the question by clear-cut legislative enactment, providing that the descended realty of decedents shall in all cases be the primary fund for payment of any debt fastened upon it by mortgage, etc., when it came to the heir, unless there is a clearly expressed intention to the contrary in the will of decedent. The better rule, we think, is to let the answer to the inquiry, Which estate got the benefit? fix the primary liability, if the debt is for borrowed money, and is secured by a mortgage on real estate, and the personalty has been benefited thereby; and the courts, for more than a century, held these facts, by necessary implication, evidence of the decedent's intention to charge his personalty with the burden of discharging the mortgage debt, in exoneration of the realty,—not an intention shown in a will, but impressed upon and inhering in the very fiber of

the transaction from which came the debt. When the debt is the price of land bought, why will not these facts, under the same rule, evidence an intent to charge the incumbered land primarily, as the debt was made for the increase of the land?

Why shift the rule, and say the personality is the primary fund to pay, because it is the "personal debt of the decedent?" In strictness, the canons of descent devolved upon the heirs only the excess of the market value of the realty over the incumbering, unpaid purchase money, with the privilege to them, upon discharging that debt, to be invested with the fee simple. The intestate took just this interest in the realty purchased, and no more was transmitted to his heirs. He consented to the retention by his vendors of so much of the realty purchased as would be sufficient to pay its price, and thereby appropriated and set apart that interest as a means charged with the payment of the price of the realty. Presumably, the purchases from Moffatt and Sanford were on speculation, and intestate intended to pay the debts credited in the purchase from the proceeds, when sold. As between the heir and the distributee, should not that intent of intestate to make the realty first liable to pay off the burden be effective, not as an intent evidenced by a will, but one impressed upon and woven into the very texture of the transaction by the intestate himself? Does public policy, or public good, or the uniformity of the rules for administering the estates of decedents favor or oppose the settlements of these open questions, as already indicated? It can only be a practical question when the distributee and heir are not the same person, which is rarely the case. Under our laws of distribution and

descent, the heir and distributee are never different persons, except when one dies circumstanced as was Thomas O'Conner, or without wife, or husband, or children, when the distributee is a parent, old, and perhaps needy.

The intestate was largely engaged in real-estate speculation in a growing city, where real estate was rapidly enhancing in value. The purchases were made with the expectation of early sales, at fine profits. He meets a sudden death. No testament is made, providing for his childless widow. If the personality is to relieve the realty of the incumbrance for its purchase money, the heir will be enriched, and the widow and distributee impoverished. The superior equity is certainly in her favor. The heir is in a court of equity, asking that equity be done. Will equity reimburse the heirs at the expense of the distributee?

The reasoning upon the first error assigned by complainant is equally applicable to the third 1,000-dollar note given to the intestate's vendors in the purchase of the McKinney land. We reach a conclusion as to this error with less certainty than we had as to the McKinney incumbrance; but still we feel justified in holding that the heirs are not entitled, in equity, to be reimbursed for sums paid upon the Moffatt and Sanford parcels of land from the proceeds of said lands. This disposes of the third assigned error of complainant adversely to the claim of the heirs at law, and upon the whole case, the chancellor is in error, and should be reversed, and the heirs at law pay the cost of this cause in this and the court below. Entertaining these views, I am compelled to dissent from the opinion of the majority of the court in this case.

KENTUCKY COURT OF APPEALS.

J. M. WHITE, *Appt.*,

v.

CINCINNATI, NEW ORLEANS & TEXAS
PACIFIC R. CO.

(....Ky.....)

Knowledge of the unsafe condition of the platform provided by a carrier for loading stock will not prevent a person, attempting to use it for that purpose, and exercising due care, from recovering for injuries received by reason of the defect.

(January 25, 1890.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Grant County in favor of defendant in an action to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts sufficiently appear in the opinion.
Mr. J. J. Landram, for appellant;

NOTE.—Carrier, unsafe condition of platform. See notes to New York, C. & St. L. R. Co. v. Doane (Ind.) 1 L. R. A. 157; Kelly v. Manhattan R. Co. (N. Y.) 8 L. R. A. 74; Missouri Pac. R. Co. v. Wortham (Tex.) 8 L. R. A. 368.
7 L. R. A.

Messrs. De Jarnette & Dickerson, with
Mr. C. B. Simrall, for appellee:

A party cannot recover for an accident occasioned by the use of a defective platform, after he had seen the defects, had his attention expressly directed to them, and "knew its unsafe condition when he went on it."

Bogenschutz v. Smith, 84 Ky. 831.

There can be no recovery for an injury caused by the mutual default of both parties. When it can be shown that it would not have happened except for the culpable negligence of the party injured concurring with that of the other party, no action can be maintained.

Beach, Contrib. Neg. § 7, and cases cited; *Sullivan v. Louisville Bridge Co.* 9 Bush, 81; *Jacobs v. Louisville & N. R. Co.* 10 Bush, 268; *Louisville & N. R. Co. v. Collins*, 2 Duv. (Ky.) 114; *Louisville & N. R. Co. v. Robinson*, 4 Bush, 507; *Louisville C. R. Co. v. Goetz*, 79 Ky. 442; *Kentucky Cent. R. Co. v. Lebus*, 14 Bush, 518; *Paducah & M. R. Co. v. Hoehl*, 12 Bush, 41; Wharton, Neg. § 800, and cases cited, and see also § 882; Shearm. & Redf. Neg. § 25, and cases cited; 2 Thompson, Neg. p. 1140, notes; Smith, Neg. 2d Eng. ed. p. 227, and cases cited; Pollock, Torts, p. 874; Wood, Mast. and S. § 319, and cases cited; Smith, Mast. and S. 4th Eng.

ed. p. 844; Patterson, Railway Acc. L. p. 45, and cases cited.

Holt, J., delivered the opinion of the court:

The appellant sues for damages for injuries sustained by him while assisting his employer, a shipper over the appellee's road, in loading stock at night upon its cars. The apron or platform connecting the stock-chute with the car into which the cattle were being driven gave way, precipitating the appellant against the side of the car. The evidence tends to show that the apron was too short,—not long enough to lap sufficiently far over on either the chute or the car to insure safety to one upon it; that it was not fastened to the chute by hinges or otherwise, as is usual, and had been out of repair for a considerable time; that all this was known to the Company, through its agent, previous to the time of the injury, but was likewise known to the appellant. It further appears that the station where the accident occurred was the nearest and most convenient point for shipping the stock, and that but the one chute and apron were provided by the Company. The lower court, at the close of the appellant's testimony, peremptorily instructed the jury to find for the Company upon the ground, as is admitted in argument, that the appellant was aware of the defective condition of the platform, and could not therefore recover.

Such an instruction should not be given, unless, conceding the truth of the evidence offered, and of every fact which it conduces to prove, the party has no case. It is contended that the knowledge of the appellant, prior to the time of the injury, of the unsafe condition of the platform, forbids a recovery. If so, the action of the trial court was correct. Let us see. It is not properly a question of contributory negligence. It is not claimed, and there is no testimony tending to show, that the appellant was negligent in the manner of using the platform. So far as appears, it was the usual and careful use of it; but the trouble consisted in the fact that it was defective. The rule is well settled by a uniform current of decisions, so numerous that citation is unnecessary, that a railroad must keep its platforms and approaches to which the public do, or will naturally, resort in doing business with it, in a safe condition for such use. This is one of the duties it owes to the public. It goes hand in hand with its franchises and extraordinary privileges. The appellant had a right to be where he was, and engaged as he was, when he was injured. The Company had invited his presence by holding itself out as a carrier of stock. It had impliedly said to the public: "The platform is safe for the purposes intended, if reasonable care be exercised in its use."

It is said, however, that the appellant knew this was not true, and that he therefore used it at his peril. This is, however, unlike the case of a servant against the master for an injury caused by a defective state of the machinery or premises or materials provided by the latter for the work of the former. The master is not bound to employ the servant. The latter cannot dictate to him in this respect. Not only the duty rested upon the Company, however, so long as it held itself out to the public as a carrier, of providing safe appliances for such pur-

pose, but the public had a right to demand it, and to use the road for travel and shipping purposes. It was bound to keep its platforms and approaches essential to travel or shipment in a safe condition; and public policy forbids that it should be allowed to protect itself from liability for injurious consequences resulting to persons from its failure to perform this important duty upon the ground that they knew the platform or approach was defective.

Suppose a passenger platform at a depot is defective. A person desiring to take passage knows it. Is he, therefore, to forego going, or else take the risk of injury without remedy, notwithstanding the exercise of reasonable care upon his part in attempting to board the train? Surely not. In this case the Company had provided but the one chute and the one apron for the shipment of stock at the station. It was inviting patronage in this way by the public, although it knew the means provided for the purpose were unsafe. Under such circumstances, was the owner of the stock to be compelled to take them elsewhere for shipment, or the appellant to refuse employment, because of knowledge of the defective condition of the platform? A very different case would be presented where one contributed to his own injury by carelessness upon his part in the use of the defective platform. He cannot complain where, but for his own neglect in the manner of using it, the injury would not have occurred. In such a case, there is a co-operating cause of injury on his part. Here there is none, but the Railroad Company invites the shipper to ship his stock. It holds itself out as furnishing safe means for the purpose; and, although he makes a prudent and usual use of them, yet after he has been injured it says to him: "There is no liability upon our part, because you knew we were not doing what we professed to the public?" It cannot be heard to rely upon the failure of a duty so important to the public. It is the duty, for instance, of a railroad company to keep its depot lighted at night, that entrance and exit may be safe. Suppose a person desires to take passage at a certain place, and upon reaching the depot he finds that this has not been done. The situation is such that he must enter the depot and take passage, or decline to go, however important his business. He accordingly enters; and, while prudently, and as best he can, making his way in the darkness, falls, and is injured by something carelessly placed in the way by the company. Will it be contended that the company could shield itself by saying: "You knew there was no light in the depot, and if you had kept out of there no injury would have resulted?"

If one have notice of a defect in a highway making it dangerous for travel, this does not *per se* make a careful and usual use of it by him negligence. We do not, of course, mean to hold that one may, by recklessly rushing into danger, or by his own culpable negligence in use of the appliances provided by the railroad company, directly produce the injury, and then hold the company liable; but as he must of necessity use them, or forego travel, or the transportation of his property, he should not be remediless, although he may know of their defective condition, if he is injured when using them for these purposes in a prudent and

the usual manner. Any other rule would leave the public at the mercy of the railroad companies. They, knowing the traveler or shipper, in this day of wonderful advance and improvement, is compelled to use their roads, or forego travel or the shipment of his property, could by their agents inform him of the defective condition of their appliances for travel, and then be exempt from liability for his injury by

reason thereof, although still inviting him to use them, and although he has been injured when doing so in a prudent and usual manner. Public safety, and the proper management of this now almost universal mode of travel and shipment, forbid the adoption of a different rule from the one we have indicated.

Judgment reversed, and the cause remanded for a new trial consistent with this opinion.

NEW YORK COURT OF APPEALS.

PITTSBURGH CARBON CO., Limited,
App't.,
v.

Frank C. McMILLIN, Receiver of the United
Carbon Companies, *Resp't.*

(...N. Y....)

1. A party to an illegal trust combination, who, in pursuance of the agreement, has furnished goods in the name of the trustee, cannot claim the proceeds as against a receiver of the trust assets, although he withdrew from the combination before the receiver was appointed.
2. The rule against granting relief to a party to an illegal contract does not apply to prevent a receiver from recovering the fruits of the transaction for the benefit of honest creditors.

(January 14, 1890.)

APPEAL by plaintiff from a judgment of the General Term of the Supreme Court, Fifth Department, affirming a judgment of the Erie Special Term in favor of defendant in an action to determine the ownership of a fund which had been paid into court by the original defendant in the suit. *Affirmed.*

The action was originally brought against the Brush Electric Light Company, of Buffalo, to recover the contract price of certain electric light carbons which were alleged to have been sold and delivered by plaintiff to that company.

The company appeared and represented that a claim was made upon it for the same debt by one Frank C. McMillin, that it admitted the debt to be due and offered to pay the same into court, and moved that McMillin be substituted as defendant in the suit. The court granted this motion and McMillin was substituted as defendant and appeared and made defense.

The court found as facts, *inter alia*, that prior to March 1, 1887, plaintiff had a contract with the Brush Electric Light Company for supplying to it certain electric light carbons from time to time; that on or about March 1, 1887, plaintiff made a contract with Edward C. Hawks relating to the conduct and management of its business, and relating to the performance by him of its existing contracts; that during the period in which the carbons for which this suit was brought were shipped to the Brush Electric Light Company plaintiff was operating its works in accordance with the contract made with Hawks, who sent bills for all

shipments, and that the bills were made payable to Hawks as trustee.

That subsequently, and before the commencement of this suit, the trust represented by Hawks was ordered to be wound up and McMillin was appointed receiver therefor, and that McMillin was entitled to receive the money which had been deposited by the Brush Electric Light Company.

Further facts appear in the opinion.

Mr. C. S. Crosser, for appellant:

The original vice of an unlawful purpose tainted every part of the trust contract, including the assignment of the claim against the Brush Electric Light Company. Such claim never in any legal sense became an asset of the trust or trustees.

Bishop, Cont. 469, 471, 473; 8 Am. & Eng. Encyclop. Law, 872; 9 Am. & Eng. Encyclop. Law, 880; *Thorne v. Travellers Ins. Co.* 80 Pa. 15; *Shieler v. Vandike*, 92 Pa. 447; *Saratoga Co. Bank v. King*, 44 N. Y. 87; *Arnot v. Pittston Coal Co.* 68 N. Y. 558; *Stanton v. Allen*, 5 Denio, 434.

There can be no estoppel against asserting the invalidity of the trust contract.

Greenhood, Pub. Pol. Rule 126; *Wheeler v. Wheeler*, 5 Lans. 355; *Langan v. Sankov*, 55 Iowa, 52; *Snyder v. Willey*, 33 Mich. 483; *Slevens v. Wood*, 127 Mass. 123; 2 Kent, Com. 466; *Bredin's App.* 92 Pa. 241.

The receiver represents the trust combination, with no better title to this claim than that of a voluntary assignee. His title is derived solely from the trust combination, with all previous equities and iniquities still attached thereto.

Rev. Stat. pt. 3, chap. 8, art. 8, § 68; *Curtis v. Leavitt*, 15 N. Y. 9; *Cutting v. Damarel*, 88 N. Y. 410; *Honegger v. Wettstein*, 94 N. Y. 252; *Williams v. Babcock*, 25 Barb. 109; *McHarg v. Donnelly*, 27 Barb. 100; *Bell v. Shibley*, 33 Barb. 610; *Van Wagoner v. Paterson Gas-light Co.* 23 N. J. L. 283; *Symes v. Hughes*, L. R. 9 Eq. 475; Greenhood, Pub. Pol. Rules 2, 10, 42; High, Receivers, § 699; Beach, Receivers, §§ 699-706; Story, Eq. Jur. § 831.

The respondent's position is not strengthened by urging the claims of the creditors of the trust, and by relying on their real, or supposed, innocence.

1. The burden was on these creditors of ascertaining the nature of the trust, and the limits of the trustees' authority.

Swan v. Produce Bank, 24 Hun, 277.

NOTE.—Conspiracy; trust combinations in trade, illegality of. See note to *People v. North River Sugar Ref. Co.* 2 L. R. A. 83; *Carroll v. Giles*, 4 L. R. 7 L. R. A.

See also 42 L. R. A. 85.

A. 254, 30 S. C. 412; *Leslie v. Lorillard*, 1 L. R. A. 458, 110 N. Y. 519; *Anderson v. Jett*, 6 L. R. A. 300, 11 Ky. Law Rep. 570.

2. The trust agreement did not by its terms create any copartnership relationship. The creditors dealt directly with, and extended credit to the trustees as principals.

Smith v. Anderson, L. R. 15 Ch. Div. 247; *Cary v. Gregory*, 6 Jones & S. 127; *Austin v. Munro*, 47 N. Y. 860; *New v. Nicoll*, 78 N. Y. 180; *Storrs v. Flint*, 14 Jones & S. 498.

The appellant's right to recover this fund antedates the trust contract and is clear of all its taint. The respondent, to succeed, must plant himself squarely upon the trust contract and secure the aid of the court to enforce the same. This is beside the purpose of equity.

Keene v. Kent, 4 N. Y. S. R. 431; *Bishop*, Cont. § 469; *Pom. Eq. Jur.* §§ 401, 940; *Wharton*, Cont. ed. 1882, § 849; *Steers v. Lashley*, 6 T. R. 61; *Sykes v. Bendon*, L. R. 11 Ch. Div. 170; *Armstrong v. Toler*, 24 U. S. 11 *Wheat*, 258 (6 L. ed. 468); *Thomson v. Thomson*, 7 Ves. Jr. 470; *Snell v. Dwight*, 120 Mass. 9; *Dunham v. Presby*, 120 Mass. 285; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 178.

Mr. Anasley Wilcox, for respondent:

Appellant cannot set up the illegality of its own contract as against the receiver, who represents not only itself and the other parties to the contract, but bona fide creditors, who had dealt with the trust or combination and had given credit to it in the ordinary course of business. The receiver represents primarily the creditors of the insolvent. For this reason he is allowed to disaffirm the illegal acts of the insolvent and recover its assets wherever creditors might do so; and in general he unites in himself all the rights of creditors and of the parties interested in the insolvent estate.

Laws 1858, chap. 814; *Rules 78, 79*, General Rules of Practice; *Atty-Gen. v. Guardian Mut. L. Ins. Co.* 77 N. Y. 272; *Talmage v. Pell*, 7 N. Y. 828; *Farmers & M. Bank v. Jenks*, 7 Met. 592; *Honegger v. Wetstein*, 15 Jones & S. 125, 94 N. Y. 252; *Alexander v. Reife*, 74 Mo. 516; *Osgood v. Laytin*, 8 Keyes, 521; *Osgood v. Ogden*, 4 Keyes, 70; *Litchfield Bank v. Church*, 29 Conn. 150.

The plaintiff cannot take advantage of the illegality of its own acts to defeat the rights of creditors, whether in a suit brought directly by them, or by a receiver as their representative.

Broom, Legal Max. pp. 279, 288. See *Litchfield Bank v. Church*, *supra*.

Members of a partnership cannot set up, as against a creditor who had dealt with the partnership in good faith, the fact that the partnership was formed for an illegal purpose, in order to defeat their own liability for a just debt.

See 1 *Lindley*, Partn. Eng. ed. 201, 205; *Metcalfe*, Cont. 116; *Adams v. Creditors*, 14 La. 461; *Kineman v. Parkhurst*, 59 U. S. 18 How. 298 (15 L. ed. 387).

Treating the contract as an agency, the principal could not set up the illegality of such a contract as against an innocent creditor who had contracted with the agent in good faith, so as to defeat its liability for a just debt.

See *Murray v. Vandrbill*, 39 Barb. 140; *Wharton*, Ag. §§ 474, 542, also §§ 25, 26, 249, 250, 320.

In cases of unlawful agreements, where they have been executed, and new rights have sprung up which do not necessarily involve the enforcement of the unlawful agreement itself, 7 L. R. A.

courts have refused to allow the parties to defeat such rights by going back to the unlawful agreement, even as between themselves.

See *Keene v. Kent*, 7 N. Y. S. R. 229; *Brooks v. Martin*, 69 U. S. 2 Wall. 70 (17 L. ed. 732); *Marsh v. Russell*, 66 N. Y. 288; *Wann v. Kelly*, 5 Fed. Rep. 584; *W. U. Teleg. Co. v. Union Pac. R. Co.* 3 Fed. Rep. 423; *New York Cent. Trust Co. v. Ohio Cent. R. Co.* 28 Fed. Rep. 806.

Andrews, J., delivered the opinion of the court:

The finding that the contract of March 1, 1887, between the plaintiff and Edward C. Hawks, as trustee for the plaintiff and other carbon companies, was made for unlawful purposes, and was illegal, was not excepted to, and is to be taken an incontrovertible fact on this appeal. The ground of illegality is not expressly stated, but it is clearly to be inferred from the other findings and the opinion of the trial court that the contract was held to be illegal for the reason that it was entered into in furtherance of an unlawful combination between the plaintiff and other carbon companies in restraint of trade. The scheme of the parties to the combination was to vest in a common trustee the management and control of the business of manufacturing and selling carbons for electric lighting theretofore carried on separately by the companies forming the combination. To this end the several companies were to lease to the trustee their respective factories, and to operate them under the direction of the trustee, who was to designate the kind of goods to be manufactured, fix the prices at which and the persons to whom they should be sold, purchase all materials and supplies, collect the bills and pay out of the common fund the cost of production, and divide the net proceeds and profits of the business between the several parties to the combination in a ratio fixed by the contracts of the respective companies with the trustee.

The plaintiff, when the contract of March 1, 1887, was made, had an outstanding contract to furnish carbons to the Brush Electric Light Company from time to time, and in its contract with the trustee the plaintiff assigned to him all existing contracts, and the trustee assumed their performance.

The sum in controversy in this action has been paid into court by the Brush Electric Light Company, being the purchase price of carbons manufactured and delivered to that Company in April, May and June, 1887. These carbons were manufactured at the plaintiff's factory, but were billed in the name of the trustee, and delivered in performance of the contract between the plaintiff and the Brush Electric Light Company, which the trustee had assumed.

In or about July, 1887, the plaintiff refused to continue any longer in the combination. Thereupon an action was commenced in the Court of Common Pleas for Cuyahoga County, in the State of Ohio, the headquarters of the combination, by some of the members of the combination, against the plaintiff and other members thereof, to dissolve and wind up its affairs, and the proceedings resulted in the appointment of the present defendant as receiver of the property and assets of the trusteeship,

with power, among other things, to take possession thereof, to collect the assets and pay and adjust claims arising out of the business. No question is made on this appeal as to the jurisdiction of the Ohio Court to entertain the proceeding and make the order appointing the receiver, and it is found that the receiver duly qualified and entered upon the discharge of his duties. It is also found that at the time of the appointment of the receiver the trust was insolvent, and that all the assets of the trust business, including the claim against the Brush Electric Light Company, are insufficient to pay its creditors.

The plaintiff stands in the attitude of a party to an illegal contract, claiming a fund which, if the contract was valid, would clearly belong to the trust combination, and not to the plaintiff as one of its members. The plaintiff has no standing to claim the fund in opposition to the clear import of the trust agreement, unless its repudiation of the contract in July, 1887, made the plaintiff the vendor of the carbons delivered to the Brush Electric Light Company during the time the plaintiff remained a party to the combination. The carbons, it is true, were delivered in performance of the plaintiff's agreement made before the combination was formed. But the trustee assumed performance by contract with the plaintiff, and the Brush Electric Light Company accepted performance by him. To permit the plaintiff to treat the debt as a debt owing to it, and not to the trustee, would be permitting the plaintiff to escape from the operation of the rule which denies relief to a party to an illegal transaction. The plaintiff had a right to repudiate the contract of March 1, 1887. Its stipulations could not have been enforced against the plaintiff. The plaintiff, notwithstanding the contract, could have sold its carbons to the Brush Electric Light Company on its own account, and received pay for them. But it did not do so.

The agreement of March 1, 1887, was carried out in part. The carbons were manufactured by and for the trustee representing the combination, and were delivered to the purchaser as the property of the trust, by the consent of the plaintiff, and the purchaser became the debtor of the trust and not of the plaintiff. The repudiation of the trust agreement by the plaintiff after this transaction did not purge its previous participation in the illegal scheme. If the Brush Company had not voluntarily paid the fund into court, it would be a grave question whether the plaintiff could have enforced a recovery against that company, al-

though there was no adverse claimant. See *De Witt v. Brisbane*, 16 N. Y. 508; *Johnson v. Bush*, 8 Barb. Ch. 207; *Talmage v. Pell*, 7 N. Y. 828.

But as between the plaintiff and the receiver of the trust combination, the latter is, we think, clearly entitled to the fund. It is claimed that no action could have been maintained by the trustee representing the trust combination, against the Brush Electric Light Company, to recover the purchase price of the carbons, for the reason that the illegality of the combination would have constituted a good defense. Assuming this predicate, it is then asserted that the receiver stands in the same position, and his title is subject to the same infirmity, as that of the combination which he represents. Without considering the assumption upon which this proposition is based, it is a sufficient answer to the proposition asserted that the receiver unites in himself, not only the right of the trust combination, but the right of creditors, and that he may assert a claim as representing creditors which he might be unable to assert as a representative of the combination merely. The general rule is well established that a receiver takes the title of the corporation or individual whose receiver he is, and that any defense which would have been good against the former may be asserted against the latter. But there is a well-recognized exception which permits a receiver of an insolvent individual or corporation, in the interest of creditors, to disaffirm dealings of the debtor in fraud of their rights. *Gillet v. Moody*, 3 N. Y. 479; *Porter v. Williams*, 9 N. Y. 142; *Curtis v. Leavitt*, 15 N. Y. 9, 108.

Assuming that the trustee could not have recovered of the Brush Electric Light Company for the reasons suggested, it would be a very strange application of the doctrine that no right of action can spring from an illegal transaction which should deny to innocent creditors of the combination, or to the receiver who represents them, the right to have the debt collected and applied in satisfaction of their claim. The just rule of the common law, that the courts will not lend their aid to enforce illegal transactions at the instance of a party to the illegality, would be misapplied if permitted to be used to prevent the recovery and application of the fruits of the transaction for the payment of honest creditors.

We think the judgment is right, and it should therefore be affirmed.

All concur.

NEW JERSEY COURT OF ERRORS AND APPEALS.

GRIGGS, *Plff. in Err.*,

STONE *et al.*

(...N. J. L....)

1. Work done in engraving upon copper shells, patterns to be printed on cloth, cre-

ates no lien on cloth-printing machines which are sold as complete without shells, under Rev., p. 669, § 5, or Supp. Rev., p. 456, § 3, giving a lien for work done upon "fixed machinery" or "fixtures for manufacturing purposes."

2. A lien on "fixed machinery" or "fixtures for manufacturing purposes" will not be extended in case of doubt to machinery of such a character that a common-law lien may be had upon it.

NOTE.—See *Conrow v. Little*, 5 L. R. A. 608, 115 N. Y. 387.

7 L. R. A.

(February 6, 1890.)

ERROR to the Circuit Court for Passaic County to review a judgment in favor of plaintiffs in an action to enforce an alleged mechanics' lien. *Reversed.*

The facts sufficiently appear in the opinion. **Mr. Thomas M. Moore** for plaintiff in error.

Mr. Joseph Coult for defendants in error.

McGill, Ch., delivered the opinion of the court:

The defendants in error, under the 5th section of the Mechanic's Lien Act (Rev. 669), claim a lien upon two cloth printing machines fixed in the soil, in buildings belonging to the Passaic Bleachery, because of work done in engraving, upon copper shells, patterns to be printed on cloth. These shells are cylinders which fit on mandrels or rollers constructed with the printing machines. A protrusion from the inside of the shell, called a "feather" (of uniform size in all shells), fits a groove in the mandrel, and keeps it from slipping as the mandrel revolves. The printing machines are sold, in this country and in England, as complete without shells. Shell-making is a distinct industry. The manufacturers of the printing machines do not make them. In fitting a shell, it is necessary that its internal diameter, or bore, shall correspond with the diameter of the mandrel of the machine by which it is used, but in all other respects the machine is adjustable, within limits, to the use of any shell. Sizes of mandrels and bores of shells are regulated by agreement between manufacturers, so that any size of either may be ordered by an agreed designation, without special measuring or fitting. For instance, the mandrels of the machines of the Bleachery Company are of that size which requires the shells to be used by them to have what is called an "E bore." A single pattern is engraved upon the external surface of each shell, and hence a printer's shells must be as numerous as the patterns he prints.

The Passaic Bleachery has 500 shells, and only two printing machines. The defendants, who are engravers in the City of Newark, have engraved patterns upon 76 of these 500 shells. The shells upon which they are worked were delivered into their possession at their place of business, and, after the work of engraving was done, were returned to the bleachery. The defendants did not do any work upon the printing machines themselves, and did not do anything to the shells which affected their mechanical connection with those machines. The lien is claimed simply because of the engraving. By the surrender of the possession of the shells, after the engraving was completed, the lien which the common law gave upon them was lost. The contention now is that, by the Statute, a lien can be had upon the printing machines as for work done in the construction or alteration of "fixed machinery," or of "fixtures for manufacturing purposes." Rev. p. 669, § 5; Supp. Rev. p. 456, § 3.

7 L. R. A.

The two printing machines are admitted to be "fixed machinery," within the intendment of the Statute. It is obvious that the simple question now to be considered is whether the shells are parts of the printing machines. If they are parts of them, it is apparent that the lien claimed must extend, not only to the machines, but also to the 500 shells which are held for use by them. The test by which this question should be determined is the inquiry whether the shells are essential to the completeness of the machines for the purposes for which the machines were designed. It has been held in several cases, which suggested this test, that rollers specially fitted for a machine designed for rolling iron are parts of it, because, without them, that machine cannot perform its functions, and would not pass as complete; and, as well, that duplicate rollers fitted to such a machine are parts of it, because their design is to render the machine more efficient. The plain purpose of the rolling-mill is to reduce iron to shape. Without rollers, it cannot accomplish this purpose, and hence it is not complete or salable without rollers. The office of the printing machine is not to itself print, but to apply that which prints to that which is to be printed upon. When sold, it is considered as complete without shells, just as the iron-rolling machine is complete without the iron upon which it operates. It stands upon the footing of the book-printing press, which is complete without types or stereotype or electro-type plates which it applies to paper. I do not conceive that a workman who alters, or even constructs, one of 10,000 stereotype plates used by a book publisher, could claim a lien upon the publisher's presses and his 10,000 plates as part of that press. It is evident that, to avoid such an absurdity, the plate must be regarded as a separate article, that the press is designed to use. I think it is plain that the shells were not parts of these printing machines.

But, if the question whether the shells are to be regarded as parts of the printing machines be doubtful, it appears to me that the court's conclusion in this case may rest upon another ground. The purpose of the Statute is to afford mechanics a lien upon machinery of which they cannot have such possession as would give them a lien by the common law. The statutory lien is confined to "fixed machinery." With this purpose of the Statute in view, it follows that, where machinery is of such a character that the common-law lien may be had upon it, doubts should not be so resolved as to hold the machinery to be also subject to lien under the Statute. In other words, in such cases doubts should be resolved against the statutory lien.

Here the defendants in error at one time had a lien by the common law. Upon these grounds I think that the judgment below should be reversed.

Reversed unanimously.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF GEORGIA.

STATE OF GEORGIA

v.

Charles TUTTY.

STATE OF GEORGIA

v.

Rose WARD.

(....Fed. Rep.....)

1. **By the settled policy of the State of Georgia marriage relations** between white persons and persons of African descent are forever prohibited, and by the Statutes of the State such marriages are declared null and void.
2. **These Statutes** have been held to be in accordance with the Constitution, by the supreme appellate tribunal of the State.
3. **The Statutes of the State also declare** that all marriages solemnized in another State, by parties intending at the time to reside in Georgia, shall have the same legal effect as if solemnized in the latter State, and, further, that parties residing in Georgia cannot evade the provisions of its laws as to marriage by going into another State for the solemnization of the marriage ceremony.
4. **The contract of marriage is not a "contract"** within the meaning of the provision in the Constitution of the United States prohibiting States from impairing the obligation of a contract.
5. **Marriage is more than a contract.** It is an institution which is the foundation of the family and of society; the rights and qualifications of the parties thereto depend upon the legislation of the State as controlled, for the benefit of the entire community, by principles of public policy.
6. **Where the statutory law is silent** as to the effect of marriages between persons domiciled in a State and who leave it with the purpose of solemnizing the marriage elsewhere, to evade such laws, but intending to return and live therein, the marriage may be upheld where the inhibition relates to form, ceremony or qualifications depending on age or like condition.
7. **When, however, the marriage is inhibited** by a positive policy of the State, as affecting the morals and good order of society and leading to serious social evils, the marriage will be held void.
8. **Where the State has enacted legislation** declaratory of the effect of marriages, extraterritorially, of its citizens, who thus seek to evade its positive policy and penal laws, the Statute affords the rule of decision.
9. **Where Tutty, a white man, and Ward, a negro woman,** were indicted in the state courts for fornication, and thereafter repaired to the District of Columbia and were married, immediately returning to Georgia, and thereupon attempted to remove into the United States court the indictments pending against them, the petition for removal was denied and the indictments remanded to the court of the State.

(February 4, 1890.)

ON motion to remand to the state court causes arising from indictments for fornication,

*Head notes by SPEER, J.

7 L. R. A.

which had been removed from such court to the federal court for trial for the alleged reason that they presented federal questions. *Grant-d.*

The case is fully stated in the opinion.

Mr. W. Wallace Fraser, Solicitor-General, for the motion.

Mr. James Atkins, contra.

Speer, J., delivered the following opinion:

It appears from the motion to remand, as well as from the petition for removal before the court, that the defendant, Charles Tutty, has been for many years a citizen and resident of Liberty County, in this State. The grand jury of that county presented an indictment against Tutty, charging him with the statutory crime of fornication on the 1st day of April, 1889, and at other times, with one Rose Ward, a woman of African descent, and formerly a slave, also a citizen of the State of Georgia and domiciled in the County of Liberty.

It appears further that after the indictment was found the said Tutty and the said Rose Ward, or Rose Tutty, as she calls herself, repaired to the District of Columbia and were married there in accordance with what are understood to be the laws of the United States for that District.

At the trial term of the Superior Court of Liberty County, to wit: on the 3d day of December, 1889, and before the trial of the criminal indictments above mentioned, both of the parties indicted presented to the state court petitions for the removal of the cases for trial into this the circuit court of the United States for this district. The petitions are practically identical. They recite the substance of the indictment. They deny the fornication. They state that the relations between the parties, which are described more in detail in the petition, "existed at a time when she (Rose Ward or Rose Tutty) was petitioner's lawful wife or under circumstances in which he and she were and are secured from lawful prosecution in the manner attempted in said case. That petitioner had been duly married to said Rose in the District of Columbia, and the acts which are charged to have been done, if done at all, were and are under their lawful executed contract of marriage with each other in full accordance with the requirements of the laws then in force in said District of Columbia. Petitioners further state that the prosecution against them is based upon a law of Georgia forever prohibiting the relation of marriage between white persons and persons of African descent. That such law denies to the petitioners the right secured to them by the Constitution and laws of the United States, providing for equal civil rights of themselves and all other citizens of the United States, to protection against the laws in a State impairing the obligation of contracts.

The *Honorable* Robert Falligant, of the superior court, declined to entertain these motions, whereupon the defendants filed in this court a certified transcript of the record of the proceedings of the superior court, and on the first day of the term, the court having been notified that the Solicitor-General of the East-

ern Judicial Circuit, who is the counsel representing the State of Georgia in its criminal prosecutions, would move to remand the causes to the court whence the transcript was taken, regularly assigned the hearing of the said motion for trial. The motion to remand, which the court required to be in writing, presents several grounds:

1. It is insisted the case should be remanded because the defendants made no appearance in the state court, and that their bonds were estreated; that their counsel, James Atkins, Esq., admits that he advised his clients to remain away from said state court as it was not necessary that they should be there in person when said motion for removal was made.

2. Because it appears that the indictments against the defendants charged the offense to have been committed on the 1st day of April, 1889, whereas it is not pretended that the alleged marriage took place until the 15th day of the same month.

3. Because the defendants have been citizens and domiciled in the County of Liberty for many years; that the defendant Rose Ward was born a slave; that they removed to Chatham County after the finding of the indictment, but that, while domiciled in the County of Liberty and citizens of the State, they went to the District of Columbia, and were married there in order to evade the laws of the State of Georgia, prohibiting marriages between whites and blacks, and that immediately after said marriage they returned to the County of Liberty.

The defendants filed affidavits to the effect that their lives would have been in danger had they attended court in Liberty County, as they were bound to do by their bond, but they do not indicate any satisfactory, or, indeed, credible, reason for that statement.

Without bestowing very great attention on the technical reasons urged for remanding these cases, it is, in the opinion of the court, the wisest and most serviceable course to consider and decide the motion upon the grave and important question which it presents.

Does the law of the State which prohibits and makes void a marriage between individuals of the Caucasian and of the African races deprive the parties in this case of their rights, guaranteed to them by the Constitution and laws of the United States, or, to state the question as it is more narrowly presented by the petition of the defendants, do the statutes of the State have the effect to violate the obligation of the marriage contract in the sense in which the Constitution of the United States inhibits state action which violates the obligation of a contract? It would, perhaps, be impossible to overstate the importance of this question under the grave and unsettled relations which exist between the distinct races now inhabiting a large portion of these United States, and it will not be wise nor patriotic for the court to evade the vital point of decision as might perhaps be done in this case.

By a settled policy of this State, a policy adopted with the purpose to preserve, as far as the laws may accomplish that result, the purity and integrity of the races inhabiting the State, it is declared, (Code, section 1768):

"Marriage relations between white persons and persons of African descent are forever prohibited, and such marriages shall be null and void."

Section 4573, Code, presents the penalty for adultery or fornication between individuals of the races, and under this section the indictments against the defendants were found.

Section 1710 of the Code provides as follows: "All marriages solemnized in another State by parties intending at the time to reside in this State shall have the same legal consequence as if solemnized in this State. Parties residing in this State cannot evade any part of the provisions of its laws as to marriage by going into another State for the solemnization of the marriage ceremony."

It will thus be seen how clearly recognized and distinctly fixed is the purpose of the State of Georgia to prohibit within its borders miscegenation as the result of marriages between the white and black races.

These Statutes have received judicial construction by the Supreme Court of the State at a period when its judges were widely known, not alone for their conservatism, their devotion to the Constitution of the common country, their broad and tolerant liberality of opinion, but also for their profound learning and conspicuous intellectual power.

In *Scott v. State*, 39 Ga. 321, this decision will be found: Leopold Daniels, a Frenchman, had married Charlotte Scott, a negro woman. They were indicted for cohabiting, and thus the question arose.

Chief Justice Joseph E. Brown pronounced the unanimous opinion of the court, of which the other members were the *Hon. H. F. McCay*, more lately the United States Judge for the Northern District of Georgia, and the *Hon. Hiram Warner*, afterwards himself the illustrious chief justice of the State.

Of the law *Chief Justice* Brown makes these observations:

"I do not hesitate to say that it was dictated by wise statesmanship, and has a broad and solid foundation in enlightened policy, sustained by sound reason and common sense.

The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observations show us that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength to the full blood of the other races. It is sometimes urged that such marriages should be encouraged for the purpose of elevating the inferior race. The reply is, that such connections never elevate the inferior race to the position of the superior, but they bring down the superior to that of the inferior. They are productive of evil, and evil only, without any corresponding good."

The court was unanimous that the law was constitutional, and the conviction of the parties was affirmed.

An identical conclusion was reached by this court, *Judge Erskine* pronouncing the decision, in the case of *Hobbs and Johnson*, 1 Woods, 537.

The section of the Code above quoted is interpreted, and is held not to be an infraction of the 14th Amendment of the Constitution of the United States, or of the laws Congress has made for its enforcement.

In the course of his opinion, page 540, *Judge*

Erskine says: "Nor, I apprehend, is marriage considered to be embraced within that clause of section 10 of article 1 of the National Constitution, which prohibits the State from passing any law impairing the obligation of contracts."

He quotes the declaration of *Chief Justice Marshall*, in *Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 518 [4 L. ed. 629], that "the provision in the Constitution has never been understood to embrace contracts other than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. It has never been understood to restrict the general rights of the Legislature to legislate on the subject of divorce."

In another part of the opinion, the same great magistrate said: "The framers of the Constitution did not intend to restrain the States in the regulation of civil institutions adopted for internal government."

Judge Erskine concludes that it is plain that the institution of marriage is not technically a contract, nor can it be said to be related to property. He quotes the declaration of *Mr. Bishop*: "All our marriage and divorce laws are state laws and state statutes, the national courts with us not having cognizance of the matter within our localities." 1 *Bishop*, Mar. and Div. § 87.

Calling attention to the fact that the state marriage regulations did not deny to a citizen the equal protection of the laws, for the punishment or penalty adjudged to the colored citizen found guilty of fornication is like that, and none other, which is inflicted on the white citizen, he holds that the sections of the Code of Georgia which inhibit marriage between white persons and persons of African descent, and which provide for the punishment of the colored and white persons who are found guilty of the crime of fornication, are not in violation of the Constitution of the United States, and the relators were remanded to the state courts.

The conclusion of *Judge Erskine*, that the marriage contract is not contemplated by the prohibition of the Constitution of the United States against the impairment of contracts by state legislation, has been, subsequently to the rendition of the decision above quoted, fully sustained by two decisions of the Supreme Court of the United States. In the case of *Maynard v. Hill*, 125 U. S. 190 [31 L. ed. 654], it was held that marriage is something more than a mere contract, though founded upon an agreement by the parties. When once formed, a relation is created between the parties which they cannot change, and the rights and obligations of each depend, not upon their agreement, but upon the law, statutory or common. It is an institution of society, regulated and controlled by public authority. Legislation, therefore, affecting this institution, or annulling a relation between parties, is not within the prohibition of the Constitution of the United States against the impairment of a contract by such legislation. It may be observed that this decision was rendered upon the effect of territorial legislation annulling a marriage. *A fortiori*, this announcement will control with reference to the legislation of a State.

The language of *Mr. Justice Fields* is peculiarly apposite and instructive with reference to the important controversy before the court. 7 L. R. A.

On page 205 [657] of the decision, he declares: "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the Legislature."

He cites many cases where the Legislatures of States have annulled marriages. He calls attention to the fact that this power was formerly exercised by the Parliament of England, and it may, with reason, be asked, if this power has been formerly exercised by state Legislatures after a marriage has been contracted, may it not, with more of force and reason, be exerted to prevent the marriage, if it would be objectionable and contrary to public policy?

Upon the main point on which the defendants here rely, the learned justice says: "The only inconsistency suggested is, that it impairs the obligation of the contract of marriage. Assuming that the prohibition of the Federal Constitution against the impairment of contracts by state legislation applies equally, as would seem to be the opinion of the Supreme Court of the Territory, to legislation by territorial legislatures, we are clear that marriage is not a contract within the meaning of the prohibition."

He quotes the language of *Chief Justice Marshall*, quoted *supra*. With reference to marriage, he says: "It is an institution in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress. This view is well expressed by the Supreme Court of Maine in *Adams v. Palmer*, 51 Me. 481, 483."

It will be interesting and important to consider the language of this case, to which *Justice Field* quotes with approval.

Chief Justice Appleton declares that "when the contracting parties have entered into the married state, they have entered into a new relation, the rights and obligations of which rest, not upon their agreement, but upon the law of the State, statutory or common, which defines and prescribes those rights, duties and obligations. They are of law, not of contract. Their rights under it are determined by the will of the sovereign, as evidenced by law. It is not, then, a contract within the meaning of the clause of the Constitution which prohibits the impairing of the obligation of contracts. It is, rather, a social relation, a creation of the law itself; a relation of the utmost importance as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress."

And the *Chief Justice* cites, in support of this opinion, the case of *Maguire v. Maguire*, 7 Dana, 181, 183, and *Ditson v. Ditson*, 4 R. I. 87, 101. In the first of these, the Supreme Court of Kentucky said that marriage was more than a contract; that it was the most elementary and useful of all the social relations regulated and controlled by the sovereign power of the State and might be abrogated by the sovereign will whenever the public good would thereby be subserved; that being more than a contract, and depending especially upon the sovereign will, it was not embraced by the con-

stitutional inhibition of legislative Acts impairing the obligation of contracts.

The Supreme Court of Rhode Island, in the case above quoted, declares it is not a contract in the sense in which the obligation may not be impaired, but one of the domestic relations.

In *Wade v. Kahlfeisch*, 58 N. Y. 282, it is declared to be more than a contract, its relations always regulated by the government. It partakes more of the character of an institution, regulated and controlled by public authority, upon principles of public policy for the benefit of the community.

In *Noel v. Ewing*, 9 Ind. 87, it is declared to be "in every enlightened government, pre-eminently the basis of civil institutions and thus an object of the deepest public concern."

The illustrious Story, in his great work on the Conflict of Laws, paragraph 108, *note*, fully sustains this view: "It follows within the full precincts of absolute and paramount administration by the controlling authority, that the marriage contract is not within the provision of the inhibitory clause of the Constitution denying to the State the power to impair contracts."

This doctrine has been repeated by the Supreme Court of the United States in the case of *Hunt v. Hunt*, 131 U. S. Appendix clxv. [S. C. in its place chronologically 24 L. ed. 1109]: "The contract of marriage is not a contract within the meaning of the provision in the Constitution prohibiting States from impairing the obligation of contracts."

In the case of *Kinney v. Com.* 30 Gratt. 858, 32 Am. Rep. 690, the precise question in this case was decided adversely to the defendants here. There a negro man and a white woman domiciled in Virginia, went, as in this case, to the District of Columbia, and were regularly married, and after remaining there ten days returned to their home in Virginia and continued to reside there as husband and wife. The law of Virginia, like the law of Georgia, prohibits marriages between white persons and negroes. It was held that the parties were liable to indictment in Virginia for lewd and lascivious cohabitation; that the marriage in the District of Columbia was a mere evasion of the laws of Virginia, and could not be pleaded in bar of the prosecution. The case is therefore precisely in point. There the argument was made that the laws of a State, with reference to marriage, could not operate *extra territorium*. Conceding the general rule, the learned court proceeded to point out the exceptions, citing *Mr. Justice Story*, in his work on the Conflict of Laws, section 118a: "The most prominent, if not the only known, exceptions to the rule are those marriages involving polygamy and incest, those positively prohibited by the laws of a country upon motives of policy." The case at bar would seem clearly within the latter classification.

Reference is made in the opinion from which we quote to the case of *Brook v. Brook*, 9 H. L. Cas. 198. In that case William Leigh Brook married in Denmark Mrs. Emily Armitage, his first wife's sister. The parties were lawfully domiciled in England and had gone to Denmark on a temporary visit. The marriage was lawful in Denmark. In a suit among the heirs of Brook, *Vice-Chancellor Stuart*, with whom

sat *Mr. Justice Creswell*, held that the marriage in Denmark was, by the well-known law of England upon the subject, wholly invalid.

The case was appealed to the House of Lords, and was there considered with great carefulness. Opinions were rendered by the *Lord Chancellor Campbell*, *Lord Cranworth*, *Lord St. Leonards* and *Lord Wensleydale*.

The Lord Chancellor declared: "While the forms of entering into the contracts of marriage are to be regulated by the *lex loci contractus* the essentials of the contract depend upon the *lex domicilii*. If the contract of marriage is such in essentials as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile though not contrary to the law of the country in which it was celebrated." All the law Lords concurred with the opinion of the Lord Chancellor. The same doctrine is affirmed in this country, in North Carolina (*Williams v. Oates*, 5 Ired. L. 535; *State v. Kennedy*, 76 N. C. 251; *State v. Ross*, 76 N. C. 242), and in Louisiana (*Dupre v. Boulard*, 10 La. Ann. 411); and the Circuit Court of the United States for the District of Virginia seems to have concurred in the opinion of the state court, in *Kinney v. Com.* above quoted. *Ex parte Kinney*, 3 Hughes, 1.

The principle, as we have seen, is made the law of the State of Georgia by the express Statute quoted above. By statute and by unbroken authority then, except by the case of *Medway v. Needham*, 16 Mass. 157, such marriages, between parties domiciled at the time in the State, as are declared void by the laws of the State, will be held invalid, no matter where they were contracted.

The case of *Medway v. Needham*, 16 Mass. 157-161, was the occasion of an interesting and learned discussion of the conflict of laws relative to marriage, and especially of the validity of marriages between persons domiciled in a State, who temporarily left it to evade its marriage laws (Story, Conf. L. 5th ed. p. 230, *note*), in which the distinguished author, with much of warrant in the renown of its courts and the learning of its judges, favors, not unnaturally, the ruling in Massachusetts. An attentive consideration of the reasoning of the text and the note will make it appear, however, that the author did not have in mind a case like that under consideration here. The true rule is stated with satisfactory clearness in the recent case of *Pennegar v. State*, decided by the Supreme Court of Tennessee on 29th of January, 1889, and reported in that useful and valuable periodical, the *Lawyers Reports, Annotated*, Vol. 2, p. 708 [87 Tenn. 244]. Stating the general rule that a marriage valid where celebrated is valid everywhere, the court calls attention to the exceptions. Of these the most important is a marriage which the local law-making power has declared shall not be allowed any validity either in express terms or by necessary implication.

Marriages of this class are divided by the court into two subdivisions: (1) where the statutory prohibition relates to form, ceremony and qualifications; (2) marriages which are prohibited by positive state policy as affecting the morals or good order of society. *Justice Folkes*, for the court, presented the distinction

in the following language: "Where the statutory inhibition relates to matters of form or ceremony, and in some respects to qualification of the parties, it is declared that the courts would hold such marriage valid. But if the statutory prohibition is expressive of a decided state policy as a matter of morals, the court must adjudge the marriage void as *contra bonos mores*." To illustrate the proposition the court cites the case of *State v. Bell*, 7 Baxt. 9, where a marriage between a white person and a negro, valid in Mississippi where celebrated, and where the parties were domiciled at the time of the marriage, was held void in Tennessee. There is in Tennessee, as in Georgia, a highly penal statute on this subject, and the court alludes in vigorous language to the "demoralization and debauchery involved in such an alliance." Referring to the criticisms made in *Medway v. Needham* by the Lord Chancellor in *Brook v. Brook*, 9 H. L. Cas. 198, and the criticism of that case in *Com. v. Lane*, 113 Mass. 458, and to the case of *Putnam v. Putnam*, 8 Pick. 433, the court calls attention to the significant fact that in *Putnam v. Putnam* the Supreme Court of Massachusetts says: "If it shall be found *inconvenient* or *repugnant to sound principles* (the italics are ours) it may be expected that the Legislature will *explicitly enact* that the marriages contracted in another State, which, if entered into here, would be void, shall have no effect within this Commonwealth." The Legislature did shortly thereafter so enact, whether because the doctrine laid down in the case was inconvenient or because repugnant to sound principles does not appear.

Justice Folkes, in his interesting opinion, quotes also from the opinion of the Lord Chancellor in *Brook v. Brook*, *supra*, the following observation relative to *Medway v. Needham*, 16 Mass. 157: "It is entitled to but little weight, and is based upon decisions which relate to the form and ceremony of marriage. If a marriage is absolutely prohibited in any country as being contrary to public policy, and leading to social evils, I think that the domiciled inhabitants in that country cannot be permitted, by passing the frontier, and entering another State in which the marriage is not prohibited, to celebrate a marriage forbidden in their own State, and, immediately returning to their own State, to insist on their marriage being recognized as lawful."

We may add, with reference to the law and the policy of Georgia, that whatever may be the difference between courts or countries in the opinion held and enforced upon this vital topic, this State, by its Declaratory Statute, has distinctly withdrawn its jurisprudence from the domain of the debate. The Statute is the rule as to persons domiciled in Georgia. "All marriages solemnized in another State by parties intending at the time to reside in this State shall have the same legal consequences and effect as if solemnized in this State. Parties residing in this State cannot evade any of the provisions of its laws as to marriage by going into another State for the solemnization of the marriage ceremony."

This authoritative and precise announcement of state policy is made in the exercise of its 7 L. R. A.

sovereignty, upon a subject which involves the character of its population and citizenship, and, as we have seen, repeatedly declared by the Supreme Appellate Court of our country, exclusively within the precincts of state control. The general rule upon which the petitioners rely, viz., that a marriage valid where celebrated is valid everywhere, depends upon international comity, a jurisprudence "existing in the sense of mutual interest, mutual benefits and mutual obligations to cultivate peace and harmony." Story, Conf. L. p. 83.

But of international comity it was said by Chief Justice Taney in the decision in *Bank of Augusta v. Earle*, 38 U. S. 18 Pet. 589 [10 L. ed. 308]: "It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interest."

That marriages between individuals of Caucasian and of African blood are contrary to the policy of Georgia, we have seen. Whether it is prejudicial to the State is for Georgia to determine. We have seen that the National Constitution is not infringed. It is true that in certain senses the States of the American Union are not independent nations. "For all national purposes embraced by the Federal Constitution the States and the citizens thereof, are one, united under the same sovereign authority and governed by the same laws. In all other respects the States are foreign to and independent of each other." *Buckner v. Finley*, 27 U. S. 2 Pet. 589 [7 L. ed. 530], opinion, *Mr. Justice Washington*. See also *Dickins v. Beal*, 53 U. S. 10 Pet. 573 [9 L. ed. 538]; *Rhode Island v. Mass.* 37 U. S. 12 Pet. 719 [9 L. ed. 1253]; *Phillips v. Payne*, 92 U. S. 132 [23 L. ed. 649].

And the 14th Amendment to the Constitution does not limit the power of the State to protect its citizens. *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26 [32 L. ed. 585].

The court will not discuss the argument of defendant's counsel to the effect that the intermarriages of whites and blacks do not constitute an evil or an injury against which the State should protect itself. This is a question which has been, as we have seen, the subject of repeated judicial deliverance, but it is more properly in the opinion of this court within the domain of legislative debate.

It is enough, for the purpose of its duty, for the court to ascertain that by a legitimate and settled policy the State of Georgia has declared such marriages unlawful and void; for, while in this country, where the home life of the people, their decency and their morality are the basis of that vast social structure of liberty and obedience to law which excites the patriotic pride of our countrymen and the admiration of the world, and while these attributes of our citizenship should be cherished and protected by all in authority, and the creatures who defy them should be condemned by all, the courts in their judicial functions are rarely concerned with the policy of the laws which are made to protect the community. The policy of the State upon this subject has been declared, as we have seen by its supreme court as well as by its statutes; and it is enough to say that this court is unable to discover anything in that policy with which the federal courts have the right or the

power to interfere. To discuss the topic further might give immediate pain to many who are wholly irresponsible for a condition which would make them sensitive to its hearing or knowledge.

It may not be improper to state that the evils comprehended in this general topic are decreasing. This the observation and testimony of superintendents of public instruction who have the opportunity to observe large numbers of colored children, prove to be true. Upon every possible consideration this must be deemed an important, indeed an absolutely necessary, step toward the amelioration of their condition and the permanent advancement of the

race; and to disregard the praiseworthy purposes and efforts of the colored people themselves, whether by nullifying the laws made to prevent miscegenation or by ignoring the vicious practices of the licentious, would be as cruel to that race as it would be injurious to society, destructive to social order and ruinous to the future of a large portion of the country, a future with which the prosperity of the whole country is indissolubly connected.

The questions presented are decided adversely to the defendants, and *the indictments must be remanded to the state court whence they were removed.*

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF GEORGIA.

John LAWTON, *Libelant* to Limit Liability as Owner of The Steamboat "Katie,"

v.

H. M. COMER *et al.*

"THE KATIE."

(40 Fed. Rep. 480.)

"The Act of June 19, 1886, extending the benefits of limited liability legislation to vessels engaged in inland navigation, having been assailed for alleged unconstitution-

***Head notes by SPENCER, J.**

ality,—*Held*, that the Act is valid, in view of the power of Congress to regulate commerce:

(a) **Because the law, amended,** excepted from its operation inland navigation only, and not internal commerce, as insisted.

(b) **The amendment extended the operation of the law,** not to internal commerce, but to inland navigation. So much for the direct purpose of the Act.

(c) **If internal commerce is affected,** it is incidentally merely. The purpose of the Legislature being legitimate, and warranted by the Constitution, it is wholly immaterial to the consideration of the validity of its action that somewhere it has a casual or contingent effect upon the domain of state legislation.

NOTE.—Congress may regulate liability of ship-owners.

It is within the power of Congress to regulate the liability of owners of vessels so far as applicable to marine torts, and it is not necessary to aver in the petition, or to prove, that the claims against the vessel are in excess of her value. *The Garden City*, 28 Fed. Rep. 766; *Providence & N. Y. Steamship Co. v. Hill Mfg. Co.* 109 U. S. 589 (27 L. ed. 1042); *Headrick v. Virginia & T. A. L. R. Co.* 48 Ga. 545.

Limited Liability Act of Congress construed.

Under the provisions of the Act of Congress of 1851, if the loss is caused by the owner's "design or neglect," his common-law liability remains intact, and he is liable for the whole loss. *Walker v. Western Transp. Co.* 70 U. S. 8 Wall. 153 (18 L. ed. 174).

The purpose of the Act was to limit the liability of the vessel owner, and it applies to any damage irrespective of locality of the thing injured, if there be "no fault or privity" on the part of the owner. *Re Vessel Owners' Towing Co.* 26 Fed. Rep. 169; *Re Goodrich Transp. Co.* 26 Fed. Rep. 713.

To render them liable there must be "privity or knowledge," some personal concurrence, or some fault or neglect on their part or in which they personally participate. *Walker v. Western Transp. Co. supra*; *Hill Mfg. Co. v. Providence & N. Y. Steamship Co.* 113 Mass. 499; *Moore v. Am. Transp. Co.* 65 U. S. 24 How. 1 (16 L. ed. 674).

The word "privity" (of the owner) means some fault or neglect in which the owner of the vessel personally participates; and "knowledge," as used, means some personal cognizance, or means of knowledge of which he is bound to avail himself, of a contemplated loss, or of a condition of things likely to produce or to contribute to a loss, without adopting appropriate means to prevent it. *Lord v. Goodall, N. & P. Steamship Co.* 4 Sawy. 292, 7 L. R. A.

The "privity or knowledge" of the officers of a corporation is "privity or knowledge" of the corporation. *Philadelphia, W. & B. R. Co. v. Quigley*, 62 U. S. 21 How. 202 (16 L. ed. 73); *Hill Mfg. Co. v. Providence & N. Y. Steamship Co.* 113 Mass. 500.

The "knowledge and privity" of the wrecking-master of an insurance company is not the knowledge and privity of the corporation so far as to charge it with responsibility for his negligence beyond the value of the vessel. *Craig v. Continental Ins. Co.* 26 Fed. Rep. 798.

The Limited Liability Act, Rev. Stat. §§ 4292-4299, leaves ship owners liable without limit for their own negligence, and liable to the extent of the ship and freight for the negligence or misconduct of the master and crew. *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 297, 440 (32 L. ed. 788, 791).

It was not intended to exonerate them beyond the value of the ship and freight, for losses from causes for which they were previously liable, including mere negligence of employees. *Norwich & N. Y. Transp. Co. v. Wright*, 80 U. S. 13 Wall 121 (20 L. ed. 591); *Allen v. Mackay*, 1 Sprague, 219; *Place v. The City of Norwich*, 1 Ben. 69; *Lord v. Goodall, N. & P. Steamship Co.* 4 Sawy. 300.

Neither the provision of 16 Stat. at L. 440, for the better protection of the lives of passengers on board steam vessels (*Carroll v. Staten Island R. Co.* 58 N. Y. 126), nor the jurisdiction over marine contracts and torts saved to the state courts by the Judiciary Act, are limited or affected by Stat. March 3, 1851, unless proceedings are taken under the latter Act by a party to limit his liability. *Baird v. Daly*, 57 N. Y. 236.

This Act applies to owners of foreign as well as domestic shipping. *The Scotland*, 105 U. S. 24 (28 L. ed. 1001); *Re Leonard*, 14 Fed. Rep. 63.

"In no case" applies to all cases of loss and dam-

(d) Even though the subjects of this extended limitation of liability, or the territory in which it is effective, are partially within the region of state control, yet, where the subjects are separable, and are partly under the national control, the Act will be sustained by the courts wherever the power of Congress extends, and as to all those objects to which it attaches; and this rule is easily applicable in this case.

(e) As to the Savannah River, it is a public navigable stream. The voyages of The Katie and her cargo are interstate in character, and the jurisdiction of Congress is undoubted.

(f) The Act is warranted also by the admiralty clause of the Constitution, and the power of Congress to modify by statute the application of admiralty doctrines.

(g) The entire purpose of the limited liability enactments was to encourage investments in shipping, and they may be extended wherever the admiralty courts of the United States have jurisdiction.

(November 12, 1899.)

LIBEL in admiralty by the owner of the Steamboat Katie to limit his liability for losses to her cargo occasioned by fire. On demurrer and motion to dismiss libel. *Overruled.* The case is fully stated in the opinion.

Messrs. Denmark & Adams, for respondents, in support of the demurrer:

The commerce clause of the Constitution not only does not authorize, but it prohibits, legislation by Congress that will affect internal commerce, traffic between citizens of the same State. This clause was intended to place such commerce beyond its control.

Gibbons v. Ogden, 23 U. S. 9 Wheat. 194 (6 L. ed. 23); *Moore v. Am. Transp. Co.* 65 U. S. 24 How. 37 (16 L. ed. 680); *The Daniel Ball*, 77 U. S. 10 Wall. 564 (19 L. ed. 1001); *Trade-Mark Cases*, 100 U. S. 95 (25 L. ed. 552); *Lord v. Goodall Steamship Co.* 102 U. S. 543 (26 L. ed. 225); *Sands v. Manistee River Imp. Co.* 123 U. S. 295 (31 L. ed. 151).

We fully recognize the familiar principle that a law may be constitutional in part and bad in part. But the courts never change, limit or restrict the natural and obvious meaning of words so as to amend the Statute into harmony with the fundamental law.

United States v. Reese, 92 U. S. 220 (23 L. ed. 565); *Trade-Mark Cases*, 100 U. S. 82 (25 L. ed. 550); *Virginia Coupon Cases*, 114 U. S. 304 (29 L. ed. 197); *Sprague v. Thompson*, 118 U. S. 90 (30 L. ed. 115); *Allen v. Louisiana*, 103 U. S. 80 (26 L. ed. 818); *Lord v. Goodall Steamship Co.* 102 U. S. 543 (26 L. ed. 225).

The cases which sustain the principle that "a legislative Act may be entirely valid as to some classes of cases, and clearly void as to others" are those in which the class to which the law has been applied has been covered by unobjectionable and separable words or clauses.

Tiernan v. Rinker, 102 U. S. 123 (26 L. ed. 103).

Unlike the Legislature of a State, Congress has only those powers conferred.

Dwarris, Stat. Const. pp. 367, 368; *Martin v. Hunter*, 14 U. S. 1 Wheat. 826 (4 L. ed. 37); *Trade-Mark Cases*, 100 U. S. 93 (25 L. ed. 551); *Cooley*, Const. Lim. 10, 11.

The law under review undertakes to regulate

age happening during the entire voyage. The City of Norwich, 118 U. S. 463, 491 (30 L. ed. 134, 143).

The Statute of June 26, 1884, contains the proviso "that this provision shall not affect the liability of any owner, incurred previous to the passage of this Act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said ship owners."

Failure to adopt the provisions of section 4285 does not deprive ship owners of the benefits of Rev. Stat. § 4284. The Scotland, 105 U. S. 24 (26 L. ed. 1001).

Loss by fire.

Owners are exempted by the Act from liability for loss by fire from negligence of their officers and agents, in which the owners did not participate (*Re Providence & N. Y. Steamship Co.* 6 Ben. 124; *Walker v. Western Transp. Co.* 70 U. S. 8 Wall. 150 (18 L. ed. 172); *Moore v. Am. Transp. Co.* 65 U. S. 24 How. 1 (16 L. ed. 674); *Keene v. The Whistler*, 2 Sawyer 348; Rev. Stat. §§ 4283, 4287); and though the vessel be in a wrecked condition, incapable of self propulsion or of carrying a cargo. *Craig v. Continental Ins. Co.* 26 Fed. Rep. 738.

The protection of this Statute may be invoked notwithstanding the fact that the thing injured is situated on land, if the damage in question be occasioned by the vessel without fault or privity on the part of her owner. *Re Vessel Owners' Towing Co.* 26 Fed. Rep. 172.

But in *Goodrich Transp. Co. v. Gagnon*, 36 Fed. Rep. 123, it was held that the words "for any act, matter or thing, loss, damage or forfeiture done, occasioned or incurred," refer only to such acts, things, losses and damages as to which relief can be had in a court of admiralty, and do not include liability for the destruction of buildings and goods

on the land occasioned by fire which has been communicated by a vessel.

The language of this Act limits its operation to fire happening to or on board a vessel, and not to a fire happening on the wharf. *Salmon Falls Mfg. Co. v. The Tangier*, 6 Am. L. Reg. 604, 11 Law Rep. N. S. 6; *The Egypt*, 25 Fed. Rep. 323.

Damage caused by collision.

Ship owners are entitled to a limitation of liability where damage is caused to other vessels and their cargo by collision. *Norwich & N. Y. Transp. Co. v. Wright*, 80 U. S. 13 Wall. 104 (20 L. ed. 585); *Wright v. Norwich & N. Y. Transp. Co.* 3 Blatchf. 14, 1 Ben. 158.

In a case of loss by collision the limitation of the owner's liability under the Act is as applicable when the proceeding is *in rem*, as when it is *in personam*; if his liability is only the amount of the vessel's value when at the bottom of the sound, his liability after it is raised and repaired is no greater. *Piace v. Norwich & N. Y. Transp. Co.* 118 U. S. 468 (30 L. ed. 134).

Where two vessels, both in fault, collide, and one of the vessels is lost, such sum as the surviving vessel is bound to pay to the owners of the sunken vessel must also be applied to the payment of the damages sustained by the owners of the cargo on board said sunken vessel. *Duncan v. The C. H. Foster*, 1 Fed. Rep. 733; *Norwich & N. Y. Transp. Co. v. Wright*, *supra*.

For the mode of applying a limitation of liability where both vessels are in fault and the damages are divided, see *The Manitoba*, 122 U. S. 97 (30 L. ed. 1065).

For the method of offsetting damages, see *The Bristol*, 29 Fed. Rep. 867.

Where two vessels collided and both were injured, and the vessel in fault subsequently on the

in a material way the rights of the parties who patronize the vessel—their traffic on the vessel. But as the Act applies and was intended to apply to the owners of all vessels without exception—whether the vessels were licensed and enrolled or not—including canal-boats and barges, the decisions will show that as a regulation of vessels the Act is unconstitutional.

Gibbons v. Ogden, 22 U. S. 9 Wheat. 197 (8 L. ed. 23); *Passenger Cases*, 48 U. S. 7 How. 400 (12 L. ed. 702); *Sinnot v. Davenport*, 68 U. S. 22 How. 243 (16 L. ed. 247); *The Bright Star*, 1 Woolworth, 266; *The Thomas Swan*, 6 Ben. 42; *The Daniel Ball*, 77 U. S. 10 Wall. 564 (19 L. ed. 1001); *Gilman v. Philadelphia*, 70 U. S. 8 Wall. 718 (18 L. ed. 96).

There is an important limitation of the power of Congress over navigation, and that is, it must be navigation on navigable waters of the United States, and which concerns, in some way, interstate or foreign commerce.

Esacaba & L. M. Transp. Co. v. Chicago, 107 U. S. 8, 632 (27 L. ed. 444); *The Daniel Ball*, 77 U. S. 10 Wall. 557 (19 L. ed. 999); *Miller v. New York City*, 109 U. S. 398 (27 L. ed. 973); *Ex parte Boyer*, 109 U. S. 681 (27 L. ed. 1057); *Haich v. Wallamet Iron Bridge Co.* 6 Fed. Rep. 829; *Yale Lock Mfg. Co. v. James*, 20 Fed. Rep. 903; *Sands v. Manistee River Imp. Co.* 128 U. S. 295 (31 L. ed. 151).

If the power to regulate commerce were made in terms as broad as the admiralty and maritime jurisdiction of the courts, still the law under review cannot be sustained because it is inconsistent with the limitations of even such a jurisdictional principle. The waters in which the

cases arise must at least be "navigable waters of the United States," the meaning of which designation has already been noticed.

The Genesee Chief v. Fitzhugh, 58 U. S. 12 How. 443 (13 L. ed. 1058); *Allen v. Newberry*, 62 U. S. 21 How. 244 (16 L. ed. 110); *The Hine v. Tretor*, 71 U. S. 4 Wall. 569 (18 L. ed. 455); *The Belfast*, 74 U. S. 7 Wall. 624 (19 L. ed. 266); *The St. Lawrence*, 66 U. S. 1 Black, 527 (17 L. ed. 183); *Re Long Island N. S. P. & F. Transp. Co.* 5 Fed. Rep. 605, 607-618.

If the object of the 4th section of the Act of 1886 was not to regulate internal commerce as well as that carried on by sea-going vessels, to change the law which protected this commerce from the operation of the Act of Congress, then it had no object. If Congress has the power here attempted to be exercised, then the commerce clause is meaningless.

See *The Lottawanna*, 88 U. S. 21 Wall. 558 (22 L. ed. 654); *Providence & N. Y. Steamship Co. v. Hill Mfg. Co.* 109 U. S. 589 (27 L. ed. 1042); *The War Eagle*, 6 Biss. 366; *The Mamie*, 5 Fed. Rep. 819.

Messrs. Chisholm & Erwin for libellant, *contra*.

Speer, J., delivered the following opinion: This is a libel brought under the provisions of section 4 of the Act of Congress of June 19, 1886 (24 Stat. at L. 80). Its purpose is to limit the liability of the owner of the steamer *Katie* for losses to her cargo occasioned by fire. The libellant (the owner) alleges that he is not liable at all for the damage which occurred to the cargo, but, if liable, to limit the liability, he

same voyage was wrecked and sunk by negligence of the master, the liability of the owners was limited to her value after she had sunk. *The City of Norwich*, 118 U. S. 468 (30 L. ed. 184); *The Great Western*, 118 U. S. 520 (30 L. ed. 156); *Thomassen v. Whitwell*, 9 Ben. 403, 21 Blatohf. 45, 12 Fed. Rep. 391; *Re Wright* 10 Ben. 14.

The value is to be ascertained by taking what she is found to be worth after she has been raised, and the expenses of raising her deducted; and the expense of raising and repairing her should not be added to the aforesaid value, nor is the insurance on said vessel to be accounted for by the owners. *Re Norwich & N. Y. Transp. Co.* 8 Ben. 312; *The City of Norwich*, 118 U. S. 468 (30 L. ed. 184).

But in *Walker v. Boston Ins. Co.*, 14 Gray, 288, 303, and *Barnes v. Steamship Co.*, 6 Phila. 479, 25 Leg. Int. 196, it was held that the limitation of liability is to be ascertained by an estimation of the value of the ship at the point of time immediately preceding that when the wrong was done and injury inflicted.

The whole value of the vessel means her value at the close of the voyage, and where she is lost no one shall recover compensation for his whole loss. *Re Providence & N. Y. Steamship Co.* 6 Ben. 124; *Thomassen v. Whitwell*, *supra*; *The Alpena*, 10 Biss. 436, 8 Fed. Rep. 280; *The City of Norwich*, *supra*.

If the vessel is lost the liability of the owner ceases (*Watson v. Marks*, 2 Am. L. Reg. 157; *contra*, *Barnes v. Steamship Co.* 6 Phila. 479, 25 Leg. Int. 196) and "freight then pending" includes freight earned at the end of the voyage for cargo on board at the time of the collision. *Sumner v. Caswell*, 20 Fed. Rep. 249.

There can be no apportionment of freight. *The Abble C. Stubbs*, 28 Fed. Rep. 719.

Where the same person owns both vessel and cargo, "freight then pending" is to be taken to 7 L. R. A.

mean the earnings of the vessel in transporting the goods of the owner. *Allen v. Mackay*, 1 Sprague, 219.

Where one of the owners of a vessel commands and sails on shares and exclusively manages the vessel and hires the crew, whereby he in effect becomes charterer thereof, he is responsible for her tortious acts. As to whether the owners also are responsible,—*quære*. *Thorp v. Hammond*, 79 U. S. 12 Wall. 408 (20 L. ed. 419); *Somes v. White*, 66 Me. 542.

Freight is only one of the items to be taken into estimation in ascertaining the extent of the liability of the party who is already responsible. *Walker v. Boston Ins. Co.* 14 Gray, 288.

A claim for unearned freight paid in advance is not within the class of claims protected by the Act. *Re Liverpool & G. W. Steam Co.* 3 Fed. Rep. 168.

The court is not bound to allow interest on the value of the vessel. *The Scotland*, 118 U. S. 508 (30 L. ed. 155).

Damages for personal injuries.

The limitation of liability extends to personal injuries sustained by passengers, as well as loss of life. *The City of Columbus*, 28 Fed. Rep. 460; *Butler v. Boston & S. Steamship Co.* 180 U. S. 527 (32 L. ed. 1017); *The Amsterdam*, 28 Fed. Rep. 112; *The Alpena*, 10 Biss. 436, 8 Fed. Rep. 280; *Rounds v. Providence & S. Steamship Co.* 14 R. I. 844; *The Epsilon*, 6 Ben. 378; *Re Long Island, N. S. P. & F. Transp. Co.* 5 Fed. Rep. 599.

Claims for personal injury caused by fire and explosion on board a steamboat prosecuting her voyage on the East River are claims within the Act. *Re Long Island N. S. P. & F. Transp. Co.* 5 Fed. Rep. 599.

Damages to the person or loss of baggage are not taken out of the operation of the Limited Liability Act by Rev. Stat., § 4493. *Re Long Island N. S. P. & F. Transp. Co.* 5 Fed. Rep. 599.

prays to be accorded the benefit of the Act referred to. The allegations of the libel are that the Katie was on her trip when the fire occurred. At that time, and for twenty years prior thereto, she had been engaged in transporting freight and passengers from and to the Ports of Savannah and Augusta, and intermediate landings on the Savannah River in the States of South Carolina and Georgia. She belonged to a line of carriers issuing through bills of lading to and from localities in Georgia, and to and from ports and places in the other States of the Union, and to and from foreign ports. The libel contains the usual averments that the damage was done without the privity or knowledge of the owner. It is admitted in the pleadings that a large portion of the cargo was laden at different points on the Georgia side of the river, and was consigned to merchants in Savannah, and that other portions, consigned in like manner, were received from the South Carolina landings.

The various owners of the cargo, as respondents, have interposed a demurrer and motion to dismiss the libel, upon the ground that the fourth section of the Act of Congress of June 19, 1886, is, as they insist, unconstitutional and void; and since the owners of vessels used in rivers or inland navigation were expressly excluded from the right to limit their liability under previous Acts of Congress (§§ 4288-4289, Rev. Stat.) it follows, they contend, that no relief can be granted under the allegations and prayers of the libel. The gist of the contention of proctors for respondents may be stated as follows: (1) They insist that section 4 of

the Act of June 19, 1886, extending the right to limit liability to the owners of "all vessels used on lakes or rivers, or in inland navigation, including canal-boats, barges and lighters," was intended to affect, and *ex vi termini* does affect, vessels used in the purely internal commerce of a State; that this purpose of the Act is expressed in unequivocal words. (2) Even though it be conceded, they urge, that Congress might have provided a measure of relief for owners of a vessel whose interstate traffic relations were identical or similar to those of the Katie, without encroaching upon the domain of internal commerce, the court, they insist, may not restrict the application of this Act so as to give it partial effect simply because the facts here are appropriate to national control, the Statute itself, in plain and unambiguous terms, exceeding, they contend, the limitations of the commerce clause of the Constitution. This clause, they maintain, so far from authorizing, actually prohibits, legislation by Congress which will affect the internal commerce between citizens of the same State, and since the terms of the Act in question comprehend alike constitutional and unconstitutional topics, the entire section of the amended Statute must, they argue, be held inoperative and void,—citing *U. S. v. Reese*, 92 U. S. 220 [23 L. ed. 565]; *Trade-Mark Cases*, 100 U. S. 82 [25 L. ed. 550]; *Virginia Coupon Cases*, 114 U. S. 304 [29 L. ed. 197]; *Leloup v. Port of Mobile*, 127 U. S. 647 [32 L. ed. 814]; *Sprague v. Thompson*, 118 U. S. 90 [30 L. ed. 115]; *Allen v. Louisiana*, 103 U. S. 80 [26 L. ed. 318]; *State Tonnage Tax Cases*, 79 U. S. 12 Wall.

The baggage of passengers is not merchandise, for the loss of which by fire ship owners are exempt. *The Marine City*, 6 Fed. Rep. 418; *contra*, *Chamberlain v. Western Transp. Co.* 44 N. Y. 306.

Surrender and transfer of ship and freight.

The privilege of exonerating himself from his individual liability, and of causing all legal proceedings against himself to cease by the surrender and transfer of the ship and freight, is not given to a party who is responsible for damages resulting from collision, but he is strictly confined to cases of loss in consequence of embezzlement or destruction by the master, mariners or passengers on board ship. *Walker v. Boston Ins. Co.* 14 Gray, 288.

Insurance is not such "an interest in such vessel and freight" as the ship owners are bound to surrender for the benefit of claimants. *The City of Columbus*, 22 Fed. Rep. 460.

Where property is sold, the insurance does not follow it, but ceases to have any value, unless the insurer consent to the transfer of the policy to the grantee of the property. In other words the contract of insurance does not attach itself to the thing insured, nor go with it when it is transferred. 2 *Marshall, Ins.* 801; *Sadlers Co. v. Badcock*, 2 Atk. 554; *Carroll v. Boston M. Ins. Co.* 8 Mass. 515; *Columbia Ins. Co. v. Lawrence*, 85 U. S. 10 Pet. 507, 512 (9 L. ed. 512, 514); *Carpenter v. Providence W. Ins. Co.* 41 U. S. 16 Pet. 495, 508 (10 L. ed. 1044, 1048); *Etna F. Ins. Co. v. Tyler*, 18 Wend. 386, 397; *Wilson v. Hill*, 3 Met. 69; *Bowles v. Innes*, 11 Mees. & W. 18; *McDonald v. Black*, 20 Ohio, 185; *Pilbinton v. Farmers Mut. F. Ins. Co.* 48 Vt. 497; *Place v. Norwich & N. Y. Transp. Co.* 118 U. S. 495 (30 L. ed. 144).

Apportionment of fund paid into court.

The provisions of the Act authorizing the apportionment of the sum for which the owner is liable 7 L. R. A.

have reference solely to losses occasioned otherwise than by fire, happening without "the knowledge or privity of the owner." *Knowlton v. Providence & N. Y. Steamship Co.* 53 N. Y. 76; *Norwich & N. Y. Transp. Co. v. Wright*, 80 U. S. 13 Wall. 104 (20 L. ed. 585); *Walker v. Boston Ins. Co.* 14 Gray, 288.

If the amount paid into court is insufficient to pay all the damages caused, it will be apportioned *pro rata* amongst the parties claiming damages in proportion to their respective losses. *Norwich & N. Y. Transp. Co. v. Wright*, *supra*.

The amount recovered, whether before the limitation proceedings or after, and whether in the court of first instance or an appellate court, will stand as the basis for *pro rata* division when the condemned fund is distributed. *The Benefactor*, 108 U. S. 220 (26 L. ed. 351).

The casualties or losses of different voyages cannot be aggregated or grouped together, and all losers be cited in to share what has been saved from shipwreck or other disasters, together with the pending freight, and have a decree entered exonerating the owners from personal liability. *The Alpena*, 8 Fed. Rep. 288; *Norwich & N. Y. Transp. Co. v. Wright* and *Walker v. Boston Ins. Co. supra*.

What owners entitled to benefit of Act.

All owners of vessels are not entitled to the privileges of the Act, but only such as fall within the description named therein, to wit, those who had no privity or knowledge of the damage incurred. *The Maria and Elizabeth*, 11 Fed. Rep. 520.

A vessel must be engaged in interstate or foreign commerce to entitle her owners to claim a limited liability. *Re Vessel Owners Towing Co.* 26 Fed. Rep. 169.

A tug engaged in towing into the waters of other States vessels engaged in interstate commerce is as much engaged in such commerce as the vessels

219 [20 L. ed. 875]. (3) While respondents concede the power of Congress to provide, by inspection, license regulations, etc., for the safety of vessels engaged in internal traffic, they insist there is a distinction between inspection and other laws intended to control the character of machinery, equipment and the like in vessels plying upon the navigable waters of the United States, and laws intended to enlarge or to limit the contract rights and liabilities of persons concerned with the same vessels; that the legislation, for the one purpose, may be warranted by the commerce clause of the Constitution, while for the purpose of affecting the rights of persons contracting with vessels engaged exclusively in the internal traffic of a State the enactments of Congress are nugatory,—citing *The Daniel Ball*, 77 U. S. 10 Wall. 557 [19 L. ed. 999]; *Ex parte Boyer*, 109 U. S. 631 [27 L. ed. 1057]; *Hatch v. Wallamet Iron Bridge Co.* 20 Fed. Rep. 329; *Yale Lock Mfg. Co. v. James*, 20 Fed. Rep. 903; *Sands v. Manistee River Imp. Co.* 123 U. S. 295 [31 L. ed. 151]. (4) They further insist that the legislation embodied in the Act of March 3, 1851, and in sections 4283–4289 of the Revised Statutes, was construed by the Supreme Court of the United States, and by other federal courts, to be authorized by the commerce clause of the Constitution,—citing *Moore v. Am. Transp. Co.* 65 U. S. 24 How. 37 [16 L. ed. 680]; *Lord v. Goodall Steamship Co.* 102 U. S. 541 [26 L. ed. 294]; *The Genesee Chief v. Fitzhugh*, 53 U. S. 12 How. 443 [18 L. ed. 1058]; *The Bright Star*, 1 Woolw. 274; *The Mamie*, 5 Fed. Rep. 819; *The War Eagle*, 6 Biss. 366. They argue that the enact-

ments are otherwise without constitutional warrant or validity. (5) They assert that the provision of the Constitution, “the judicial power shall extend to all cases of admiralty and maritime jurisdiction,” has relation merely to the law of the forum, and gives no authority to Congress to regulate the property rights and liabilities of parties litigant therein. Moreover, even though it be conceded, they say, that the admiralty clause confers upon Congress the power to legislate as to all topics which are properly within the admiralty jurisdiction, nevertheless the Act of June 19, 1886, is broader even than that extensive domain, for it applies to all inland waters, while the admiralty jurisdiction is limited to those waters which, by themselves, or their connections with others, form a continuous channel for commerce among the States or with foreign countries,—citing *The Daniel Ball* and *The Genesee Chief v. Fitzhugh*, *supra*; *Allen v. Newberry*, 62 U. S. 21 How. 244 [16 L. ed. 110]; *The Hine v. Trevor*, 71 U. S. 4 Wall. 569 [18 L. ed. 455]; *The Belfast*, 74 U. S. 7 Wall. 624 [19 L. ed. 266]; *The St. Lawrence*, 66 U. S. 1 Black, 527 [17 L. ed. 188].

Proctors for respondents instance rivers and inland waters in the States which are not included in the navigable waters of the United States; and they cite *Veazie v. Moor*, 55 U. S. 14 How. 568 [14 L. ed. 545]; *The Montello*, 78 U. S. 11 Wall. 411 [20 L. ed. 191]; *Sands v. Manistee River Imp. Co. supra*. By all of this reasoning they reach with great apparent confidence the conclusion that the Act of June 19, 1886, has no foundation upon the admiralty

themselves and is within the provisions of the Statute. *Ibid.*

A vessel employed in navigation upon the Hudson River, and not elsewhere, is not within the class excepted by the provisions of § 4289. *The Tug Sears*, 8 Fed. Rep. 365.

It is only vessels engaged in what is known ordinarily as maritime commerce which are subject to the provisions of the Act; hence, the owners of a small steam pleasure yacht engaged in navigating the Detroit River are not entitled to the benefit of the Limited Liability Act. *The Mamie*, 5 Fed. Rep. 818, 8 Fed. Rep. 367.

Proceedings for claim of benefit of Act.

Limited liability may be claimed (1) merely by way of defense to an action; or (2) by surrendering the ship or paying her value into court; the latter method is necessary only when the owner desires to bring all the creditors claiming damage into concourse for distribution. *Thommessen v. Whitwill*, 118 U. S. 520 (30 L. ed. 156).

Ship owners are entitled to the benefit of the Statute, though no action has been begun against them. *The John Bramall*, 10 Ben. 496.

Where the owners may invoke the provisions of the statute, the court cannot know without appropriate proceeding the value of the offending vessel and the pending freight. *The Maria and Elizabeth*, 11 Fed. Rep. 520, 12 Fed. Rep. 627.

Where on a libel for collision the vessel has been decreed liable for damages, the owner cannot on a petition for a limitation of liability retry the question of liability, that being *res judicata*. *Ibid.*

The institution of proceedings under the Statute, followed by a decree, is a bar to an action elsewhere for damages. *Rounds v. Providence & S. Steamship Co.* 14 R. I. 344.

Proceedings for a limitation of liability, if not in-
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stituted until after a party has obtained satisfaction of his demand, are ineffectual as to him, and a return of the money should not be compelled. *The Benefactor*, 103 U. S. 239 (26 L. ed. 351).

If any such proceedings are begun after the suit brought, they must be in the same district court as that in which the suit is pending. *The Alpena*, 10 Biss. 436; *Re The Luckenbach*, 26 Fed. Rep. 870.

Costs may be imposed upon the owners for delaying for an unreasonable period to institute proceedings for a limitation of liability. *Re The Garden City*, 27 Fed. Rep. 234; *Miller v. O'Brien*, 35 Fed. Rep. 779.

Jurisdiction in proceedings for limitation of liability.

The words “in any court” refer to a competent federal court, and not to a state court. *Re Providence & N. Y. Steamship Co.* 6 Ben. 124.

In a cause of a limitation of liability, which proceeding is *in rem*, partaking of the nature of a suit *in personam*, and not a proceeding *in rem*, possession of the vessel or her proceeds is not essential to the jurisdiction. *Re The City of Norwich*, 6 Ben. 330; *The Mendota*, 14 Fed. Rep. 353.

The “appropriate proceedings” must be proceedings *in personam* where the parties to be affected are to be duly brought before the court, and such proceedings are not within the jurisdiction of an admiralty court. *Place v. The City of Norwich*, 1 Ben. 30.

The rule of limited liability embraces all damages done by a vessel without the privity of the owner, whether consummated on land or water; and this being a maritime rule or regulation, courts of admiralty have authority to enforce it, and to enforce claims on the fund representing the value of the vessel. *Re Goodrich Transp. Co.* 26 Fed. Rep. 718.

A district court cannot take jurisdiction in admiralty of a petition for a limitation of liability

clause, and none upon the commerce clause, of the Constitution, and must therefore be wholly disregarded, and, as a consequence, that the libel must be dismissed.

It is not difficult, it would seem, for the observing mind, trained in the philosophy and history of our law, to appreciate the interesting considerations of legal thought suggested by the pending inquiry and the gigantic magnitude of the values which its ultimate adjudication may affect. Should the propositions of the respondents be deemed finally controlling, this would afford the twenty-first instance when an Act of Congress was decisively adjudged unconstitutional. When it is considered that this record of legislative conscientiousness and judicial conservatism embraces a period of ninety-nine years, the inchoate and formative period of a vast and novel experiment in the science of government, the exciting exigencies of foreign wars, the corroding inflammation of civil strife, the expansion of three millions of primitive people, employed mainly in the simple and unproductive occupations of frontiersmen, to sixty millions whose ventures in the production of national wealth are as diverse in character as they are intrepid in enterprise and affluent in results; when, also, the mighty volume of decided cases, involving the application or interpretation of the Constitution, is considered, it must be granted that the national legislation is with substantial uniformity stable and valid, and that the occasions when it may be held by the courts invalid are rarely afforded. It is equally obvious that the courts will decline to adjudge a statute to be in conflict with the Constitution, unless the reasons therefor are of that convincing and imperative character which at once clear the mind of doubt and constrain the inevitable decision.

The attempted impeachment of the fourth section of the Act of June 19, 1886, extending the privilege of limited responsibility to "all vessels used on lakes or rivers, or in inland navigation, including canal-boats, barges and lighters," is evolved mainly from this premise

of respondents' proctors: "It seems to us clear that section 4 of the Act (save in the use of the words 'sea-going vessels') directly collides with the Constitution, and that its expressed purpose was to do the very thing which Congress is prevented from doing. The law, as it stood, excepted from the operation the owners of vessels engaged in internal commerce. The design of the Act of 1886 was so to change the excepting clause as to apply the law to such owners and commerce. Take the law as it was in connection with this fourth section, and it will then appear that the purpose was to do an unconstitutional thing; that is to say, the very legislation proposed was unconstitutional if our contention be correct as to the power of Congress."

In this connection it may be well to state that elsewhere in the copious and valuable brief from which the quotation is taken an important axiom of constitutional interpretation is frankly set forth, viz., "that a court ought not to declare a law unconstitutional unless the fatal infirmity is made clearly to appear,—to appear beyond any reasonable doubt." With this cardinal rule in mind, let us attempt to ascertain if there is not at least a reasonable doubt as to the existence of error or misapprehension in the propositions of the proctor, above set forth. Is it true that Congress has "expressed the purpose" by this Amendment to take control of the internal commerce of the States? 1. Did the law, before the Amendment, except from its operation the owners of vessels engaged in internal commerce? 2. Does the Amendment assailed apply the law to such owners and commerce? 3. Is it true that the "purpose of Congress was to do an unconstitutional thing?" It does not appear that the Law of Limited Liability before the 19th of June, 1886, excepted from its operation the owners of vessels engaged in internal commerce. The language of the exception was applicable to the owners of craft of certain description plying upon certain waters. It is wholly silent as to the character or kind of commerce for which

where it would not have had cognizance in admiralty originally of the cause of action involved, as where suit was brought by a sufferer from a fire set out on land by a passing vessel. *Ex parte Phoenix Ins. Co.* 118 U. S. 610 (30 L. ed. 274); *The Plymouth*, 70 U. S. 8 Wall. 20 (18 L. ed. 125). See, however, *The Mary Lord*, 81 Fed. Rep. 418; *Norwich & N. Y. Transp. Co. v. Wright*, 80 U. S. 13 Wall. 104 (20 L. ed. 585); *Providence & N. Y. Steamship Co. v. Hill Mfg. Co.* 109 U. S. 578 (27 L. ed. 1038); *Elwell v. Geibel*, 33 Fed. Rep. 71; *The Epillon*, 6 Ben. 378.

Proceedings to limit the liability of ship owners may be instituted in a district where a fund or claim equitably representing the lost vessel is in litigation, though the petitioners reside in another district. *Re Leonard*, 14 Fed. Rep. 53.

In *The Benefactor*, 103 U. S. 239 (26 L. ed. 351), the supreme court promulgated a rule that a petition for the limitation of liability shall be filed in the circuit court, if a suit as to the vessel is there pending, and though the ship owner on the trial as to the cause of the collision contest all liability whatever. *The Benefactor*, 103 U. S. 239 (26 L. ed. 351).

And though the ship has been surrendered to the underwriters. *The City of Norwich*, 118 U. S. 468 (30 L. ed. 184).

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It should not be difficult to understand that this is widely variant from the proposition of respondents. The excepting clause, if their construction had been adopted, would probably have read: "This Act shall not apply to the owners of any vessel, etc., used in purely internal commerce."

There is, or may be, a vast distinction in the lading or contracts of a vessel used in inland navigation, and one used for internal commerce. A vessel may be used for internal commerce and never traverse inland waters, or may ply the waters of a lake embosomed in the central territory of a State, and be wholly engaged in interstate commerce. Then it is not true that the law, before the Amendment, excepted from its operation the owners of vessels engaged in internal commerce, but simply those whose vessels were used in rivers or inland navigation. Again, does the Amendment to the Limited Responsibility Law, assailed by the respondents, apply to the "owners of vessels engaged in internal commerce?" In the opinion of the court, very clearly not. It has no syllable with reference to internal commerce. It "shall apply also to all vessels used on lakes or rivers, or in inland navigation, including canal-boats, barges and lighters." Congress, in the Amendment as in the excepting clause of the Act of 1851, *supra*, dealt entirely with classes of vessels navigating inland waters and lakes, and gave no attention to cargoes or shipping contracts. It did not deal with commerce, but with shipping. As we have before seen, there is no essential identity of topic in a vessel and the character of the commerce in which it is engaged. By a parity of reasoning it follows that Congress has not, by this extension of the limited-responsibility privilege, expressed the purpose to take control of internal commerce, nor, so far as it has been made to appear, was it its purpose to do an unconstitutional thing. These conclusions seem to be clearly inferable from the plain and unambiguous words of the clauses which constituted the old law and the remedial statute, which, as we will presently see, is but an encouragement to important classes of shipping in which the wealth of the country is largely invested. But if the language of the sections quoted was equivocal, there would even then be no difficulty in tracing to its constitutional source the current of this legislation, which has revived the drooping but vital growth of the country's maritime interests. It is well to remember that it is an elementary principle of construction, not only that the scope of a legislative enactment may be modified by the purpose expressed in the title, but that the intention of the Legislature is often gathered from a view of the whole, and every part, of continuous legislation on the same general topic. 1 Kent, Com. 461, 462. Upon consideration of the several enactments on the subject of limiting responsibility of the owners of shipping, it is not possible to discover any purpose of the national

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The Act of March 8, 1851, was entitled "An Act to Limit the Liability of Ship Owners, and for Other Purposes." Its provisions applicable to the questions at bar, embodied in §§ 4288-4289, Rev. Stat., are as follows: "The liability of the owner of any vessel for any embezzlement, loss or destruction, by any person, of any property, goods or merchandise shipped or put on board of such vessel; or for any loss, damage or injury by collision, or for any act, matter or thing lost, damage or forfeiture done, occasioned or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." § 4289, Rev. Stat. "The provisions of [this title] [the seven preceding sections], relating to the limitation of the liability of the owners of vessels, shall not apply to the owners of any canal-boat, barge or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation." § 4289, Rev. Stat.

The legislation upon this subject, next succeeding the Act of 1851, is found in the Act of June 26, 1894 (28 Stat. at L. 58). This, it is important to observe, is entitled "An Act to Remove Certain Burdens on the American Merchant Marine, and Encourage the American Foreign Carrying Trade, and for other Purposes." The eighteenth section of this Act is as follows: "That the individual liability of a ship owner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole, and the aggregate liabilities of all the owners of a vessel, on account of the same, shall not exceed the value of such vessel and freight pending: provided, that this provision shall not affect the liability of any owner incurred previous to the passage of this Act, nor prevent any claimant from joining all the owners in one action, nor shall the same apply to wages due to persons employed by said ship owners."

We thus perceive that the title indicates what the body of the Act makes clear, viz., that it was intended to encourage, and therefore to foster, the American merchant marine and the American foreign carrying trade. Its

clause, and none upon the commerce clause, of the Constitution, and must therefore be wholly disregarded, and, as a consequence, that the libel must be dismissed.

It is not difficult, it would seem, for the observing mind, trained in the philosophy and history of our law, to appreciate the interesting considerations of legal thought suggested by the pending inquiry and the gigantic magnitude of the values which its ultimate adjudication may affect. Should the propositions of the respondents be deemed finally controlling, this would afford the twenty-first instance when an Act of Congress was decisively adjudged unconstitutional. When it is considered that this record of legislative conscientiousness and judicial conservatism embraces a period of ninety-nine years, the inchoate and formative period of a vast and novel experiment in the science of government, the exciting exigencies of foreign wars, the corroding inflammation of civil strife, the expansion of three millions of primitive people, employed mainly in the simple and unproductive occupations of frontiersmen, to sixty millions whose ventures in the production of national wealth are as diverse in character as they are intrepid in enterprise and affluent in results; when, also, the mighty volume of decided cases, involving the application or interpretation of the Constitution, is considered, it must be granted that the national legislation is with substantial uniformity stable and valid, and that the occasions when it may be held by the courts invalid are rarely afforded. It is equally obvious that the courts will decline to adjudge a statute to be in conflict with the Constitution, unless the reasons therefor are of that convincing and imperative character which at once clear the mind of doubt and constrain the inevitable decision.

The attempted impeachment of the fourth section of the Act of June 19, 1886, extending the privilege of limited responsibility to "all vessels used on lakes or rivers, or in inland navigation, including canal-boats, barges and lighters," is evolved mainly from this premise

of respondents' proctors: "It seems to us clear that section 4 of the Act (save in the use of the words 'sea-going vessels') directly collides with the Constitution, and that its expressed purpose was to do the very thing which Congress is prevented from doing. The law, as it stood, excepted from the operation the owners of vessels engaged in internal commerce. The design of the Act of 1886 was so to change the excepting clause as to apply the law to such owners and commerce. Take the law as it was in connection with this fourth section, and it will then appear that the purpose was to do an unconstitutional thing; that is to say, the very legislation proposed was unconstitutional if our contention be correct as to the power of Congress."

In this connection it may be well to state that elsewhere in the copious and valuable brief from which the quotation is taken an important axiom of constitutional interpretation is frankly set forth, viz., "that a court ought not to declare a law unconstitutional unless the fatal infirmity is made clearly to appear,—to appear beyond any reasonable doubt." With this cardinal rule in mind, let us attempt to ascertain if there is not at least a reasonable doubt as to the existence of error or misapprehension in the propositions of the proctor, above set forth. Is it true that Congress has "expressed the purpose" by this Amendment to take control of the internal commerce of the States? 1. Did the law, before the Amendment, except from its operation the owners of vessels engaged in internal commerce? 2. Does the Amendment assailed apply the law to such owners and commerce? 3. Is it true that the "purpose of Congress was to do an unconstitutional thing?" It does not appear that the Law of Limited Liability before the 19th of June, 1886, excepted from its operation the owners of vessels engaged in internal commerce. The language of the exception was applicable to the owners of craft of certain description plying upon certain waters. It is wholly silent as to the character or kind of commerce for which

where it would not have had cognizance in admiralty originally of the cause of action involved, as where suit was brought by a sufferer from a fire set out on land by a passing vessel. *Ex parte Phoenix Ins. Co.* 118 U. S. 610 (30 L. ed. 274); *The Plymouth*, 70 U. S. 8 Wall. 20 (18 L. ed. 125). See, however, *The Mary Lord*, 31 Fed. Rep. 418; *Norwich & N. Y. Transp. Co. v. Wright*, 80 U. S. 13 Wall. 104 (20 L. ed. 555); *Providence & N. Y. Steamship Co. v. Hill Mfg. Co.* 109 U. S. 578 (27 L. ed. 1038); *Elwell v. Geibel*, 31 Fed. Rep. 71; *The Epsilon*, 6 Ben. 378.

Proceedings to limit the liability of ship owners may be instituted in a district where a fund or claim equitably representing the lost vessel is in litigation, though the petitioners reside in another district. *Re Leonard*, 14 Fed. Rep. 53.

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The Act of March 8, 1851, was entitled "An Act to Limit the Liability of Ship Owners, and for Other Purposes." Its provisions applicable to the questions at bar, embodied in §§ 4283-4289, Rev. Stat., are as follows: "The liability of the owner of any vessel for any embezzlement, loss or destruction, by any person, of any property, goods or merchandise shipped or put on board of such vessel; or for any loss, damage or injury by collision, or for any act, matter or thing lost, damage or forfeiture done, occasioned or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." § 4283, Rev. Stat. "The provisions of [this title] [the seven preceding sections], relating to the limitation of the liability of the owners of vessels, shall not apply to the owners of any canal-boat, barge or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation." § 4289, Rev. Stat.

The legislation upon this subject, next succeeding the Act of 1851, is found in the Act of June 26, 1884 (23 Stat. at L. 53). This, it is important to observe, is entitled "An Act to Remove Certain Burdens on the American Merchant Marine, and Encourage the American Foreign Carrying Trade, and for other Purposes." The eighteenth section of this Act is as follows: "That the individual liability of a ship owner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole, and the aggregate liabilities of all the owners of a vessel, on account of the same, shall not exceed the value of such vessel and freight pending: provided, that this provision shall not affect the liability of any owner incurred previous to the passage of this Act, nor prevent any claimant from joining all the owners in one action, nor shall the same apply to wages due to persons employed by said ship owners."

We thus perceive that the title indicates what the body of the Act makes clear, viz., that it was intended to encourage, and therefore to foster, the American merchant marine and the American foreign carrying trade. Its

chief modification of the existing law was an enlargement of the privileges of exemption. It will be readily observed that it was the consistent legislative purpose to broaden the privileges of the owners of American craft upon the high seas. The enactments, it seems, were found advantageous also, as they were followed very soon afterwards by the Act of June 19, 1886 (24 Stat. at L. 79), which is entitled "An Act to Abolish Certain Fees for Official Services to American Vessels, and to Amend the Laws Relating to Shipping Commissioners, Seamen and Owners of Vessels, and for Other Purposes." The fourth section of this Act extends previous enactments relating to limitations of liability to "all sea-going vessels," and here the respondents insist the National Legislature exhausted its jurisdiction.

But it was not deemed enough to accord these privileges to sea-going vessels. A vast and rapidly augmenting fleet of American shipping, embracing every type of vessel, from the clumsy sailing craft of the last century to the latest achievements in naval architecture, whose twin screws and triple expansion engines drive them with incredible swiftness over the teeming waters of the Great Lakes, were wisely esteemed by Congress to merit the aid and encouragement of the legislation which had been so effective with sea-going shipping. Nor was this all. It had been found that the vital necessity for cheap transportation for the natural and manufactured productions of the country, often denied in greater or less measure by railway combinations, had been accomplished by a return to the slower but cheaper methods of water carriage. Rivers, canals and inland lakes, by themselves or their connections, in many instances afford the most important channels for the ebbing and flowing tide of interstate and foreign commerce.

In the case of *The Daniel Ball*, 77 U. S. 10 Wall. 557 [19 L. ed. 999], where the recovery of a penalty under the Act of Congress for failure to obtain a license to transport merchandise and passengers upon the bays, lakes, rivers or other navigable waters of the United States was resisted upon the ground that the steamer navigating the Grand River, in the State of Michigan, was not engaged in interstate commerce, and for this reason it was insisted Congress had no control over her, the supreme court make very pertinent declarations. They decided that the Grand River was a navigable stream. They hold that rivers "are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are, or may be, conducted in the customary modes of trade and travel on water, and they constitute navigable waters of the United States, within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form, in their ordinary condition, by themselves, or by uniting with other waters, a continuous highway, over which commerce is, or may be, carried on with other States or foreign countries, in the customary modes in which such commerce is conducted by water." 77 U. S. 10 Wall. 563 [19 L. ed. 1001].

This test was applied to Grand River, and 7 L. R. A.

the conclusion was reached that it was a navigable stream, and the court adds: "And by its junction with the lake it forms a continued highway for commerce, both with other States and with foreign countries, and is thus brought under the direct control of Congress."

The court continues: "That power [i. e. the power to regulate commerce] authorizes all appropriate legislation for the protection or advancement of either interstate or foreign commerce, and, for that purpose, such legislation as will insure the convenient and safe navigation of all the navigable waters of the United States, whether that legislation consists in requiring the removal of obstructions to their use, in prescribing the form and size of the vessels employed upon them, or in subjecting the vessels to inspection and license, in order to insure their proper construction and equipment. 'The power to regulate commerce,' this court said in *Gilman v. Philadelphia*, 70 U. S. 3 Wall. 724 [18 L. ed. 99] 'comprehends the control for that purpose, and to the extent necessary, of all navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation of Congress.' But it is contended that the steamer *Daniel Ball* was only engaged in the internal commerce of the State of Michigan, and was not, therefore, required to be inspected or licensed, even if it be conceded that Grand River is a navigable water of the United States; and this brings us to the consideration of the second question presented. There is undoubtedly an internal commerce which is subject to the control of the States. The power delegated to Congress is limited to commerce 'among the several States,' with foreign nations and with the Indian tribes. This limitation necessarily excludes from federal control all commerce not thus designated, and of course that commerce which is carried on entirely within the limits of a State, and does not extend to or affect other States. In this case it is admitted that the steamer was engaged in shipping and transporting down Grand River goods destined and marked for other States than Michigan, and in receiving and transporting up the river goods brought within the State from without its limits; but inasmuch as her agency in the transportation was entirely within the limits of the State, and she did not run in connection with, or in continuation of, any line of vessels or railway leading to other States, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan, and destined to places within that State, she was engaged in commerce between the States; and, however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for, whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity,

some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress. It is said that, if the position here asserted be sustained, there is no such thing as the domestic trade of a State; that Congress may take the entire control of the commerce of the country, and extend its regulations to the railroads within a State on which grain or fruit is transported to a distant market.

We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation. And we answer, further, that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the States when that agency extends through two or more States, and when it is confined in its action entirely within the limits of a single State. If its authority does not extend to an agency in such commerce when that agency is confined within the limits of a State, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a State, and leaving it at the boundary line at the other end, the federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter." See also *The Montello*, 78 U. S. 11 Wall. 411 [20 L. ed. 191], 87 U. S. 20 Wall. 490 [22 L. ed. 391]; *Ex parte Boyer*, 109 U. S. 629 [27 L. ed. 1056].

In the case last cited the waterway upon which the collision occurred was actually the property of the State of Illinois, and was wholly artificial, and was wholly within its territorial boundaries. The court says, through Mr. Justice Blatchford: "Within the principles laid down by this court in the cases of *The Daniel Ball*, 77 U. S. 10 Wall. 557 [19 L. ed. 999], and *The Montello*, 87 U. S. 20 Wall. 490 [22 L. ed. 391], which extended the salutary views of admiralty jurisdiction applied in *The Genesee Chief v. Fitzhugh*, 53 U. S. 12 How. 443 [18 L. ed. 1058]; *The Hine v. Trevor*, 71 U. S. 4 Wall. 555 [18 L. ed. 451]; and *The Eagle*, 75 U. S. 8 Wall. 15 [19 L. ed. 865], we have no doubt of the jurisdiction of the district court in this case." "Navigable water, situated as this canal is, used for the purposes for which it is used, a highway for commerce between ports and places in different States, carried on by vessels such as those in question here, is public water of the United States."

It is true that this case considers and decides a question of admiralty jurisdiction; but the canal, although wholly artificial, and wholly within the body of the State, is declared public water, for the reason that it is a conduit for interstate commerce. In concluding the opinion, Mr. Justice Blatchford observes: "This case does not raise the question whether the admiralty jurisdiction of the district court extends to waters wholly within the body of a State, and from which vessels cannot so pass as to carry on commerce between places in such State and places in another State or in a

foreign country, and no opinion is intended to be intimated as to jurisdiction in such a case."

The case was decided in January, 1884. In December, 1870, in the case of *The Montello*,—a proceeding to recover a penalty under a statute operative upon the "bays, lakes, rivers or other navigable waters of the United States,"—Mr. Justice Field, for the court, declares that the stream "can only be deemed a navigable water of the United States when it forms by itself, or by its connection with other waters, such a highway." "If, however," the learned justice continues, "the river is not of itself a highway for commerce with other States or foreign countries, or does not form such a highway by its connection with other waters, and is only navigable between different places within the State, then it is not a navigable water of the United States, but only a navigable water of the State, and the Acts of Congress . . . for the enrollment and license of vessels have no application. Those Acts only require such enrollment and license for vessels employed upon the navigable waters of the United States."

It will be observed that this was the construction of a penal statute, and its application under the admiralty power. But, for the regulation of interstate commerce, as we shall presently see, Congress has enacted legislation with reference to the commerce upon water routes, whether they form, by connection with other waters or with railways, a highway for continuous carriage or shipment of passengers or property. The power of Congress for this purpose is, we believe, generally conceded. If, therefore, the navigable waters of a State wholly within the State, and with no exterior water connection, are yet utilized under "common control, management or arrangement," in connection with railroads, for "continuous carriage,"—in other words, for interstate commerce,—they would become public waters of the United States, and subject to congressional control under the commerce clause (par. 3, § 8, art. 1) of the Constitution, if not under the admiralty clause. See Act of February 4, 1887, entitled "An Act to Regulate Commerce," 24 Stat. at L. 379; *Stockton v. Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 411, 32 Fed. Rep. 9.

But if it be true, as contended, that the terms of the Act of June 19, 1886, are so broad that they affect the navigable waters of a State upon which there are vessels wholly engaged in internal commerce, must the Act be held a nullity for that reason? From the fact that the indefatigable proctors for respondents have referred to the Kissimee, in Florida, and the Jordan, in Utah, to illustrate their argument, it is perhaps fairly inferable that such streams and lakes are very rare. It is probable, also, that the commerce which they convey is comparatively unimportant. Now, is it not the duty of the court to sustain the Act under consideration if it appears that its application to the navigable inland waters of the United States, and to the great body of commerce, is valid and appropriate, even though it may affect, upon occasion, commerce wholly within a State? Concede that its language is susceptible of the meaning suggested by the respondents, it is nevertheless clearly warranted, and operative as to all the important inland navi-

gation of the country and the Great Lakes, and as to a mighty volume of commercial transactions. It has long been settled that statutes, constitutional in part only, will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are separable. *Keokuk N. L. Packet Co. v. Keokuk*, 95 U. S. 80 [24 L. ed. 377].

A case of controlling authority upon the proposition that the Statute may be valid as to one class of commerce, even though invalid as to another, is *Ratterman v. W. U. Teleg. Co.* 127 U. S. 411-438 [32 L. ed. 229-234]. There a single tax was assessed by the State of Ohio upon the receipts of the telegraph company. These were derived as well from interstate as from internal commerce. The items of the income account were of course capable of separation, but they were returned and assessed in gross, and without separation or apportionment. A bill was presented to the judge of the circuit court of the United States, sitting in chancery, by the telegraph company, with averments that the tax was illegal and void, and in conflict with the Constitution of the United States, for the alleged reason that the State was seeking by the Act to impose a tax upon gross receipts principally accumulated from interstate telegraphic messages. The prayers were that the defendant, to wit, the treasurer, may be compelled to accept that portion of the tax lawfully due the State and country, and that he may be enjoined from levying or collecting the balance of the assessment. To the bill a general demurrer was filed. The circuit court, after argument, upon an agreed submission of facts, which was in the main but a statement of the separate amounts received from business within the State, and from business between points in Ohio and in other States, held that the tax by the State, so far as apportioned to receipts derived from interstate communication, was unconstitutional and void, but, as apportioned to messages within the State, it was valid. The case reached the supreme court by a certificate of difference of opinion between the circuit and the district judge; and *Mr. Justice Miller*, for the court, presenting the unanimous opinion with the characteristic vigor and clearness of his judicial deliverances, has with precision, and we think with conclusiveness, defined the rule for our guidance. After stating the question certified, and observing that the agreement of parties had avoided the point that the tax was not separable, the learned justice decisively states: "Nor do we believe, if there were allegations, either in the bill or answer, setting up that part of the tax was from interstate commerce, and part from commerce wholly within the State, that there would have been any difficulty in securing the evidence of the amount of receipts chargeable to these separate classes of telegrams by means of the appointment of a referee or master to inquire into that fact and make report to the court. Neither are we of opinion that there is any real question, under the decisions of this court, in regard to holding that, so far as this tax was levied upon receipts properly appurtenant to interstate commerce, it was void, and that, so far as it was only upon commerce wholly within the State, it was valid."

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How apposite is this language to the facts before the court! Here the books and bills of lading of the steamer would show every fact essential to the apportionment of the cargo into classes of internal and interstate traffic and freight. But even more pertinent is the next succeeding remark of the learned justice: "This precise question was adjudged in the *Case of State Freight Tax*, 82 U. S. 15 Wall. 232 [21 L. ed. 146]." There a statutory tax of Pennsylvania of two cents for one class, three cents for another, and five cents for another, imposed upon every ton of freight transported by any railroad or canal of that State was resisted by the Reading Railroad Company on the ground that it was levied on interstate commerce. The returns of the railroad company to the accounting officers stated separately the amount of freight carried wholly within the State, and the amount brought into or carried out of the State. The court held "that the tax upon the former class . . . was valid under the law of Pennsylvania, by which it was imposed; but that the latter classes, being commerce among the States, were not subject to such taxation." These cases are very satisfactory.

It is also true that the apportionment and separation of subjects under control of the State, and exempt therefrom, will apply to the transportation routes, as well as to the freight transported or messages forwarded. In the case of *W. U. Teleg. Co. v. Atty-Gen. of Mass.*, 125 U. S. 530 [31 L. ed. 790], where a tax by that State was estimated against the company upon the length of its lines within the State, as proportioned to their length elsewhere, it was held that since lines along post routes and across navigable waters of the United States were not subject to taxation, and since, in the State, 233,455 miles of the defendant's lines were thus exempted, there remained only 49,850 miles not exempt; and upon this the company offered to pay the proportion of the tax assessed against it according to mileage by the state authorities. The remaining assessment was enjoined. "We refer to this now," continues this valuable opinion, "only for the purpose of showing how easily the question of taxation which is forbidden by the Constitution may be separated from that which is permissible in this class of cases." If the subjects of taxation are so readily classified to mark the separate domain of federal and state taxing power, how entirely justifiable will be the same process when necessary to maintain the validity of national legislation! This, as we have seen, is the unquestionable duty of the court. *Vide also Tiernan v. Rinker*, 102 U. S. 123 [26 L. ed. 103]; *Philadelphia & S. M. Steamship Co. v. Pennsylvania*, 122 U. S. 326 [30 L. ed. 1200], 1 Inters. Com. Rep. 811; *W. U. Teleg. Co. v. Pennsylvania*, 128 U. S. 89 [32 L. ed. 845].

A case very interesting and very instructive as to this important topic is *Philadelphia & S. M. Steamship Co. v. Pennsylvania*, 122 U. S. 326-345 [30 L. ed. 1200-1204]. The opinion of the court, rendered by *Mr. Justice Bradley*, comprehends an attractive analysis of the more pertinent decisions upon this rule, with copious references to many others.

It will be observed that we have heretofore considered the argument submitted by respond-

ents' proctors as if a portion of the cargo of The Katie was shipped to be transported wholly within the State. It is true, however, as we shall presently see, that all of it is properly to be regarded as interstate in its character. It is true, also, that The Katie was engaged, in the strictest sense, in interstate and foreign commerce, and that the Savannah River between Augusta and Savannah is, as clearly, as the Mississippi between St. Louis and New Orleans, a navigable river of the United States. We extract the following from the valuable and elaborate brief of Mr. Robert Erwin, the proctor for libellant:

"The State of Georgia is bounded on the east by a line running from the sea, or the mouth of the River Savannah, along the stream thereof, to the fork or confluence made by the Rivers Keowee and Tugalo. Code Ga. § 15. It is proper to state, however, that there has been much discussion as to whether the State of Georgia extends only to the thread of the stream or to the Carolina shore. However that may be, the second article adopted by the convention of Beaufort, which settled the boundary between Georgia and South Carolina, provided that the navigable portion of the Savannah River should be henceforth equally free to the citizens of both States, and exempt from all duties, tolls, hindrance, interruption and molestation whatsoever attempted to be enforced by one State on the citizens of another. See Hotchkiss, Stat. Law Ga. 916. And as the steamboat Katie, on every trip, touched at landings on both shores of the river,—that is, in South Carolina and in Georgia,—there can be no doubt that she was engaged in interstate commerce."

In *New Orleans Cotton Exchange v. Cincinnati, N. O. & T. P. R. Co.* 3 Inters. Com. Rep. 289-294, we find it announced that commerce between points in the same State, but which passes through another State, is regarded and treated as interstate commerce. Mr. Commissioner Morrison, stating the conclusion of the Commission, on page 293, uses the language following: "While passing through Mississippi, after passing from Louisiana, this commerce is interstate, and subject alone to interstate regulation. It is not subject at any place between Shreveport and New Orleans to regulation by both the State and the Congress. It passes by continuous carriage from Louisiana to and through the State of Mississippi. It is not transportation 'wholly within one State.' It is subject to regulation by the provision of the Act to Regulate Commerce, and the Commission has jurisdiction to revise the rates, when the parties interested in them are before it."

This report is strongly advisory, and the statement quoted seems otherwise altogether justifiable. Then The Katie was in all respects engaged in interstate commerce. See also *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 [29 L. ed. 155]; *The Daniel Ball*, *supra*.

To summarize our conclusions upon this important and interesting topic, we are of opinion that the Act of June 19, 1836, is valid, in view of the power of Congress to regulate commerce: (1) Because the law, amended, excepted from its operation inland navigation only, and not internal commerce, as insisted. (2) The Amendment extended the operation of the law, not to

internal commerce, but to inland navigation. So much for the direct purpose of the Act. (3) If internal commerce is affected, it is incidentally, merely; and the purpose of the Legislature being legitimate, and warranted by the Constitution, it is wholly immaterial to the consideration of its validity that somewhere it has a casual or contingent effect upon the domain of state legislation. (4) Even though the subjects of this extended liability, or the territory in which it is effective, are partially within the region of state control, yet, where they are separable, and are partly under the national control, the Act will be sustained by the courts wherever the power of Congress extends, and as to all those objects to which it attaches; and this rule is easily applicable to the facts. (5) As to the Savannah River, it is a public navigable stream. The voyages of The Katie and her cargo are interstate in character, and the jurisdiction of Congress is undoubted.

It will be seen that the question presented as to the constitutionality of the clause extending the benefit and privilege of limited responsibility to the owners of vessels engaged in navigating the inland public waters of the United States has been heretofore considered solely with relation to the commercial power of Congress. But the commerce clause of the Constitution is not the only title to the validity and effectiveness of the enactments. It is equally clear that the Amendment is warranted by par. 1, § 2, art. 3, of the Constitution, which extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction. Since the demurrer was argued, the Supreme Court of the United States, in *Butler v. Boston & S. Steamship Co.* 130 U. S. 527-558 [32 L. ed. 1017-1025], has settled with distinctness the following principles applicable to this discussion: The law of limited liability was enacted by Congress as part of the Maritime Law of the United States, and is co-extensive in its operation with the whole territorial domain of that law. (2) While the General Maritime Law, with slight modifications, is accepted as law in this country, it is subject, under the Constitution, to such modifications as Congress may see fit to adopt. (3) The Limited Liability Act applies to the case of a disaster happening within the technical limits of a county in a State, and to a case in which the liability itself arises from a law of the State. The case resulted from the well-known disaster to the City of Columbus near Gay Head, at the western extremity of Martha's Vineyard; and it was insisted by respondents to the libel to limit liability, filed by the steamship company, that the doctrine had no application to cases of personal injury and death, and none in the technical limits of a county in a State, nor to a cause of action created by state law. All of these propositions were negatived by the court. The case seems to have been argued with great care and elaboration; and the opinion, rendered by Mr. Justice Bradley, is most valuable. The learned justice declares that the purpose of the Limited Liability Law is, we may observe, not to affect internal commerce, but for the encouragement of ship-building, and the employment of ships in commerce. He refers to the various attempts which have been made to narrow the operation of the Statute. He cites

the leading cases in which the beneficent object of the law has been set forth: *Norwich & N. Y. Transp. Co. v. Wright*, 80 U. S. 18 Wall. 104 [20 L. ed. 585]; *Providence & N. Y. Steamship Co. v. Hill Mfg. Co.* 109 U. S. 578 [27 L. ed. 1088].

"The law of limited liability," says the learned justice, "as we have frequently had occasion to assert, was enacted by Congress as a part of the Maritime Law of this country, and therefore it is co-extensive in its operation with the whole territorial domain of that law. *Norwich & N. Y. Transp. Co. v. Wright*, 80 U. S. 18 Wall. 104-127 [20 L. ed. 585-593]; *The Lottawanna*, 88 U. S. 21 Wall. 558-577 [22 L. ed. 654-663]; *The Scotland*, 105 U. S. 24, 29-31 [26 L. ed. 1001, 1003]; *Providence & N. Y. Steamship Co. v. Hill Mfg. Co.* 109 U. S. 578-593 [27 L. ed. 1088-1044].

"In *The Lottawanna* we said: 'It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed.' Page 577 [661].

"Again, on page 575 [662], speaking of the maritime jurisdiction referred to in the Constitution, and the system of law to be administered thereby, it was said: 'The Constitution must have referred to a system of law co-extensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of Maritime Law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign States.'

"In *The Scotland* this language was used: 'But it is enough to say that the rule of limited responsibility is now our maritime rule. It is the rule by which, through the Act of Congress, we have announced that we propose to administer justice in maritime cases.' Page 31 [1004].

"Again in the same case, (page 29 [1003]) we said: 'But whilst the rule adopted by Congress is the same as the rule of the General Maritime Law, its efficacy as a rule depends upon the Statute, and not upon any inherent force of the Maritime Law. As explained in *The Lottawanna*, the Maritime Law is only so far operative as law in any country as it is adopted by the laws and usages of that country; and this particular rule of the Maritime Law had never been adopted in this country until it was enacted by statute. Therefore, whilst it is now a part of our Maritime Law, it is nevertheless statute law.'

"And in *Providence & N. Y. Steamship Co. v. Hill Mfg. Co.* it was said: 'The rule of limited liability prescribed by the Act of 1851 is nothing more than the old maritime rule administered in courts of admiralty in all countries except England from time immemorial; and, if this were not so, the subject matter itself is one that belongs to the department of Maritime Law.' 109 U. S. 593 [27 L. ed. 1044].

"These quotations are believed to express the general, if not unanimous, views of the members of this court for nearly twenty years past, and they leave us in no doubt that whilst the General Maritime Law, with modifications, is accepted as law in this country, it is subject to such amendments as Congress may see fit to adopt. One of the modifications of the Maritime Law as received here was a rejection of the law of limited liability. We have rectified that. Congress has restored that article to our Maritime Code. We cannot doubt its power to do this."

At this point it is material to observe that the exception to the Act of 1851 denying the Statute operation to inland waters was added in the Senate. It seems to have been suggested by an Act of Parliament in the reign of Geo. III., which provided that these privileges "should not extend to the owners of any lighter, barge, boat or vessel, of any burden or description whatsoever, used wholly on rivers or inland navigation, or vessel not duly registered according to law." Opinion of *Judge Drummond* in *The War Eagle*, 6 Biss. 364.

Surely Parliament was not concerned with questions of interstate or internal commerce. To use the language of *Mr. Justice Bradley* above quoted, it was a modification of the Maritime Law. We have rectified that. In fact, our Statute adopted the Maritime Law, as contradistinguished from the English statutes, with that exception, where they were followed. But in England, as in this country, the scope of this great privilege had been gradually but steadily extended. It was partially adopted by the Act of 7 Geo. II. in 1734. It was enlarged by 26 Geo. III., 1786, and again by 53 Geo. III., 1813. In 1841, France took advanced action in behalf of the ship owner. The Act of 1851 was framed in the light thrown upon the subject by all of this European legislation, and by the writings of Grotius (*War and Peace*, bk. 2, chap. 11, § 13), Valin (*liber 2*, title 8), Pardessus (*2 Droit Commercial*, pt. 3, title 2, chap. 3, § 2), and many others.—renowned writers on Maritime Law. Who can doubt its wisdom or its beneficence, when considered in the light of such experience and such authority? Its philosophy is eminently practical, and is well explained by *Mr. Justice Bradley* in *Norwich & N. Y. Transp. Co. v. Wright*, 80 U. S. 13 Wall. 121 [20 L. ed. 591].

"The great object of the law was to encourage ship-building, and to induce capitalists to invest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. Those who are willing to manage and work ships are generally unable to build and fit them. They have plenty of hardiness and personal daring and enterprise, but they have little capital. On the other hand, those who have capital, and invest it in ships, incur a very large risk in exposing their property to the hazards of the sea, and to the management of sea-faring men, without making them liable for additional losses and damage to an indefinite amount. How many enterprises in mining, manufacturing and internal improvements would be utterly impracticable if capitalists were not encouraged to invest in them through corporate institutions, by which they are exempt

from personal liability or from liability except to a limited extent! The public interests require the investment of capital in ship-building quite as much as in any of these enterprises."

Having rectified by the Act of 1851 its omission to obtain the benefit of this law for the ship owners who are our countrymen, Congress, finding that it was injudicious to exclude therefrom the interests engaged in inland navigation, rectified that mistaken exclusion by the Act of June 19, 1858, now under consideration. Who can successfully dispute the wisdom of this legislation? Who may deny its absolute and vital importance to the shipping interests of the country upon those northern oceans of living water,—traversed by vast fleets of steamers and sailing vessels, annually discharging into the coffers of national and individual treasure an opulence of wealth beyond the dreams of avarice? Is it possible to question the benefit of this law, to the traffic upon those mighty streams which, with their tributaries, vitalize the continent, as the arteries the human body, or upon the innumerable water-courses of lesser volume, but the value of which the nation is beginning to appreciate, and for the improvement of which the public makes annual and

liberal expenditures in order to advance the commerce, which is declared in argument here to be wholly without national control?

After consideration in detail of the reasons urged against the validity of the Act,—consideration had with the carefulness and attention demanded, not alone by the great moment of the inquiry, but also by the zeal and earnestness with which the supposed encroachment upon the rights of the State has been combatted,—we are thoroughly satisfied that the legislation is proper, as well to the commercial power of Congress as to the admiralty jurisdiction of the courts, as modified by the Statutes. It has afforded an additional illustration of the fortunate truth that the Constitution of our country is never an obstacle to the practical and patriotic assertion of national control over subjects of national concern; but considered in sympathy with the broad and patriotic, yet cautious and conservative, purposes of its framers, it furnishes an undoubted warrant for all legislation appropriate to our diverse system, and in consonance with the expansion and progress of the country on the paths of civilization as they widen and extend.

The demurrer will be overruled.

MISSOURI SUPREME COURT.

Miles W. GARDNER, *App't.*

v.

William M. TERRY *et al.*, *Respts.*

(.....Mo.....)

1. An injunction may be granted to prevent a sale of land under a deed of trust in order to prevent a cloud being cast thereby on the title, which has been obtained by adverse possession.
2. A suit to restrain a sale of real estate under a trust deed in order to prevent a cloud upon title is one "involving title to real estate" within the jurisdiction of the supreme court.

(*Barclay, J., dissents.*)

(January 27, 1890.)

APPEAL by complainant from a judgment of the Circuit Court for Franklin County in favor of defendants in a suit to enjoin the sale of certain real estate under a deed of trust. *Reversed.*

The facts sufficiently appear in the opinion. *Mr. John W. Booth*, for appellant:

A sale and conveyance thereunder would have made an apparent better title, which, though no title in fact, could only have been defended against by proof of matter *dehors* the deed. This being so, the sale and conveyance would have cast a cloud on appellant's title; and therefore the court erred in sustaining the demurrer to plaintiff's petition, and should have made the injunction perpetual as prayed for.

Gunby v. Brown, 86 Mo. 258, and cases cited.

Messrs. Isaac T. Wise and John H. Pugh, for respondents:

Plaintiff alleges that he has so good a defense

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at law that he ought to have equitable interference in his favor to save him the effort and trouble of setting it up. This is not the law. Where the law affords a complete remedy, equity will not interfere.

Chicago & A. R. Co. v. Maddox, 10 West. Rep. 42, 92 Mo. 470; *Shelbina Hotel Assn. v. Parker*, 58 Mo. 327; *Kelly v. Hurt*, 74 Mo. 561; *Bobb v. Graham*, 5 West. Rep. 461, 89 Mo. 200.

The purchaser at this sale would have acquired no better title than the trustee had to convey. But except by a sale, the title remains in the trustee, and nothing can be done toward collecting the note or enforcing its payment.

Wilcox v. Walker, 13 West. Rep. 263, 94 Mo. 88; *Martin v. Jones*, 72 Mo. 23.

Limitation as a defense must be made as such and proved, and an issue at law tendered upon it. It does not become a defense unless made one like any other defense.

Lewis v. Schwenn, 6 West. Rep. 855, 93 Mo. 26.

While the sale under the deed of trust will cast a cloud on the title, still it could make no greater or more dense cloud than that originally made by said deed of trust from the day it was filed for record.

Martin v. Jones, *supra*; *Kuhn v. McNeil*, 47 Mo. 389; *Drake v. Jones*, 27 Mo. 428.

Black, J., delivered the opinion of the court:

Gardner brought this suit against William M. Terry and the administrator of William H. Lamoreaux, to enjoin the sale of two lots under a deed of trust in which Terry is the substituted trustee and the estate of Lamoreaux is the beneficiary. The court sustained a demurrer to the petition, and gave judgment thereon, to reverse which the plaintiff appealed.

The petition discloses the following facts: William H. Lamoreaux, being the owner of the two lots in question, conveyed them to Isaac Brooks by a deed dated the 26th of August, 1869. On the same day Brooks gave Lamoreaux a deed of trust on the lots to secure two notes, both payable to Lamoreaux,—one for \$500 payable in ten days, and the other for \$625, payable on the 1st of March, 1870. The \$625 note has never been paid, and from this averment it seems the other one had been paid. On the 29th of February, 1872, Brooks conveyed the lots to Sarah V. Lamoreaux, and she at the same time executed a deed of trust thereon. The property was sold under this deed of trust, and Brooks again became the purchaser; and he conveyed to Hall in 1878, who conveyed to the plaintiff in 1882. The administrator of W. H. Lamoreaux caused the defendant Terry to be substituted as trustee in the deed of trust first mentioned, which was executed by Isaac Brooks, and advertised the property for sale under that deed of trust. This is the sale which plaintiff seeks to enjoin. He states in the petition that he and his grantors have been in the actual, open, notorious, adverse possession of the lots for more than ten years, and that the deed of trust is barred by the Statute of Limitations; and this is the ground upon which he seeks to enjoin the proposed sale.

Although a note secured by a deed of trust may be barred by limitation so that no personal judgment can be had on it, it does not follow that the remedy on the deed of trust is barred. To defeat a foreclosure or other remedy on the deed of trust there must have been ten years' adverse possession. These principles of law have been often asserted by this court. *Booker v. Armstrong*, 93 Mo. 58, 10 West. Rep. 325, and cases cited.

On the facts, as they are stated in the petition in this case, it must be conceded that the deed of trust and all remedy thereon is barred by reason of the ten years' adverse possession, and the question is whether this fact furnishes a good ground for injunctive relief. In general, the Statute of Limitations is available in defense only, but ten years' adverse possession of real estate will not only bar an action of ejectment, but it will confer title upon the possessor. A title thus acquired is as good as any other title, and ejectment may be maintained as well as defended upon such a title. *Nelson v. Brod-hack*, 44 Mo. 596; *Fulkerson v. Mitchell*, 82 Mo. 20.

It is therefore difficult to see why a title thus acquired is not entitled to the same protection as a title acquired in any other way. The objection made to the relief asked is that the plaintiff can avail himself of the defense in an action of ejectment brought by the purchaser at the trustee's sale. That he could do this there can be no doubt, but it is not a complete answer to the right to the relief asked. The relief is demanded on the ground that the sale will cast a cloud on the plaintiff's title. The jurisdiction and power of a court of equity to prevent a cloud being cast upon the title to real estate is as well established as is the jurisdiction and power to remove one already created. *McPike v. Pen*, 51 Mo. 63; *Martin v. Jones*, 72 Mo. 24; *Vogler v. Montgomery*, 54 Mo. 577.

In *Harrington v. Utterback*, 57 Mo. 519, the 7 L. R. A.

plaintiff was the owner of a homestead which had been sold upon execution, and he brought his suit to remove the cloud thus cast upon his title. The objection was there made that the plaintiff could, by the statutory proceeding, compel the defendant to bring a suit at law to try the title; but the objection was not allowed to prevail, and the petition, it was held, stated a cause of action.

In *Vogler v. Montgomery*, *supra*, the question arose whether a sale under a deed of trust should be enjoined. The plaintiff was the owner of a homestead which had been sold under execution, and the purchaser at the execution sale made a deed of trust on the property thus purchased. It was held that the sale under the deed of trust should be enjoined. The court said: "It is the true policy of courts to prevent litigation, and a sale by the trustee would undoubtedly cast a cloud over plaintiff's title and embarrass a sale, if he desired to sell." See also *State v. Tiedemann*, 69 Mo. 306.

Where the facts are such that a court would remove the cloud when cast, it seems clear the court should interfere by injunction to prevent its being cast. 1 High, Inj. 2d ed. § 873.

The relief is granted in such cases upon the ground that the deed or other instrument constituting the cloud may be used to embarrass the plaintiff's title, and that, too, when the plaintiff's evidence is not at hand. As we hold in this State that one judgment in ejectment is not a bar to the prosecution of another like suit between the same parties for the same property, injunctive relief ought not to be withheld on the sole ground that the plaintiff may make his defense in an action of ejectment. The relief at law, to defeat the equitable jurisdiction, should be adequate and complete. The present invalidity of the deed of trust does not appear from the face of the records. It only appears by a resort to other evidence, and parol evidence at that; so that there can be no objection to the petition on the ground that the proposed sale will be void on the face of the records. It is to the interest of all parties that the present validity of the deed of trust should be settled before a sale thereunder, and our conclusion is that the demurrer should have been overruled.

The point is not made in the briefs, but the question has been properly suggested by members of this court, whether we have jurisdiction of this appeal. If this court has jurisdiction, it is because the case is one "involving title to real estate," it not appearing that the amount in dispute exceeds \$2,500.

We have held again and again that suits for the enforcement of tax-bills, mechanics' liens and vendors' liens are not suits involving the title to real estate. In such cases there is generally no contest about the title, and the question is one of the enforcement of a lien against a conceded title.

In the case of *State v. Court of Appeals*, 67 Mo. 200, the relator had obtained a judgment enjoining a sale under execution on the ground that the sale would cast a cloud upon his title, from which an appeal was taken to the court of appeals, and it was held that the case was not one involving the title to real estate, and hence an appeal would not lie to this court. The facts of that case are not stated in the opinion, but it closes with these significant ob-

servations: "The real matters which the relation seeks to have determined in the suit for injunction are the validity and effect of the proceedings under which the execution sale is threatened to be made. He has, as yet, no contest with anyone about the title to his property."

In the case in hand the plaintiff says he has a title, though not of record, and not required to be made matter of record, which is superior to and cuts out the deed of trust; and he brings that title forward, and pleads it, relying upon the Statute of Limitations, which concerns real actions only, and bases his right upon that

Statute. The real issue which he tenders is the same that he would make in an action of ejectment brought by the purchaser at a trustee's sale, and surely this court would have jurisdiction of an appeal in such a case. We must look to the pleadings in this case to see what the real issues proposed to be made are, and in doing this we cannot escape the conclusion that the case is one involving the title to real estate.

The judgment is reversed, and the cause remanded.

All concur except **Barclay, J.**, who dissents.

NEW YORK COURT OF APPEALS (2d Div.).

Charles COUDERT *et al.*, Admsrs., etc., of
Edmond Fougera, Deceased, *Respts.*,
v.

Isidor COHN *et al.*, *Appts.*

(....N. Y.....)

Where tenants enter under a lease for a stated term of more than one year, which is void by reason of the absence of written authority to the owner's agent making the same, and pay rent, they become tenants from year to year, and the time for the commencement and termination of the respective terms will correspond in each year with the date of entry; and if they hold over after the close of any term, they cannot terminate the tenancy until the end of the succeeding term with the possible exception that they may quit at the day fixed in the lease for the termination of the tenancy should such day be reached.

(January 14, 1890.)

APPPEAL by defendants from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of the Kings Circuit entered upon a verdict directed for plaintiffs in an action to recover rent alleged to be due and unpaid. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Simpson & Werner*, for appellants:

The yearly term expired on August 1, 1885, and, the defendants having quitted, they were not further liable.

Doe v. Bell, 5 T. R. 471, 2 Smith, Lead. Cas. 7th Am. ed. 114; *People v. Rickert*, 8 Cow. 231; *Laughran v. Smith*, 75 N. Y. 209.

The defendants were only liable for the time they actually occupied, which is coincident with the expiration of the term, to wit, August 1, 1885; and consequently there can be no recovery here.

Thomas v. Nelson, 69 N. Y. 118; *Prial v. Entwistle*, 10 Daly, 898; *Smith v. Genet*, 2 N. Y. City Ct. Rep. 88; *Fougera v. Cohn*, 2 N. Y. City Ct. Rep. 253.

Messrs. Carpenter & Roderick, for respondents:

The defendants are liable for the rent sued for. Having entered into possession under the void lease, a yearly tenancy was created, and, having held over after the expiration of the first year, they are liable for at least another year's rent.

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Laughran v. Smith, 75 N. Y. 205; *Reeder v. Sayre*, 70 N. Y. 180; *Doe v. Terry*, 4 Ad. & El. 274.

Bradley, J., delivered the opinion of the court:

The action was brought to recover rent of premises described in a written lease made by the agent of the plaintiffs' intestate to the defendants in January, 1884, for the term of two years and five months, commencing on the 1st day of March, 1884, and ending on the 1st day of August, 1886, at the yearly rent of \$3,000, payable, in equal monthly payments, on the last business day of each month. The authority of the agent to make the lease not being in writing, it was void. 2 Rev. Stat. p. 184, § 6.

The defendants went into possession on the 1st of March, 1884, and continued to occupy and pay rent up to August, 1885, when they left the premises, and sought to surrender the possession up to the plaintiffs' intestate, who declined to accept it. He recovered for the amount of rent at the rate mentioned in the lease from the 1st of August to the 1st of March following. While the cases are not entirely in harmony on the subject, the doctrine now in this State is such that the defendants, on going into possession of the premises and paying rent, became, by reason of the invalidity of the demise, tenants from year to year, and in such case the continuance of occupancy into the second year rendered them chargeable with the rent until its close. They could then only terminate their tenancy at the end of the current year. *Reeder v. Sayre*, 70 N. Y. 180; *Laughran v. Smith*, 75 N. Y. 205.

The question presented is, When did the rental year arising out of such relation commence and terminate? It is contended by the defendants' counsel that inasmuch as the end of the term designated by the terms of the lease was the 1st of August, 1886, that was the time when the yearly tenancy, in contemplation of law, terminated, and therefore the surrender was properly made on the 1st of August, 1885. It is urged that this view is in harmony with the recognized principle that, although the lease was invalid, the agreement contained in it regulated the terms of the tenancy in all respects except as to the duration of the term, and *Doe v. Bell*, 5 T. R. 471, is cited. There a farm was, in January, 1790, let by a parol lease, void by the Statute of Frauds, for seven years, the

lessee to enter upon the land when the former tenant left, on Lady Day, and into the house on the 25th of May following, and was to quit at Candlemas. He entered accordingly, and paid rent. A notice was served upon the tenant, September 22, 1792, to quit on Lady Day. In ejectment brought against him, it was claimed on the part of the lessee that his holding was from Candlemas, and therefore the notice was ineffectual to terminate the tenancy. Lord Kenyon, in deciding the case, said and held that "it was agreed that the defendant should quit at Candlemas; and though the agreement is void as to the number of years for which the defendant was to hold, if the lessor choose to determine the tenancy before the expiration of the seven years, he can only put an end to it at Candlemas."

That case has in several instances been cited by the courts of this State upon the question of the force remaining in the terms of the agreement embraced in a void lease. And in *Schuyler v. Leggett*, 2 Cow. 668, it was remarked by Chief Justice Savage, in citing it, that such an agreement "must regulate the terms on which the tenancy subsists in other respects, as the rent, the time of the year when the tenant must quit," etc. And the citation was repeated to the same effect by the chief justice in *People v. Rickert*, 8 Cow. 230.

The question here did not arise in either of those two cases, nor can they be treated as authority that the time for termination of a tenancy from year to year, in any year other than that of the designated expiration of term, is governed by such designation in a void lease for more than one year rather than by the time of entry. The effect sought to be given in the present case to the case of *Doe v. Bell* is not supported by English authority.

In *Berrey v. Lindley*, 3 Man. & G. 498, the tenant entered into possession of premises under an agreement void by the Statute of Frauds, by the terms of which he was to hold five years and a half from Michaelmas. Several years after his entry, and after expiration of the period mentioned in the agreement, the lessee gave notice to his landlord to terminate the tenancy at Michaelmas. It was there contended on the part of the latter, and *Doe v. Bell* was cited in support of the proposition, that the time designated in the agreement for the termination of the tenancy governed in that respect. But the court decided otherwise, and held that the notice was effectual to terminate the tenancy. The views of the court there were to

the effect that, although the tenancy was from year to year, the tenant might without notice have quit at the expiration of the period contemplated in the agreement, but, having remained in possession and paid rent subsequently to that time, he must be considered a tenant from year to year with reference to the time of the original entry.

The same principle, in respect to holding over a term, was announced in *Doe v. Dobell*, 1 Ad. & El. N. S. 806, where it was said that "in all cases the current year refers to the time of entry, unless the parties stipulate to the contrary."

The doctrine of the English cases seems to be that a party entering under a lease, void by the Statute of Frauds, for a term, as expressed in it, of more than one year, and paying rent, is treated as a tenant from year to year from the time of his entry, subject only to the right to terminate the tenancy without notice at the end of the specified term; and to that extent, and for that purpose only, the terms of the agreement, in such case, regulate the time to quit. This right is held to be reciprocal. *Doe v. Stratton*, 4 Bing. 446.

That proposition is not without sensible reason for its support. The lease for more than one year, unless made in the manner provided by the Statute, cannot be effectual to vest the term in the lessee; yet in other respects the rights of the parties may be determined by its terms, so far as they are consistent with its failure to create any estate or interest in the land, or any duration of term for occupancy by the lessee; and that principle is properly applicable to such leases. *Porter v. Bleiler*, 17 Barb. 154; *Reeler v. Sayre*, 70 N. Y. 184; *Laughran v. Smith*, 75 N. Y. 205, 209.

This view does not aid the defendants. They became tenants from year to year as from the time of their entry; and although, by virtue of the terms of the agreement in that respect in the lease, they may have been at liberty to quit on the 1st of August, 1886, if they had remained until then, such time in that or the year previous could not be treated as the end of any year of the tenancy. The defendants having entered upon the second year from the time of the original entry, it was not within their power to terminate their relation or liability as tenants until the end of the then current year, which did not terminate until the 1st of March was reached. The conclusion, from these views, necessarily follows that *the judgment should be affirmed.*

All concur, except *Brown, J.*, not sitting.

NEW YORK COURT OF APPEALS.

CHURCH OF ST. MONICA, *Respt.*,
v.
MAYOR, etc., of NEW YORK *et al.*, *Appts.*
(....N. Y....)

The fact that a school-house in the City of

NOTE.—Legislative grants of immunity from taxation to be strictly construed.

Where the Legislature has power to exempt property from taxation, such grants of immunity
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New York is the property of a religious society will not exempt it from taxation, if the society is unincorporated.

(January 14, 1890.)

APPEAL by defendants from a judgment of the General Term of the Superior Court of

must be strictly construed. *State v. Whitworth*, 8 Lea, 594; *Bellinger v. White*, 5 Neb. 401; *Crawford v. Burrell Twp.* 58 Pa. 219.

An exemption of every school-house and every

the City of New York affirming a judgment of the Special Term in favor of plaintiff in an action to have certain taxes adjudged void, and to enjoin the collection of the same: *Reversed.*

Statement by Earl, J.:

This action was brought for the purpose of having certain taxes which were imposed upon real estate in the City of New York in and for the year 1882 adjudged void and canceled, and to restrain the collection thereof. The case was tried at a special term of the New York Superior Court, and the trial justice found the following facts: That on or about December 22, 1881, James J. Dougherty entered into a written contract with the New York Life Insurance Company for the purchase of premises known as "No. 304 East Seventy-Eighth Street," New York City, upon which was a four-story building, with basement. That on or about January 17, 1882, for a valuable consideration, the insurance company, by deed, conveyed the premises to Dougherty, who took the property in his own name, individually, but purchased the same on behalf of and with moneys belonging to the Church of St. Monica, a religious society of the Roman Catholic Church, of which he then was pastor. That it is a common custom for priests of the Roman Catholic Church to take deeds of property in their own names, and this custom was known to the archbishop at the time of the purchase, and the purchase was made with the archbishop's knowledge and authority. That prior to January, 1882, and ever since, the building was and has been used exclusively for school purposes, under the management of Dougherty, as pastor of the Church of St. Monica. That the school was presided over by the Sisters of Charity. That all female children of St. Monica's parish between the ages of five and sixteen years were admitted to the school, which was known as "St. Monica's Female Parochial School," and that all branches of common-school education were taught there. That the basement and several floors of the building, during the period aforesaid, were used as follows: The basement was the class-room for primary children; the first floor, the class-room for larger children; the second floor was used for the chapel; the third floor, for a lecture-room, and the fourth floor, for the residences of the Sisters of Charity, with the exception of three rooms used for storage. That the City of New York, through its proper officers, assessed the premises for taxation, in and for the year 1882, in the sum of \$7,000, and thereafter imposed a tax upon the premises for that year, based upon the assessed valuation, amounting to \$157.50. That in the year 1885 the Church of St. Monica was incorporated as a religious body, under the provisions of chapter 45, Laws 1863, and amendments. That, on or

about May 28, 1885, Dougherty conveyed the premises to the plaintiff, the incorporated Church of St. Monica. That the parochial school is not incorporated, but belongs to the plaintiff. And he found as conclusions of law that the tax of \$157.50 imposed upon the property for the year 1882 was void because at the time of the imposition thereof the property was exempt from taxation for the reason that the building was a "school-house," within the meaning of the Statute exempting school-houses from taxation, and was exclusively used for the purposes of a school, and was exclusively the property of a religious society; and he gave judgment for the plaintiff as prayed for.

Mr. D. J. Dean for appellants.

Mr. Alexander B. Johnson for respondent.

Earl, J., delivered the opinion of the court:

Among the property exempted from taxation in the Revised Statutes is the following: "Every building erected for the use of a college, incorporated academy or other seminary of learning; every building for public worship; every school-house, court-house and jail; and the several lots whereon such buildings are situated, and the furniture belonging to each of them." Rev. Stat. pt. 1, chap. 18, title 1, § 4, subd. 3. Under this provision it has been held that no seminary of learning is exempt from taxation, unless it is incorporated, and that no school-house is exempt, unless it belongs to the public common-school system of the State. *Oregaray v. New York*, 13 N. Y. 220; *People v. Brooklyn Board of Assessors*, 82 Hun, 457, affirmed in this court, 97 N. Y. 648; *Colored Orphans Ben. Assn. v. New York*, 104 N. Y. 581, 6 Cent. Rep. 796.

If, therefore, the exemption here claimed depended upon the Revised Statutes, it is clear that it would have to be denied. There has been, however, further legislation. In 1852 (chapter 282) the Act "Defining the Exemptions from Taxation on Public Building in the City of New York" was passed, the first section of which is as follows: "The exemption from taxation of every building for public worship, and every school-house or other seminary of learning, under the provisions of subd. 3, § 4, title 1, chap. 18, of pt. 1 of the Revised Statutes, or amendments thereof, shall not apply to any such building or premises in the City of New York, unless the same shall be exclusively used for such purposes, and exclusively the property of a religious society, or of the New York Public-School Society." And this provision was subsequently embodied in the Consolidation Act relating to the City of New York, except the last phrase, above italicized. Laws 1862, chap. 410, § 827. There is

building erected for the use of a college, incorporated academy or seminary of learning, does not embrace a building used and occupied for a private boarding-school. *Chegaray v. New York*, 13 N. Y. 220; *State v. Ross*, 24 N. J. L. 497; *St. Mary's College v. Crowl*, 10 Kan. 451.

An exemption of all houses of religious worship will not exempt portions of the building leased for business purposes. *Prop'rs of S. O. Meeting-House v. L. R. A.*

v. Lowell, 1 Met. 538; *Pierce v. Cambridge*, 2 Cush. 611; *Old South Society v. Boston*, 127 Mass. 378; *Chapel of the Good Shepherd v. Boston*, 120 Mass. 212; *Baltimore Appeal Tax Court v. Grand Lodge A. F. & A. Masons*, 50 Md. 421; *Fort Des Moines Lodge, I. O. O. F., v. Polk Co.* 56 Iowa, 84; *Griwald College v. State*, 46 Iowa, 275; *Cook v. Hutchins*, 46 Iowa, 706; *Frederick Co. v. Sisters of Charity of St. Joseph*, 48 Md. 84.

some dispute whether, at the time this assessment was imposed, the Act of 1852, or the provision in the Act of 1882, was in force; and it is now immaterial to determine the matter. The provision above quoted is not happily worded, and its precise scope and meaning are not entirely clear; and its language has given some trouble to those who have had to deal with it. *Colored Orphans Ben. Assn. v. New York*, 38 Hun, 598.

It was apparently the purpose of the Act of 1852 to limit and confine in the City of New York the exemptions contained in the Revised Statutes, and not to extend them; and hence the qualifying words, "exclusively used for such purposes, and exclusively the property of a religious society," were added. But, without undertaking to give a precise construction to these qualifying words, we think this, at least, is clear: that before a school-house can be exempted it must belong to the public-school system of the city, or be "exclusively the property of a religious society." We have therefore only to determine whether this school-house belonged to a religious society. We will assume that it belonged to the society at the time called the "Church of St. Monica," although the legal title was held either by the insurance company or Father Dougherty. But

that was an unincorporated society, and not, we think, such a society as the law-makers meant to include in the words "religious society," used in the Act of 1852. They evidently had in mind religious societies incorporated under the Act of 1813, entitled an Act "to Provide for the Incorporation of Religious Societies," or under some one of the other numerous Acts for the same purpose. The words "religious society," when used in the laws of this State, as they frequently are, generally have reference to an incorporated religious society. It cannot be supposed that it was the legislative intention that any number of persons could come together for some religious purpose, and set up a school, and then claim the exemption. In using the words "religious society," it is most probable that the law-makers had in mind some legal entity capable, as such, of taking and holding property, and popularly known as a "religious society."

We are therefore of opinion that upon the facts found the plaintiff was not entitled to the relief claimed, and that the judgment should be reversed; and as there is no probability that the facts can be changed, the complaint should be dismissed, with costs.

All concur.

TEXAS SUPREME COURT.

G. KRUEGER, *Appt.*,

v.

John KRUEGER.

(.....Tex.....)

1. When a debt is barred the new promise relied on must acknowledge the justness of the claim, and express a willingness to pay it.
2. A letter saying: "I have done my best to raise some money, but I cannot do it now . . . But some money we will send you, but not all, because we must live first,"—does not constitute a clear, unequivocal and unconditional acknowledgment of the justness of the demand, nor express a willingness to pay sufficient to remove the bar of the Statute.

(January 21, 1890.)

APPPEAL by defendant from a judgment of the District Court for Fayette County in favor of plaintiff in an action upon a promissory note which was alleged to have been taken out of the operation of the Statute of Limitations by a new promise. *Reversed.*

Commissioner's opinion.

The facts sufficiently appear in the opinion.

Mr. C. K. Bell for appellant.

Messrs. Robson & Rosenthal for appellee.

Acker, P. J., delivered the opinion of the court:

Appellee brought this suit on the 14th day of May, 1889, against appellant, in the District

Court of Fayette County, and alleged in his petition that the defendant resided in Hamilton County, Texas, and that on the 1st day of January, 1880, the defendant executed and delivered to him his promissory note set out in the petition, as follows:

\$2,061. Round Top, January 1, 1880.
We the undersigned, or either one of us, promise to pay to the order of John Krueger, in the Town of Round Top, Fayette Co., Texas, the sum of two thousand and sixty-one dollars, American coin, with interest from date at the rate of ten per cent per annum, interest payable annually, for value received. It is further provided that we are to pay any and all expenses, including attorney's fees, should the collection of the note be made by an attorney.

G. Krueger.

It was further alleged that the defendant, in a letter written by him to plaintiff in regard to his indebtedness on the 10th day of August, 1887, admitted the justness of the debt, and promised to pay it. The letter is as follows:

Hamilton, 10th August, 1887.

Dear Father: I have done my best to raise some money, but I cannot do it now, because the little money which I had yet, I bought wheat for, which was cheap still. I bought it at 68 cents yet, and then hauled 40 miles; and corn for feed I must also buy, because that is very slim here, as rain was wanted. Cotton, too, don't look the best. But some money we will send you, but not all, because we must live first, and that in Brenham we must pay too: that was a hard lick for us. Dear father, you sent me a note that I don't sign. I will pay you some every year, but whenever I can, but I sign no more papers, for I think it is just as

Note.—Limitations, acknowledgment to take debt out of statute. See note to *Opp v. Wack* (Ark.) 5 L. R. A. 742.

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good without, because we all know how we stand; but you must be satisfied with what you get every year, for I will do whatever I can.

G. Krueger.

The defendant pleaded his privilege of being sued in the county of his residence, and claimed that, while the original note was payable in Fayette County, it was barred, and the suit was on the alleged admission and promise contained in defendant's letter of August 10, 1887, which did not stipulate for payment in Fayette County. The defendant interposed the same defense by special exception, and also especially excepted on the ground that the note set out in the petition was barred by the four-years' Statute of Limitations, and that "the letter sued on as a new promise does not show any promise to pay any certain sum of money, nor does it show any acknowledgment of the justness of any demand of plaintiff against defendant." The plea and exceptions were overruled, and the trial, without a jury, resulted in judgment for plaintiff for principal, interest and attorney's fees, according to the terms of the note.

Under proper assignment of error, it is contended that the court erred in holding that defendant's letter to plaintiff was sufficient to take the barred note out of the Statute of Limitations; and this is the only question we think it necessary to consider. It is conceded that the original debt was barred. When a debt is barred, the new promise relied on must acknowledge the justness of the claim, and express a willingness to pay it. *Coles v. Kelsey*, 2 Tex. 555.

An acknowledgment which will take a debt out of the bar of the Statute of Limitations must be clear and unequivocal, and neither qualified by conditions nor limitations. *McDonald v. Grey*, 29 Tex. 83; *Dickinson v. Lott*, Id. 178; *Madox v. Humphries*, 24 Tex. 196; *Smith v. Fly*, Id. 353.

Considered in the light of these authorities, we think it too clear for argument that the letter relied on by plaintiff to take the barred note out of the operation of the Statute of Limitations is not sufficient for that purpose. It does not contain a clear, unequivocal and unconditional acknowledgment of the justness of plaintiff's demand, nor does it contain an expression of a willingness to pay. We think it settled by the authorities, *supra*, that the acknowledgment, to relieve the claim from the operation of the Statute of Limitations, must contain an unqualified admission of a just, subsisting indebtedness, and express a willingness to pay it. If the expression of a willingness to pay is coupled with conditions, it devolves upon the plaintiff to prove that the named conditions have taken place. *Leigh v. Lintheum*, 30 Tex. 103.

We think the court below erred in its construction of the letter from defendant to plaintiff, and are of the opinion that its judgment should be reversed, and the cause dismissed.

Stayton, Ch. J.:

Report of commission of appeals examined, opinion adopted, judgment reversed, and cause dismissed.

MICHIGAN SUPREME COURT.

Clarence M. BURTON, *Relator*,

v.

Thomas P. TUIE, Treasurer of Detroit,
Resp't.

(....Mich.....)

1. Books made up by the receiver of taxes containing a statement of tax sales, and by him handed over to the city treasurer, are public records within the meaning of Pub. Acts 1889, No. 205, giving all persons the right to examine them for any lawful purpose.
2. An abstract maker cannot be deprived of the right to inspect public records given by Pub. Acts 1889, No. 205, because he uses the records to prepare abstracts of title for other persons for a compensation.

(December 28, 1890.)

PETITION for a writ of mandamus to compel respondent to permit relator to inspect the public records in the custody of respondent as city treasurer. *Granted.*

The facts are fully stated in the opinion.

Mr. Henry A. Chaney, for relator:

Relator has a right to inspect and copy from the city treasurer's official records; and this right is enforceable by mandamus.

Lum v. McCarty, 89 N. J. L. 287; *People v. Richards*, 99 N. Y. 620; *Hanson v. Ehrstaedt*, 69 Wis. 538; *State v. Rachae*, 37 Minn. 372; *Boylan v. Warren*, 39 Kan. 301, 7 Am. St. Rep. 551. 7 L. R. A.

The Legislature has full power to open the records to the public, and no mere official perquisite can stand against its action.

Silver v. People, 45 Ill. 225.

Courts have nothing to do with any mere questions of policy in the enactment of statutes.

Crane v. Reader, 22 Mich. 335; *Reithmiller v. People*, 44 Mich. 230; *Sheley v. Detroit*, 45 Mich. 481.

That the right of inspection existed at common law, see—

Rez v. Shelley, 8 T. R. 141; *Rez v. Allgood*, 7 T. R. 748; *Herbert v. Ashburner*, 1 Wils. 297; *Bacon*, Abr. title *Evidence* (F) 306.

The abstract maker's standing in the law is now such that he is held to a responsibility in damages for the accuracy of the information which he furnishes.

Smith v. Holmes, 54 Mich. 104.

Mr. John W. McGrath, for respondent:

There is no common-law right to make copies or abstracts of public records for speculative purposes, as for the compilation of a set of abstract books for selling abstracts of titles, nor is such a right given by Act 54 of 1875.

Webber v. Townley, 43 Mich. 534; *Diamond Match Co. v. Powers*, 51 Mich. 145.

Morse, J., delivered the opinion of the court:

The relator asks for the writ of mandamus

to compel the respondent to permit him to inspect and examine the records and files in the city treasurer's office at Detroit, and to furnish proper and reasonable facilities for such inspection and examination, and for making memoranda and transcripts from such files and records, in compliance with Act No. 205, Pub. Acts 1889. The Act in question reads as follows: "That the officers having the custody of any county, city or town records in this State shall furnish proper and reasonable facilities for the inspection and examination of the records and files in their respective offices, and for making memoranda or transcripts therefrom, during the usual business hours, to all persons having occasion to make examination of them for any lawful purpose: provided, that the custodian of said records and files may make such reasonable rules and regulations with reference to the inspection and examination of them as shall be necessary for the protection of said records and files, and to prevent the interference with the regular discharge of the duties of such officer: and provided, further, that such officer shall prohibit the use of pen and ink in making copies or notes of records and files." Pub. Acts 1889, p. 286.

Relator shows in his petition that he is engaged in the abstract business in the City of Detroit, and has invested a large sum of money in said business. That his business requires that he should know what taxes, levied by the City of Detroit, are liens upon property of which he is furnishing abstracts, and by whom such liens, if any, are held. That when lands are sold for unpaid taxes the sale is conducted by the receiver of taxes. A statement of such sales in book form is made by the receiver, and turned over to the city treasurer, in whose custody it thereafter remains. When sales are redeemed or city bids sold, such redemption is minuted in this book. That it is necessary in said relator's business to frequently consult this book. If proper facilities were granted him, he would not need to consult the same more than ten minutes in any one day. That the prevailing rule and custom is, in all the city and county offices, to permit all persons to have free access to the records therein, and he, himself, has ordinarily been allowed this privilege without obstruction or restraint, except in the case of the respondent, who is city treasurer of the City of Detroit. That said respondent has frequently refused to permit relator to inspect the sales-book above referred to, as have also his subordinates; and, if at times an inspection of such record has been granted, it has always been accompanied with insulting language, implying that relator was taking time which belonged to the public, and that he must hurry, or that the books would be taken from him; and this, too, although no other parties were present to be waited upon or attended to, and though much more time was consumed by said treasurer in making such complaints than would be necessary for relator to inspect and make such memoranda as he needed if he could have access to the records without unreasonable interruption. A clerk would be detailed to see that the relator did not mutilate the records, with instructions not to permit relator to take the books. But more frequently relator has been told by the said

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city treasurer and his subordinates that he could not see the records. Respondent has followed this obstructive course for a long time, to the great annoyance and discomfort of relator, and in the face of the fact that there was posted in his office a notice to the effect that all information desired by the public would be cheerfully and promptly furnished. That respondent at one time informed relator that it was a matter of money with him, and that, if relator would pay him \$25 per month, relator could have what access he pleased to the records in said treasurer's office.

July 2, 1889, relator called at the treasurer's office, at about 11 o'clock A. M., and requested the privilege of inspecting some of the sales-books. Respondent asked if the information wanted was for relator's private business. Relator replied that Richard M. Coon was the owner of lot 24, in Wesson's section of the Thompson Farm, in the City of Detroit, and that he had employed relator to see if certain tax-sales which had been previously made were still held by the city or disposed of, and, if disposed of, to whom. Respondent requested relator to write out what he wanted on a piece of paper, which he did. The paper was handed to a clerk, who was called by the respondent to wait on relator. The parcel of land had been sold for six successive years, and it became necessary to inspect six different sales-books. That the statement which relator had made for the clerk, a copy of which he retained, informed the clerk the number of the book required, the page of the book, and the line on the page which he desired to inspect. That said clerk produced four of the books required, and they were hastily inspected by relator, but he was not permitted to handle them. During the examination, which could hardly have occupied ten minutes, respondent himself sat by, discussing the general subject of relator's rights, and apparently in no wise hurried by pressure of official duties. That, after relator had inspected the fourth volume, said clerk—taking his cue from the language and actions of his employer, said respondent—abruptly, violently and unreasonably refused to produce the other two books requested, and left the room. That relator then asked the city treasurer himself to produce the two books asked for, but said treasurer refused. Relator then told respondent that he would get the books himself if he (respondent) would permit him (relator) to go into the room where said books were, for that purpose. Respondent told him he could not go into that room, and absolutely refused to permit him to see the books he desired. Relator offered respondent \$10 per month to be accorded such treatment as was accorded to the public. Respondent refused the offer. Relator then formally demanded the right to inspect the two books he had asked for before, and reminded respondent of the Statute. Relator said that if he could not see the books he should ask for a mandamus. Respondent told him to "mandam" if he wanted to; that the books were in the vault, and relator could not see them; and that nothing but an order from the common council would make him remove them. He told relator to leave a written memorandum of what he wanted, and relator refused to do this, as he had already furnished respondent

with one statement of what he required. Respondent became vociferous, declared that he had disposed of the subject, refused to hear anything further, and left the room. Relator then, under the advice of counsel, made a new memorandum of what he wanted, and offered it to the deputy treasurer, who said he had no time to attend to it. Relator told him he need not attend to it then, as he would send his clerk for it, laid the memorandum on the table, and placed a paper-weight upon it. Respondent came in about then, in a high temper, and with some profanity ordered the relator out of the office, which order relator obeyed. During the whole time of this interview there was no other person in the office on business, unless he was secluded in the private office of respondent.

The respondent in his answer denies that the books referred to by relator are public records, or that they are made so by charter, ordinance or law, or that they are required by law to be kept, or that relator, or any person except respondent, is entitled to the possession of said books or entitled to take them out of the custody of respondent, or to make extracts from them, except under the immediate supervision of respondent. He denies that it is the universal practice in city offices to permit all persons desiring to inspect the said books to have free access to them, or that such is the usage, or that such usage has become so well established as to have the force of a common-law custom. He denies that relator has been ordinarily allowed to inspect such books without obstruction or restraint, if by obstruction or restraint is meant a denial of the right of access to said books without the supervision of the city treasurer. He denies that the right which relator seeks to establish is recognized or confirmed by any Act of the Legislature. He denies that at any time this respondent, or, by this respondent's direction or authority, any deputy or clerk in respondent's office, has accompanied any inspection of the books which relator has been allowed to make with insulting language. He denies that relator has been told by respondent that he (the relator) could not see the records. He denies that respondent has been guilty of obstructing relator. He denies that respondent derives an income from abstracts amounting to \$1,000 per annum, or any such sum. He denies that this respondent has ever said that if relator would pay respondent \$25 per month during his term of office the relator could have whatever access he desired to the books in respondent's office. He denies that he made use of the expression found on page 9 of relator's petition, viz., "God damn quick, too."

Respondent also sets forth in his answer that relator is seeking the information from the books as a matter of merchandise to sell to others. That up to July 2, 1884, abstracts could only be procured of the city treasurer, and that the treasurer, whose office expired in 1884, realized from \$1,500 to \$2,000 annually from tax abstracts, and that he is informed relator paid such officer for the privilege of making a copy of the books of said office, and did make and use the same for private gain. That for one year prior to July 1, 1888, relator paid \$35 per month for this privilege. That respondent has always been ready and willing

to give any lot owner or citizen desiring it information as to tax charges upon lands, and has always done so free of charge. Insists that he has the legal right to charge a small fee for making out abstracts, as there is no law requiring him to make them otherwise. That the books in question have been kept for the information and convenience of the City of Detroit, and are not required to be kept by the city charter or any law or ordinance. That each year, after the receiver of taxes makes sale of lands for unpaid taxes, one of said books is made up by such receiver, and entered therein in the name of the owner, if known, a description of such parcel of land, the amount of the city tax, school tax, etc., the total tax, the name of the person to whom sold, which is usually the City of Detroit; and said books also contain blanks for entry of assignment or redemption. There are in all thirty-seven books, containing from 100 to 250 pages each. In addition, there are some sales-books, containing memoranda of sales for unpaid special assessments. There are also sixteen (one for each ward), indexes to sales-books, each of which contains a description of each parcel of land in that ward, with a column for each year in which to enter, if sold, the number of the page of the sales-book for that year containing the memoranda of the sale. If a sale has been canceled, a red-ink line is drawn through the reference figures. That the books so kept are easily subject to alteration or defacement. That the books aforesaid are valuable, and the loss of the same, or any of the same, would be irreparable. That respondent is charged by the city with the care and custody of the same. That a portion of respondent's office is kept for the use of the public, and the public is necessarily, by means of desks, railings and wire-work partitions, excluded from the private or working department of the office, and from the part containing the moneys, books and papers in respondent's office. That relator, in order to use the right which he here seeks to establish, must necessarily be admitted to that portion of respondent's office from which the general public is excluded. That the books referred to are kept by respondent in a vault in the city treasurer's office, and in the same vault are other valuable books and papers, together with large sums of the city moneys, varying in amount from \$100 to \$30,000. That to produce said books, and a number of them, as is often required by relator, requires a large amount of time almost daily, and from ten to thirty minutes per day have often been consumed in so doing. That respondent insists that it is the duty of respondent, in order to protect himself and his bondsmen, to keep these books under the immediate care, custody and supervision of himself or one of his trusted employés. That during the month of July, relator's purpose is not so much to look after individual cases of sales, as it is to compare his minutes of sale with the office memoranda of the same.

Respondent submits that he is not obliged to produce the books of his office, and supervise the inspection of the same, to one who is collecting information for merchandise, and that, if he does do so, he is entitled to pay for it. He also submits that in other public offices,—in the

office of the register of deeds, in the probate court, and in the county clerk's office,—when information is furnished which the law does not require to be furnished, charges are made, and legitimately, for such information. He also shows that he has given bond for the safe keeping of these records. That his total fees for abstracts for eleven months ending December 31, 1888, were but \$248. And he finally submits that relator is not entitled to access to the books of respondent's office at his own pleasure; neither is he entitled to frequent or enter into that portion of respondent's office from which the general public is excluded. That respondent is entitled to supervise the examination of the books in his office, and that the relator, as a dealer in information, is not entitled to compel respondent to give his time to relator, at the pleasure of relator, for his gain, and without compensation to respondent.

It is evident, from the petition and answer, that there is more or less of ill feeling between these parties, and it is also clear that the relator has been in fact denied free access to these sales-books, and that the respondent does not propose to permit such access unless he is paid therefor; nor does he propose to furnish any facilities, reasonable or otherwise, to the relator to inspect and examine said books without pay. This right of relator, claimed under the Statute, is denied, first, on the ground that these books are not public records, because there is no express statutory provision anywhere that such books shall be kept. These books are made up in the first place by the receiver of taxes, and by him handed over to the city treasurer. They are therefore books used and kept in two of the public offices in the City of Detroit, and they must be considered public records. The claim that they are private books of account is absurd. They are neither the private books of the receiver of taxes nor of the city treasurer, and the City of Detroit, a public municipal corporation, can have no private books, not even of accounts, not open to the inspection of its citizens. Its doings, and the doings of its officers, and the records and files in their offices, must be open to the public; nor can fees be charged for such inspection to those having the right to examine and inspect such files and records.

But the broad ground is also taken that the relator has no lawful right to inspect these sales-books without recompense to the respondent, because he is an abstract maker, and his business may be, and is in most cases, to sell some person the information gained by such examination; that he does not come under the Statute, because he does not have "occasion to make examinations of them for a lawful purpose," and that this case is covered and against relator by two former decisions of this court: *Webber v. Townley*, 43 Mich. 534; *Diamond Match Co. v. Powers*, 51 Mich. 145.

If I understand the latter case, the writ of mandamus was denied because the Diamond Match Company was not a citizen nor an inhabitant, nor even a domestic corporation. It did not show its charter, nor give any evidence of its powers or artificial capabilities. The court says: "We have no means of knowing that it has capacity to buy lands or hold them, or deal in titles anywhere, or to carry on the

business in which its petition alleges it to be engaged, or to apply itself to such an enterprise as making a system of abstracts of all the titles of all the real property in a county. The case is bare of information in regard to the true legal status of the relator, and as to whether it is other than a mere intruder in what it demands." The petition of the relator alleged that it was incorporated under the laws of the State of Delaware; that it had become the purchaser of about 80,000 acres of pine land in the County of Ontonagon, had erected extensive saw-mills, and invested nearly \$200,000, and was cutting large quantities of pine, and constantly purchasing more land; and, to provide against acquiring defective titles, desired to protect its rights and interest by providing for itself an abstract of all the lands in the county. The relator was permitted opportunity to examine and make abstracts, as far as its own ownership or interest was concerned, present or prospective; but the dispute was whether it had the right to go further, and insist on having office accommodations, and the handling of all the records, to make an abstract of title to all the lands in the county. While the writer of the opinion, *Chief Justice Graves*, paused to make some practical suggestions of obstacles in the way of proper relief being afforded by mandamus, the ground of the denial of the writ was that the relator had failed to show any title to the right it claimed, because the authority given to it by the State by which it was created was not disclosed, and could not be assumed. See *Diamond Match Co. v. Powers*, 51 Mich. 147, 148.

In this view of the case above cited, I do not think that it is any authority bearing against the relator's claim in this case. And I cannot agree with the opinion of this court, or the reasons given for it, in *Webber v. Townley*, *supra*; nor do I anticipate that hardly any, if any, of the results imagined by the writer of that opinion would ever occur, if the holding were otherwise. If any of them should happen, the law is powerful enough to remedy them, and "sufficient unto the day is the evil thereof." I do not think that any common law ever obtained in this free government that would deny to the people thereof the right of free access to and public inspection of public records. They have an interest always in such records, and I know of no law, written or unwritten, that provides that, before an inspection or examination of a public record is made, the citizen who wishes to make it must show some special interest in such record. I have a right, if I see fit, to examine the title of my neighbor's property, whether or not I have any interest in it, or intend ever to have. I also have the right to examine any title that I see fit, recorded in the public offices, for purposes of selling such information, if I desire. No one has ever disputed the right of a lawyer to enter the register's office, and examine the title of his client to land as recorded, or the title of the opponent of his client, and to charge his client for the information so obtained. This is done for private gain, as a part of the lawyer's daily business, and by means of which, with other labors, he earns his bread. Upon what different footing can an abstractor—can Mr. Burton—he placed, within the law, without giving a privilege to one man

or class of men that is denied to another? The relator's business is that of making abstracts of title, and furnishing the same to those wanting them, for a compensation. In such a business it is necessary for him to consult and make memoranda of the contents of these books. His business is a lawful one, the same as is the lawyer's, and why has he not the right to inspect and examine public records in his business as well as any other person? If he is shut out because he uses his information for private gain, how will it be with the dealer in real estate, who examines the records before he buys or sells, and buys and sells for private gain? Any holding that shuts out Mr. Burton from the inspection of these records, for this reason also shuts out every other person except the buyer, seller or holder of a particular lot of lands, or one having a lien upon it, or an agent of one of them, acting as such agent without fee or reward. It cannot be inferred that the Legislature intended that this Statute should apply only to a particular class of persons, as, for instance, those only who are interested in a particular piece of land; any person means all persons.

I can see no danger of great abuses or inconveniences likely to arise from the right to inspect, examine or make notes of public records, even if such right be granted to those who get their living by selling the information thus gained. The inconvenience to the office is guarded against by the Statute, which authorizes the incumbent to make reasonable rules and regulations with reference to the inspection. And when abuses are shown there will no doubt be found by the Legislature or the courts a remedy for them. It is plain to me that the Legislature intended to assert the right of all

citizens, in the pursuit of a lawful business, to make such examinations of the public records in public offices as the necessity of their business might require, subject to such rules and restrictions as are reasonable and proper under the circumstances. The respondent in this case is the lawful custodian of these sales-books, and is responsible for their safe keeping, and he may make and enforce proper regulations, consistent with the public right, for the use of them. "But they are public property, for public use, and he has no lawful authority to exclude any of the public from access to and examination and inspection thereof at proper seasons." It follows that he has no right to demand any fee or compensation for the privilege of access to the records, or for any examination thereof not made by himself or his clerks or deputies. He has no exclusive right to search the records against any other citizen. *Lum v. McCarty*, 39 N. J. L. 237; *Boylan v. Warren*, 39 Kan. 301; *State v. Rachac*, 37 Minn. 372; *People v. Richards*, 99 N. Y. 620; *Hanson v. Eichstaedt*, 69 Wis. 538.

It follows, in my opinion, that *the prayer of the petitioner must be granted, and the writ issue as prayed*, the relator asking in this writ no more than the Statute gives him.

Champlin, J., concurred.

Campbell, J.:

I think relator has such an interest as entitles him, under the Laws of 1889, to see the books in question, and confine my opinion to that point.

Sherwood, Ch. J., and Long, J., did not sit.

KENTUCKY COURT OF APPEALS.

PADUCAH LUMBER CO., *Appl.*,

v.

PADUCAH WATER SUPPLY CO.

(.....Ky.....)

1. Where a city has power under its charter to enter into a contract with another for the construction and operation of water-works therein, the right and duty attaches to it to make the contract for the personal benefit of inhabitants within its corporate limits.
2. If such city makes a contract for a water supply, for the benefit of its inhabitants, and the property of one of them is destroyed by fire because of the failure of the person agreeing to furnish such supply to comply with his contract, the property owner may sue in his own name for damages for breach of the contract, he being the "real party in interest" within the provision of Civ. Code, § 13, that every action must be prosecuted in the name of such party; and the city is not a necessary party to the action.
3. One undertaking to furnish a water supply to a city for the benefit of its inhabitants under a contract which provides that he shall not be liable for damages occasioned by the temporary shutting off of the water for purposes of repair, etc., will, in the absence of such excuse, be

liable for damages to property by fire resulting from his neglect to furnish the stipulated amount of water; and such liability will not be released by the insertion in the contract of provisions relieving the city from liability for rent for hydrants, and permitting rescission of the contract, in case it is not complied with.

4. The inquiry is, in an action to recover such damages, whether or not, under all the circumstances, the fire could and would have been prevented or extinguished before occasioning the damage, if defendant had performed his contract; and the question as to how or where the fire originated is immaterial provided it was not caused by plaintiff.

(December 5, 1889.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for McCracken County, sustaining a demurrer to the petition in an action to recover damages for the loss of plaintiff's property by fire because of the alleged breach by defendant of its contract with the City of Paducah to furnish a water supply. *Reversed.*

The facts are sufficiently stated in the opinion.

Messrs. Gilbert & Reed, for appellant:

7 L. R. A.

This is not an action *ex delicto* to recover damages for a tort or tortious negligence, but it is an action *ex contractu*, seeking to recover for a loss occasioned by or flowing out of a breach of an express and binding contract. The maxim, *causa proxima non remota spectatur*, is not applicable alike to the two cases stated.

Shinkle v. Covington, 1 Bush, 618; *Webb v. Rome, W. & O. R. Co.* 49 N. Y. 420; *Pennsylvania R. Co. v. Hope*, 80 Pa. 873; *Milwaukee R. Co. v. Kellogg*, 94 U. S. 474 (24 L. ed. 258).

Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Thompson, Neg. § 18; *Hadley v. Barendale*, 9 Exch. 341, 26 Eng. L. & Eq. 393; *Griffin v. Colver*, 16 N. Y. 489; *Leonard v. New York, A. & B. Teleg. Co.* 41 N. Y. 544; *Wharton, Neg.* § 435. See also *U. S. Teleg. Co. v. Wenger*, 55 Pa. 262; *Sedgw. Dam.* 5th ed. pp. 410-414, notes; *Rittenhouse v. Independent Line Teleg. Co.* 44 N. Y. 263.

Negligence may be the proximate cause of an injury of which it is not the sole or immediate cause.

Shearm. & Redf. Neg. § 10.

Messrs. Husbands & Husbands also for appellant.

Messrs. Burnett & Dallam for appellee.

Lewis, Ch. J., delivered the opinion of the court:

The buildings, machinery and other property of appellant, a corporation engaged in the lumber and planing-mill business in the City of Paducah, having been, in 1887, destroyed by fire, it instituted this action to recover damages therefor of appellee, also a corporation; and the City of Paducah, having, as alleged, refused to join as plaintiff, was made likewise defendant to the action, though no recovery against it is sought.

In the petition it is stated, in substance, that in consideration of the grant by the City of Paducah to appellee, as assignee of one Jones, of the franchise and right to construct, maintain and operate for the term of forty years waterworks, including the laying of pipes and erection of hydrants in all the streets, avenues and public grounds of the city, and agreement to pay \$40 annual rent for each of 150 hydrants, besides the privilege given to charge and collect of the inhabitants limited rates for private use of water, appellee agreed to erect upon a platform 50 feet high a stand-pipe, 22 feet in diameter, and 175 feet high, with which were to be connected the conducting pipes and hydrants mentioned, and also two pumping engines, each having capacity to force into the stand-pipe 2,000,000 gallons of water every twenty-four hours, and to keep a head of water sufficient to throw from any eight of the hydrants simultaneously, and for five consecutive hours at any one period of time, streams through

50 feet of hose 100 feet high, all which works were completed and put in operation in 1885; that appellee also agreed to have in the stand-pipe and conducting pipes at all times a supply of water sufficient to afford a head or pressure requisite for all domestic, manufacturing and fire-protection purposes, for all the inhabitants and property of the city, and to increase the number and length of hydrants and pipes when necessary to meet demands of the city and citizens; that said contract was made with appellee by the City of Paducah for the use and benefit of all its property owners and inhabitants, and appellant's property was, from 1885 until destroyed by fire, in common with that of others, taxed at its full value to raise money with which to pay said hydrant rents.

It is further stated that, under a contract directly between them, there had been erected, previous to the fire, on the same lot where the burned property was situated, two hydrants, one within 80, and the other 70, feet of the place where the fire originated, and connected by pipes with the water-main, to be used by appellant to extinguish fires, and for steam purpose, for which it had been paying rent to appellee, and that in consideration thereof appellee had agreed to furnish and have ready at all times water sufficient to throw streams through hose kept by appellant in proper condition, to be connected with the two hydrants, the height provided for in said contract between appellee and the City of Paducah; that the fire originated in a wood building situated on the lot of appellant, and connected with its other property, though occupied at the time by another, but said fire occurred without any fault or negligence of appellant or its servants, and it could and would have been extinguished before doing damage to the property of appellant if there had been the stipulated quantity of water in the stand-pipe and conducting pipes, or the pumping machinery had been in readiness to operate, and the engineer and servants of appellee had been present to set it in motion; for immediately after the fire commenced, and before it had done any damage, or extended to the premises then occupied by appellant, hose pipes in good order were attached to the two private hydrants, and carried to within 5 or 6 feet of the fire, for the purpose of applying water to it.

There were besides four or five double-nozzle fire hydrants, one within 12 and two within 60 feet of the property burned, and all near enough to extinguish fire on any part of said lot; and experienced firemen employed by the City of Paducah were present on the ground within ten minutes or less after the fire started, and had hose, suitable and in good condition, attached to the hydrants. But that, notwithstanding it had since 1885 been receiving from the City of Paducah the agreed hydrant rent, and from numerous inhabitants thereof, appellant included, large sums of money for water furnished to them, appellee, in violation of said contract, and without excuse, refused and neglected to have, when said fire commenced, the stipulated quantity of water in the stand-pipe, and for more than one hour after the alarm was given, and the city firemen had arrived and attached hose to the hydrants, neglected to start the pumping machinery, or to have its engineer

or other servant present for the purpose, so that, although when water was in the stand-pipe at the height of 75 feet streams could be forced through hose attached to the two private hydrants 75 feet high, and higher when pressure was applied by the pumping machinery, the streams passing through the hose when applied at the incipency of the fire did not reach 10 feet, and were so weak as to be utterly useless, nor was there sufficient head of water to force a stream through any kind or length of hose as much as 25 feet; by reason of which refusal and neglect appellant's property was burned and destroyed.

The grounds of demurrer are, in substance, that the facts stated in the petition and amendments do not constitute a cause of action in favor of the plaintiff against the defendant, which we will treat as involving two questions: (1) whether there is vested in the plaintiff (appellant) such legal interest in the contract between the City of Paducah and the defendant (appellee) as to authorize it in any event to prosecute an action in its own name, and for its own benefit; (2) whether appellee can be legally made liable in damages for the alleged breach of contract.

Clearly appellant had a right to sue for a breach of the distinct contract set out in the petition, by which, in consideration of rent paid for use of the two hydrants on its own lot, water was agreed to be furnished directly to it by appellee. But we will consider the two questions first stated as they arise on the contract between appellee and the City of Paducah. Authorities in some of the States hold the general rule to be that the plaintiff in an action on contract must be a person from whom the consideration actually moved, and that a stranger to the consideration cannot sue on a contract. But, we think, if there be in fact consideration for a promise or engagement made for the benefit of the person who sues, it is not essential for it to have passed directly from him to the person sued.

It is not, however, important whether this case either comes within what is elsewhere laid down as a general rule, or is an allowable exception to it; for this court has held the doctrine well settled that a party for whose benefit a contract is evidently made may sue thereon in his own name, though the engagement be not directly to or with him (*Smith v. Lewis*, 8 B. Mon. 229; *Allen v. Thomas*, 8 Met. 198); which practice is not only in accordance with the rule found in Chitty on Pleading, but seems to be required by § 18, Civil Code, that in express terms provides every action must be prosecuted in the name of the real party in interest, except that under section 21 a fiduciary or trustee may bring an action without joining with him the person for whose benefit it is prosecuted.

It thus follows that if the City of Paducah had power to make the contract as well for the personal benefit of its several inhabitants as for purely municipal purposes, and did so make it, appellant, being the real party in interest because owner of the property destroyed, has the right to prosecute the action in its own name, if maintainable at all, and the City of Paducah, though made so, is not even a necessary party, because whatever interest it may have or in-

jury it may have sustained, is entirely distinct, if not remote.

Conceding, as must be done, existence of the alleged power of the City of Paducah under its charter to enter into a contract with another for construction and operation of waterworks, the right and also duty attached to make it for the personal benefit of inhabitants within its corporate limits; for supply of water in a city for domestic and manufacturing purposes, and as safeguard against injury to or destruction of private property by fire, is always in such cases the main inducement, the need of the municipal corporation itself for water supply being comparatively little. Besides, it is manifest the principal source of expected profit to appellee was the money to be collected by imposition of the special taxation, and for private use of water with which to pay for service in supplying water for use of the inhabitants, and protection of their property from effects of fire; and it being alleged in the petition, and also, in effect, provided in the ordinance of the city council that contains the terms and conditions of the contract, that it was made for the benefit of the inhabitants, it seems to us that, if appellee can be made answerable in damages at all, it is liable to appellant upon the facts stated in the petition.

It is a rule co-existent with contracts that a party who has performed his part is entitled to reparation in some form for breach to his injury by the other. In equity he may sue for specific performance or rescission, neither of which is an appropriate or adequate remedy when the subject matter of a contract is destroyed, and no longer exists; but at the common law, when an actual injury to one of the parties has been caused by refusal or neglect of the other to do what he agreed to do, and received consideration for doing, damages commensurate with the loss thereby sustained may be recovered, and such right of recovery cannot be regarded waived or relinquished unless clearly so provided in the contract.

It is not provided in the ordinance referred to, nor can it be fairly inferred, that appellee was not to answer in damages for its failure or refusal to perform its contract. The provision on that subject is that appellee shall have the right to shut off water temporarily for the purpose of making repairs or extension of the works, and shall not be liable for any damages occasioned by such temporary suspension, provided notice is given of the intention to shut off the water, and such repairs or extension are made with due diligence and without delay; but that, if at any time the supply is shut off from any cause for more than five days, rent for the fire hydrants shall cease during the period of such suspension. It is further provided that, if appellee fail for five months to furnish an adequate supply of water for fire or other public or private purposes, the contract is to be void, and the franchise forfeited. As, under the contract, exemption from liability in damages for shutting off or suspending the water supply exists only when done for the special and temporary purpose of making repairs or extension of the works, and not then unless notice is given, and such repairs and extension are made with due diligence, and without delay, the necessary inference is that appellee

was intended to be, and according to a fair interpretation must be, regarded liable in the absence of such excuse. For, manifestly, neither the provision for rent of the fire hydrants to cease in case of a longer than five days' suspension of the water supply for the particular purpose mentioned, nor the reserved right of the City of Paducah to rescind the contract for the cause stated, was intended by the parties, or can be properly construed, to release appellee from liability, or deprive the City of Paducah or its inhabitants of the remedy for non-performance of the contract while it is in force.

The rule laid down in the leading case of *Hadley v. Baxendale*, 9 Exch. 358, is that "where two parties have made a contract which one of them has broken, the damages which the other ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally—that is, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." This rule, which has been generally adopted and approved in the United States, is applicable and useful in determining the question of legal liability, as well as in fixing the measure of damages in case of breach of contract; for "parties, when they enter into contracts, may well be presumed to contemplate the ordinary and natural incidents and consequences of performance or non-performance." 1 Sutherland, Dam. 77.

It is, however, argued that the damages sustained by appellant were not the natural and proximate consequences of the neglect complained of, and therefore no recovery can be had; and the case of *Patch v. Covington*, 17 B. Mon. 722, is cited to sustain the position. There the action was to recover in damages the value of a house destroyed by fire in consequence of failure on the part of the City of Covington to keep its public cisterns in repair, and to provide the fire company with hooks, ladders and other necessary apparatus. The fire originated in a building adjacent to that of the plaintiff. The firemen had reached the house before the flames were communicated to it, and, as alleged, would have been able to save it but for neglect of the city to keep sufficient water in the cistern. But the judgment dismissing the action was affirmed, on the ground that the cause of plaintiff's loss "was wholly disconnected from, and independent of, the city, or its acts or omissions."

That, unlike this, was an action against a municipal corporation for failure to perform what at most was an implied public duty, which, upon other than the ground just mentioned, courts in several States have held cannot be maintained. But whether the conclusion there reached was or not proper, the reason for it was not entirely pertinent; for while, in one sense, the fire which in that as in this case originated in an adjacent building, was the proximate cause of the house being destroyed, the complaint was not that the defendant was in any way responsible for the occurrence of it, but failed to perform what was assumed to be its contract duty to furnish water in cisterns with which to extinguish it, 7 L. R. A.

the immediate consequence of which failure was, as alleged, loss of the building. There is a clear distinction between the occurrence of a fire, the origin of which is often unknown, and for which generally there attaches no legal liability to any person, and the extinguishment of it, which generally can be accomplished by application of water, that a party may, by contract, undertake and bind himself to supply in the proper manner and time. It does not, therefore, make any difference in this case how or where the fire originated, provided appellant did not cause it; because the duty of appellee was not to prevent occurrence of it, but to keep the stipulated quantity of water in readiness to be applied to put it out.

Waterworks, however costly and skillfully constructed and operated, are not potent enough to extinguish, with absolute certainty, and at all events, every fire occurring in a city before destruction of, or serious injury to, the property ignited, nor are they ever made with such end in view. But it is entirely practicable by that means to supply water in such quantity, and having such head or pressure, as to usually extinguish a fire before serious damage is done, when promptly and efficiently used; and parties to a contract like this must be presumed to have contemplated and agreed that such, in the natural order of things, would be the probable effect of a performance of it, else there would have been no rational motive nor adequate consideration for entering into it. But the degree of probability in every such case as this must, of course, depend upon the stage of the fire when water is applied, upon the efficiency of the firemen, and all other attendant circumstances and agencies favorable or adverse to arresting or extinguishing fires.

It seems, if the contract before us is not to be treated as meaningless and totally ineffectual for every purpose, the parties to it must be regarded as having contemplated and assented to the consequences of nonperformance, as well as the profit and advantage of performance, and consequently appellee is liable in this case for such damages as its failure or refusal to perform may have caused to appellant. The inquiry therefore is, whether, considering the purpose, character and capacity of the waterworks, and all the attending circumstances and agencies, the fire which destroyed appellant's property could and would have been prevented or extinguished before doing damage if appellee had performed its contract; and as the facts alleged in the petition and amended petition constitute a prima facie cause of action, the lower court erred in sustaining the demurrer.

Wherefore the judgment is reversed and remanded, with directions to overrule the demurrer, and for further proceedings consistent with this opinion.

A petition for rehearing was subsequently filed, and on March 18, 1890, Lewis, Ch. J., on behalf of the court, delivered the following response:

It is not necessary to even consider whether a municipal corporation can be made liable for destruction by fire of property of its individual inhabitants, because that question is not

before us. But, even assuming no action could be maintained in that case, still the doctrine of *respondet superior* would not, as contended, avail to relieve appellee of its own liability because the relation of principal and agent does not exist in any sense between the City of Paducah and it. On the contrary, they entered into a contract by which for a valuable consideration to be paid by taxation and by rents for private use of hydrants, appellee agreed, among other things, to keep a specified quantity of water in its stand-pipe at all times except on particular occasions mentioned, none of which existed when appellant's property was burned.

It is too plain for discussion that the City of Paducah had the power to and did make the contract for benefit of its inhabitants, and consequently each one of them has a right to sue and recover for an injury caused to him by a breach of it.

Appellee did not covenant to prevent occurrence of fires, nor that the quantity of water agreed to be furnished would be a certain and effectual protection against every fire, and consequently does not in any sense occupy the attitude of an insurer. But it did undertake to perform the plain and simple duty of keeping water up to a designated height in the stand-pipe, and if it failed or refused to comply with that undertaking, and such breach was the proximate cause of destruction of appellant's property, which involves questions of fact for the determination of the jury, there exists no reason for its escape from answering in damages, that would not equally avail in case of any other breach of contract.

Petition for rehearing overruled.

KENTON INSURANCE CO., *Appt.*,

v.

C. S. WIGGINTON.

(....Ky.....)

1. Failure to furnish proof of loss within the time required by a policy of fire insurance is

NOTE—Fire insurance; provision requiring statement and proof of loss.

The Pennsylvania Act providing that proofs of loss within twenty days shall be sufficient, is for the protection of persons insured, and does not exact proof within that time. *Springfield F. & M. Ins. Co. v. Brown*, 128 Pa. 392.

A provision for payment in sixty days after proofs of loss refers to the proofs required within thirty days, and not to other proofs required for establishing the claim. *Clover v. Greenwich Ins. Co.* 2 Cent. Rep. 373, 101 N. Y. 277.

The failure of the assured to serve upon the company proofs of loss within the time usually limited by such company for that purpose in its printed forms will not prevent a recovery by the assured for the breach of a parol contract to insure or to issue a policy. *Nebraska & L. Ins. Co. v. Seivers* (Neb.) 43 N. W. Rep. 351.

The provision in a policy requiring the insured to furnish a full and detailed statement of the loss and the amount claimed does not require that the insured shall attempt to compute or state the share of loss to be borne by each insurer where there are 7 L. R. A.

waived where the insured, after attempting to do everything necessary, is lulled into security by the acts of the company or its agent, and is led to believe they are preparing to adjust his loss.

2. The owner of an undivided fourth of a tract of unpartitioned land, who is merely a life tenant of the rest, to which his claim of ownership in fee is then in litigation, does not, by stating that he is the unconditional owner of the land, make a material misrepresentation which will avoid a policy of fire insurance upon a building situated thereon which provides that the application must disclose the true character of the title, and the fact of any litigation concerning it, where the building insured was remodeled from a worthless one at his own expense, and he would therefore, in partition, be entitled to it without estimating its value, and to the ground on which it stood; and where it is provided by statute that neither misrepresentations nor warranties shall affect the right to recover unless material to the risk, or fraudulent.

3. The mere expression of an opinion as to value of property by one applying for insurance thereon, cannot, in the absence of bad faith, defeat the right of such person to recover on his policy.

(December 5, 1889.)

A PPEAL by defendant from a judgment of the Superior Court affirming a judgment of the Circuit Court for Carroll County in favor of plaintiff in an action upon a policy of fire insurance. *Affirmed.*

The case fully appears in the opinion.

Messrs. Collins & Fenley for appellant.

Messrs. George C. Drane and J. A. Donaldson for appellee.

Pryor, J., delivered the opinion of the court:

The appellant, the Kenton Insurance Company, made a contract of insurance with the appellee, Wigginton, by which the Company insured his dwelling-house against loss or damage by fire for the period of three years from the 2d day of November, 1886. The policy of insurance contains the usual stipulations with regard to notice and the preliminary proof as to the loss, as well as the representations by the

several who are liable. *Fuller v. Detroit F. & M. Ins. Co.* 36 Fed. Rep. 499.

A false statement, or an overestimate of the loss, will not defeat the right to recover, where no fraudulent intent is shown. *Schuster v. Dutchess Co. Mut. Ins. Co.* 3 Cent. Rep. 183, 102 N. Y. 290; *Stone v. Hawkeye Ins. Co.* 68 Iowa, 737.

Waiver of objections to want of proof of loss.

Where the policy required proofs to be rendered as soon as possible, what is a reasonable time is a mixed question of law and fact. *Am. F. Ins. Co. v. Hazen*, 1 Cent. Rep. 631, 110 Pa. 580; *Hickman v. Shimp*, 100 Pa. 16; *Miller v. Hartford F. Ins. Co.* 70 Iowa, 704; *Springfield F. & M. Ins. Co. v. Brown*, 128 Pa. 392.

Omission of the company to object to the form of proofs will operate as a waiver. *German Am. Ins. Co. v. Hocking*, 6 Cent. Rep. 911, 115 Pa. 396. See note to *Smith v. Niagara F. Ins. Co. (Vt.)* 1 L. R. A. 216.

Taking cognizance of loss, and agreeing to pay.

After an insurance company has itself taken cognizance of a loss and prepared such proofs as it

insured that he was the owner in fee of the property. The dwelling insured having been destroyed by fire, the appellant refused to pay the loss, for the following reasons: *First.* It contends that no preliminary proof of the loss was made and presented to the Company as the contract of insurance required; and, that being a condition precedent on the part of the insured, the recovery should have been denied. *Second.* The insured owned only an interest of one fourth in the property when he represented that he was the sole owner in fee. *Third.* The title to the property was in litigation in the Carroll Circuit Court when the insurance was effected by the appellee; and, the contract of insurance making the policy void if that fact is not disclosed, no recovery should be had.

The policy provides that no action shall be maintained until the proofs of loss are furnished as required by the contract, and the application must disclose the true character of the title; and, if incumbered or involved in litigation, such facts must be disclosed by the insured. An examination of this record has satisfied us that no valid defense has been made out, and the absence of the preliminary proofs essential to the demand of payment from the Company was caused by the conduct of the Company or its agents, and for which the appellee is in no wise responsible. As soon as the fire occurred, and the appellee's property was destroyed, he notified the local agent of the Company, and asked him for the usual blank forms kept and furnished by such companies to the insured as a guide in proving the loss sustained, and, in response, was told that the agent had no blank forms, but would write or see the principal agent or the home office on the subject. The principal office having been notified of the destruction of the property, and the appellee becoming restless at the delay in delivering to him the formula for making his preliminary proof, the local agent went to Covington, the place of the principal office,

and was there told, in effect, that someone would be sent down to see about the matter, or to settle it, all of which was communicated to Wigginton, who relied on the statements of the local agent, that are not denied by the Company, but admitted to be true. The home office knew that the written forms had been applied for by Wigginton, the appellee, at the office of the agent at Carrollton; had been written to by this agent to send the forms, and, instead of doing so, or delivering them to the local agent, who had gone to the home office to inquire about the delay, said to the agent, "We will send someone down to see about it," and this "someone" did come, but never saw the appellee, or approached him on the subject, nor did he give the latter the opportunity of seeing him, but left the Town of Carrollton as if the matter was of no importance to the appellee or the Company. The appellee began to comply with his contract the morning after the fire, and attempted to do everything that was necessary to notify the Company of his loss, but delay after delay, resulting more from the action of the Company than that of the appellee, prevented the proofs from being made within the thirty days; and that the appellee was lulled into security by the conduct of the Company or its agents is too plain a proposition to be controverted. There was not the shadow of a suspicion that the dwelling was burned for the purpose of obtaining the insurance; and the appellee, no doubt a plain, unsuspecting farmer, confiding in the statements of the local agent, and with the full belief that this Company was preparing to adjust the loss, took no steps to present the proofs, except in the manner stated, and is now met with the defense that the Company was delaying payment for the want of the proof of loss, and the still further defense that no payment would have been made, if the proof had been furnished, because the appellee was not the owner in fee of the property insured.

deems essential to an adjustment, the insured may assume, until notified to the contrary, that additional notice and proofs are not required. *American C. Ins. Co. v. Sweetser*, 116 Ind. 370.

Where an insurance company forwarded blanks for proofs of loss, and the president of the company promised to pay the loss, all defenses are thereby waived except that of power and authority to make the contract of insurance. *Eddy v. Merchants M. & C. Mut. F. Ins. Co.* (Mich.) 49 N. W. Rep. 775.

An agreement to pay whatever appraisers would make as the amount due, as soon as the value was made, is a waiver of preliminary proofs of loss. *Snowden v. Kittanning Ins. Co.* 122 Pa. 502.

Where a policy taken out for the benefit of a mortgagee of the property insured contains the provision that the company, within sixty days after proof of loss, shall either pay the amount of the insurance or replace the property, or may, within fifteen days after statement of loss, notify insured of intention to rebuild or repair; and proof of loss was delivered by plaintiff to the company, and, more than sixty days before suit was brought, it delivered to defendant another proof of loss sworn to by the assured, and defendant remained silent,—it was a waiver of any defects in proof of loss. *Elliot Five Cent. Sav. Bank v. Commercial U. Assur. Co.* 2 New Eng. Rep. 538, 142 Mass. 142.

Receiving proofs of loss after time limited.

Receipt of proofs of loss after time limited in 7 L. R. A.

policy is a waiver of the condition. *Commercial U. Assur. Co. v. Hooking*, 6 Cent. Rep. 915, 115 Pa. 407; *Martinson v. North British & M. Ins. Co.* 7 West. Rep. 637, 64 Mich. 372; *Carpenter v. Continental Ins. Co.* 61 Mich. 636; *German F. Ins. Co. v. Grunert*, 113 Ill. 68; *Titus v. Glens Falls Ins. Co.* 81 N. Y. 419; *Gane v. St. Paul F. & M. Ins. Co.* 43 Wis. 109.

Deficiencies in proofs of loss are waived if the insurance company, on receiving the proofs, instead of pointing out the deficiencies, refuses to pay the loss, placing its refusal on the ground of a breach of a condition in the policy prohibiting a vacancy of the buildings insured. *Continental Ins. Co. v. Ruckman*, 127 Ill. 364.

Waiting forty-five days before claiming that there is a defect in proofs of loss furnished is a waiver of a defect in the description of other policies. *Jones v. Howard Ins. Co.* 28 N. Y. S. R. 844.

Imposing conditions to impede or hinder.

Where assured did all they possibly could in perfecting the proofs of loss and an express purpose to embarrass and hinder them by imposing blind conditions in the hope of being able to legally reject the proofs, appeared from the letters of the company, it was for the jury to determine whether the omission of a signature was excused and the proofs sufficient; and if they so found, it would not invalidate the policy. *Martinson v. North British & M. Ins. Co.* 7 West. Rep. 637, 64 Mich. 372.

The general doctrine in regard to such conduct on the part of insurance companies can be well applied in this case: The preliminary proof of loss "will be excused on the ground of waiver by the insurers, if their conduct is such as to induce delay, or to render the production or correction useless or unavailing, or as to induce in the mind of the insured a belief that no proofs will be required." May, Ins. § 468.

It appears from the application made by the appellee that the building insured stood on a tract of land containing 224 acres, and, in the answer propounded to a question as to the title, he stated that he was the fee-simple owner, or rather the unconditional owner, of the entire tract. Whether any difference exists in a case like this in the meaning of the words "the owner in fee" and "the unconditional owner" is not necessary to determine; and, in considering the question of title, the case will be disposed of as if the appellee had represented to the agent that he was the owner in fee of the entire tract of land. He in fact owned but one fourth of the whole tract in fee, with a life estate in remainder, but was then claiming a fee in the whole,—the sole question being involved in a litigation, then pending, as to the extent of his interest in the remainder, he claiming a fee, and the children of his wife by her first husband insisting that he had a life estate only. The agent, or rather Gullion, who was a sub-agent of the local agent, with whom the appellee made the contract, was fully cognizant of all the facts.

It is said, however, that this subagent was not employed by the Company, but by the local agent, without any authority from the Company to appoint him, or to conduct its business in that mode. This is doubtless the fact of the record; but the appellee, nevertheless, had not imposed on the Company by perpetrating an actual fraud, but made his representations to one whom he believed was the agent, and who knew the condition of the title. So

neither Davis nor the agent of Davis was imposed on by the appellee; but, the Company ignoring the authority of Gullion, the case must be determined on the materiality of the representation made as to the title, and its effect on the Company. So we find the appellee the owner of one fourth of the entire land in fee, and a life estate in the balance, living on the land, and in a building erected out of his own means, and necessary, and we might say indispensable, as a habitation for himself and family. He is a tenant in common of the whole tract, and the dwelling insured (built at his own expense, or remodeled) was an old one that was valueless, that cost him \$2,000. It is not pretended that the land cannot be divided so as to include the improvement made by the appellee, and allot to him that portion of the land where he has lived since the year 1864. He was the owner in fee of the one-fourth interest, and in good faith believed that he held the fee to the whole tract, but this court held otherwise in the case of *Peak v. Wigginton*, 10 Ky. L. Rep. 922 (decided at the last term).

It is manifest that in a division of this land the building would have been assigned to the appellee without estimating its value. The old building was worthless, and the entire expense incurred by the appellee in remodeling it, and the fact that the title is not purely legal, is no argument against this recovery. There was no incumbrance on this one-fourth interest, or litigation in regard to it; and, the tenant in common having the right to improve the land, and to erect such buildings as would enable him to live on it, if the other tenants get their part of the land in its unimproved state, without regard to the improvements made by their cotenant, no one will be heard to complain. The improvements in such a case, as was held in *Nelson v. Clay*, 7 J. J. Marsh. (Ky.) 139, "will be assigned in the partition to the tenant making them."

It certainly would constitute no defense on

Where offer of proofs would be in vain.

An unqualified refusal to pay a loss, based upon facts within the company's knowledge, and made under such circumstances as to justify the insured in believing that the rendition of proofs would be a vain act, and that they would not be examined, is equivalent to an express agreement of waiver, even though the obligation to make such proofs is imposed by statute as well as by contract. *Boyd v. Cedar Rapids Ins. Co.* 70 Iowa, 325.

Waiver of proof of loss will be inferred exclusively from recognition of liability, or denial of obligation for other reasons. *Lebanon Mut. F. Ins. Co. v. Erb*, 2 Cent. Rep. 733, 112 Pa. 149.

Where an insurer denies all liability for loss on the ground that there has been no insurance, and the policy, if it has been issued, is void, it cannot insist upon a strict compliance with the terms of the policy as to the manner of making proofs of loss. *Campbell v. Am. F. Ins. Co.* 73 Wis. 300.

When the insurance company, on being notified of a loss, at once offers to pay a specific sum, denying liability for some of the articles as not being covered by the policy, this is a waiver of the preliminary proof of loss, and authorizes the insured to sue at once, without waiting for the lapse of sixty days provided for in the policy. *Commercial F. Ins. Co. v. Allen*, 80 Ala. 571.

Refusal to pay a policy solely on the ground that the insured has no title to the premises is a waiver. 7 L. R. A.

of objections as to the proof of loss. *German Ins. Co. v. Gueck* (Ill.) 6 L. R. A. 335.

If an insurance company, repudiating its contract, refuses to renew a fire policy, it is not necessary to make proof of loss as required by the policy. *Gold v. Sun Ins. Co.* 73 Cal. 216.

What not a waiver of proofs.

The fact that local agents of an insurance company, who are not shown to have had any authority to adjust or agree to pay a loss, promised the insured that his loss would be paid, is no waiver of proofs of loss. *Von Gensechtin v. Citizens Ins. Co.* 75 Iowa, 544.

A letter to a person insured, advising her of her right to reopen the matter and make proofs of loss, informing her what must be established thereby, cannot be held to waive proofs of loss. *Welsh v. Des Moines Ins. Co.* 77 Iowa, 376.

A stipulation in a fire insurance policy, that the insured must, after a loss, forthwith give notice thereof, and that he must, as soon after as possible, render a sworn account of the loss, is material and imperative, unless waived; and the mere silence of the insurer after loss is not a waiver of the notice or of the sworn proof. And the notice will not suffice both for itself and in place of the sworn proof required, and it may be waived without waiving the sworn proof. *Central City Ins. Co. v. Oates*, 88 Ala. 558.

the part of the appellant if, instead of a conveyance of record, the appellee had only a bond for title, with all the purchase money paid. The representation as to the title to the entire tract was not fraudulent, but made in the best of faith; nor was it material to the risk, because the appellee was entitled to his one-fourth interest in fee, including the dwelling insured. The appellee was the unconditional owner of this dwelling, and the ground upon which it stood, free of any incumbrance; and the fact that he did not own the entire tract, although he may have so stated, could in no manner have affected the rights of the Insurance Company, or misled its agent when taking the risk; and no court, it seems to us, should hold that the fee was not in the appellee for the reason that partition had not been made.

It is further claimed that the dwelling was not of the value placed upon it by the insured. The testimony on his part shows that the building cost him \$2,000, and the valuation, at best, is a mere matter of opinion, as is evidenced by the conflicting statements of witnesses in this

case; and therefore, unless there is proof showing that the insured has purposely fixed a high estimate upon his property, with a view of obtaining that to which he is not entitled, the mere expression of an opinion as to value, in the absence of bad faith, cannot be held to be either defective or fraudulent.

Under the Statute of February 4, 1874, neither representations nor warranties affect the right of recovery, unless "material to the risk, or fraudulent;" and where the property belongs to the insured, or, if a joint owner, and, between him and his co-tenants, he is entitled to the property insured, the mere fact that there has been no partition, or a partition without a conveyance, if otherwise free of incumbrance or lien, will constitute no defense by the Company. The best of faith has been shown in this entire transaction, on the part of the appellee towards the appellant, and there is no reason, upon any principle of law, equity or justice, for relieving the appellant from its liability.

Judgment affirmed.

CONNECTICUT SUPREME COURT OF ERRORS.

Samuel E. MERWIN, Trustee in Insolvency
of the Estate of Elijah Gilbert,
v.

Sarah E. AUSTIN, *Appt.*

(....Conn.....)

1. A sole solvent surety for a hopelessly insolvent principal, on a debt that was due before the appointment of a trustee in insolvency, is entitled to set off his claim for payment of such debt against debts due from him to the insolvent, in a suit on them brought by the trustee, although the insolvency was not known when the debt became due and payment by the surety was not actually made until after the trustee was appointed.

2. A trustee of an insolvent, as a general rule, takes the estate subject to all outstanding equities.

(September 13, 1889.)

A PPEAL by defendant from a judgment of the Superior Court for New Haven County disallowing her claim to set off certain demands in an action against her by the trustee of an insolvent estate. *Reversed.*

The case is sufficiently stated in the opinion.

Messrs. Henry Stoddard and John W. Bristol, for appellant:

Where the defendant has, either in law or in equity or in both, a counterclaim or right of set-off against the plaintiff's demand, he may have the benefit of any such set-offs or counterclaims by pleading the same as such in his answer, and demanding judgment accordingly. *Rev. 1888, §§ 876, 877. See Norwich Printing Co. v. Kloppenberg, 50 Conn. 801.*

The general doctrine that in an action at law, and without recourse to equitable principles, the debt to be set off must be due at the com-

NOTE.—Surety, paying debt of principal; rights of.

When a surety has actually paid or satisfied the obligation of the principal or any part thereof, he is entitled to be reimbursed by the principal debtor; he is entitled to the creditor's place by substitution. *Smith v. Rice, 27 Mo. 506; Tiernan v. Woodruff, 5 McLean, 352; Pardee v. Van Anken, 3 Barb. 540; Elwood v. Delfendorf, 5 Barb. 413; Wood v. Jefferson Co. Bank, 9 Cow. 206; Brown v. Williams, 4 Wend. 367; Cuyler v. Ensworth, 6 Paige, 32; Eddy v. Traver, 6 Paige, 521; Cheesebrough v. Millard, 1 Johns. Ch. 414.*

Entitled to relief in equity.

Courts of equity administer relief in favor of sureties whenever they can. *United States v. Aborn, 3 Mason, 128.*

Jurisdiction in equity extends to all those who in reality stand in a position of suretyship toward principal debtors, *e. g.*, to a surety for a prior surety. *Dering v. Earl of Winchelsea, 1 Cox. Ch. 818, 1 Lead. Cas. in Eq. 120, 124, 134, 4th Am. ed.; Craythorne v. Swinburne, 14 Ves. Jr. 100; Hazelton v. Valentine, 118 Mass. 472, 479; Savage v. Winchester, 7 L. R. A.*

15 Gray, 453; Kontzky v. Meyer, 49 N. Y. 571; Townsend v. Whitney, 76 N. Y. 425; Harris v. Warner, 13 Wend. 400; Gahn v. Niemcewicz, 11 Wend. 312; Wesley Church v. Moore, 10 Pa. 273; Baxter v. Moore, 5 Leigh, 219; Butler v. Butler, 3 W. Va. 674; Hare v. Grant, 77 N. C. 203; Moore v. Young, 1 Dana, 517; Hamilton v. Johnston, 82 Ill. 39; Hearne v. Keath, 63 Mo. 84.

When a surety pays the debt of his principal he has a right to be substituted in the place of the creditor, as to all his remedies against the principal debtor and his estate. *Van Horne v. Everson, 13 Barb. 530.*

The equity of a surety to be subrogated to the rights which the creditor has against the principal debtor or his estate exists as well when the surety's property only is pledged as when he comes under a personal responsibility. *Royalton Nat. Bank v. Cushing, 53 Vt. 325.*

Equity requires cross-demands to be set off.

A court of equity recognizes the natural equity that cross-demands should be offset against each other and the balance only recovered, and acts upon

commencement of the action, is applied only when no occasion for the exercise of equity power exists.

Henry v. Butler, 32 Conn. 141.

It does not apply to a payment by a surety to a creditor, made after action brought.

Colebrook, Collateral Secur. § 226, p. 298, citing *Thompson v. McClelland*, 29 Pa. 475; *Beaver v. Beaver*, 23 Pa. 187; *Brittain v. Quist*, 1 Jones, Eq. 828; *Mattlingly v. Sutton*, 19 W. Va. 19.

Trustees in insolvency represent and stand in the place of the insolvent, and they have no greater rights, either at law or in equity, than the insolvent.

Palmer v. Thayer, 28 Conn. 245; *Gaylor v. Harding*, 37 Conn. 518. See also *Boston Type & S. Co. v. Mortimer*, 7 Pick. 187; *Marrett v. Equitable Ins. Co.* 64 Me. 587; *Donnell v. Portland & O. R. Co.* 76 Me. 37; *Farmers Bank v. Franklin Bank*, 81 Md. 404; *Boston & M. R. Co. v. Oliver*, 82 N. H. 172; *Strong v. Mitchell*, 19 Vt. 644; *Drake, Attachm.* § 688; *White v. Wiggins*, 32 Ala. 424.

Natural equity says that cross demands should compensate each other by deducting the less sum from the greater, and that the difference is the only sum which can be justly due.

Spurr v. Snyder, 35 Conn. 178; 2 Story, Eq. Jur. § 1438, p. 1766; *Clarke v. Hawkins*, 5 R. I. 219; *Paterson Bank Receivers v. Paterson Gaslight Co.* 23 N. J. L. 238.

The insolvency of Mr. Gilbert is sufficient to give jurisdiction and power in the courts to enforce an equitable set-off, which will be allowed, although the debt of the principal to the surety be not due.

Colebrook, Collateral Secur. § 226, pp. 292, 298, citing *Lindsey v. Jackson*, 2 Paige, 581; *Simpson v. Hart*, 14 Johns. 67; *Mattlingly v. Sutton*, 19 W. Va. 19; *Brandt, Sur.* § 196; *McKnight v. Bradley*, 10 Rich. Eq. 557; *Waterman, Set-Offs.* §§ 895, 896; *Pond v. Smith*, 4 Conn. 297. See *Coffin v. McLean*, 80 N. Y. 564; *Smith v. Felton*, 43 N. Y. 419; *Greene v. Darling*, 5 Mason, 207; *Chicago, D. & V. R. Co. v. Field*, 86 Ill. 270; *Fulkerson v. Davenport*, 70 Mo. 542; *Brewer v. Norcross*, 17 N. J. Eq. 225; *Morrow v. Bright*, 20 Mo. 298; *Raymond*

v. Green, 12 Neb. 215; *Tuscumbia, O. & D. R. Co. v. Rhodes*, 8 Ala. 206; *Wood v. Steele*, 65 Ala. 486; *Barney v. Grover*, 23 Vt. 391.

As Miss Austin is a surety, she has a surety's right to compel the principal to exonerate her and appropriate any amount due the principal in payment of her debt.

Colebrook, Collateral Secur. § 226, p. 298; *Nisbet v. Smith*, 2 Bro. Ch. 583, note A; 1 Story, Eq. Jur. chap. 7, § 827; 2 Story, Eq. Jur. §§ 730, 849; *Tyson v. Cox*, 1 Turn. & R. 395; *King v. Baldwin*, 2 Johns. Ch. 561; *Hayes v. Ward*, 4 Johns. Ch. 432; 8 Pom. Eq. p. 468; *Ardeco Oil Co. v. North American Oil & Min. Co.* 66 Pa. 381; *Norton v. Reid*, 11 S. C. 593; *Wooldridge v. Norris*, L. R. 6 Eq. 413.

When Miss Austin became surety for Mr. Gilbert at his request, in May, 1888, thereupon an indirect or implied contract of indemnity was created at that time.

Ward v. Henry, 5 Conn. 599; *Brandt, Sur.* § 177, p. 255.

The payment only fixes the amount of damages for which the principal is liable under his original agreement to indemnify the surety.

Brandt, Sur. § 177, p. 255; *Rice v. Southgate*, 16 Gray, 142; *Barney v. Grover*, 23 Vt. 391.

Messrs. John W. Alling and James H. Webb, for appellee:

Appellant could have no right of set-off for a claim not due at the commencement of the suit.

Henry v. Butler, 32 Conn. 140.

She would have owned no counterclaim, until she had paid the obligation.

1 Story, Eq. Jur. 12th ed. 499, b, c, d. See *Munger v. Albany City Bank*, 85 N. Y. 580; *Spaulding v. Backus*, 122 Mass. 553.

The trustee should recover according to his title, when it accrued.

Henry v. Butler, supra; *Finch v. Ives*, 28 Conn. 115; *Rhodes v. Seymour*, 36 Conn. 1.

The indefinite extension of the rule of set-off would offend the spirit of the Insolvent Law, both as to equality, and as to an early settlement of the estate.

First Nat. Bank v. Hartford L. & A. Ins. Co. 45 Conn. 39; *Tolle's App.* 4 New Eng. Rep. 482, 54 Conn. 521; *Nowell's App.* 51 Conn.

this principle in cases where the law cannot give a remedy in a separate suit in consequence of the insolvency of one of the parties. *Chicago, D. & V. R. Co. v. Field*, 86 Ill. 272; *Quick v. Lemon*, 105 Ill. 587; *Jackson v. Bell*, 81 N. J. Eq. 569. See *Gay v. Gay*, 10 Paige, 389; *Simpson v. Hart*, 14 Johns. 63; *Carson v. Carson*, 2 Met. (Ky.) 97; *Hughes v. McCoun*, 3 Bibb, 254; *Edmiston v. Baxter*, 4 Hayw. (Tenn.) 112; *Smith v. Field*, 6 Dana, 361; *Tuscumbia, C. & D. R. Co. v. Rhodes*, 8 Ala. 206; *Bettison v. Jennings*, 8 Ark. 287; *Ponder v. Cox*, 28 Ga. 305; *Payne v. Loudon*, 1 Bibb, 518; *Buckmaster v. Grundy*, 8 Ill. 626; *Raleigh v. Raleigh*, 35 Ill. 512.

Equity follows the law.

Equity follows the law on the subject of set-off, unless special circumstances occur, or peculiar equities exist, to justify the interposition of courts of equity for protection of the rights of parties. *Armstrong v. McKelvey*, 30 Hun, 212; *Jennings v. Webster*, 8 Paige, 503.

While, as a general principle, courts of equity follow the rules of law in enforcing set-offs, they 7 L. R. A.

exercise an original jurisdiction over the subject, and in cases of peculiar equity and under special circumstances will enforce a set-off in cases not within the letter of the statute. *Bathgate v. Harkin*, 59 N. Y. 538; *St. Matthew's Congregation v. Heise*, 44 Md. 480; 2 Story, Eq. Jur. § 1437; *Smith v. Felton*, 43 N. Y. 419; *Smith v. Donnell*, 9 Gill, 86; *Cawdor v. Lewis*, 1 Younge & C. (Exch.) 427; *Beasley v. Darcy*, 2 Sch. & Lef. 403, note; *Southeastern R. Co. v. Brogden*, 3 Maon. & G. 25.

The power of common-law courts to compel a set-off of judgments, upon motion, is based upon their supervisory power over their own judgments and suitors in their courts, and is governed by no fixed rules. While, in actions in equity, it is said that suitors may ask the interference of the court *ex debito justitiae*. *Zogbaum v. Parker*, 55 N. Y. 123.

A court of equity is not confined to the terms of the Statute of Set-Off, but can allow a set-off to be made in a case not within the Statute, where, from the peculiar circumstances of the case, justice cannot be obtained in a cross action. *Perry v. Chester*, 12 Abb. Pr. N. S. 127.

108. See also *Demmon v. Boylston Bank*, 5 Cush. 194; *Aldrich v. Campbell*, 4 Gray, 284; *Nelson v. Harrington*, 16 Gray, 189; *Spaulding v. Backus*, *supra*; *Backus v. Spaulding*, 129 Mass. 234; *Jones v. Wolcott*, 15 Gray, 541; *Howe v. Snow*, 3 Allen, 111; *Myers v. Davis*, 22 N. Y. 439; *Martin v. Kunzemuller*, 37 N. Y. 396; *Newcomb v. Almy*, 96 N. Y. 308; *Walker v. McKay*, 2 Met. (Ky.) 294; *Ex parte Smith*, 5 Ves. Jr. 295; *Bradley v. Angel*, 3 N. Y. 475; *Munger v. Albany City Bank*, *supra*; *Granger v. Granger*, 6 Ohio, 85; *Fuller v. Steiglitz*, 27 Ohio St. 355; *Harris v. Taylor*, 1 New Eng. Rep. 392, 58 Conn. 500; *Nichols v. Dayton*, 84 Conn. 65; *Olmstead v. Scutt*, 4 New Eng. Rep. 807, 55 Conn. 125; *Parsons v. Root*, 41 Conn. 161; *Stanisford v. Hide*, 1 Root, 397.

The claims, to be entitled to dividends, must be such as existed at the time the title to the property vested in the trustee for the benefit of the creditors.

1 Story, Eq. Jur. 12th ed. § 499, *b, c, d.*

Pardee, J., delivered the opinion of the court:

In May, 1888, Elijah Gilbert was indebted to the City Bank of New Haven by his note for \$5,000, for money loaned to and used by him. For his accommodation the defendant had signed the note as surety. On November 13 the bank notified the defendant that the note was overdue and unpaid, and that it should look to her for payment. On December 5 she orally promised the bank to secure the note by a mortgage, and on December 7 duly executed and delivered it. On December 10 Elijah Gilbert was adjudicated an insolvent upon a petition filed on December 6, and served on December 7, and the plaintiff was duly appointed trustee of his estate in insolvency. On January 22, 1889, the defendant, upon the demand of the bank, paid the note from her own money and now holds it as her property, as a claim against the estate of Elijah Gilbert. The estate is also indebted to her for the rent of a store to the amount of \$2,000.

The plaintiff as trustee complains that the estate has a claim against the defendant for money paid for to or her from time to time during the years 1887 and 1888; for an account on book, and upon a rent account, aggregating \$4,633.02, and asks for judgment. Gilbert had been insolvent during the entire year preceding the adjudication of his insolvency; but that fact was unknown both to him and to the defendant until the adjudication.

It is the claim of the defendant that so much of the sum of \$4,633.02, paid to and for her by Elijah Gilbert, as is necessary to pay the amount of \$2,000 due from him to her for rent should be so applied; or, if not so applied, that she should be permitted to set off the \$2,000 against the claim of the estate against her; and that she be allowed to set off such portion of the sum of \$5,000 which she has been compelled to pay to the bank, as is necessary to meet the balance.

The plaintiff denies the right of set-off. The superior court determined that the defendant is entitled to a set-off to the extent of \$2,000, the amount due from the estate to her for rent, but that she is not entitled to any set-off by reason of having paid the note for \$5,000 to the

City Bank. The defendant appeals from this denial of her right of set-off.

Upon November 13 the note for \$5,000, owned by the bank, made by Elijah Gilbert as principal and the defendant as his surety, being due and unpaid, she stood as the sole and solvent surety for a hopelessly insolvent principal upon a matured obligation; she owed a debt to the bank, and the bank had the right to compel instant payment. No circumstance was wanting to the certainty of her obligation to pay the amount of the note for the sole benefit of the insolvent principal. He having procured her suretyship for his own accommodation upon his implied agreement to save her harmless therefrom, it became his duty on November 13 to credit her upon his account with the amount of the note,—to so state the account as that he should be her debtor for a balance. He omitting to do this, it has been continuously her right since that day to ask a court of equity to compel him to do so. And, not only so, but to compel him to make such provision for the payment of the balance as would protect her from possibility of loss. For this purpose, in equity, she became, so far forth as he was concerned, the real creditor in a matured debt and could move in compelling him to instant payment. 1 Story, Eq. Jur. § 327, and cases there cited; 8 Pom. Eq. note to § 1417, p. 468; *Bishop v. Day*, 18 Vt. 88; *Ardesco Oil Co. v. North American Oil & Min. Co.* 66 Pa. 381; *Norton v. Reid*, 11 S. C. 593. And this even in the absence at that time of belief on her part that he was insolvent.

That she for a long time had been and then was the sole solvent surety for a hopelessly insolvent principal, is now made certain by judicial determination; certain that she then was under an obligation to the bank, for his sole accommodation, from which there could be no release except by payment. The right to relief in equity was in her, even if she did not know it; it rests upon the existence of the fact, not upon her knowledge of it. It has been in her continuously thence to the present; she has not released it; she has not forfeited it. In her answer she moves the court to enforce it; and her motion relates back to the first moment of the existence of the right; and that was prior to the acquisition of any right by the trustee; and his right is subject to her elder and stronger equity. For, while it is true that the trustee can exercise some rights which are not in the insolvent, such as the setting aside of preferences and the recovery of property conveyed in fraud of the rights of creditors, yet as a general rule he is entitled to have and do only what the insolvent could have had and done; must take the estate with the burdens placed thereon by him, with all outstanding equities against it.

In *Parsons v. Root*, 41 Conn. 161, the defendant was factorized by the plaintiff as the debtor of French & Nichols; at the time of service of the factorizing process Root owed them, but he then had an unperformed contract with them upon performance of which they would be indebted to him. He subsequently performed it, and they became his debtor. This court denied him the right of set-off of any part of this indebtedness for the reason that at the time of service of the garnishee process it was uncertain whether anything would ever be due to

him from French & Nichols. In effect, the court declined to make the possibility that he would complete a contract the basis of a set-off.

There is error in the judgment complained of. In this opinion the other Judges concurred.

Preston H. HODGES

o,

Edwin W. KOWING and Wife, *Appls.*

(...Conn....)

1. The signature of the vendor to a contract for the sale of real estate, which is otherwise sufficient, is not necessary in order to enable him to enforce it against the vendee.
2. An objection that a contract is void upon its face for uncertainty cannot be raised for the first time on appeal.
3. A contract to purchase of a man "his place" in a certain town, "containing fifteen acres more or less," sufficiently describes the property, where he resides on the premises and owns no other real estate in that town.
4. A remedy at law, in order to defeat a suit in equity, must be as complete and beneficial as the latter.
5. A suit by a vendor for specific performance of a fair contract for the sale of land cannot be defeated on the ground that there is a remedy at law.

(April 15, 1890.)

APPEAL by defendants from a judgment of the Superior Court for Fairfield County in favor of plaintiff in an action to enforce specific performance of a contract for the purchase of certain real estate. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. D. B. Lockwood and E. W. Seymour, for appellants:

The specific performance of a contract for the purchase of land, though possessing all the other jurisdictional requisites, will not be decreed if the plaintiff has adequate remedy at law, which is defined in *Wheeler v. Bedford*, 2 New Eng. Rep. 881, 54 Conn. 249.

See Rev. 1875, p. 418, § 5; *Meeker v. Meeker*, 16 Conn. 408; *Quinn v. Roath*, 37 Conn. 24; *Taylor v. Atwood*, 47 Conn. 509; *Stuart v. London & N. W. R. Co.* 1 DeG. M. & G. 721; *Webb v. Direct London & P. R. Co. Id.* 521; *Whitney v. New Haven*, 23 Conn. 681.

Such want of adequate remedy is a jurisdictional fact to be stated, proved and found before a decree of specific performance can be granted.

Dodd v. Seymour, 21 Conn. 478.

If it appears that there is adequate remedy at law, or that the contract is not equitable, reasonable, certain, on good consideration, consistent with policy, and free from fraud, suspicion or mistake, then the specific performance will not be decreed.

Bispham, Eq. § 364, p. 433; *Pickering v. Pickering*, 88 N. H. 400; *Huntington v. Rogers*, 9 Ohio St. 512; *Jones v. Newhall*, 115 Mass. 244; *Patterson v. Bloomer*, 85 Conn. 63; 5 Wait, Act. and Def. 763; *Hennessey v. Woolworth*, 128 U. S. 488 (32 L. ed. 500); *Pom. Spec. Perf.* 66.

This contract is not mutual within the meaning of that term as applied to the doctrine of specific performance. Here is no written contract on the part of the plaintiff to sell the land, as is required by the Statute of Frauds, nor any part performance to relieve the contract from the operation of said Statute. The part payment of \$100 has no such effect.

Pom. Spec. Perf. 149, 150, 159, 160, § 164; *Eaton v. Whitaker*, 18 Conn. 229; *Fry, Spec. Perf.* 2d Am. ed. § 286; *Benedict v. Lynch*, 1 Johns. Ch. 370; *Lawrenson v. Butler*, 1 Sch. & Lef. 13; *Bromley v. Jefferies*, 2 Vern. 415; *Bodine v. Glading*, 21 Pa. 50; *Duvall v. Myers*, 2 Md. Ch. 401.

The difference in the amount of land as represented by the plaintiff, and as in fact contained in the deeds, makes it inequitable to compel specific performance. A misrepresentation made by the vendor in a matter of substance, affecting the value of the estate sold, is a good defense to a suit for specific performance, although the vendor, as well as the vendee, was ignorant of its untruth.

Best v. Stow, 2 Sandf. Ch. 298; *Coles v. Bowne*, 10 Paige, 526; *Fry, Spec. Perf.* §§ 481, 482, 458; *Ainslie v. Medlycott*, 9 Ves. Jr. 13, 21; *Wall v. Studds*, 1 Madd. 80; *Harris v. Kemble*, 5 Bligh, N. R. 780, 751; *Cadman v. Horner*, 18 Ves. Jr. 10; *Clermont v. Tasburgh*, 1 Jac. & W. 112.

The contract must be fully understood from the writing itself without the necessity of resorting to parol proof.

Pom. Spec. Perf. 226, § 161; *Parkhurst v. Van Corilandt*, 1 Johns. Ch. 273; *Colson v. Thompson*, 15 U. S. 2 Wheat. 841 (4 L. ed. 253); *Carr v. Duval*, 89 U. S. 14 Pet. 77 (10 L. ed. 361); *Reed v. Hornback*, 4 J. J. Marsh. 377; *Ellis v. Deadman*, 4 Bibb, 467; *Kendall v. Almy*, 2 Sumn. 278; *Parrish v. Koons*, 1 Pars. Sel. Eq. Cas. (Pa.) 79.

Messrs. Wheeler & Curtis, for appellee.

The remedy of specific performance upon an agreement for the sale of land is mutual, and open equally to vendor and vendee.

Catheart v. Robinson, 80 U. S. 5 Pet. 276 (8 L. ed. 120); *Old Colony R. Corp. v. Evans*, 6 Gray, 30; *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400; *Richmond v. Gray*, 8 Allen, 25; *Hopper v. Hopper*, 16 N. J. Eq. 147; *Richards v. Green*, 23 N. J. Eq. 587; *Brooklyn Park Comrs. v. Armstrong*, 45 N. Y. 248; *Jenkins v. Fahey*, 73 N. Y. 355; *Bensel v. Gray*, 80 N. Y. 521; *Whitney v. New Haven*, 23 Conn. 624; *Goodale v. Hill*, 42 Conn. 317.

An action for the breach of a contract for the purchase of land is not as complete or ben-

NOTE.—Specific performance.

See notes to *Lindley v. O'Reilly* (N. J.) 1 L. R. A. 7; *Gassett v. Bogk* (Mont.) 1 L. R. A. 240; *Woodruff v. Woodruff* (N. J.) 1 L. R. A. 380; *Miller v. Cameron* (N. J.) 1 L. R. A. 554; *Middletown v. New-7 L. R. A.*

port Hospital (R. I.) 1 L. R. A. 191; *Close v. Stuyvesant* (Ill.) 3 L. R. A. 161; *Townshend v. Goodfellow* (Minn.) 3 L. R. A. 739; *Converse v. Hood* (Mass.) 4 L. R. A. 521; *Boggs v. Bodkin* (W. Va.) 5 L. R. A. 245; *Frame v. Frame* (W. Va.) 5 L. R. A. 323; *Tappan v. Albany Brewing Co.* (Cal.) 5 L. R. A. 423.

official a remedy as an action for the specific performance of such contract.

See *Munson v. Munson*, 80 Conn. 435.

All that the Statute of Frauds requires is a written promise by the party to be charged to buy or sell the land at certain terms.

Sage v. Wilcox, 6 Conn. 85; *Packard v. Richardson*, 17 Mass. 122; *Potter v. Tuttle*, 22 Conn. 515; *Old Colony R. Corp. v. Evans*, *supra*.

Where a party to a contract comes into court to seek the specific performance of such contract, against a party bound by a writing, the party before unbound, upon filing his complaint, puts himself under all the obligations of the contract, and the other party is enabled to enforce it. And thus the want of mutuality in the remedy fails to exist.

Richards v. Green, *supra*; *Snell*, Eq. p. 455; *Fry*, Spec. Perf. 2d Am. ed. § 297.

The land to which the contract related might be shown by parol evidence disclosing the circumstances of possession, ownership, situation of the parties, and their relations to each other and to the property at the time of the negotiations.

Mead v. Parker, 115 Mass. 415; *Hurley v. Brown*, 98 Mass. 548; *Atwood v. Cobb*, 16 Pick. 229; *Slater v. Smith*, 117 Mass. 97; *Nichols v. Johnson*, 10 Conn. 192; *Annan v. Merritt*, 18 Conn. 492; *Fish v. Hubbard*, 21 Wend. 652; *Robeson v. Hornbaker*, 3 N. J. Eq. 60; *Barry v. Coombe*, 28 U. S. 1 Pet. 640 (7 L. ed. 295).

General descriptions of land in memorandums are sufficient.

Hurley v. Brown, 98 Mass. 545; *Slater v. Smith*, *supra*; *Mead v. Parker*, 115 Mass. 415; *Nichols v. Johnson*, *supra*. See also *Atwood v. Cobb*, *supra*; *Smith's App.* 69 Pa. 474; *Colerick v. Hooper*, 3 Ind. 818; *Torr v. Torr*, 20 Ind. 122; *Waterman*, Spec. Perf. § 152; *Pom. Spec. Perf.* § 161.

The memorandum discloses all that is essential—the parties, the subject matter, the price, the terms,—and, when taken in connection with the situation and relations of the parties to the land and to each other, its certainty is beyond question.

Andrews v. Bell, 56 Pa. 849; *Nichols v. Johnson*, *supra*; *Annan v. Merritt*, 18 Conn. 478; *Grace v. Denison*, 114 Mass. 16; *Matteson v. Scofield*, 27 Wis. 671.

Proof of fourteen acres and a small fraction satisfies the statement that there were "about fifteen acres."

Weart v. Ross, 16 N. J. Eq. 290; *Winch v. Winchester*, 1 Ves. & B. 376; *Noble v. Googins*, 99 Mass. 232, and cases cited; *Morris Canal Co. v. Emmett*, 9 Paige, 168; *Johnson v. Taber*, 10 N. Y. 319; *Veeder v. Fonda*, 3 Paige, 97.

The words "more or less" should be construed to qualify representations of quantity, in such a manner that, if made in good faith, neither party should be entitled to any relief on account of deficiency or surplus.

Stebbins v. Eddy, 4 Mason, 414; *Jones v. Plater*, 2 Gill, 128; *Noble v. Googins*, *supra*.

An agreement for the sale of land shall not be defeated by reason of excess or deficiency in quantity, unless the excess or deficiency is so great as to raise a presumption of fraud, or to destroy the purpose of the sale.

Noble v. Googins, 99 Mass. 235; *Pom. Spec. Perf.* § 352.

7 L. R. A.

Beardsley, J., delivered the opinion of the court:

On the 17th day of August, 1887, the defendants entered into the following contract with the plaintiff:

Stratford, August 17th, 1887.

We agree to purchase of P. H. Hodges his place in Stratford, Conn., containing fifteen acres, more or less, for the sum of nine thousand five hundred dollars; to pay six thousand cash and three thousand five hundred on bond and mortgage for one year; to take title immediately, and possession on the first of January, 1888; and have paid him one hundred dollars on account.

Edwin W. Kowing,
Eliza Kowing.

No writing relating to the contract was signed by the plaintiff. The court below, upon the petition of the plaintiff, decreed that the defendants should specifically perform the contract, from which decree they appeal to this court.

They claim that under the Statute of Frauds the plaintiff was not bound by the contract, not having signed any memorandum of it, and hence that it should not, in equity at least, be enforced against them; and make this claim the ground of one of their reasons of appeal.

The Statute requires only that the written agreement shall be "signed by the party to be charged therewith." The defendants rely upon certain cases as authority for their claim, and among others upon the cases of *Benedict v. Lynch*, 1 Johns. Ch. 370, and *Lawrenson v. Butler*, 1 Sch. & Lef. 18.

Both of these cases are in accord with the claim of the defendants; but the former case is opposed to the numerous decisions in the State of New York on the same subject, and the latter case to nearly all the English decisions.

In the case of *Clason v. Bailey*, 14 Johns. 484, *Chancellor Kent*, after reviewing the New York decisions, says that "it is sufficient if the agreement is signed by the party to be charged." In the same opinion he reviews the English decisions up to that time, and adds: "There is nothing to disturb this strong and united current of authority but the observation of *Lord Redesdale* in *Lawrenson v. Butler*, 1 Sch. & Lef. 18, who thought that the contract ought to be mutual, and that if one party could not enforce it the other ought not."

The authority of *Lawrenson v. Butler* seems not to have been recognized in England. The more recent decisions in that country are referred to in 1 Benjamin on Sales, §§ 254, 255.

There is still some conflict in the decisions in this country, but the weight of authority is that the Statute of Frauds is satisfied by the signature to the contract of the party sought to be charged only, whether the suit to enforce it be at law or in equity, and whether it relates to the sale of real or personal estate. *Clason v. Bailey*, 14 Johns. 484; *McCrea v. Purmort*, 16 Wend. 460; *Richards v. Green*, 23 N. J. Eq. 536; *Old Colony R. Corp. v. Evans*, 6 Gray, 33; *Sutherland v. Briggs*, 1 Hare, 34.

We think that there is not sufficient ground for this reason of appeal.

Another reason of appeal is, "that the specific execution of the contract should not have been decreed because it is too uncertain to be

enforced, inasmuch as it could not be understood from the writing itself without the necessity of resorting to parol proof."

No objection seems to have been made to the contract when it was offered in evidence, and therefore the objection now made, that it is void upon its face, comes too late to be entitled to consideration. But the claim if seasonably made would have been unfounded.

The defendants do not specify in their reasons of appeal, or in their brief, the particulars in which they claim that the contract is deficient in certainty. We suppose their claim to be that the statement of the location of the land is too indefinite to satisfy the requirement of the Statute of Frauds. If the only description of the land had been "fifteen acres, more or less, in the Town of Stratford," there would have been force in this claim, though according to the decisions of courts of high authority such a description might have been applied to the land intended by it by extrinsic evidence.

In the case of *Hurley v. Brown*, 98 Mass. 545, the only description in the contract of the property agreed to be conveyed was "a house and lot on Amity Street." The court admitted evidence that there was only one house and lot on Amity Street which the defendant had a right to convey, and that the parties had been in treaty for the purchase and sale of it, and held that the subject matter of the contract might be thus identified. See also *Mead v. Parker*, 115 Mass. 418; *Robeson v. Hornbaker*, 8 N. J. Eq. 60.

In the present case the court finds that the plaintiff owned no other real estate in Stratford, and that the same was occupied by him as a homestead and residence. But we think that the description of the land in this contract is so definite as not to require a resort to extrinsic evidence to identify it, other than such as is always necessary to apply a description of real estate to the premises described.

The language of the contract is: "We agree to purchase of P. H. Hodges his place at Stratford, containing fifteen acres, more or less." The import of the word "place" in this connection is reasonably certain. Its popular and correct meaning, as thus used, is the place where one resides—his homestead. Webster's Dict.,—*in verbum*.

The court finds that the plaintiff told the defendants, before they signed the contract, that the place contained about fifteen acres, and that this statement was made in good faith. The defendants assign as a reason of appeal that "there was not about fifteen acres of land."

It is enough to say that the court does not find that there were not fifteen acres in the place, but evidently declined to make such a finding.

The defendants introduced the recitals in two deeds as evidence of the quantity of land in the place. One was the deed to the plaintiff of the land, in which was added to the description of the quantity of land the words "more or less," and the other was a conveyance of a small strip of the land to a railroad company, specifying the quantity conveyed. Except for the words "more or less" in the deed to the

plaintiff it would have appeared that there was a fraction of an acre less than fifteen acres in the piece.

The court, referring to this evidence, says: "There was no evidence as to the exact quantity of land except the recital in said deeds." It properly regarded those recitals as inconclusive evidence.

The remaining reason of appeal is that the plaintiff had adequate remedy at law. The defendants claim that the equitable jurisdiction of the courts in this State was restricted by the provision in the old Statute last found in the Revision of 1875, p. 418, § 5, that "courts of equity shall take cognizance only of matters in which relief cannot be had in the ordinary course of law;" and that that provision is still in force.

It is unnecessary to inquire whether that provision has not, as the plaintiff claims, been since repealed by the Practice Act passed in 1879, because, in our view, it did not have the restrictive effect claimed for it. A similar claim was made by the defendant in the case of *Munson v. Munson*, 30 Conn. 425, and the court says the provision referred to "is simply an affirmation of a well-settled rule of equity." The rule of equity is thus stated by Judge Swift: "It is a leading principle that equity will not interpose where there is an adequate remedy at law. It is not sufficient that there is a remedy, but it must be as complete and beneficial as the relief in equity." 2 Swift, Dig. chap. 1, § 1.

In the action at law for the breach of the contract the plaintiff could only recover the excess if any of the sum agreed to be paid for the land above its market value when the contract was to be performed. Such a remedy is manifestly inadequate, and courts of equity therefore hold, as a general rule, that when a contract for the sale of real estate has been fairly entered into, the party contracting to sell, as well as the party contracting to buy, is entitled to have it specifically performed.

The cases on this question are all one way. It is true courts of equity have, in the exercise of their discretion, refused to apply the rule in certain cases where it would be productive of hardship or inconvenience. The court did so in the case of *Whitney v. New Haven*, 23 Conn. 624. In that case the city had contracted to purchase from the plaintiff land and water rights for the purpose of providing a water supply, and afterwards voted to abandon the project contemplated by the purchase. The court dismissed the bill for a specific performance, but remarked as follows in their opinion: "As a general rule, where a purchaser of real estate can come into a court of equity to obtain a deed of it, the vendor can come there to get his money which was agreed to be paid; but the rule is not universally true, and should not be applied, we think, where it will do unnecessary mischief to one of the parties."

In the present case the contract appears to have been fairly made, and is subject to the general rule of equity.

There is no error in the judgment complained of.

In this opinion the other Judges concurred.

INDIANA SUPREME COURT.

Frank C. HESS, *Appt.*,

v.

Isaac LOWREY.

(.....Ind.....)

1. The death of one of two physicians sued as partners in an action for damages for unskillful treatment and the abatement of the action as to him does not abate it as to the survivor.
2. Declarations of a partner while he was engaged in the firm's business, although made in the course of a transaction on which an alleged liability of the firm is based, may be proved against the other partner.
3. Testimony of plaintiff in a suit against a physician as the surviving partner, in respect to the deceased partner's declarations while engaged in the business of the firm, is not inadmissible under Rev. Stat. 1881, § 498, making an interested adverse party incompetent to testify against an administrator as to matters in decedent's lifetime where judgment may be rendered against the estate.
4. The exhibition by plaintiff of an injured shoulder to the jury may be permitted in an action for unskillful treatment.
5. Evidence that a physician devotes a considerable share of his time to farming is admissible on the question of his professional skill.
6. Refusing an order for a private examination, by defendant's experts, of plaintiff, in an action for physical injuries, is not error when application is not made until after the close of plaintiff's evidence, and no reason is shown for the delay, especially where plaintiff offers to submit to examination before the jury or in the presence of his own experts.
7. A medical expert may be cross-examined by asking him whether certain statements are not made by authorities on the subject, and the statement may be read from a medical book in asking the question.
8. An objectionable instruction as to the credit and weight of the testimony of interested witnesses is not cause for reversal where there is no serious conflict between the appellant and any other witness, and nothing to show that it applied to him more than to the other party who also testified.

(January 7, 1890.)

APPEAL by defendant from a judgment of the Circuit Court for Fayette County in favor of plaintiff in an action to recover damages for the unskillful treatment of plaintiff's dislocated shoulder. *Affirmed.*

The case is fully stated in the opinion.

Messrs. Mellett & Bundy and Brown & Brown for appellant.

Messrs. T. B. Redding, Chambers & Hedges and Charles Roche for appellee.

Mitchell, Ch. J., delivered the opinion of the court:

This action was originally instituted by Isaac Lowrey against Luther W. and Frank C. Hess, to recover damages for an injury sustained to the person of the plaintiff, alleged to have been caused by the negligent and unskillful manner

in which the defendants, who were partners engaged in the practice of medicine and surgery, reset and treated the plaintiff's shoulder, which had been dislocated. Pending the action, Luther W. Hess died, and the case proceeded to judgment against his personal representative and surviving partner jointly. On appeal to this court, the judgment was reversed. *Boor v. Lowrey*, 103 Ind. 468, 1 West. Rep. 54*, 58 Am. Rep. 519, and *note*.

On the former appeal we arrived at the conclusion that, even though the action was in form *ex contractu*, since the principal or only damages sought to be recovered grew out of an injury to the person, the action would not survive against the personal representative of a deceased partner. *Hegerich v. Keddle*, 99 N. Y. 258; *Ott v. Kaufman*, 68 Md. 56, 10 Cent. Rep. 107.

The nature of the damage sued for, and not the nature of its cause, determines whether or not the action survives. *Cutter v. Hamlen*, 147 Mass. 471, 1 L. R. A. 429; 1 Chitty, Pl. 101.

The case is here on a second appeal, and the question is now presented whether or not, the action having been abated against the estate of the deceased partner, it can be prosecuted to judgment against the survivor. That each partner is the agent of the firm while engaged in the prosecution of the partnership business, and that the firm is liable for the torts of each, if committed within the scope of his agency, appears to be well settled. *Champlin v. Laytin*, 18 Wend. 407; *Trucker v. Cole*, 54 Wis. 539; *Fletcher v. Ingram*, 46 Wis. 191; *Taylor v. Jones*, 43 N. H. 25; *Schwabacker v. Biddle*, 84 Ill. 517; *Story*, Partn. §§ 107-166; 1 *Bates*, Partn. § 461.

"It follows from the principles of agency, coupled with the doctrine that each partner is the agent of the firm, for the purpose of carrying on its business in the usual way, that an ordinary partnership is liable in damages for the negligence of any one of its members in conducting the business of the partnership." 1 *Lindley*, Partn. 299.

Thus, in *Hyrne v. Erwin*, 23 S. C. 226, which was an action against two physicians for an injury resulting from the negligent and unskillful setting of a broken arm, it was held that the act of one within the scope of the partnership business was the act of each and all, as fully as if each was present, participating in all that was done, and that each partner guarantees that the one in charge shall display reasonable care, diligence and skill, and that the failure of one is the failure of all. It is contended, however, that if the appellant was liable at all, he was only liable jointly with his deceased partner, and that, the action having abated as to the deceased partner, the case falls within the rule that, where one or more of the joint plaintiffs or joint defendants dies, the action shall not thereby be abated, if the cause of action survives; but, if the cause of action is one that does not survive, then the death of either joint plaintiff or joint defendant abates the whole action. *Meek v. Ruffner*, 2 Blackf. 23; *Williams v. Kent*, 15 Wend. 300.

The general rule established by the cases is

that, where several persons jointly commit a tort for which an action in form *ex delicto* may be maintained, without reference to any contract relation between the parties, the plaintiff has his election to sue all or any one of those engaged in the wrongful act, even though the existence of a contract may have been the occasion, or furnished the opportunity, to commit the act complained of. But where the action is founded on a joint contract, and is in substance, whatever its form may be, to recover damages for a breach of the contract upon which the action is predicated, all those jointly liable must be sued, in case all are alive, and within the jurisdiction of the court. *Lou v. Mumford*, 14 Johns. 426; *Weall v. King*, 12 East, 452; *Whittaker v. Collins*, 34 Minn. 299; 1 Lindley, Partn. 482; Bish. Non-Contract Law, § 531; Chitty, Pl. 469.

In a case like the present, where the gravamen of the action is the breach of a contract, by the terms of which two persons undertook, as partners, to reset the plaintiff's shoulder, and to treat him with the skill and diligence ordinarily displayed by competent surgeons, and the action is not maintainable without referring to the contract, it may well be, even though the action be laid in tort, that the non-joinder of one of them would be ground for a plea in abatement. Collyer, Partn. § 721; Dicey, Parties, 455.

But a plea in abatement for nonjoinder of parties must, in order to be good, show that the person alleged to be jointly liable and not sued is living, and subject to the process of the court. *Dillon v. State Bank*, 6 Blackf. 5; *Wilson v. State*, Id. 213; *Bragg v. Wetzel*, 5 Blackf. 95; *Levi v. Haverstick*, 51 Ind. 236; *Ferguson v. Hagans*, 90 Ind. 88; Collyer, Partn. § 741; *Merriman v. Barker* (Ind.) 23 N. E. Rep. 992.

If, in an action against partners to recover damages for a personal injury growing out of the breach of a contract, it is necessary, as in ordinary actions *ex contractu*, to join all the partners, it must follow that upon the death of one, notwithstanding the action may abate as to the deceased partner, the rule applicable to ordinary actions upon contracts against partners must obtain. At the common law, the contract of partners was always treated as a joint agreement, but the firm creditors could not proceed against the estate of a deceased partner, because the death of one of the partners extinguished the contract as to him, leaving it in force as the separate engagement of the survivor. The legal remedy of the creditor was thereafter confined exclusively to the surviving partner, except as the common law was modified by statutes, or by the principles of equity. *Sherman v. Krentz*, 42 Wis. 83.

The right to sue for claims due the firm, as well as the liability to be sued for claims against the firm, devolved exclusively upon the surviving partner. *Meek v. Ruffner*, *supra*; *McLain v. Carson*, 4 Ark. 164; *Childs v. Hyde*, 10 Iowa, 294; *Emanuel v. Bird*, 19 Ala. 596; 2 Lindley, Partn. 665.

Upon the death of one partner, the creditor has a right to collect his claim at law from the survivor, or, if the cause of action survives against the personal representative, to proceed, in the manner pointed out by the Statute, against the estate of the deceased partner. 7 L. R. A.

Ralston v. Moore, 105 Ind. 243, 2 West. Rep. 747; *Kimball v. Whitney*, 15 Ind. 280; *Gere v. Clarke*, 6 Hill, 850.

If a partner dies pending an action against the firm, the death being suggested on the record, the action does not abate, but may proceed to judgment against the surviving partner unless the cause of action dies, not only as against the personal representative of the deceased partner, but as against the surviving partner also. Collyer, Partn. § 727; Pom. Rem. §§ 250, 251; Bates, Partn. § 1055; *Williams v. Kent*, *supra*.

When the damages sued for arise out of an injury to the person of the plaintiff, the cause of action dies with the person of either party; but the cause of action dies only so far as it affects the liability of the decedent, or his personal representative. Neither by the common law, nor under the Statute, does the cause of action die as to a surviving partner or defendant, who, as we have seen, remains liable for all claims against the firm. *King v. Bell*, 13 Neb. 409; 8 Wait, Act. and Def. 502.

While the members of the firm were all alive, each was liable *in solido* as principal, the firm being in law a single entity. Upon the death of one partner, his liability was extinguished, but the surviving partner, as the sole representative of the firm, continued liable. *Shals v. Schantz*, 35 Hun, 622.

It is only where the cause of action does not survive in favor of, or against either of, the joint plaintiffs or defendants that the death of one abates the whole action. If the action is, as doubtless it should be, regarded as a suit quasi *ex contractu* for damages, for an injury to the person occasioned by the breach of a joint contract, the death of one of the defendants simply severed the joint liability and extinguished the claim against the decedent, while it continued in full force as to the survivor. If the action is regarded as purely in tort, as where the injury is willful and intentional, then the liability of the defendants may be joint and several, and the death of one does not abate the action as to the other. Collyer, Partn. 6th ed. 1078, note.

The death of one partner in no wise affects the liability of the survivor, who, upon the happening of that event, becomes individually liable to make good the joint undertaking of both. Ordinarily, in actions *ex delicto*, where the liability arises from the misconduct or wrongful act of the parties, each is liable for all the consequences, and there is no right to enforce contribution; but this rule does not apply between partners, unless the liability resulted from a meditated or willful wrong, intentionally inflicted by the one seeking to enforce contribution. *Armstrong Co. v. Clarion Co.* 66 Pa. 218; *Pearson v. Shelton*, 1 Mees. & W. 504; *Jacobs v. Pollard*, 10 Cush. 287; *Acheson v. Miller*, 2 Ohio St. 203; *Bailey v. Bussing*, 28 Conn. 455; 4 Am. & Eng. Cyclop. Law, 12, 18; Lindley, Partn. 771.

That the cause of action died as to Luther W. Hess does not at all affect the question of the right of contribution between the survivor and his personal representative. The right of contribution grows out of the partnership relation, and rests upon the implied obligation of each partner to contribute his proportion to the

liquidation of all partnership liabilities, unless the liability arose out of an intentional tort, committed by the partner asking contribution. That the right of contribution exists, affords a persuasive reason for holding that the action may be maintained against the surviving partner.

From every point of view the conclusion follows that the cause of action did not die as to both partners because one member of the firm died, and that the proceeding to judgment against the survivor was not of itself erroneous. The court permitted the plaintiff to testify as a witness in his own behalf, as a matter of right, and to describe the acts and repeat declarations made to him by Luther W. Hess, deceased, while engaged in resetting his shoulder, and while treating him afterwards for the injury sustained. It is insisted that this testimony was improperly admitted, because the declarations were not made in the presence of the defendant, and for the further reason that the testimony falls within the prohibition of section 498, Rev. Stat. 1881.* The declarations were made by a partner while engaged in the business of the firm, and they were therefore admissible on the ground that the law implies an agency on the part of each partner to bind the firm in respect to transactions pertaining to the business of the firm, when the declarations are made during the progress of the partnership business to which they pertain. *Boor v. Lowrey*, 103 Ind. 468, 1 West. Rep. 548; *Williams v. Lewis*, 115 Ind. 45, 14 West. Rep. 825, and cases cited.

After some hesitation we have concluded that the testimony does not fall within the prohibition of the Statute. *Durham v. Shannon*, 116 Ind. 403.

As we have already seen, upon the death of Luther W. Hess the plaintiff's cause of action died, because extinguished as to the decedent. The only cause of action remaining was that which existed against the appellant; and, while the transaction with the decedent is incidentally involved, his estate is not concluded by the judgment in the present case. Even though the appellant may be entitled to enforce contribution from the estate, that right cannot be regarded as settled by this judgment.

It was not error to permit the plaintiff below to exhibit his shoulder to the jury. The jury were, after seeing the condition it was in, better able to apply the evidence of the witnesses. It is settled by the decisions of this court that evidence such as that complained of is admissible. *Indiana Car Co. v. Parker*, 100 Ind. 181; *Louisville, N. A. & C. R. Co. v. Wood*, 118 Ind. 544, 12 West. Rep. 303; *Hart v. State*, 15 Tex. App. 202.

It appeared at the trial that the plaintiff's shoulder had been reduced or reset principally by Dr. Luther W. Hess, the father of appellant. For the purpose of affecting the knowledge and skill of the surgeon who set the shoulder, the court permitted the plaintiff to prove, by the cross-examination of the appel-

lant, that his father was extensively engaged in farming at and prior to the time of the injury, and that he devoted a considerable share of his time to the management of several farms. The appellant complains that this evidence tended to prove that Dr. Hess was wealthy, and that it was therefore incompetent as tending to induce the jury to give enhanced damages. The evidence was not admitted for the purpose of showing the relative pecuniary condition of the parties. It would have been clearly incompetent for any such purpose. It was, however, entirely competent as tending to show that one who undertook to perform professional services requiring peculiar skill and knowledge, as well as constant study and close application, was devoting himself principally to some other avocation. After the plaintiff had closed his evidence in chief, and while the appellant was examining a medical expert as a witness, he asked the court to order the plaintiff below to submit to a private examination by the appellant's medical experts. The court refused to make the order, the plaintiff having offered to submit to an examination in the presence of the jury, or to a private examination on the next morning, or as soon as he could secure the presence of his own expert witnesses. It is undoubtedly true that the court may in its discretion, in a proper case, if application is seasonably made, require the plaintiff to submit his person to a reasonable examination, by competent physicians and surgeons, when necessary to ascertain the nature, extent and permanency of injuries; but where the application is not made until after the close of the plaintiff's evidence, and no reason is shown for the delay in making the application, it will not be error to refuse the order, especially where the plaintiff offers to submit to a private examination as soon as the attendance of medical experts on his behalf can be secured. *White v. Milwaukee City R. Co.*, 61 Wis. 536; *Miami & M. Turnp. Co. v. Bailly*, 87 Ohio St. 104; *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Iowa, 375; *Shaw v. Van Rensselaer*, 60 How. Pr. 143; *Shepard v. Mo. Pac. R. Co.*, 85 Mo. 629; *Atchison, T. & S. F. R. Co. v. Thul*, 29 Kan. 466, 10 Am. & Eng. R. R. Cas. 783; *Thomp. Trials*, § 859.

Complaint is also made that the court erred in admitting in evidence extracts from certain books or treatises on surgery. It does not appear that extracts from the books were read in evidence, or admitted in evidence as such. In the cross examination of a medical expert, the witness was asked whether certain statements were not made by certain writers on surgery, the statement referred to being read from a book held by counsel as part of the question. It is recognized as a proper method of cross-examination, in order to test the learning of a witness who testifies as an expert, to refer to books of approved authority upon the subjects under investigation. *Ripon v. Bittel*, 30 Wis. 614; *Conn. Mut. Ins. Co. v. Ellis*, 89 Ill. 516; *Pinney v. Cahill*, 48 Mich. 584; *State v. Wood*, 53 N. H. 484; *Rogers, Exp. Test.* §§ 181, 182.

*The material provisions of that section are as follows: "In suits or proceedings in which an executor or administrator is a party, involving matters which occurred during the lifetime of the decedent, where a judgment or allowance may be made or rendered for or against the estate represented by such executor or administrator, any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a competent witness as to such matters against such estate." [Rep.]

The opinion of a witness may be tested by a cross-examining counsel by reading from medical books. 2 Best, Ev. 882-884.

Medical books may be read to the jury, not for the purpose of proving the substantial facts therein stated, but to discredit the testimony of experts who refer to books as authority for or in support of their opinions. *Pinney v. Cahill, supra.*

Among other things, the court charged the jury that "the credit and weight that should be attached to the testimony of a witness depends upon his disinterestedness in the result of the suit and his freedom from bias or prejudice. Whenever a witness is lacking in any of these respects, it tends to a greater or less degree to weaken the force of his testimony." This instruction runs upon the very edge of propriety, and while it applies alike to the testimony of both parties, both having testified as witnesses, yet, if it had been pointed out to us, or if we could discover that there was any serious conflict between the

testimony of the appellant and any other witness on any material point, we should feel constrained to reverse the judgment. Instructions such as the one in question have so often been the subject of animadversion that courts should not put their judgments in jeopardy by putting such charges in the record. *Union Mut. L. Ins. Co. v. Buchanan*, 100 Ind. 63-82; *Dodd v. Moore*, 91 Ind. 522; *Woolen v. Whitacre*, 91 Ind. 503; *Cline v. Lindsey*, 9 West. Rep. 218, 110 Ind. 837, and cases cited.

Without in any wise approving the instruction, since it was general, and may have been as injurious to one side as the other, we cannot reverse the judgment in the absence of anything to indicate that it was especially applicable to the appellant. Some of the other instructions are subjected to criticism. We have considered the objections urged, and do not find them objectionable.

The judgment is affirmed, with costs.

Petition for rehearing denied February, 1890.

TENNESSEE SUPREME COURT.

Thomas PICKLE, *Appt.*,

v.

PEOPLE'S NATIONAL BANK of Shelbyville and John T. Muse.

(...Tenn....)

1. **The possession by a bank of a check** which is not indorsed does not raise a presumption that it was paid to the payee named therein, when such payment is denied by the payee, and the only other proof of payment is a custom of the bank to pay checks without indorsement only when presented by the payee.
2. **The acceptance of a check is necessary** in order to give the holder thereof a right of action thereon against the bank.
3. **The acceptance of a check**, so as to give a right of action to the payee, is inferred from the retention of the check by the bank, and a subsequent charge of its amount to the drawer, although it was presented by, and payment made to, an unauthorized person.
4. **The payee of a check which never came into his hands**, but which was paid to some person who had no right to collect it, or left with the bank to be credited to him and credit not given through mere oversight, by suing the bank upon it ratifies the receipt of the check from the drawer as if it had been received by his agent for his use and benefit.

(*Snodgrass and Caldwell, JJ., dissent.*)

(January 16, 1890.)

APPEAL by plaintiff from a decree of the Chancery Court for Bedford County in favor of defendants in a suit to recover the

amount alleged to be due upon a bank check. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. Cooper & Frierson* for appellant. *Messrs. Ivie & Ivie* for the defendant Bank. *Mr. Thomas R. Myers* for defendant Muse.

Lurton, J., delivered the opinion of the court:

This is a bill in equity to recover the sum of \$600, which complainant charges is due to him from either the People's National Bank or John T. Muse, both of whom are made defendants. The bill, in substance, alleges that Muse, being indebted to complainant in the sum of \$600, claims on the 26th of March, 1887, to have paid the debt in a check drawn by himself, against his account with the defendant Bank, payable to complainant or his order, and that the check had been paid by the Bank, and charged up against his account. The defendant Bank claims that the check was presented to it for payment by complainant in person, and that it was paid to him. Complainant charges that the check has never been paid to him, or to his order, or to anyone authorized by him. Upon these facts he prays for a decree against the defendants or either of them, as the law and facts may justify. The defendant Muse, in his answer, admits the indebtedness as charged, but insists that he has fully paid same by drawing and delivering his check for the sum of \$600 to complainant, and that the check has been paid by the drawee to Thomas Pickle, and charged up to the account of the drawer. The answer of the Bank ad-

NOTE.—Banks and banking.

See notes to *Richards v. Attleborough Nat. Bank* (Mass.) 1 L. R. A. 781; *Lewis v. Lynn Sav. Inst.* (Mass.) 1 L. R. A. 785; *Atlanta Nat. Bank v. Burke* (Ga.) 2 L. R. A. 96; *Philadelphia Nat. Bank v. Dowd* (N. C.) 2 L. R. A. 480; *Manufacturers Nat. Bank v. Continental Bank* (Mass.) 2 L. R. A. 696; *Marshall v. 7 L. R. A.*

Farmers & M. Sav. Bank (Va.) 2 L. R. A. 534; *Freeman v. Citizens Nat. Bank* (Iowa) 4 L. R. A. 422; *National Exch. Bank v. Gay* (Conn.) 4 L. R. A. 343; *Cutler v. American Exch. Nat. Bank* (N. Y.) 4 L. R. A. 328; *Harrison v. Harrison* (Ind.) 4 L. R. A. 111; *Fowler v. Bowery Sav. Bank* (N. Y.) 4 L. R. A. 145; *Schluter v. Bowery Sav. Bank* (N. Y.) 5 L. R. A. 541.

mits the drawing of the check by Muse, payable to Thomas Pickle or order, and claims that it was presented by the payee, and paid to him in person. It admits that the check has never been indorsed by complainant, but insists that it never required the indorsement of such a check when presented for payment by the payee in person. The officers of the defendant Bank do not in their depositions pretend to any memory as to the payment of this check. They prove that it was the rule and custom of the Bank to require the indorsement of all checks drawn against it where the check is payable to the payee or order, when presented for payment by one other than the payee, but that, when presented by the payee in person, they do not require his indorsement; that the check in question bears the bank stamp of payment as of March 28, 1887, and has no indorsement; and that, in view of their custom or rule, they would not have paid such a check to anyone but complainant, unless indorsed by him. They further insist that the possession of such a check raises a presumption that it was paid to the payee named in the check.

The possession of an order by the person upon whom it is drawn is *prima facie* evidence that the articles or money specified therein were delivered or paid according to the order. *Kincaid v. Kincaid*, 8 Humph. 17; 2 Daniel, Neg. Inst. § 1647.

This presumption is, however, rebutted by the positive and uncontradicted testimony of complainant that he in fact never did collect the check, or authorize anyone to collect it for him. We have considered all the circumstances relied on by the defendant as tending to support the presumption of payment to complainant in person, and are of opinion that the weight of proof is that the check has never been paid to complainant. The custom of the defendant Bank to pay such checks as the one now under consideration, to the payee, without his indorsement, is the occasion of this litigation. The contrary is the usage of commerce. Such a check, returned to the drawer when paid, and credited to his account, with the indorsement of the payee, would be a voucher for such payment in favor of the drawer against the payee. But, without such indorsement, it would not be evidence, as between drawer and payee, of such payment. 2 Daniel, Neg. Inst. § 1648.

The almost universal custom of business is to make checks payable to the payee or order, for the purpose of making the check a voucher for the payment; so the indorsement by the payee would furnish the banker very high evidence of payment in accordance with the direction of the drawer. A check drawn in favor of a particular payee or order is payable only to the actual payee, or upon his genuine indorsement; and, if the bank mistake the identity of the payee, or pay upon a forged indorsement, it is not a payment in pursuance of its authority, and it will be responsible. *Morgan v. State Bank*, 11 N. Y. 404; 2 Daniel, Neg. Inst. §§ 1618, 1668; *First Nat. Bank v. Whitman*, 94 U. S. 848 [24 L. ed. 229].

This brings us to the question as to whether complainant can recover upon this check as against the Bank. While the authorities are not agreed, yet the decided weight of opinion 7 L. R. A.

is that the holder of a bank check cannot sue the bank for refusing payment, in the absence of proof that it was accepted by the bank, or that it has done some other act equivalent to and implying acceptance. This has been the uniform view of this court. *Planters Bank v. Merritt*, 7 Heisk. 177; *Planters Bank v. Keese*, Id. 200; *Imboden v. Perrie*, 13 Lea, 504. In the latter case the reasons for this doctrine are forcibly stated and the authorities collated by Judge Turney. We are unable to see any reason for disturbing the rule as heretofore declared by this court, especially as the decided weight of authority is in accord with our decision. *National Bank of the Republic v. Millard*, 77 U. S. 10 Wall. 152 [19 L. ed. 897]; *First Nat. Bank v. Whitman*, 94 U. S. 848 [24 L. ed. 229]; *Carr v. Nat. Security Bank*, 107 Mass. 45; *Etna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82; *Seventh Nat. Bank v. Cook*, 73 Pa. 485; *Saylor v. Bushong*, 100 Pa. 23; *Purcell v. Allomong*, 22 Gratt. 742; *Bellamy v. Majoribanks*, 8 Eng. L. & Eq. 523.

Has there been any acceptance by the defendant Bank of the check in question? It is argued that the check, having been charged up to the account of the drawer, and returned to him, is tantamount to an acceptance. The authorities are not agreed as to the effect of such an act. The case of *National Bank of the Republic v. Millard* was the case of a payment made of a check upon a forged indorsement. It did not appear that the check had been charged to the drawer, and there was a judgment in favor of the Bank. *Mr. Justice Davis*, in delivering the opinion of the court, in speaking of the effect of such a charge, said: "It may be, if it could be shown that the Bank had charged the check on its books against the drawer, and settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the ground that the rule *ex aequo et bono* would be applicable; as the bank, having assented to the order, and communicated its assent to the paymaster, would be considered as holding the money . . . for the plaintiff's use, and therefore under an implied promise to him to pay it on demand." 77 U. S. 10 Wall. 137 [19 L. ed. 899].

In the subsequent case of *First Nat. Bank v. Whitman* the very question arose, when the court, through *Mr. Justice Hunt*, held that such a charge, having been made through mistake, and upon the assumption that it had in fact paid the check to one authorized to collect it, would not authorize the presumption of an acceptance and promise to pay it again. 94 U. S. 847 [24 L. ed. 281].

Upon the question of commercial law, we should be generally inclined to follow any well-settled line of decisions by the Supreme Court of the United States when the question was in this State *res integra*. This question can hardly be regarded as one of "commercial law," in the ordinary sense of the phrase. It is rather a question as to weight and sufficiency of evidence tending to prove an acceptance. We agree that the holder of a check, for want of privity, cannot recover upon the check against the bank, unless he can show an acceptance. The question presented is as to the weight to be attached to certain acts done by the Bank, and the inference fairly to be drawn from these

acts. Where a bank has negligently paid a check to an improper person, it would seem that, in good conscience, the true owner and payee ought not to be remitted to his action against a palpably insolvent drawer, for thereby he may lose his debt altogether. A legal principle, however, stands in the way, in that there is no privity between himself and the bank until the bank has assented to the order of the drawee requiring it to pay the holder of the check the sum of money named. The assent which is necessary before there is any contract relation between the holder of the check and the bank is what is meant by acceptance. This assent need not be by indorsement of "Good" across the check, or by any other particular words, either in writing or oral. The question of assent or acceptance is one of fact, and may be made out by any of the methods by which a fact is proven.

Did the defendant Bank assent to the directions of its customers to pay out of its funds on deposit the sum named in the check? If so, to whom did it assent to pay this sum? The answer is found by inspection of the check. If it assented to pay the check, it undertook and assumed to pay it to Thomas Pickle, or upon his order. Now, the facts which are relied upon as making out such an assent to the direction of the drawee of this check as to bring complainant into privity with the Bank are that it received and retained the check, and that it has charged the check to the account of the drawer, and settled with him, deducting the amount of the check. Now, when a bank certifies a check as "Good," it is not only authorized, but good banking would require that such check should be then charged to the account of the drawer, as so much of his funds which they have obligated themselves to pay upon that check. Of course, if the check is never paid, or is returned, the drawer would be credited. The debiting of this check to the account of the drawer would then mean only one of two things,—that the check has been paid as ordered, or that the fund is held subject to the demand of the payee. The bank must be taken to have assented to pay it as directed; that is, to the payee or his order. That it has assented to the payment of this check is, we think, to be inferred from the retention of the check when presented at its counter, and the subsequent charge of the check to the drawer. Upon this charge to the drawer we predicate its assent or acceptance. It had no right to charge it to the drawer, and to settle his account, unless it had either paid the check to the payee named in the check, or his order, or, having accepted the check, held the fund of the drawee subject to the demand of the payee. It has not paid the check. It must therefore be held to hold the amount of the check for the payee. It cannot escape this consequence by saying that what we have done in receiving the check, and in paying it, and in debiting to the account of the drawer, is all through mistake. That would be to suffer it to escape the consequences of its own mistake, by pleading its own negligence in answer to the natural inference from its reception and retention of this check, and its subsequent charge to the drawer might enable it to shelter itself behind the technical defense of want of privity; but, on the other hand,

it may result in the loss to complainant of his debt by remitting him to his action against his original debtor, whom he may be unable to coerce into payment. We think there is no inequity in holding the Bank to the inference that it has accepted this check, springing out of the fact that it has charged it up to the account of the drawer. This was clearly the view of *Mr. Justice Davis*, a great master in the law, as appears from his opinion in the *Millard Case*, *supra*. It has the support of the only other courts which have been called upon to pass upon this question,—the Supreme Courts of Pennsylvania and Ohio. *Seventh Nat. Bank v. Cook*, 73 Pa. 483; *Saylor v. Bushong*, 100 Pa. 23; *Dodge v. Nat. Exchange Bank*, 20 Ohio St. 234.

So *Mr. Daniel*, in his very learned work upon Negotiable Instruments, lends the support of his name to the view we have taken, saying: "There is no doubt that, if the bank pays a check upon the forged indorsement of the payee's or special indorser's name, the payee or such indorser may recover back the amount, if the check had been delivered to him, and the drawer may recover it back if he had not issued it." 2 *Daniel*, Neg. Inst. § 1663.

This brings us to the question as to whether the check was ever delivered to the complainant; for it is asserted that if there has been no delivery to him he has no such title to the instrument as will enable him to maintain a suit against the Bank. Whether this check was sent to complainant, and miscarried, and fell into the hands of a stranger, or whether it was left with the Bank to be credited to the complainant, who kept his account there, and by oversight this credit was not given, is all matter of conjecture. How this check ever reached the Bank we are unable, from the proof, to determine. All we can say is that we are satisfied that it never came into the hands of complainant. Someone undoubtedly received it from Muse. By suing the Bank upon this check, complainant may and does ratify the receipt of the check from Muse. It is as if it had been received by an agent for the use and benefit of the complainant. *Omnia ratihabitis retrotrahitur et mandato priori equiparatur*,—a subsequent ratification has a retrospective effect, and is equivalent to a prior command *Broom*, Legal Max. 676. "This is a rule," says *Mr. Broom*, "of very wide application. . . . 'No maxim,' remarks *Mr. Justice Story*, 'is better settled in reason and law than this maxim; . . . at all events, where it does not prejudice the rights of strangers.' *Fleckner v. Bank of U. S.* 21 U. S. 8 *Wheat.* 303 [5 L. ed. 631]."

As illustrative of the application of the rule, the author cites the case where the goods of A are wrongfully taken and sold. The owner may either bring trover against the wrong-doer or may elect to consider him as his agent, and adopt the sale, and bring an action for the price. *Smith v. Hodson*, 4 T. R. 211.

So, in another case it was said: "That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well established rule of law. In that case the

principal is barred by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority.' *Wilson v. Tumman*, 6 Man. & Gr. 242." Broom, Legal Max. 679.

The Bank is not prejudiced by this subsequent ratification, for it dealt with the check as the property of the complainant, and undertook to pay to him or his order. The effect of this ratification is simply to make the check the property of the complainant. It does not ratify the collection of the check by one whose act in receiving it is subsequently ratified, and agency to receive a check payable to order implies no authority to indorse it in the name of the payee, or to collect it without such indorsement.

In the case of *Dodge v. Nat. Exchange Bank*, a certificate of indebtedness by the government to Dodge was remitted by mail to the paymaster for a check. The mail was robbed, and the certificate presented by the thief to the paymaster, and a check demanded. The latter, without requiring proof of the identity of the holder of the certificate, paid a check payable to Dodge or order, and took up the certificate. The indorsement of Dodge was forged, and the check paid. Subsequently Dodge sued the bank, and recovered, the court holding that he might ratify the taking of the check for the certificate, and sue upon it as an accepted check. 20 Ohio St. 234. See, to same effect, *Graves v. American Exchange Bank*, 17 N. Y. 207.

The decree of the chancellor is reversed, and judgment for complainant against the Bank for the amount of the check, and interest from date of filing of bill, and all the cost of the cause.

Snodgrass, J., dissenting:

Disagreeing with the majority upon the merits of the question decided, and strongly opposed to the policy of refusing to follow the Supreme Court of the United States on this important banking and commercial question, I am constrained to express briefly my dissent. The exact question before us, as shown in the majority opinion, was decided adversely to it in *First Nat. Bank v. Whitman*, 84 U. S. 343 [24 L. ed. 229], in 1877, by the Supreme Court of the United States, without dissent by any member of the court. In that court, in the *Millard Case*, 77 U. S. 10 Wall. 152 [19 L. ed. 897], Judge Davis had doubtfully intimated that the bank might be liable to the payee of a check which it had improperly paid off to an unauthorized holder and charged to account of drawer, not, as the majority holds here, because such payment to an unauthorized holder is an acceptance and implied promise to pay the real owner or payee,—for this doctrine he repudiated,—but because of the charge to the drawer the bank might be liable to the payee for money had and received to his use. But this whole matter was the doubtfully expressed inference of argument, and was not even an affirmative dictum, which, least of all things, is entitled to serious consideration. Afterwards, when the exact question arose, with the *Millard Case* before it, cited in argument and referred to in the opinion, the court, on full consideration, unanimously held the bank not liable to suit on any

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ground. Judge Davis, who had made the dictum in the former case, it is true was not present, having just before resigned, but the other judges who made the decision were present, and all concurred in it.

The decision commands my most earnest approval; but there are additional reasons why I think it should be followed: *First*. It is the judgment of the highest court in the country on a general banking and commercial question, where the decisions should be treated as conclusive, as on such questions the Supreme Court of the United States follows no state construction. It is not "rather a question of the weight of evidence," as put by the majority, because we all agree that the check in the case before us was not paid to the payee, and, having determined that, we come to settle the question whether, upon this conceded condition of affairs, the payee can maintain suit against the Bank. *Second*. The decision should be followed because it is an original question in this State, so far as our cases go, and we should in such case, on such question, make our decisions conform to that of the United States, and thereby have but one rule applicable to our citizens. As it is, when our decisions conflict, ours, of course, can only be good as to a part of the litigation which may arise in the State, for, as to any litigants who may be carried into the federal courts by nonresidence and otherwise, the federal rule will be applied. So it will be in all cases where the national banks go into the hands of receivers, and have their affairs wound up in the federal courts, and in every case in which, by virtue of the situation of parties, or manner in which the question is involved, the federal courts have jurisdiction. Many reasons could be added, but they will suggest themselves. These are sufficient to indicate them, and outline the ground of dissent.

Caldwell, J., joins in this dissent.

E. W. COLE et al., Appts.,
v.

Joe HAND.

(....Tenn....)

One employed by a corporation on a monthly salary, who is part of the time on the road selling goods, making collections, etc., as a drummer, and the rest of the time working in a store shipping and receiving goods, moving and handling stock, etc., or making sales and collecting bills in the city, is a "clerk" within the meaning of the General Incorporation Act of 1875, § 11, making stockholders individually liable for moneys due "laborers, servants, clerks and operatives" in case the corporation becomes insolvent.

(January 21, 1890.)

APPEAL by defendants from a judgment of the Circuit Court for Davidson County in favor of plaintiff in an action to recover, under § 11 of the Act of 1875, from the stockholders of an insolvent corporation, the salary due an alleged clerk. *Affirmed*.

The facts are fully stated in the opinion.

Messrs. Gaines & Slemons, for appellants:
The remedy against the stockholder must be

strictly construed, because of the nonliability of stockholders at common law.

Woods v. Wicks, 7 Lea, 45

A book-keeper who worked by the year, and often acted as manager, is not a laborer, servant or operative, nor does he come within that category.

Taylor, Corp. §§ 782, 784, *note 2*, citing *Wakefield v. Fargo*, 90 N. Y. 218; *Jones v. Avery*, 50 Mich. 826.

A traveling salesman is not a "laborer" within the meaning of a provision that stockholders shall be individually liable for labor performed for the corporation.

Peck v. Miller, 89 Mich. 594.

A corporation aggregate cannot be an employee of another corporation within the meaning of a statute which makes the stockholders liable for debts due and owing laborers, servants, operatives and employes.

Dukes v. Love, 97 Ind. 841.

A president of a corporation is not a laborer.

England v. Daniel F. Beatty Organ & Piano Co. 3 Cent. Rep. 494, 41 N. J. Eq. 470.

As to who is a drummer, see—

Robbins v. Shelby Co. Taxing Dist. 18 Lea, 306; *Singleton v. Fritsch*, 4 Lea, 96, cited in *State v. Miller*, 93 N. C. 511, 58 Am. Rep. 469, and in *Ex parte Taylor*, 58 Miss. 478, 38 Am. Rep. 336.

It may be stated as a general rule that only those who perform menial or manual labor are within the class contemplated in the Statute.

Wakefield v. Fargo, 90 N. Y. 218; *Cook, Stock and Stockholders*, § 215, p. 206, *note 3*; *Adams v. Goodrich*, 55 Ga. 238; *Stryker v. Cassidy*, 76 N. Y. 50, 33 Am. Rep. 262; *Whitaker v. Smith*, 81 N. C. 840, 31 Am. Rep. 508; *Brockway v. Innes*, 89 Mich. 47, 38 Am. Rep. 848; *Pennsylvania & D. R. Co. v. Leuffer*, 84 Pa. 168, 24 Am. Rep. 189.

Words in the Constitution or Statute, which have a technical meaning, are supposed to be used in that sense; but if not, then in their ordinary sense or common acceptance.

In *Adams v. Goodrich*, *supra*, a laborer was held to be one who performs manual labor. See also *Hebner v. Chave*, 5 Pa. 115; *Pennsylvania & D. R. Co. v. Leuffer*, *supra*; *Aikin v. Watson*, 24 N. Y. 482; *Coffin v. Reynolds*, 37 N. Y. 640; *Stryker v. Cassidy*, *supra*; *Ericsson v. Brown*, 88 Barb. 390.

The labor Hand did was the incident, and not the principal, of his services. Hence he cannot recover.

Cook, Stock and Stockholders, p. 229; *Coffin v. Reynolds*, 37 N. Y. 643.

Chief Justice Shaw defines the word "operative" thus: "Probably the primary thought which the legislators had in mind was the wages due men and women, working in manufacturing, who receive their pay usually weekly or monthly."

Thayer v. Mann, 2 Cush. 371.

Mr. Percy D. Maddin, for appellee:

It is the laborers, servants and clerks who have no voice in the management of the company, who have nothing to do with its financial or business policy, who cannot say what contracts shall and what shall not be made, it is these who are under the direction and control of the superior officers and agents of the company that are protected.

The word "servant," in our legal nomenclature, has a broad significance, and embraces all persons of whatever rank or position who are in the employ and subject to the direction and control of another in any department of labor or business. Indeed, it may in most cases be said to be synonymous with "employé."

Wood, Mast. and S. p. 2.

There is no middle ground between restricting the operation of the Statute to day laborers and applying it to all persons employed in the service of the company who have not a different, proper and distinct appellation, such as officers and agents of the company.

Conant v. Van Schaick, 24 Barb. 98; *Coffin v. Reynolds*, 37 N. Y. 643; *Short v. Medberry*, 29 Hun, 40; *Sleeper v. Goodwin*, 67 Wis. 590; *Harris v. Norrell*, 1 Abb. N. C. 127; *Williamson v. Wadsworth*, 49 Barb. 298.

Folkes, J., delivered the opinion of the court:

This is an action at law to recover of the defendants individually the wages claimed to be due plaintiff by the Nashville Plow Company, an insolvent manufacturing corporation chartered under section 11 of the General Incorporation Act of 1875. Under the case as made in the record, the only question presented is whether the plaintiff, who was a traveling salesman or drummer in the employ of the company, can claim the benefit of said Act, as being one of the persons in favor of whom the Legislature has given an individual right of recourse over upon the stockholders. Section 11 of said Act provides for the creation of mining, quarrying and manufacturing companies, and contains this clause: "The stockholders are jointly and severally liable, individually, at all times, for all moneys due and owing to the laborers, servants, clerks and operatives of the company, in case the corporation becomes insolvent."

The proof shows that for a salary of \$100 per month, payable as wanted, the plaintiff had been on the road for about twenty-three weeks, and at the factory fourteen or fifteen weeks, during the time of his employment, being out and in alternately, and for varying periods as directed and required by the company; that while on the road he sold goods by sample or photograph, made collections, settled claims and generally did any and every thing which is understood to be within the duties of a drummer working on a salary, subject to the direction and control of the general manager of the company. When not on the road, he worked in the store, shipping and receiving goods, moving and handling stock, etc. He also made sales in the city, and collected bills, when so instructed. There is due him salary for five and four-fifths months, during which time he was on the road and at the factory, about half each. Does this character of employment and service bring him within the benefit of the clause of the Act above quoted?

While there is no doubt of the power of the Legislature to impose this increased liability upon the stockholder, when it is done in the Act creating the corporation, yet, being in derogation of the common law, such statutes, so far as concerns such liability, are to be strictly construed. They are a wide departure from established rules, and, though founded

upon considerations of public policy and general convenience, are not to be extended beyond the plain intent of the words of the Statute, as said by Mr. Cook in his work on Stock and Stockholders, § 214. Again, this author says, in speaking of the statutory liability of stockholders for debts of the corporation due its servants or laborers: "There has been difficulty in determining what persons are to be classed as 'servants,' but the courts are not inclined to give a broad application to the word." § 215.

It must also be borne in mind that while the Legislature has in such Acts manifested a purpose to guard and protect the wages of a certain class, it does not follow that the class should be extended by any liberality of construction, so as to include persons not named. The court should be slow to enlarge the class by any latitudinous construction, not only upon the consideration above stated, but for the further reason that the Legislature is not to be presumed to place unnecessary burdens upon the corporations of its creation. They serve a most valuable purpose in developing and building up the resources of the State. By means of the aggregation of capital, they are able to accomplish great and much-to-be-desired benefits to the public, which individual means and effort would be unable to achieve. With these general principles to direct us, we are to ascertain, as each case arises, what employé is or is not within the language of the Act. In arriving at a satisfactory conclusion, we find but little aid and comfort from the adjudged cases from the courts of other States, the same language receiving very different construction at the hands of different courts, of equally high authority, as a citation of some of them will show.

The following persons have been held not to fall within the terms "servant" or "laborer": the secretary of a manufacturing company (*Cuffin v. Reynolds*, 87 N. Y. 640); a civil engineer (*Pennsylvania & D. R. Co. v. Leuffer*, 84 Pa. 168); a consulting engineer (*Ericson v. Brown*, 38 Barb. 390); an assistant engineer (*Brookway v. Innes*, 39 Mich. 47); an overseer on a plantation (*Whitaker v. Smith*, 81 N. C. 340); a book-keeper and general manager. *Watefield v. Fargo*, 90 N. Y. 213.

These cases seem to rest upon the idea that the terms named have reference only to persons who perform menial or manual labor, or, rather, to persons whose chief employment is to perform such labor, and not to embrace the higher class named in the authorities just cited, although each of the persons named did perform more or less of manual labor, as incidents to their employments. On the other hand, a master mechanic or machinist employed by the year was held to be embraced under a statute protecting clerks or laborers. *Sleeper v. Goodwin*, 67 Wis. 500.

But without further naming the cases, we refer the curious to note 1 to § 215, Cook, Stock and Stockholders, where a number of cases are to be found.

The Statute under consideration, as we have seen, uses the words "laborers, servants, clerks, operatives." We do not deem it necessary to define the terms "laborer" or "operative," as it may be said to be clear, under the

principles of construction that are to govern us, that they do not include the traveling salesman on a salary of \$100 per month. Whether he would be embraced under the term "servants," it would be difficult to say. He would be, if we were at liberty to accept the term in its broadest sense, as defined by Mr. Wood in his work on Master and Servant, viz.: "The word 'servant' in our legal nomenclature has a broad significance, and embraces all persons of whatever rank or position, who are in the employ, and subject to the direction or control, of another, in any department of labor or business. Indeed, it may, in most cases, be said to be synonymous with 'employé.'" § 1.

That it is, however, not used in that sense in the Statute, is shown by the fact that other terms are used, which would be altogether unnecessary and idle, if it were meant to be synonymous with "employé." We would have no room for the words "laborer, clerk" or "operative."

Webster defines "clerk," as "an assistant in a shop or store who sells goods, keeps accounts," etc. Bouvier says he is a person in the employ of a merchant, who attends to any part of his business, while the merchant himself superintends the whole; or a person employed in an office to keep accounts or records. Rapalje says: "In business law, an assistant employed to aid in any business, mercantile or otherwise, subject to the advice and direction of his employer." Rapalje & L. Law Dict. 219.

That "clerk" embraces and includes "salesman," seems beyond all doubt. If the term includes the salesman who remains in the shop or store, we can see no reason why it does not include the salesman on the road under like terms of employment. Each makes sales, collects accounts, handles goods and acts under the instruction of the employer.

It is worthy of note that the Act of 1875, chap. 143, "To Provide for the Organization of Corporations," creates an individual liability upon the stockholders to employées in different companies in different language, and some of the corporations created are left without any provision at all on the subject. Thus section 12 ("cotton compress and warehouse" companies) has the same provision that we have been considering for mining and manufacturing, viz.: "Laborers, servants, clerks and operatives." Section 18 (hotel companies). The terms are "laborers, servants and clerks." Section 21 (as to printing and publishing companies), the language is: "Journeymen for wages due, and all other servants and employées." Section 22 (as to transfer and omnibus companies), "To servants and agents." Section 24 (steamboat and packer companies), "To hands, and other employées"—while there is no provision at all on the subject as to railway, turnpike, telegraph, insurance or street railway companies, building associations, pawnbrokers, levees, banks or immigration and real-estate companies.

Whatever may have been the purpose of the Legislature in making these distinctions, they do not materially help us to a decision of the case in hand, and we have referred to it merely as a matter of interest in connection with the subject of statutory liability of stockholders, so far as concerns employées.

There was no error in the action of the circuit judge, and his judgment in favor of the plaintiff for the full amount of the wages or sal-

ary shown to be due by the corporation will be affirmed against the stockholders sued herein, with interest and costs.

MICHIGAN SUPREME COURT.

ATTORNEY-GENERAL

v.

Common Council of the CITY OF DETROIT.

(...Mich....)

1. That a law would necessitate the incurring of large expense cannot be alleged as a sufficient reason for not obeying its provisions if it is otherwise valid.
2. A Registration Law providing that for the next registration the inspectors of the last election shall act, and that they cannot act out of their own precincts, and which repeals all other Registration Laws, is inoperative where the Act provides for changing and increasing the number of the precincts in such a way that some would have more than their proportion of inspectors residing therein, some less and some none at all.
3. A constitutional provision which requires a residence in the town or ward of ten days only as a condition of voting is violated by a law which compels registration, and fixes the last day therefor on the fourth Monday of October, which in some years will be more than ten days before election day.
4. A law providing but five days only in the whole year upon which a person can be registered to qualify himself as a voter, requiring his personal application therefor, with no exception in case of his sickness or absence on these days, is unreasonable and void.
5. The Legislature cannot disfranchise

legal voters without their own fault or negligence in an attempt to prevent fraud.

6. A provision that naturalized voters in order to be registered must produce proper certificates of naturalization or declaration of intention or satisfactory evidence thereof other than the oath of the applicant, and which requires the name of the court in which such proceedings were had, and also the date thereof, to be proved, is unreasonable and void; especially where a person claiming to be a voter because native born may prove that fact by his own oath.
7. Male inhabitants residing in the State on the 24th day of June, 1835, being made voters in Michigan by the Constitution, although neither native born nor naturalized, a law which compels registration of voters, and provides only for native-born or naturalized citizens, is not valid.
8. No Registry Law is valid which deprives the elector of his constitutional right to vote, by any regulation with which it is impossible for him to comply.
9. Portions of an Act being declared unconstitutional, if it is apparent that the Legislature, had it foreseen this fact, would not have enacted the other portions of the Act, the whole Act must fall.

(December 23, 1889.)

PETITION for a writ of mandamus to compel the City Council of Detroit to comply with the terms of the Act of 1889, relating to the registration of voters, etc. On return to rule to show cause. *Writ denied.*

NOTE.—Elections; rights of voters to be registered.

The Legislature may require registration under reasonable restrictions, as proof of the possession of the qualifications prescribed by the Constitution, but the voter must have a right to prove himself to be an elector, register and vote, at any time prior to the closing of the polls on election day. *State v. Corner, 22 Neb. 205.*

Where an elector possessed the qualifications prescribed by the Constitution, he was vested with the right to vote; and it is not within the power of the Legislature to change, impair, add to or abridge that right in any manner. *Dells v. Kennedy, 49 Wis. 555; State v. Baker, 38 Wis. 71; Daggett v. Hudson, 1 West. Rep. 781, 43 Ohio St. 548; Page v. Allen, 56 Pa. 323; Edmunds v. Banbury, 28 Iowa, 237; Monroe v. Collins, 17 Ohio St. 603; White v. Multnomah Co. 13 Or. 317.*

Before an election is held, opportunity must be given to all persons entitled to register; and if this opportunity is denied, either purposely or by accident, it may vitiate the election, if it materially affects the result. *McDowell v. Massachusetts & S. Construction Co. 96 N. C. 514; Goforth v. Rutherford Co. Construction Co. 96 N. C. 535.*

An Act providing that no person shall be entitled to be registered as a voter within thirty days of naturalization is unconstitutional. *Kinneen v. Wells, 4 New Eng. Rep. 437, 144 Mass. 497.*

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A law which limits the voter to seven specified days within which to register is unconstitutional. *Daggett v. Hudson, 1 West. Rep. 780, 43 Ohio St. 548.*

So a statute which provides that an elector must be registered on one of four specified days is unconstitutional as making "a hindrance or impediment to the right of a qualified voter to exercise the elective franchise." *State v. Corner, 22 Neb. 205.*

In North Carolina a "qualified voter" is one who is not only eligible to vote, but who is also duly registered. *Smith v. Wilmington, 98 N. C. 343.*

The Statutes of North Carolina prescribe registration as an essential qualification. *Ibid.*

Under the North Carolina Registration Law, a voter who has been duly registered cannot be deprived of his right to vote; nor will he lose his character as a "qualified voter" by a failure to re-register, unless a new registration is made in pursuance of the plain requirements of the law. *Ibid.*

An elector lawfully registered in a municipality is entitled to vote there. *Gooding v. Brown, 22 Fla. 437.*

A statute which attempts to take from an elector of such town his constitutional right of suffrage is unconstitutional. *State v. Fitzgerald, 37 Minn. 26.*

Voters and elections, see notes to *Bloomer v. Todd (W. T.) 1 L. R. A. 111; Warren v. Board of Registration (Mich.) 2 L. R. A. 303; Bates v. Taylor (Tenn.) 3 L. R. A. 316.*

The case is fully stated in the opinion.

Messrs. Edwin F. Conely and William P. Wells, with Mr. Stephen V. R. Trowbridge, Atty. Gen., for relator, Mr. Fred A. Baker, with Mr. John W. McGrath, City Atty., for respondent.

Morse, J., delivered the opinion of the court:

At the last session of the Legislature an Act was passed, entitled "An Act to Preserve the Purity of Elections, and Guard against Abuses of the Elective Franchise, in the City of Detroit." This Act was approved by the governor July 1, 1889, upon which day it took effect and became operative. Local Acts 1889, p. 994.

The relator, in his petition, sets forth that the Common Council of the City of Detroit has neglected and failed to comply with the law, and still fails and neglects to do so, although well aware that the necessity of such compliance is reasonable and urgent; and that he believes that said Common Council intends to ignore the Act entirely, and that such body intends to hold the city election to take place in November, 1889, under the Registration and Election Laws in force before the passage of this Act, the same in every respect as if no such Act had been passed. The Attorney-General therefore asks that this court issue a peremptory mandamus to compel said Common Council to re-subdivide into election precincts or districts, containing each not more than 800 electors resident therein, such wards of the City of Detroit as may require it, under this Act, and to provide suitable and proper means for the registration of electors upon such subdivision or rearrangement as the circumstances may require.

The relator, from the records in the city clerk's office, makes a showing of the number of votes cast in each election district now existing in said City, sixty-one in number, at the November election in 1888. This showing, under the Act, would necessitate the creation of 68 additional precincts, making a total of 129. Section 1 of the Act provides "that, as soon as possible after this Act shall take effect, the Common Council of the City of Detroit shall by ordinance, if it shall appear that at the election held in November, 1888, or at the election held in April, 1889, more than 500 votes were cast in any election precinct, again divide the ward or wards in which such precinct or precincts may be, and establish new election precincts or districts therein, if necessary, or rearrange the same so that each precinct shall contain, as near as may be, an equal number of electors, no precinct to contain more than 800 electors resident therein; and as often as it shall appear, after any election thereafter held, that more than 600 votes had been cast in any election precinct, said precinct shall, within six months after said election, again be subdivided, or the precincts of the entire ward be rearranged and divided, so that each precinct shall contain 800 electors, as near as may be, resident therein." And section 2 provides that for the registration, as provided by the Act, to be held in 1889, the inspectors of election selected at the last election shall act, and hereafter four persons for each election precinct, respectively, residents and electors therein, shall be selected in the

manner now by law provided for the selection of such inspectors in said City, to act as a Board of Registration for such precinct, and such board shall elect one of its number as chairman. Section 3 constitutes these boards of registration election inspectors, and, in case of the unavoidable absence at any time of any member of the board, the remaining members may temporarily appoint another person to act in his stead until he appears. The remaining twenty-three sections of the Act relate to the manner and effect of the registration of voters, some of which sections will be noticed hereafter.

The Common Council of the City of Detroit, in answer to the order to show cause why the writ of mandamus should not issue to compel them to obey this law, say: "(1) That a compliance with the law would create in all 129 voting districts. The expense of such compliance for the approaching municipal election would be over \$23,000, and probably \$25,000. That the amount to be raised for this purpose upon the assessment and levy for taxes this year is but \$6,000. The Act was passed after such assessment and levy, and makes no provision for the expense attending and necessary to its execution. There is no money in the contingent fund of the City, and such expenses can lawfully be paid from no other fund. (2) There are at least 85,000 voters in the City of Detroit, of whom there are at least 5,000 foreign-born electors, who have taken out their naturalization papers, or declared their intention to become citizens, without the State of Michigan. That large numbers of persons so naturalized in other States have voted, from year to year, from five to forty years, within the City of Detroit, and their citizenship has been open and notorious, and their qualifications as electors conceded. That many of them have not now their citizenship papers, but the same have been lost or destroyed. In many instances it would be impossible to procure certified copies of the same, or any record evidence of their issue; but said electors are able to procure abundant evidence of the exercise of the rights of citizenship, and of electors. That under laws heretofore existing these men have been able to produce sufficient evidence of their rights as electors, but that the Act under consideration here practically disfranchises these, at least 15,000, people, who are in fact and in law qualified voters in said City. (3) That this law will also disfranchise a large number of electors, residents of Detroit, who do business outside of and away from said City, as such persons will necessarily be absent from the City during the days fixed by this Act for registration. (4) It will also disfranchise those persons who from sickness are unable to appear before the boards of registration on such days. (5) It will disfranchise those moving from one ward to another after the last day of registration, who are electors under the Constitution and general laws of the State as to qualifications of voters. (6) That there are at present five duly elected election inspectors in each of the present sixty-one election precincts. That for these reasons, and for other good and substantial reasons appearing upon the face of the law, the Act is inoperative, burdensome, unreasonable, unconstitutional and void."

Upon hearing and argument of this matter upon petition and answer, we, on the 11th day of October, 1889, denied the application for the writ. The reasons for so doing will now be stated.

The first objection, as to expense, we did not consider, as it could not be alleged as a sufficient reason for not obeying a valid law.

But a serious difficulty arises in the outset, as to the operation of this law. If we were concerned only with the question of dividing the wards of the City into election districts containing not more than 300 electors,—certainly a desirable thing,—there could be no hesitation in granting the writ; but the object of this Law is not simply to create voting districts when the electors shall not exceed this number, but it is a scheme for a new system of registration, and requiring that all persons not complying with the rules and regulations of such registration shall not be permitted to vote under any circumstances whatever, under heavy penalties. The machinery for the approaching municipal election is not provided by the Law, except as it undertakes to provide the same from the law now in force, and which it undertakes to repeal. By this neglect to provide for this emergency, we think the Act is inoperative. There are now 61 election districts, with five inspectors in each, making in all 305 inspectors. Under this Act there must be 129 districts. Under section 1 of the Act, by the statement of votes cast in November, 1888, found in relator's petition, there are but three wards—the Fourteenth, Fifteenth and Sixteenth—that will be undisturbed. In the other thirteen wards there are precincts in each that cast over 500 votes. These wards must be rearranged and subdivided, and 120 districts created, in all, therein. There are three precincts each in the remaining wards. An inspector cannot act out of his own precinct; and consequently forty-five of those now in office will remain in these three wards, as before. But of the remaining 260 inspectors who are to act in the 120 districts to be created, none of them can act out of the wards or precincts in which they live. As far as their duties as inspectors of election are concerned, there would be no trouble, as the people at the opening of the polls would have an undoubted right to fill all vacancies by election on the spot, or to create an entire new board, if there were no inspectors left in such precinct by the new division and arrangement of the ward. But it is different with such inspectors acting as a board of registration before election day. The authority to fill vacancies, or to create an entire new board of registration, must be found in the laws. There is no inherent right in the people to do it. This Law makes no provision for filling any vacancies in the inspectors acting under the present law. There are but 260 inspectors for 120 districts,—a fraction over two for each. It must necessarily happen that in the new subdivision of these wards some precincts will have more than their proportion residing within their limits, and some less, and some will have none. If any precinct should, in such division, be left without any inspectors residing within it, the inevitable result, under this Act, would be the disfranchisement of the

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electors of such precinct for want of registration. *People v. Koppelman*, 16 Mich. 342.

There is no provision in this Act providing for any such event, and, having repealed all other Registration Laws in the City of Detroit, there are no existing statutes to aid or remedy the difficulty.

But, in my view, the Law is unreasonable and void in that it undertakes to disfranchise a large number of voters through no fault of their own, and to make an unjust and unlawful distinction between the rights of native-born and naturalized citizens and electors. The Constitution authorizes the Legislature to enact laws "to preserve the purity of election, and guard against abuses of the elective franchise;" but this does not authorize, by direction or indirection, the disfranchisement, without his own fault or negligence, of any elector under the Constitution. Article 7, § 6.

The Constitution provides that "in all elections every male citizen, every male inhabitant residing in this State on the 24th day of June, 1835, every male inhabitant residing in the State on the first day of January, 1850, who has declared his intention to become a citizen of the United States, pursuant to the laws thereof, six months preceding an election, or who has resided in the State two years and six months, and declared his intention as aforesaid, and every civilized male inhabitant of Indian descent, a native of the United States, and not a member of any tribe, shall be an elector, and entitled to vote; but no citizen or inhabitant shall be an elector, or entitled to vote at any election, unless he shall be above the age of twenty-one years, and has resided in this State three months, and in the township or ward in which he offers to vote ten days, next preceding such election." There is also a provision as to electors in the army or navy, not necessary to be here recited. Article 7, § 1.

By this section of the Constitution it will be noticed that there are five distinct classes of persons who are made electors, and the only qualification to any of these classes is that the elector shall be of age, and have resided in the State three months, and in the township or ward where he offers to vote ten days, next preceding the election. It cannot be for a moment contended that by section 6 of article 7 the framers of the Constitution intended to give the Legislature the power to arbitrarily disfranchise any elector who is such under section 1 of the same article, or to make any difference between the rights of any of the classes of electors therein specified, or to put obstacles in the way to the ballot-box for one class, while the road is left open to another. The laws to regulate elections, and to preserve their purity, and to guard against abuses of the elective franchise, must be reasonable, uniform and impartial, and must be calculated to facilitate and secure, rather than to subvert and impede, the exercise of the right to vote. *Capen v. Foster*, 12 Pick. 448. Let us examine the Act before us. See Local Laws 1889, p. 994. The plan of registration under this Law is extensive and minute in its details. In this discussion we shall only concern ourselves with its general features and results. It provides that in the year 1889, and again in 1892, and every

fourth year thereafter,—striking, by design or accident, a presidential election year,—there shall be a new and complete general registration of voters in the City of Detroit. And it is made the duty of every elector to see that his name is registered in compliance with the requirements of the Law; and he shall not be deemed to have acquired a legal residence in the precinct unless he has so caused himself to be registered; “nor shall any ballot be received by the inspectors at any election, under any pretense whatever, unless the name of the person offering such ballot shall have been entered in the register of the precinct in which he claims to vote as herein provided.” Sections 3 and 4. The elector must personally apply to the board for registration, and such board “shall examine each applicant.” Persons who will be of age on election days, having the other qualifications of electors, may be entered on the register. “Every applicant, in the years when a general new registration is required, who has commenced to reside in such precinct, and who has resided therein at least two days,” if he be otherwise qualified, shall be entered on the register, and can vote on election day, if he has resided therein ten full days next preceding. Section 7. The meeting of these boards of registration for 1889, and for 1892, and every four years thereafter, is first to be held on the first Monday of October, at which time the board sits for four days, and also again one day, on the fourth Monday of October.

The law makes no provision for any other registration in the years of this new or general registration. In this year the fourth Monday of October came on the 28th, and the city election on the 5th of November, there being seven days between the last day of registration and election day; but whenever the month of October begins on Sunday, Monday or Saturday, more than ten days will ensue between the last day of registration and the day of election; and, as the Act requires that the elector must have actually resided in the precinct two days before his name can be entered on the registry book, this Act, in the years of general registration, will disfranchise every voter who has not resided in his ward nineteen or more days, in the precinct, before election day, whenever the month of October begins on either one of these three days. For instance, in 1888, October began on Monday. The fourth Monday was the 22d. The general election day was November 6, leaving fourteen full days between the last day of registration and election; and, adding the two days, every elector not residing within the precinct for sixteen full days before the day of election, under this Act, would have been deprived of his vote. This would be in direct conflict with the Constitution, which makes him an elector upon a residence of ten days. No such requirement as this is reasonable. There is no good reason why the boards of registration cannot sit within the ten days before election, and thereby preserve to each elector his constitutional right. Nor is this all. If the Legislature can make the residence twelve or sixteen days, it can make it a month, three months, or one year. This, in my opinion, cannot be done indirectly, under the guise of regulation, any more than it can be done di-

rectly, as a mere exercise of the legislative will. And no one will contend that the Legislature could prescribe by statute that a resident of the City of Detroit must reside in a precinct twelve days, sixteen days or a month, before his ballot could be legally taken on election day, in the face of the Constitution, which provides that he need reside therein but ten days.

But more unreasonable yet is this Act in that it contains no provision by which a person who is sick or absent on the days of registration can vote on election day. It may be said, with some show of reason, perhaps, that a person who is absent on the registration days is himself in fault, in not returning to his home, and complying with the regulations which the Legislature have a right to prescribe; but the man who is ill, and unable to attend the meetings of the board, but who is able to be out on the day of election, is deprived of his ballot, and for no good reason, that I can see. And neither do I think there is any necessity of disfranchising a large number of business men, who will be disfranchised unless they drop important business, and travel many miles to be registered some seven or more days before election. There are, under this law, but five days in the whole year that an elector can cause his name to be placed on the registry list; and this, unmistakably, by the provisions of the Act, he must do personally.

The language of the Supreme Court of Ohio, in speaking of a similar statute of that State, which was by that court unanimously declared unconstitutional, seems very appropriate here: “It will be seen by the above there are but seven [five] days in the year when voters can register. . . . There is no provision for registering at pleasure during the earlier part of the year, and no provision for proving his qualifications on election day, and voting.” And it is declared that “no vote shall be received at any election aforesaid unless the name of the person offering to vote be on the registry,” etc. A voter who is the oldest inhabitant of the ward, and an elector in it for the greater part of his lifetime, cannot vote if from absence, however necessary or unintentional, during the seven days, his name is not on the registry. Many absentees may get home to vote, and, if they were afforded opportunities during the year, might also register, whose right of suffrage must necessarily be lost under the Act. How many mechanics may be absent, pursuing their trades, during the seven days? A large number of persons will be away on steamboat and other sailing craft, and elsewhere, earning a support. A large number of students, a great many of the class usually termed ‘commercial travelers,’ will be away, perhaps planning their trips to be home on election day. A large number of citizens in government employ, at Washington and elsewhere, will be at their posts of duty, and may return to vote, but would hardly have the opportunity to return on a different day to register. Even the members of this court might be unable to register, without a decided detriment to the public business, and might be compelled to elect between the neglect of important official duties and the loss of suffrage.” *Daggett v. Hudson*, 43 Ohio St. 548, 1 West. Rep. 789.

There is no State in the Union that has ever

sustained a law like this, except Illinois. All of the Registration Laws that have been upheld by the courts of other States have contained some provision by which a sick or absent voter might not necessarily be disfranchised, excepting the Law of 1885 in Illinois. See *People v. Hoffman*, 116 Ill. 587, 8 West. Rep. 522.

In Massachusetts the board must be in session one hour on the day of election. *Capen v. Foster*, 12 Pick. 485.

In Iowa an elector unregistered, but otherwise qualified, is permitted to vote upon showing a proper reason for not having registered in time, and furnishing the affidavit of a registered voter as to his proper residence. *Lilmonds v. Binbury*, 29 Iowa, 267.

The Election Law of Kansas provides that the registry shall close ten days before election, but permits the voter to register at all times during the year, except on these last ten days. *State v. Butts*, 81 Kan. 587. See also Rev. Stat. Me. 95; Rev. N. J. p. 864, § 152; Supp. Code Md. 240 et seq.; Code Ala. p. 230, § 238; Dig. Laws Ark. 1874, p. 471, § 2328.

In Mississippi registration is required; and the registration lists are to be kept by the clerk of the circuit court, "and any person not on the lists may appear at any time before the clerk and be registered."

In Kentucky a clause in a Registration Law applying only to the City of Louisville, which provided that the elector must reside in the city one year preceding the election, was held void because the Constitution required but sixty days' residence in a precinct, and one year in Jefferson County. The balance of the law was sustained, but registration was permitted by the Act within the last three days preceding the election. *Com. v. McVelland*, 83 Ky. 686.

The Registry Act of Missouri requires the registration of voters to be completed ten days before the election, but this is also a constitutional requirement.

In California the elector may have his name entered on the list at any time before the poll of the election is opened; but, if he does not do this thirty days before election, he must show a good reason why he did not procure the enrollment of his name previous to said thirty days. *People v. Laine*, 83 Cal. 55; *Webster v. Byrnes*, 84 Cal. 278.

In New York, as to cities, under the Law of 1865, the board of registration met on Monday before election, which is the day before; and under the Amendment of 1872 the registry is completed on the Saturday night before election. The question of its constitutionality has not been raised.

In *Byler v. Asher*, 47 Ill. 101, it was held that the Registry Law of Illinois was valid; but under that Act the non-registered voter was allowed to vote on making proof, in the manner prescribed in the Statute, of his right to vote, without showing any excuse for not registering.

In *People v. Hoffman*, 116 Ill. 587, 8 West. Rep. 522, a law was sustained which provided for the close of registration on the third Tuesday before election; but, under the Constitution of that State, a man must reside in the voting precinct thirty days before election. Nothing is said in the opinion as to persons absent or sick upon the days of registration, but

the law makes no provision for an after registry by sick electors.

In Wisconsin a Registry Law providing that no vote should be received at any general election unless the name of the person offering to vote be on the registry as completed by the board, except in the case of a person becoming a qualified voter of the election district after the last day for the completion of the registry, who might vote on making certain specified proof of that fact, was held unconstitutional because it gave no opportunity for sick and absent persons to register and vote after the completion of the registry lists. *Della v. Kennedy*, 49 Wis. 555.

Under this Act, as shown by Taylor, J., in a dissenting opinion at page 569, 49 Wis., the sick or absent person, being advised of the days of registration, could send his application by writing. But in the Act before us this cannot be done. The Registry Law of Pennsylvania permits an unregistered voter to prove his qualifications and vote on election day. *Re Election of McDonough*, 105 Pa. 490.

In Connecticut (see *Hyde v. Brush*, 84 Conn. 454), it appears from the opinion filed in that case that the registry lists must be closed on Wednesday of the week preceding the election, which would be from four to five days; but it is not stated what the opportunities are for registering before that time. In our own State the provision as to sick and absent voters is well known; and so far no great abuse to the elective franchise has been developed from the exercise of the privilege therein granted, of registering on election day. How. Stat. § 93.

The object of a Registry Law, or of any law to preserve the purity of the ballot-box, and to guard against abuses of the elective franchise, is not to prevent any qualified elector from voting, or to unnecessarily hinder or impair his privilege. It is for the purpose of preventing fraudulent voting. In order to prevent fraud at the ballot-box, it is proper and legal that all needful rules and regulations be made to that end; but it is not necessary that such rules and regulations shall be so unreasonable and restrictive as to exclude a large number of legal voters from exercising their franchise. Nor can the Legislature, in attempting ostensibly to prevent fraud, disfranchise legal voters without their own fault or negligence. The power of the Legislature in such cases is limited to laws regulating the enjoyment of the right, by facilitating its lawful exercise and by preventing its abuse. The right to vote must not be impaired by the regulation. It must be regulation, not destruction. *Page v. Allen*, 59 Pa. 338; *Della v. Kennedy*, 49 Wis. 555; *Edmonds v. Banbury*, 28 Iowa, 287; *Monroe v. Collins*, 17 Ohio St. 668, 685; *Daggett v. Hudson*, 48 Ohio St. 548, 1 West. Rep. 739; *State v. Baker*, 83 Wis. 71; *State v. Butts*, 81 Kan. 554.

These authorities all tend in one direction. They hold that the Legislature has the right to reasonably regulate the right of suffrage, as to the manner and time and place of voting, and to provide all necessary and reasonable rules to establish and ascertain by proper proof the right to vote of any person offering his ballot, but has no power to restrain or abridge the right, or unnecessarily to impede its free exer-

cise. This law before us disfranchises every person too ill to attend the board of registration, and unreasonably and unnecessarily requires persons whose business duties, public or private, are outside of Detroit to return home to register as well as to vote, making two trips when only one ought to be required.

This Act is also not impartial. It seems to be aimed especially at naturalized voters, and, taken all in all, was fitly characterized by one of the counsel as "an Act to disfranchise a large number of the legal voters of the City of Detroit." In providing particularly and minutely for the forms of entry in the books of registration (see §§ 5-8), subdivision *h* of section 8 provides: "*h*. In the column headed 'Court,' the designation of the court in which, if naturalized, such naturalization was had, or, if a declaration of intention was made, the name of the court from which the certificate was issued, and if the applicant claims the right to be registered and vote as a naturalized citizen, or because he has declared his intention six months or more prior to the election, he must produce the proper certificate of such naturalization, or declaration of intention, or satisfactory evidence, other than by the oath of the applicant, must be produced, that the same was issued." By another subdivision of the same section there must be set down in this book the "date of papers," the time of such naturalization or the making of the declaration "as appears by the certificates, or other duly authenticated evidence." Subdivision *g*.

The essence of these requirements is that the naturalized voter must produce his certificate, or show, by evidence other than his own oath, that such a certificate was issued. And it would seem that, if he cannot procure from the records of the court evidence that such a certificate was issued, or declaration of intention made, he must produce some person, besides himself, who was present when the declaration was made or certificate issued. Perhaps, under a liberal construction of the law, one who could swear that he had seen the certificate would be a sufficient witness; but how is he to testify to the date, and the particular court that issued it, or that it was genuine? Why should a person claiming to be an elector by naturalization be debarred, if he has lost his certificate, from establishing such fact by his own oath? A person may swear that he is native born, and he is not required, also, to prove this fact by someone else, before he can be registered; but, if he wishes to show that he is an elector by naturalization, he is presumed to be unable himself to tell the truth under oath, and must be corroborated by someone. The easiest way for a person of this class, wishing to cast a fraudulent vote, would simply be to swear that he was born in the United States; and in such case a perjurer is put to less trouble to get on the registry list than an honest man who desires to show that he has been naturalized, but who, unfortunately, has lost the record evidence of such naturalization. This distinction between native-born and naturalized electors is an unfair one, and, as above shown, entirely unnecessary in order to prevent fraud. Its tendency will be to disfranchise honest men, and induce dishonest men to perjure themselves. Section 18, in reference to removals from one precinct

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to another, and the necessary steps to become registered in such cases, seems to be most unreasonable and unnecessary; but perhaps this is within the power of the Legislature, as it is not absolutely impossible to comply with it. But, in relation to naturalized voters, the very men who have probably lost their certificates, and cannot now replace them, are elderly men, who have been naturalized for many years, and have exercised the elective franchise in Detroit, without question, for upward of a quarter of a century. They have, many of them, no doubt, forgotten the particular name of the court in which they took out their papers; and to prove their issue by someone other than themselves would be, in some instances, impossible. A law that treats these men as men whose oaths cannot be taken in their own interest, while it permits a native-born citizen to prove his standing as a voter by his own testimony, cannot receive my sanction, as I believe such a requirement to be not only unjust, but unconstitutional, unless applied to all. Another distinction may also be noted. A native-born citizen, becoming of age between the last day of registration and the election, is permitted to vote; but a foreign-born citizen, who has taken out his first papers, and whose right to full citizenship or the elective franchise will ripen between the completing of the registry list and the opening of the polls, cannot vote.

In this minute and detailed plan of registration, with its provisions for an elaborate registry book, only two classes of voters are recognized, to wit, native-born and naturalized. Three classes of electors, under the Constitution, are provided for, unless Indians are to be classed with the native-born citizens, without any particular designation of their own; and the male inhabitant residing here in 1850, who had declared his intention six months before an election, is to be classed with naturalized voters, and treated the same as the rest. But it is quite possible that there are persons now living in the City of Detroit who were "white male inhabitants" of this State in 1835. A man twenty-one years old then would be seventy-five now. This class were not required to be native born, nor naturalized. They were made voters because they resided here at that date. There seems to be no place for such as these in this Registry Law, unless they are native born, or can establish their naturalization. And it is by no means certain that the term "inhabitant" would not include all those who had a residence or fixed settlement and home in Michigan in 1835, although not then of age, if they have since lived in Michigan. If so, a larger number of voters would be affected by this Act, as, strictly following the law, they are disfranchised by it.

In my opinion, no Registry Law is valid which deprives an elector of his constitutional right to vote by any regulation with which it is impossible for him to comply. No elector can lose his right to vote, the highest exercise of the freeman's will, except by his own fault or negligence. If the Legislature, under the pretext of regulation, can destroy this constitutional right by annexing an additional qualification as to the number of days such voter must reside within a precinct before he can vote therein, or any other requisite, in direct

opposition to any of the constitutional requirements, then it can as well require of the elector entirely new qualifications, independent of the Constitution, before the right of suffrage can be exercised. If the exigencies of the times are such, which I do not believe, that a fair and honest election cannot be held in Detroit, or in any other place in our State, without other qualifications and restrictions upon both native-born and naturalized citizens than these now found in or authorized by the Constitution, then the remedy is with the people to alter such Constitution by the lawful methods pointed out and permitted by that instrument. This disposition to hamper and abridge the rights of the people to govern themselves, upon the theory that certain communities are unfit to con-

trol their own local affairs, which seems to be growing more prevalent in our legislative bodies in this country, must, nevertheless, if the idea be a correct one, be exercised in reason, and within constitutional limits.

This Law being, in the respects pointed out both unreasonable and in conflict with the Constitution, and it being apparent that the Legislature would not have enacted the other portions of the Act had it foreseen that the courts would declare these parts unconstitutional, *the whole Act must fall, and be held unconstitutional and void.* *Dells v. Kennedy*, 49 Wis. 560, and cases cited; *Duggett v. Hudson*, 43 Ohio St. 548, 1 West. Rep. 789; *Brooks v. Hydorn* (Mich.) 49 N. W. Rep. 1122.

The other Justices concurred.

MONTANA SUPREME COURT.

TERRITORY of Montana, *ex rel.* BOARD OF COMMISSIONERS OF CHOTEAU COUNTY, *Resp't.*,

v.

BOARD OF COMMISSIONERS OF CASCADE COUNTY, *Appl.*

(3 Mont. 393.)

1. The County of Cascade under the Act of September 12, 1887, providing that it "shall be liable for, and shall pay, the sum of \$30,000" to the County of Choteau from which it was created, giving it the option to cause warrants to be issued, which, on being indorsed "Not paid for want of funds," shall bear interest, or to issue coupon bonds and sell them, cannot discharge the debt by delivery of the bonds, but if it issues the bonds must convert them into cash and pay the debt.

2. When the Legislature directs a county to pay money to another county, and directs the county commissioners to

raise it by issuing either warrants at their first general session or coupon bonds as near as may be in conformity to the General Law, the refusal of the commissioners to take action in the matter at either their first or second meeting after the direction is given constitutes a case of money "withheld by an unreasonable and vexatious delay," and it will bear interest from the date of the second meeting at the rate of 10 per cent per annum, under Mont. Comp. Stat., § 1237.

3. When the law itself imposes a duty on county commissioners as such, and they are not appointed thereto by the county, the county will not be responsible for their breach of duty, or for their nonfeasance or misfeasance in relation to such duty.

4. Under the Organic Act of Cascade County, which imposes upon its Commissioners the duty of selecting which of two methods shall be adopted in the payment of its indebtedness (the issuance of either warrants or bonds), and declares what they shall do when they have determined which method they will adopt, inas-

NOTE.—Mandamus to enforce a public duty.

In mandamus to enforce a purely public duty, not due the government as such, any private person may move as relator. *State v. Weid*, 39 Minn. 426.

Mandamus is the proper remedy to compel the mayor and council of a city to execute duties imposed upon them as to which they are allowed no discretion. *State v. Shakespeare*, 41 La. Ann. —, 6 So. Rep. 562.

An alternative writ of mandamus to compel the performance of a public duty by an officer, that is coupled with the expenditure of the general fund of a county, should allege that there is sufficient money belonging to the fund that can legally be appropriated to the purpose. *Miller v. State* (Kan.) 22 Pac. Rep. 323.

A formal demand and refusal are not a necessary preliminary to the filing of a petition for mandamus to compel the performance of a public duty which the law requires to be done. *People v. Board of Education of Upper Alton School Dist.* 127 Ill. 612.

When executive officers of the government refuse to act in a case at all, or when by special statute or otherwise a mere ministerial duty is imposed upon them that is a service which they are bound to perform without further question, then, if they refuse, a mandamus may be issued to compel them. *United States v. Black*, 128 U. S. 40 (32 L. ed. 854).

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A ministerial duty on the part of a public officer, the discharge of which may be compelled by mandamus, is some duty imposed expressly by law, not by contract, or which arises necessarily as an incident to the office, involving no discretion in its exercise, but mandatory and imperative. *State v. Whitesides*, 3 L. R. A. 777 and note, 30 S. C. 579.

Mandamus is the proper proceeding when a party has a legal right to the enjoyment of which the discharge of a ministerial duty on the part of a public officer who refuses to perform it is necessary, and the party has no other adequate remedy. *Ibid.*

Mandamus will lie to compel the payment of warrants drawn upon a county treasurer, who had funds sufficient to pay them on their presentation. *Bush v. Gelsy*, 16 Or. 355.

In mandamus proceedings to compel the board of supervisors to make provision for the payment of a claim previously allowed by them against the county, it is competent to set up in defense the invalidity of the claim originally, or to plead the Statute of Limitations, or both. *Board of Supra. v. Catlett* (Va.) 13 Va. L. J. 611.

Mandamus to public officer; application for; real party in interest; when may issue,—see note to *United States v. Hall* (D. C.) 1 L. R. A. 738.

To enforce public duties, see note to *Commercial U. Teleg. Co. v. New England Teleg. & Teleg. Co.* (Vt.) 5 L. R. A. 161.

much as they derive their power from the law alone and none of it comes from the County, the County cannot be liable for interest on the debt for failure of the Commissioners to take action, although in violation of the plain, imperative mandate of the Statute.

5. Under Comp. Stat., p. 870, § 847, providing that a county attorney shall receive certain fees to be taxed as costs for collections made for the county, such fees may be taxed in a proceeding by writ of mandate to compel the payment of money into the treasury as well as in an action brought for recovery of the money.

6. A county attorney not being entitled under Comp. Stat., p. 870, § 847, to more than \$1.20 in fees, the amount of fees already received by him must be deducted from \$1.20 and the balance only taxed in his favor in any given case where the percentage allowed would make the total more than that sum.

(February 2, 1889.)

APPEAL by defendant from a decree of the District Court for Meagher County granting a writ of mandamus directing it to provide for and pay certain money according to the direction of the Legislature, and from an order upon motion to relax costs. *Affirmed in part.* The facts are fully stated in the opinion.

Messrs. Wade, Toole & Wallace, for appellant:

This debt is created by virtue of the Act alone. Hence no more money can be taken from Cascade, directly or indirectly, than is ordered to be paid by the terms of the Act itself.

Laramie Co. v. Albany Co. 93 U. S. 307 (23 L. ed. 552).

The Legislature having created the debt, it has entire control both of the manner and means of its payment.

Sharp v. Contra Costa Co. 84 Cal. 291.

This writ, in effect, requires the payment of a greater debt than the Act. A vindication of this mandate of the writ could only be attempted on the theory that the officers constituting the Board of Commissioners were guilty of nonfeasance in not acting at their March session. And under such circumstances, nothing is better settled than that the county, or the municipal corporation, cannot be held liable for a violation or neglect of duty by its officers.

Cooley, Torts, p. 621; *Richmond v. Long*, 17 Gratt. 878, 94 Am. Dec. 461; *Anne Arundel Co. v. Duckett*, 20 Md. 468, 83 Am. Dec. 566; *Stewart v. New Orleans*, 9 La. Ann. 461, 61 Am. Dec. 218; *Lloyd v. New York*, 5 N. Y. 369, 55 Am. Dec. 347; *Lorillard v. Monroe*, 11 N. Y. 395, 62 Am. Dec. 124, note; *Chumaseo v. Potts*, 2 Mont. 242; *People v. Tweed*, 13 Abb. Pr. N. S. 77.

The county attorney's fees are in no event taxable as costs in this proceeding. And as to the taxability of these attorney's fees in any event, only such costs can be taxed as are expressly warranted by the Statute. And all statutes providing for a taxation of costs are strictly construed.

Toms v. Williams, 41 Mich. 552; *State v. Kinne*, 41 N. H. 238.

The county attorney is only allowed fees upon "collections of sums of money."

Mont. Comp. Stat. § 847, p. 870.

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Strictly construed, this would mean money, and nothing else. The word "collections," in the Act, is limited to moneys actually paid into the treasury, or at least actually collected.

Rawlins v. Poindester, 27 Miss. 64; *Dyer v. Gibson*, 16 Wis. 557; *French v. Marsh*, 29 Wis. 649. See *Hedges v. Lewis and Clarke Co.* 4 Mont. 280.

Messrs. Carpenter, Buck & Hunt, with *Messrs. S. H. McIntire and H. G. McIntire*, for respondent:

Whenever a county brings an action by its county attorney and recovers judgment, such of the fees as it is liable for therein to its county attorney become a part of the costs of the action, follow any judgment it may recover, and must be taxed as such costs against the losing party.

People v. Hagar, 52 Cal. 190; *Higby v. Calaveras Co.* 18 Cal. 178.

What the form may be of such an action is immaterial.

Higby v. Calaveras Co. supra.

McConnell, Ch. J., delivered the opinion of the court:

This was an action brought by the respondent for a writ of mandate to compel the appellant to perform a duty imposed upon it by the second section of an Act entitled, "An Act to Create the County of Cascade, and to Define its Boundaries and Provide for its Organization, Passed at the Extra Session of the 15th General Assembly of this Territory, and Approved September 12, 1887." The transcript contains two appeals, one from a final decree directing the issuing of a writ of mandate, and the other from an order after final judgment upon motion of the appellant to relax costs. The appellant demurred to the petition for the writ of mandate upon the grounds: first, "that the same does not state facts sufficient to constitute a cause of action;" second, "that the same does not state facts sufficient to warrant the issuance of the warrant prayed for, in that the discretion required to be exercised under the Act, by the respondent Board, was to pay either in warrants or bonds, and it appears upon the face of the petition that the discretion had been legally exercised by the respondent Board tendering payment in bonds as required by law, and the relator wrongfully refused to receive the same."

The last ground of demurrer cannot be considered because it raises a question of fact which does not appear upon the face of the petition.

The points relied upon by the appellant are: first, that the Act authorizes payment by bonds issued directly to Choteau County, and the writ denies this privilege, and, as the petition shows no default in this respect, the writ should have been denied; second, the writ improperly directs the warrants to be dated, registered and to bear interest from March 8, 1888; and, third, the writ improperly directed the issuance of a warrant in the event of the second alternative of payment being adopted. Said section 2, out of which this contention arises, is as follows, to wit: "That the present indebtedness of the Counties of Choteau and Meagher shall be apportioned between said Counties respectively, and said County of Cascade, as follows, to wit:

To the County of Choteau, the said County of Cascade shall be liable for and shall pay the sum of \$30,000, and to the said County of Meagher the County of Cascade shall be liable and shall pay the sum of \$8,000, which said sums shall be in full of all claims and demands against said County of Cascade for or on account of its proportion of the present indebtedness of said Counties respectively; and it is hereby made the duty of the County Commissioners of the County of Cascade to cause to be issued at their first regular session to each of said Counties a warrant or warrants on the general fund of said County for the amounts to which they may be respectively entitled as aforesaid, which said warrants, if not paid on presentation to the treasurer of said County of Cascade, shall be by him indorsed 'not paid for want of funds,' and shall thereafter bear like interest as other county warrants; or said Commissioners may issue coupon bonds of said County bearing interest at not more than 6 per cent per annum, payable in seven years, and due in fifteen years, in payment of said debt, and to pay current expenses for the first year. Said bonds shall not be sold for less than par, and shall be issued as near as may be in conformity with the General Law."

As the main question presented by the demurrer depends upon the construction to be given to said section 2 of the Act to organize Cascade County, we will consider it first.

It is contended by the appellant that said section gives the County Commissioners of Cascade County the right to elect whether they will pay the indebtedness of their County to Choteau County by issuing coupon bonds, and turning them over in payment, or drawing county warrants upon the general fund. The question is, Have they this power under section 2? We think they have not. The Act itself does not provide that the bonds shall be turned over to Choteau County. The language used in the Act "in payment of said debt," coupled with the succeeding clause, "and to Pay Current Expenses for the first year," shows manifestly that the Legislature intended to put payment of the current expenses of the new County for the first year upon a like footing with the payment of the debt to Choteau County; and no one will contend that the Legislature ever meant to issue coupon bonds and turn them over in kind in payment of the current expenses of the County. The new County was to derive territory, population and property from the mother County and the Legislature, acting as a kind of *pater familias* between the mother and daughter, enacted that the just and equitable portion of the debt of Choteau County, which the new County should bear, was the sum of \$30,000. It is true that in the absence of such legislation the new County would not be bound in law for any part of said debt. *Laramie Co. v. Albany Co.* 92 U. S. 307 [23 L. ed. 552]. But the Act which declared that Cascade County should pay \$30,000 had the effect of converting a moral into a legal obligation, and to liquidate the accounts between them at that amount. It then became an indebtedness in as full a sense as if it had arisen by contract between the parties. The language used is "to the County of Choteau, the said County of Cascade shall be liable for, and shall pay, the sum

of \$30,000." It thus creates a debt to be paid in money. But the Legislature, in view of the fact that a county can only raise money by taxation or the sale of its bonds, proceeds to direct how this debt may be paid: first, in the discretion of the County Commissioners by issuing warrants upon the general fund to be raised by taxation, or, secondly, by issuing coupon bonds and selling them, and thus raising the money with which to pay said debt. That the Legislature meant that Cascade County should sell the bonds, and pay the debt with the money thus raised, is further manifested from the provision that said coupon bonds should bear interest at not more than 6 per cent per annum, thus leaving it in the discretion of the County of Cascade to determine the rate of interest that the bonds should bear, limiting it only by the provision that the rate should not exceed 6 per cent, leaving the matter entirely within the discretion of the Commissioners to fix the interest from a nominal rate of one half or 1 per cent up to and including 6 per cent per annum. If the Commissioners should see fit, in the exercise of their discretion, to issue coupon bonds, bearing only a nominal rate of interest, which they might do under the construction contended for by the appellants, and turn said bonds over to Choteau County in kind in payment of said debt, it would practically defer payment of said debt for fifteen years, as it would be impossible for Choteau County to sell said bonds at par as provided by law. Certainly if the Legislature intended that Choteau County should receive the bonds in payment of this debt, it would not have left it at the mercy of the new County.

Said Act further provides that the bonds shall be payable in seven years and due in fifteen years, and that they shall not be sold for less than par, and that they shall be issued as near as may be in conformity with the General Law. Such a construction would present the spectacle of the Legislature solemnly declaring that in justice and good conscience as the consideration for the territory, population and property that Cascade County might derive from Choteau County, and the relief of its taxpayers from the debts of the parent county, Cascade should be liable for and should pay to said County the sum of \$30,000, and then providing that instead of paying this money it might pay it in her own coupon bonds, due in fifteen years, bearing only a nominal rate of interest, issued under a law which forbade Choteau County from selling said bonds at less than par. It seems to us that such legislation would be to trifle with the rights of Choteau County and practically declare that a debt of \$30,000 now due shall not be paid for fifteen years, and that in the mean time it should bear only a nominal interest, unless said County of Cascade, of its own grace, should see fit to pay it at the end of seven years. The Legislature did not mean to make such a contingency possible.

If this construction of the bond clause of said Act is the correct one, then the two propositions between which an election was to be made are so unequal that there is no room for choice. It would be to paraphrase the language of the Act, which creates the liability, so that it shall read as follows, to wit: "To the County of Choteau, the said County of Cascade

shall be liable for, and shall pay, the sum of \$30,000, fifteen years after date."

But it is insisted by the appellant that if the Act contemplated a cash payment from the proceeds of the bonds, it would have said so, and would have provided for the transfer of the proceeds from one county treasurer to the other. In reply to this we say that the Act provides that said bonds shall be issued as near as may be in conformity with the General Law, and when we turn to section 810 of the General Laws of the Territory, we find that "when the county commissioners of any county shall issue any bonds authorized by this Act, it shall be their duty to sell the same, and give notice by advertising in some newspaper published in the county, or if there be no newspaper published in such county, then in any newspaper published in an adjoining county of this territory, and also in one or more newspapers published in the City of New York, for a period of not less than thirty days prior to the time said bonds are to be sold; such advertisement shall be for sealed proposals, which shall state the amount of such bonds for sale, and the party or parties offering the highest price therefor shall be entitled to receive the amount of such bonds which he or they may offer to buy, but no bonds shall be sold for any price less than the par value thereof."

This is a provision for funding the floating indebtedness of the counties by authorizing them to issue bonds, sell them according to the foregoing provisions, cover the money back into the treasury, and pay them out upon presentation in their order of the outstanding warrants. The law then amply provides for the manner in which the bonds shall be converted into cash, and the proceeds transferred from the treasury of the county issuing the bonds to the creditors, be they counties or individuals.

It is further argued that these General Laws touching the management of the affairs of the counties already existing were applicable to Cascade County when organized, and that therefore there was no necessity for the Legislature, in the Act organizing Cascade County, to provide for the issuance of coupon bonds and their sale for the purpose of paying its indebtedness. The same remark would apply with equal force to the provision in said Act that bonds may be issued to pay the current expenses for the first year. The right to do this was as perfect under existing laws before the passage of this Act as it was afterwards. So, likewise, in regard to the first alternative, that the Commissioners of the County of Cascade should cause to be issued at their first regular session to each of said Counties a warrant or warrants on the general fund of said County for the amounts to which they be respectively entitled as aforesaid, which said warrants, if not paid on presentation to the treasurer of said County of Cascade, shall be by him indorsed, 'not paid for want of funds,' and shall thereafter bear interest as other warrants." The Legislature having declared that Cascade County owed Choteau County the sum of \$30,000, without any further legislation under existing laws, upon application of Choteau County to the Commissioners of Cascade County, it would have been their duty to

have issued warrants upon the general fund of the County for this indebtedness—as much so as for any item of the current expenses of said County.

So that the fact that the Legislature saw fit in the passage of this Act to put in provisions which were already provided for by existing laws is no argument in favor of the construction insisted upon by the appellant in relation to the purpose for which the coupon bonds of said County might be issued by said Commissioners.

In interpreting any clause of a section it should be construed in connection with existing laws, and should be interpreted in the light of the objects and purposes that the Legislature had in view in its enactment. Here the Legislature is about to call into existence a new county, necessarily without revenue to pay debts and meet current expenses. Time must elapse before taxes can be assessed and collected, and it was not to be supposed that there would be in the treasury of the new County, at the first meeting of the Commissioners, money enough with which to pay the sums of \$30,000 and \$6,000, due respectively to Choteau and Meagher Counties, and also to pay its necessary current expenses. In anticipation of this obvious condition of affairs, the Legislature provided for the issuing of warrants upon the general fund, and upon their being presented and not paid for want of funds, which they must have obviously seen must be the case, they should bear interest from the date of their indorsement by the treasurer at the usual rate at which warrants draw interest, that is 7 per cent; thus putting it in the power of Cascade County to carry the debt, until it could provide for its liquidation by taxation, or, at their election, place coupon bonds upon the market at such rate of interest as they might be able to sell them at par, not to exceed 6 per cent, and thus raise the money with which to pay in cash the indebtedness created by said Act. The Act provides that these bonds shall not be payable for seven years, and shall not be due for fifteen years, thus giving the County ample time to get its affairs upon such footing as would enable it to provide for the payment of the principal without embarrassment to its taxpayers. If the Commissioners should see fit to issue warrants upon the general fund and pay 7 per cent interest until the money could be raised to pay them, they might at any time thereafter, when in their judgment it was for the best interest of the County to do so, have issued bonds and sold them under the general law to obtain money with which to liquidate said warrants. But instead of leaving the County to the General Law as it then stood, the Legislature saw fit to insert these express provisions for its government.

2. If the Commissioners elected to issue warrants on the general fund, they had the right to the whole of the time of such meeting in which to make their election. But the failure of the Commissioners to act at this meeting ought not to defeat the rights of the respondent. Had it received its warrants it could either have had the money and the use thereof, or the interest which would have accrued. But if the Commissioners had elected the second alternative,

that is to issue coupon bonds of Cascade County for the purpose of raising the money with which to discharge said debt, the inquiry arises as to whether interest should be paid upon said debt, and if so from what time shall it be computed. The Act organizing the county is silent upon this point. In other words, it does not say in so many words that interest shall be paid upon the debt until it is discharged by the proceeds of the bonds for the issuance of which it provides. On the other hand, the Act does provide that if the debt is paid by warrants drawn upon the general fund, they shall bear interest, and it provides the time from which the interest shall commence. In the absence of any special provision in the Act, we are left to interpret it in the light of the general law and with reference to the scope and purpose of the law under consideration. It is fair to assume that the Legislature acted in the belief that the Cascade Commissioners would at their first regular meeting make their election as to the method by which they would pay the debt, and that if they chose to pay it by issuing coupon bonds, they would proceed at once to advertise as required by section 810, *supra*, and raise the money with which to pay said debt.

It is fair to assume that the Legislature believed that bidders could be found in the markets of the world for these bonds. We observe that the Commissioners could not have issued and sold the bonds at their first meeting if they had elected to do so. We observe, further, that they were not bound to issue warrants upon a special fund which they had not had reasonable time to provide. Said warrants when presented to the treasurer and indorsed "not paid for want of funds" would draw interest under the General Law. This would not be a fair construction of the Act under consideration. We think, then, that it was the expectation of the Legislature that the County Commissioners would provide for the payment of this debt in a reasonable time, if they saw fit to sell bonds for that purpose. Certainly it was the duty of the appellant to have realized the money by the time of its second meeting, which, according to the allegations of the petition, was on the 6th of June, 1888. At this meeting an agent of Choteau County demanded of the appellant warrants upon the general fund or the money in payment of said indebtedness, and its Commissioners refused to do either. They had failed to take action in the matter at the March session, in violation of the plain, imperative mandate of the Statute. They again refused at the June session, and continue thus in open defiance of the law to the present time. We think this constitutes a case of money "withheld by an unreasonable and vexatious delay;" and that it should bear interest from the 6th day of June, 1888, at the rate of 10 per cent per annum, under section 1237 of the Compiled Statutes.

But we are met at this point with the argument that "this Board is composed of public officers, who give bonds for the faithful performance of their official duties, on which they are directly answerable for neglect or violation of duty. And in this instance, by virtue of the Act in question, they are created a special tribunal for the performance of certain public governmental functions or duties imposed by

positive law. And under such circumstances nothing is better settled than that the County or other municipal corporation cannot be held liable for a violation or neglect of duty by its officers." And we are referred to the following authorities in support of this position: Cooley, Torts, p. 621; *Richmond v. Long*, 94 Am. Dec. 461, 17 Gratt. 373; *Anne Arundel Co. v. Duckett*, 20 Md. 468, 83 Am. Dec. 566, last note; *Stewart v. New Orleans*, 9 La. Ann. 461, 61 Am. Dec. 218; *Lloyd v. New York*, 5 N. Y. 369, 55 Am. Dec. 847; *Lorillard v. Monroe*, 11 N. Y. 895, 62 Am. Dec. 124, note; *Chumassero v. Potts*, 2 Mont. 242; *People v. Tweed*, 13 Abb. Pr. N. S. 77, referred to in note 62 Am. Dec. 124.

The doctrine of these cases is that when the law devolves upon certain public officers a duty to perform as such the rule of *respondet superior* does not apply to them. This rule can only apply where the relation of master and servant or principal and agent exists. In such cases the master or principal must answer for the conduct of the servant or agent within the scope of the service or agency imposed. Judge Rives, of the Supreme Court of Virginia, in the case of *Richmond v. Long*, 17 Gratt. 373, 94 Am. Dec. 461, in speaking of municipal corporations, lays down this doctrine in the following language, to wit: "The functions of such municipalities are obviously two-fold: (1) political, discretionary and legislative, being such public franchises as are conferred upon them for the government of their inhabitants and the ordering of their public officers, and to be exercised solely for the public good rather than their special advantage; and (2) those ministerial, specified duties, which are assumed in consideration of the privileges conferred by their charter. Within the sphere of the former, they are entitled to this exemption; inasmuch as the corporation is a part of the government and to that extent its officers are public officers, and as such entitled to the protection of this principle; but within the sphere of the latter they drop the badges of their governmental offices, and stand forth as the delegates of a private corporation in the exercise of private franchises, and amenable as such to the great fundamental doctrine of liability for the acts of their servants.

Again the Supreme Court of the State of New York, in the celebrated case of *People v. Tweed*, 13 Abb. Pr. N. S. 77, lays down this doctrine as follows, to wit: "This special commission, appointed by the Legislature, whether or not they were a corporation, or a quasi corporation, it is not material to inquire. It is sufficient to say they were created, by an Act of the State, public officers, and they were invested with certain specified powers as such, to be exercised for special and limited purposes; but it was nevertheless clearly an office of public trust, to be executed for confessedly public purposes. They were not created the agents of the County of New York, or of the board of supervisors in their corporate capacity. *Lorillard v. Monroe*, 11 N. Y. 895, 62 Am. Dec. 120.

"The county could not be sued or made responsible for the manner in which they discharged or used the duties of their office, for their breach of duty, for misfeasance or non-

feasance, or for frauds, collusions, conspiracy or embezzlement of money."

We hold, then, that while a county is a corporation for many purposes, and as such an independent legal entity endowed by law with a limited portion of the sovereignty of the State, and as such charged with duties political and discretionary in their character, to be exercised for the public good, and that the board of county commissioners is the organ through which its functions are mainly executed, still, when the law itself imposes a duty upon its commissioners as such, and they are not appointed thereto by the county, the county will not be responsible for their breach of duty or for their nonfeasance or misfeasance in relation to such duty. The Organic Act of Cascade County imposes upon its Commissioners the duty of selecting which of two methods shall be adopted in the payment of its indebtedness, and declares what they shall do when they have determined which method they will adopt. They derive their power from the law alone. None of it comes from the County. They are in no legal sense the servants or agents of the County, so that the doctrine of *respondet superior* can apply to them. It follows, therefore, that the taxpayers of the County of Cascade cannot be burdened with \$1 more indebtedness than the Legislative Act imposes. And when we turn to it we find that the principal sum is \$30,000, and interest on warrants, if they are issued at all, from the time they are presented to the treasurer, and by him indorsed "Not paid for want of funds," at the rate of 7 per cent; but if coupon bonds are issued and sold, and the debt paid from the proceeds thereof, then no interest at all shall be paid by the County.

8. The second ground of appeal presents the question of the correctness of an item of costs of \$1,582.85. Of this item the court below allowed the sum of \$1,059, from which defendant appealed; no appeal on the part of plaintiff. This was taxed as the fees of the county attorney, under § 847, p. 820, Comp. Stat. This section provides, among other things, that the county attorney shall receive "for collections made for the county or territory on all sums of \$500 or less, 10 per cent thereof; on all sums over \$500, 10 per cent on the first \$500, and 5 per cent on the excess over \$500 . . . all fees in this section hereinbefore provided shall be taxed as costs." The defendant contends that the above section applies to the collections of money actually made and paid into the treasury, and not to the proceeding by writ of mandate to compel the performance of a duty, notwithstanding such duty is the payment of money into the treasury. At first we thought this position correct, but upon fuller consideration we have reached a different conclusion, and follow the construction given by the Supreme Court of California to a similar statute, in the case of *Higby v. Calaveras Co.* 18 Cal. 176. In this case the court says: "But it 7 L. R. A.

is argued that this case is not brought within the purview of the Statute, for the reason that this proceeding was not an action, but a mere mandate, not brought for the recovery of money, but to enforce a specific obligation, the direct effect of which was not the collection of money, but the enforcement of a ministerial duty, which resulted in securing the evidence of a debt rather than the payment of it. We think, however, that there is more ingenuity than soundness in this view. The Statute makes no other provision for this service, and we cannot suppose that the Legislature meant that the compensation of the district attorney should be made dependent upon the nature or form of the action. The substantial thing intended was a proceeding whereby the claim might be realized, and whether this were by action of debt or mandamus was not important, if this end were secured. Nor is it important whether this result be obtained by a judgment for money or for anything else which was equivalent, or could be made equivalent, to money. The assurance of the warrant by a judgment affirming the indebtedness of Amador County was in effect the collection of the money, or the securing of it to the County of Calaveras; and when that county used the warrant as money it became liable to the attorney for his fees as if the money had been directly paid to it. This would be the true construction of an ordinary contract between counsel and client, and we see no reason for a different rule here."

The argument that the fee cannot be paid until the money is collected is not sound, because the Statute provides that it shall be taxed as costs, and this should be done at the time the judgment is rendered.

Section 846, *supra*, provides "that in no case shall the fees allowed by this section . . . exceed in amount the sum of \$1,200 in any county, and the county attorney shall furnish to the county commissioners a statement of all fees received by him, which, together with the fees allowed by the county commissioners, shall not exceed the sum of \$1,200." This Statute governs in this case. By its provisions the county attorney cannot receive a greater sum as fees than \$1,200; and the commissions allowed by the Statute are limited by this provision. If the county attorney who was in office when the case was tried below has received the maximum of \$1,200 in fees, then he can receive no more.

The case will be remanded upon this point, with directions to the court below to ascertain by proof what amount of fees the county attorney of Choteau County has already received. This sum will be deducted from \$1,200, the remainder will be taxed against the defendant and collected as costs.

Judgment modified.

DeWolfe and Liddell, JJ., concur.

Motion for rehearing overruled July 12, 1889.

LOUISIANA SUPREME COURT.

WALKER
v.
VICKSBURG, SHREVEPORT & PACIFIC
R. CO., *Appt.*,

(.....La. Ann.....)

*1. While it is the duty of a railroad company to stop its train at the station to which it has contracted to carry a passenger, and to land him safely and conveniently, yet the fact that the company neglects this duty, and its train passes the station without stopping, does not justify a passenger in jumping from the moving train, unless expressly or impliedly invited to do so by the employees of the company.

2. The plaintiff's act in jumping from the moving train was purely voluntary, uninfluenced by any invitation expressed or intended by the Company's employees, and excused by no impending danger or necessity of any kind, except his simple unwillingness to be carried beyond his destination; it was imprudent and dangerous, and his action for resulting injury is barred by his own contributory fault

(*Watkins, J., dissents.*)

(December, 1890.)

APPEAL by defendant from a judgment of the District Court for the Parish of Webster in favor of plaintiff in an action to recover

*Head notes by FENNER, J.

NOTE.—Duty of railroads to furnish safe stations and platforms for use of passengers.

As a general rule, railroad companies are bound to keep in a safe condition all portions of their platforms and approaches thereto, where passengers taking passage on their cars would naturally or ordinarily be likely to go. *Union Pac. R. Co. v. Sue*, 25 Neb. 772.

The company must, for the safety of its passengers, properly light its platform within a reasonable time before the arrival and departure of trains. *Grimes v. Pennsylvania Co.* 36 Fed. Rep. 72.

Where a railroad train stops at a place of peril in a dark night, after notice has been given that the next stopping place would be at a certain station, the safety of the passengers requires that some notice or warning should be given them to retain their seats. *Philadelphia & R. R. Co. v. Edelstein* (Pa.) 23 W. N. C. 342; *Philadelphia, W. & B. R. Co. v. McCormick*, 124 Pa. 427.

A railroad company leaving unguarded a hole in a passageway at its station, likely to be used by persons going to and from its cars, is negligent. *Green v. Pennsylvania R. Co.* 36 Fed. Rep. 66.

Where a platform maintained jointly by two railroad companies for the purpose of enabling passengers to pass from the depot of one of the companies to that of the other is negligently left in an unsafe condition, both companies are liable to a passenger for injuries sustained while passing over such platform. *Lucas v. Pennsylvania Co. (Ind.)* 21 N. E. Rep. 972.

It is the duty of a railroad company so to fix its station or depot that a passenger who gets off at the depot or place to alight may do so without danger; and it is also its duty to fix such a way of exit from the depot over its right of way that a passenger may go away from the place at which he is invited to get on and off, without danger to life or limb; but it is not the company's duty to see him safe and

damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts fully appear in the opinions. *Messrs. Wise & Herndon* and *F. P. Stubbs* for appellant.

Messrs. Watkins & Watkins for appellee.

Fenner, J., delivered the opinion of the court:

On the 16th of October, 1886, plaintiff was a passenger on defendant's train, having purchased a ticket from Bodeau Station to Doyline Station. The latter is a flag station, at which trains do not stop unless they have passengers to put off or take on. If a signal is given from the station that there are passengers to get on, the engineer blows two whistles to signify intention to stop. If there are passengers to put off, the conductor notifies the engineer by pulling the bell-rope, and the engineer, on receiving such signal, blows two whistles to signify the same intention. If there are no passengers to take on or put off, only one whistle is blown, and the train does not stop, but simply slackens speed to a rate of eight or ten miles an hour in passing the station, to enable the mails to be thrown on and off. On this occasion the train had been compelled to come almost to a stop about 200 yards from Doyline, on account of some oxen which were on the track. It then moved forward again, and the conductor,

secure in his exit from the track and over its right of way. *Central R. Co. v. Thompson*, 76 Ga. 770.

Negligence regarding stations. See notes to *New York, C. & St. L. R. Co. v. Doane* (Ind.) 1 L. R. A. 157; *Kelly v. Manhattan R. Co.* (N. Y.) 3 L. R. A. 74; *Missouri Pac. R. Co. v. Wortham* (Tex.) 3 L. R. A. 368; *Parsons v. New York Cent. & H. R. R. Co.* (N. Y.) 3 L. R. A. 683; *Louisville, N. A. & C. R. Co. v. Lucas* (Ind.) 6 L. R. A. 193.

Railroads; reasonable rules for carriage of passengers.

Railroad companies have the power to make reasonable rules and regulations as to the manner of performing their duties as public carriers; that is to say, as to the hour and schedule time for starting and running their trains, and as to the places on the route at which particular trains shall stop in transit. *Duling v. Philadelphia, W. & B. R. Co.* 5 Cent. Rep. 571, 66 Md. 120.

It is the duty of a passenger to inquire before embarking on a train whether it will stop at the station of his destination, and if he does so, and is misled by an agent authorized to speak for the company, he has his action against the company for the misdirection, but not for the refusal of the conductor to stop there, if it be a station at which the train is forbidden to stop by the regulations of the company. *St. Louis, I. M. & S. R. Co. v. Atchison*, 47 Ark. 74.

A passenger having purchased a ticket at a reduced rate, good only on trains advertised to stop at certain stations, has no right thereunder to stop a train at a station not advertised; but if he signaled the train at a station where such train was obliged to stop when signaled, the company became liable to exemplary damages. *Wilson v. New Orleans & N. E. R. Co.* 63 Miss. 352.

Where an intending passenger purchased a ticket at the company's office when a train was about de-

knowing he had this passenger to put off, attempted to signal the engineer with the bell-rope, but, owing to some tangle or disarrangement, could not do so, consequently the two whistles were not blown. The conductor, the engineer and the porter all agree on this point, and there is no contradictory statement. The porter only calls out flag-stations when there are passengers to put off and the signal to stop is blown. The plaintiff testifies that the porter did pass through the car, and call out Doyline Station, but this the porter positively denies, and, considering the uncontradicted testimony that no signal to stop was given, the fact is of little importance. The consequence was that the train passed by the station, only slackening its speed, as customary, but not stopping.

The plaintiff having several times made this same trip, and knowing his station, went out on the platform of the car for the purpose of getting off. He went down on the steps of the car, and, after passing a little beyond the station platform, seeing that the car did not stop, and, as he says, supposing that it was intended that he should get off, and that he could do so with safety, he stepped off while the train was moving; and he says that, as he was in the act of doing so, the train accelerated its motion, giving a sudden jerk, which threw him, and broke his ankle, occasioning the injuries for which his present action in damages is brought. He says that, just before he stepped off, someone called to him, "Is not this your station?" which acted in determining him to step off; but the evidence leaves no doubt that the person who asked the question was not any em-

ployé of the Company. The conductor says that, having failed to give the signal, he went through the train, after passing the station, to find plaintiff, intending to lack the train up to the station, and put him off, but failed to find him, and supposed he had gotten off when the train had stopped on account of the oxen on the track.

Under these facts, the fault of the Company, in not stopping its train, cannot be disputed. It was bound, under its contract, to stop, and safely discharge its passenger. But did its negligent failure to discharge this duty justify the plaintiff in jumping off the moving train, or absolve him from the charge of contributory negligence, which, under the settled jurisprudence of this court, is a bar to his recovery? We consider the law to be settled by the overwhelming weight of authority that while a railroad company is bound to stop its train at the station to which it has contracted to carry a passenger, and to land him safely and conveniently, the fact that the train is about to pass such a station without stopping does not justify the passenger in jumping off the moving train, unless expressly or impliedly invited to do so by the Company.

A leading case on the subject, which we select from a multitude of authorities, not only on account of the great lawyer who delivered it (*Judge Black*), but also because it has been expressly quoted and affirmed by this court, lays down the principle, in a state of facts strikingly similar to those before us, as follows: "The plaintiff below was a passenger in defendant's cars from Philadelphia to Morgan's

parting in the direction he wished to go, and after he boarded the train he learned that it would not stop at the station for which he had purchased the ticket, he has no redress against the company. *Duling v. Philadelphia, W. & B. R. Co. supra.*

A railroad company, having sold a ticket to a point on its road, including a return trip, was bound to stop at the station and bring the passenger back, upon the usual signal, which had been recognized by the company, being given. *Freeman v. Detroit, M. & M. R. Co. 9 West. Rep. 117, 65 Mich. 577.*

Liability for injury to passenger, alighting from train.

Where the conductor has reason to believe that any passenger, on reaching the station of his destination, has not alighted, and is dilatory in the act of alighting, and he starts his train without examination or inquiry, and such passenger is in the act of alighting when the train is started, and is thereby injured, the company will be liable. *Sherwood, J., dissents, on the ground that there was evidence to show the conductor that plaintiff was not in danger. Strauss v. Kansas City, St. J. & C. B. R. Co. 5 West. Rep. 433, 86 Mo. 421.*

Where, before a passenger had safely alighted at a station, the conductor signaled the train to start, and jerked the passenger to the ground, injuring him, the carrier is liable. *Louisville, N. A. & C. R. Co. v. Wood, 12 West. Rep. 313, 113 Ind. 544.*

When a conductor is merely asked how long a train will stop at a certain station, and tells the passenger, he is not presumed to know that the latter desires to alight on business, and does not thereby assume any obligation to watch the movements of the passenger or delay the train on his account. *Missouri Pac. R. Co. v. Foreman, 73 Tex. 311.*

He is not bound at his peril to ascertain from any mere stranger of the existence of an agreement to 7 L. R. A.

change the arrangement and stop at an unusual place. *Atchison, T. & S. F. R. Co. v. Ganta, 33 Kan. 603.*

A freight train accustomed to discharge passengers away from its platform, or where it is impracticable to reach it, may require them to leave at some convenient place. *New York, C. & St. L. R. Co. v. Doane, 1 L. R. A. 157, 15 West. Rep. 465, 115 Ind. 435.*

Where a passenger-freight train stopped at an inconvenient place, a female passenger was justified in supposing it would stop at the platform, and, her presence being discovered as the train passed the station, it was negligence in the company not returning to the station or assisting her to alight from the train when it stopped, or to reach the station in safety. *Ibid.*

A female passenger required to alight from a freight train, beyond the station, was not negligent in not discovering gates into a private inclosure through which the station might be reached by an unmarked route; and the company is liable for injuries suffered by her falling while attempting to cross a cattle pit. *Ibid.*

Duty of carrier to stop train to allow passenger to alight.

It is the duty of the servants and employés on a passenger train to stop the train long enough for a passenger, by the exercise of ordinary care and diligence, considering age, sex and physical condition, to alight from the train safely before it is started or suffered to start. *Hickman v. Missouri Pac. R. Co. 8 West. Rep. 564, 91 Mo. 433; Central R. Co. v. Whitehead, 74 Ga. 441; Strauss v. Kansas City, St. J. & C. B. R. Co. 5 West. Rep. 433, 86 Mo. 421.*

A sufficient time to permit a passenger to get off the train in safety means time to alight safely in the use of reasonable diligence and care, having re-

Corner. The train should have stopped at the latter place, but some defect in the bell-rope prevented the conductor from making the proper signal to the engineer, who therefore went past, though at a speed somewhat slackened on account of the switches which were there to be crossed. The plaintiff, seeing himself about to be carried on, jumped from the platform of the car, and was seriously hurt in the foot. . . . Persons to whom the management of a railroad is intrusted are bound to exercise the strictest vigilance. They must carry the passengers to their respective places of destination, and set them down safely, if human care and foresight can do it. . . . But they are answerable only for the direct and immediate consequences of errors committed by themselves. They are not insurers against the perils to which a passenger may expose himself by his own rashness and folly. . . . From these principles it follows very clearly that if a passenger is negligently carried beyond his station, where he . . . had a right to be let off, he can recover compensation for the inconvenience, the loss of time and the labor of traveling back, because these are the direct consequences of the wrong done to him. But, if he is foolhardy enough to jump off without waiting for the train to stop, he does it at his own risk, because this is gross imprudence, for which he can blame nobody but himself." *Pennsylvania R. Co. v. Aspell*, 23 Pa. 147.

This court long ago laid down the like doctrine in the following language: "If the daughter of plaintiff voluntarily jumped from the cars when in motion, even though it was

the constant habit of the company to stop at that place, the leap not being made to avoid an imminent impending peril, produced by the misconduct of defendants, but to avoid being carried beyond her destination, she was herself guilty of such imprudence as relieves the company from the consequences of the want of caution on the part of their servants; for in such a case the accident may be attributed to the fault of both parties, which would destroy plaintiff's right to recover." And then the court quotes, with approval, the above decision of the Pennsylvania court. *Damont v. New Orleans & O. R. Co.* 9 La. Ann. 441.

In a very recent case we referred to this principle as an evident one, saying: "Now, supposing that any passenger on a regular train should labor under a similar mistake in believing, for instance, that the train was passing by the station to which he was destined, and, fearing that he might be carried beyond the same, should jump out as the train was pulling out of the station, and be injured by falling; could the company be held liable for injuries thus received? Evidently not." *Reary v. Louisville, N. O. & T. R. Co.* 40 La. Ann. 83.

In the multitude of adjudications and judicial expressions on this subject, by numerous courts, there have naturally arisen varieties and conflicts of opinions, and decisions, hostile, or apparently hostile, to each other, are quoted on either side; but the weight of authority undoubtedly sustains the views above expressed, and, at all events,—what more nearly concerns us,—they have been adopted in the jurisprudence of Louisiana.

gard to all the circumstances. *Pennsylvania R. Co. v. Lyons* (Pa.) 25 W. N. C. 6.

A conductor has no right to assume, because he does not see a passenger in the coach on looking into it, that he has leaped out in the dark from the moving train; but it is his duty to know that he has a passenger for a station, to have the station announced and to stop the train. *Louisville, N. O. & T. R. Co. v. Mask*, 64 Miss. 738.

Passenger carried beyond his destination.

A passenger carried beyond his station may recover for an injury sustained by falling through a trestle work. Whether he consented to leave the train at that point, so as to waive his right, is a question for the jury. *Winkler v. St. Louis, I. M. & S. R. Co.* 3 West. Rep. 433, 21 Mo. App. 99.

The complaint in an action for carrying a passenger beyond his station should aver that under the rules of the company the train should have stopped at the station. *Chicago, St. L. & P. R. Co. v. Bills*, 1 West. Rep. 919, 104 Ind. 12.

The plaintiff is entitled to recover damages for his trouble and inconvenience in getting back to his destination. *East Tennessee, V. & G. R. Co. v. Lockhart*, 79 Ala. 815.

A railroad company which sells a ticket to a point beyond its line is liable for injuries to the passenger caused by the negligence of those in charge of the train and car at a point beyond its own line to which the passenger was carried without change of cars. *Chollette v. Omaha & H. V. R. Co.* (Neb.) 4 L. R. A. 135.

A woman with an infant, wrongfully carried by a train beyond her destination, and who insists on being put off, in consequence of which she has to walk back a mile, is not thereby prevented from recovering damages, where she was without money, and, if she had gone on, would have been left late

at night in a strange city. *Galveston, H. & H. R. Co. v. Crisp*, 73 Tex. 238.

Where a train passes the station to which the passenger was entitled to be carried, without stopping a sufficient time for him to get off, the carrier is liable in damages. The fact that the train carried freight as well as passengers makes no difference. *White Water Valley R. Co. v. Butler*, 12 West. Rep. 207, 112 Ind. 598.

A railroad company admitting passengers to a freight train incurs the same liability to transport them safely as if on a passenger train. *New York, C. & St. L. R. Co. v. Doane*, 1 L. R. A. 157, 15 West. Rep. 465, 115 Ind. 435.

If a passenger-freight train is stopped near a station, and the passengers rightfully understand they are to leave the train, the company is liable for the injuries they may sustain in so doing, to the same extent and upon the same ground as if suffered from the defectiveness of its own premises. *Ibid.*

Contributory negligence defeats right of action.

An administrator cannot recover for the death of his decedent, caused by negligence of a railroad company, unless decedent was in the exercise of due care for his own safety. *Chicago & A. R. Co. v. Fietsem*, 12 West. Rep. 844, 123 Ill. 518.

An adult, if guilty of any negligence, however slight, contributing directly to produce the injury to himself, cannot recover. *Dowling v. Allen*, 5 West. Rep. 370, 88 Mo. 203; *Monongahela City v. Fischer*, 2 Cent. Rep. 79, 111 Pa. 9; *Western Union Tele. Co. v. McDaniel*, 1 West. Rep. 274, 103 Ind. 204; *Cook v. Missouri Pac. R. Co.* 1 West. Rep. 453, 19 Mo. App. 329.

A street railway is not liable for a personal injury when it appears that, when plaintiff signaled the conductor to stop the car, the latter rang the bell for that purpose, and the car immediately be-

The question is, then, whether the plaintiff, in jumping off the moving train, acted upon the express or implied invitation of the Company. The evidence conclusively negatives any express invitation on the part of any employé of the Company. It is equally clear that the officers in charge of the train never intended or expected that plaintiff should get off, and certainly did not slack up for the purpose of letting him get off. They acted precisely as they would have done had there been no passengers to take on or put off; for the engineer had no signal to that effect, therefore did not know that there was a passenger to put off, and only slackened the speed, as was his duty on all occasions, simply to allow the exchange of mails. Is it possible to construe this as implying an invitation? If so, such an invitation is given to everyone who wants to get off the train whenever it passes such a station.

The testimony is conflicting as to the rate of speed at which the train passed the station. Nothing can be more uncertain than such estimates, especially when made by unskilled observers. The natural and probable conclusion from the circumstances is that the train only made the usual slackening of speed for exchanging the mails. There was no reason why the engineer should have acted otherwise. Plaintiff thinks he would have landed safely but for the acceleration of speed which took place as he was in the act of jumping. But this acceleration only took place after the train had passed the platform, and after the mails had been exchanged, which was the usual and natural course. If plaintiff chose to infer an invitation to jump off from these customary acts of the Company, it was a rash conclusion. One of his own witnesses testifies that he never, at any other time, saw a person jump from a train moving as fast as that one was, although he says it was moving slowly. That plaintiff's action was imprudent is shown by the result, and, as we think, by all the circumstances. His own evidence shows that he hesitated about attempting the jump, and was only determined by the question of a third person, and the thought that otherwise he would be carried beyond his station. His act was purely volun-

tary, uninfluenced by any invitation expressed or intended by the employés of the Company, and excused by no impending danger or necessity of any kind, except his mere unwillingness to be carried beyond his station. It was imprudent and dangerous, and his action for the resulting injury is clearly barred by his own contributory fault. It is therefore ordered and decreed that the verdict and judgment appealed from be annulled and set aside, and that there be judgment in favor of defendant rejecting the demand, at plaintiff's costs in both courts.

Watkins, J., dissenting:

Plaintiff sued the Railroad Company for \$10,000 damages for injuries he received in alighting from one of its trains while in motion, on which he was a passenger, it having passed the station to which he was ticketed without making a full stop, only slowing up to permit an exchange of mails. There was a verdict of a jury in his favor, which this court has set aside, and the substance of the majority opinion is that the act of the plaintiff was voluntary, and without invitation on the part of the officers and agents of the Railroad Company; and while the Company was, primarily, guilty of negligence in failing to carry out its contract of safe carriage, the plaintiff was guilty of contributory negligence.

The opinion puts the proposition thus: "The question is, then, whether the plaintiff, in jumping off the moving train, acted upon the express or implied invitation of the Company;" and, answering that question, the opinion says: "The evidence conclusively negatives any express invitation on the part of any employé of the Company. It is equally clear that the officers in charge of the train never intended or expected that he should get off." These dicta are the sole foundation of the opinion, and the legal proposition announced rests exclusively upon *Damont v. New Orleans & C. R. Co.*, 9 La. Ann. 411; *Pennsylvania R. Co. v. Appell*, 38 Pa. 147, and *Rearv v. Louisville, N. O. & T. R. Co.* 40 La. Ann. 82.

Let us see what is their purport, and what are the principles they announce, and whether they are a proper foundation for the opinion. In

gan to slow down, and that plaintiff, without waiting for the car to stop, stepped from the car while it was in motion. *Harmon v. Washington & G. R. Co.*, (D. C.) 8 Cent. Rep. 738.

One who jumps from a train moving twenty-five miles an hour, when not invited or ordered to do so by the agents of the railroad company, or not to avoid some threatened peril, is guilty of contributory negligence barring a recovery for injuries thereby received. *Jarrett v. Atlanta & W. B. R. Co.*, (Ga.) 9 S. E. Rep. 681.

Where a person is killed or injured by attempting to jump from a railroad train while it is crossing a public street, the negligence of the railroad company in failing to ring its locomotive bell while crossing the street, as required by law, while it is clearly negligence, does not contribute to the injury; and of such failure plaintiff cannot complain; and such failure is therefore no cause for a recovery by one so injured. *Central R. Co. v. Harris*, 76 Ga. 501.

Where sufficient time was allowed the passenger to get off, but he did not do so, and remained on the train till it started, when he jumped off and was injured, he cannot recover for the injury. *Pennsylvania R. Co. v. Lyons* (Pa.) 25 W. N. C. 8.

A passenger who is unnecessarily and improperly upon the platform of a railroad car, knowing that the train is about to start, and who is thrown down and injured by the starting of the engine with no unusual or unnecessary jerk, cannot recover therefor. *Torrey v. Boston & A. R. Co.*, 7 New Eng. Rep. 148, 147 Mass. 412.

The fact that he was at the time looking for some one does not excuse him in case he was injured. *Ibid.*

A passenger carried beyond her stopping place, who takes the risk of getting off while the train is in motion, must take the consequences, and cannot recover against the railroad company for injuries thereby sustained. *Watson v. Georgia Pac. R. Co.* 81 Ga. 476.

A man who attempted, while a street-car was in motion, to step off from the front of the car with a keg of lead in his hands, is guilty of negligence which will prevent his recovering for injuries which he would not have received if he had remained on the steps, although there was negligence on the

the *Damont Case* none of the facts are stated. The only question discussed was the correctness of the charge of the judge *a quo* to the jury, and the case was remanded for a new trial. The only cases cited therein as authority were *Lessee v. Pontchartrain R. Co.* 17 La. 362, and *Fleitas v. Pontchartrain R. Co.* 18 La. 339. Those two cases involved claims for damages sustained by the owners of slaves who had been killed, one in attempting to cross a railroad track, and the other while lying on the track, either drunk or asleep. The mere citation of those cases as authority for the decision of that case shows how imperfectly understood were the questions involved, in 1854, when that opinion was rendered; for, of course, there being between the owners of the slaves and the railroad companies no contractual relations whatever, the former were primarily guilty of gross negligence, and the latter were without fault. But the opinion quotes with approval the paragraph from *Pennsylvania R. Co. v. Aspell*, which was quoted in the *Damont Case*, but in that extract no part of the facts of that case is recited. They are brought forward in Wood's Railway Law, at pages 1130 and 1132, and we quote them to show how very inapplicable to this case they are. They are as follows, viz.: "Whilst the train was in motion, the plaintiff leaped from the car, though warned by the conductor and brakeman not to do so, and informed him that the train would be stopped and backed to the station. . . . If he had heeded them, he would have been safely let down, at the place he desired to stop at, in less than a minute and a half. Instead of this, he took a leap which promised him nothing but death; for it was made in the darkness of midnight, against a wood-pile close to the track, and from a car going probably at the full rate of ten miles an hour."

On this state of facts both the *Aspell* and *Damont Cases* depend. On such a state of facts, of course, the plaintiffs were held to have been guilty of gross negligence, and the railroad companies without fault. But why should those decisions be cited in this case as sustaining the doctrine of contributory negligence? I confess I cannot understand, for I

respectfully submit that this record presents no such case.

Nor is the case of *Reary v. Louisville, N. O. & T. R. Co.* at all applicable, because it was one of a little girl who received injuries in jumping from a train of cars while in motion. But she was not a passenger. The train was in the depot-yard being uncoupled at the time, and the conductor had gone home. The paragraph quoted from that case in the opinion was hypothetically stated, merely for the purpose of an illustration, and has no weight, as a part of that decision. Without antagonizing the opinion on its statement of facts, I propose to make an independent one.

As a witness, the plaintiff says that, when within 200 yards of the station of his departure, there was a yoke of oxen on the track, and the speed of the train was slackened until they were frightened off. Afterwards the speed was increased a little, the whistle blown, and it was again reduced, and slowly moved by the depot platform, while the mail was being exchanged. When the train passed the depot he thought it was running slowly enough for a man to get off without danger. The only thing that prevented him getting off safely was that the train gave a jerk forward as he got off. The train was moving all the time, but very slowly. The place where he attempted to alight was a better place to get off than that where persons usually get off. The ground was smoother. The train was running at less than one half its usual speed. When he was passing the place where the ties, etc., were lying, he thought it was not a safe place to get off. As he hurriedly made up his mind, the train passed an open place, and he got off there, because he thought it was better ground, and he could get off there without getting hurt. Using his own language, he says: "Just at the moment that I got off, the train made a jerk. I was in the act of leaving the steps, when the jerk came. I had let go the railing, and had started to step in the direction of the way the train was going, and one foot had left the steps, and the other [was] still on the steps, and [in the act of] leaving, when the jerk came." This occurrence happened at 10 o'clock A. M.

part of the carrier. *Ricketts v. Birmingham Street R. Co.* 85 Ala. 600.

Exception to rule of contributory negligence.

The rule that it is negligence in a passenger to jump from a moving train is subject to exceptions, —as, when the passenger is placed in peril by the default or negligence of the company, or when he leaves the train, while it is in motion, by the direction of the company's agents. *Pennsylvania R. Co. v. Lyons* (Pa.) 25 W. N. C. 6.

Where a boy sixteen years of age leaped from a train, upon which he was a trespasser, at a show of force displayed by the conductor, it was held that the company was liable. *Indianapolis, P. & C. R. Co. v. Pitzer*, 4 West. Rep. 257, 100 Ind. 179.

A street-car passenger who has signaled for the car to stop so he may alight is not guilty of contributory negligence in going upon the step of the car when it slows up, as he has a right to expect that it will stop; and where it starts up again with a jerk before stopping, and he is thrown off, the accident is not the result of contributory negligence. *Harmon v. Washington & G. R. Co.* (D. C.) 17 Wash. L. Rep. 426
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A company is responsible for injuries resulting from acts done under the direction of the conductor. *Beilman v. New York Cent. & H. R. R. Co.* 42 Hun. 180.

Negligence cannot be imputed to a passenger, although a woman advanced in pregnancy jumped from a car to the ground in obedience to an instruction from the conductor, the train having been stopped at a place other than the usual platform. *Baltimore & O. R. Co. v. Leapley*, 4 Cent. Rep. 253, 65 Md. 571.

Where a train stops at a station and starts again before a passenger can alight, an attempt by him to leave it while it is moving, made under the conductor's direction, is not, as a matter of law, contributory negligence which will bar a recovery for injuries sustained in doing so. *St. Louis, I. M. & S. R. Co. v. Person*, 49 Ark. 182.

Where the conductor announces the name of the station after the train stops, the announcement is equivalent to an invitation to alight; and if passengers are deceived by such an announcement, and are consequently injured, the railroad company will be responsible. *Central R. Co. v. Thompson* 76 Ga. 770.

Another witness for plaintiff states that he was present, and saw the train approach the station. Using his own words, he says: "I think the train checked up a little, west of the platform, but near it. I do not think the train stopped entirely at the station this trip. . . . I think the train came nearer stopping that day than it usually does to put off the mail. . . . About the time the locomotive got opposite the platform the train was moving very slow."

Another of plaintiff's witnesses states, using his own language: "I was at Doyline Station the day that Mr. Walker got his leg broke. I was in about fifteen steps of him when it happened. I saw him when he went to step off the train, and it appeared to me that, as he did so, the train got faster, and jerked his feet from under him. Just before and at the time he attempted to get off the train was going slow, and just as he went to step it appeared to me that it jerked his feet from under him. I do not know that it was going any slower than when they checked up for the mail. I have never seen anyone get off there when the train was running as fast as it was then, except Mr. Walker. I have frequently got on the train . . . when it was going as fast as that."

On the part of the defendant there is not a syllable of positive testimony in opposition to these emphatic statements. The conductor was sworn, and simply stated "that the average rate of running is about twenty-four and one half miles an hour on the road from Monroe to Shreveport. This was true in October, 1886. . . . The average rate of speed, when passing flag stations, when the train does not stop, is between eight and twelve miles an hour, for the exchange of mails, as above stated." This witness does not profess to have any knowledge of the occurrence, because he says: "I learned the day afterwards that Mr. Walker jumped off the train, and had broken his leg." He subsequently volunteered the statement: "I judge that the train was running at about ten miles an hour on that day, when it passed Doyline, because it usually passes at that speed when only delivering the mail."

The engineer testified that he was on this road, running a passenger engine and train, in October, 1886, but that he had "no recollection of the accident that resulted in the injury of Mr. Walker." Said he did not "recollect who was engineer on the passenger train going east, on the 16th of October, 1886."

The defendant's third witness was the porter, who states, using his own words: "I recollect the time that Mr. Walker was said to have been hurt, at or near Doyline Station." He says further: "I remember that on that day no signal was given to stop at Doyline, and I did not leave my seat."

Consequently it is established by the concurring statements of defendant's three witnesses, all of them trainmen, that they knew nothing of the occurrence, and could testify to nothing adverse to the testimony of plaintiff's witnesses. Of course the mere theoretical conjecture of the engineer, as to the speed of the train, amounts to nothing at all.

The recital of the foregoing facts is sufficient to take this case out of the principle announced in *Pennsylvania R. Co. v. Aspell*. They plainly show the defendant in fault, and without ex-

cuse. Now, I will consider whether they show the plaintiff guilty of contributory negligence to such a degree as to preclude his right to recover. A review of authorities will first be necessary.

It was decided by the Supreme Court of Tennessee, in 1887, that the act of a passenger in alighting from a train while in slow motion, who sustained injuries in consequence, has been, in the courts of several of the States, treated as negligence *per se*, and no damages can be recovered; but, says the court (86 Tenn. (2 Pickle) 348), "this is contrary to the current of judicial opinion, in this country at least. The true rule deducible therefrom is stated in 2 Wood, Railway Law, 1180, to be that 'in all cases the question is one of fact whether, in view of the particular circumstances, the passenger was guilty of negligence in attempting to leave the train while it was in motion. In this, as in all other matters where the safety of passengers is concerned, the company owes a duty to the passenger to act with proper care and caution; and if the motion of the train is not entirely stopped, and the passenger is expressly or impliedly invited to leave the train while moving at a slow rate of speed, he has a right to presume that it is safe for him to do so. . . . If the train is moving slowly, and there is no obvious danger in getting off, it cannot be said to be negligence *per se* to make the attempt, especially if the passenger is directed to do so; . . . and it would be wrong to instruct the jury that such an attempt *per se* constituted contributory negligence.' Id. 1129. 'As a rule, it may be said that where a passenger, by the wrongful act of the company, is compelled to choose between leaving the cars while they are moving slowly, or submitting to the inconvenience of being carried by the station where he desires to stop, the company is liable for the consequences of the choice, provided it is not exercised negligently or unreasonably.' Id. 1181, 1182."—citing *Thompson, Carr. 237-267*. See also *Plopper v. New York Cent. & H. R. R. Co.* 13 Hun, 625; *Keating v. New York Cent. & H. R. R. Co.* 49 N. Y. 673; and *Taber v. Delaware, L. & W. R. Co.* 71 N. Y. 489.

"The earlier cases," says the Tennessee court, "establish the rule that leaving a train [while] in motion was such negligence as defeated the right of recovery, unless done to avoid danger of remaining on board; and this is still stated as the 'general rule' in many authorities. 2 Wood, Railway Law, 1126; *Thompson, Carr. 267*."

"But the rule we have laid down is the modern one, and formulated from the many exceptions, and this modification has been before recognized by this court. *East Tennessee, V. & G. R. Co. v. Conner*, 15 Lea, 253; *Louisville & N. R. Co. v. Stacker*, 86 Tenn. (2 Pickle) 345."

It was decided by the Supreme Court of Georgia, in a recent case, that "the railroad was bound to put him [a passenger] off,—to stop its train for this purpose. This it failed to do, and it was not want of ordinary care in the passenger to use the only means to get off the course of the defendant permitted." *Georgia R. & Bkq. Co. v. McCurdy*, 45 Ga. 289. See also *Filer v. New York Cent. R. Co.* 49 N. Y. 47; *Lloyd v. Hannibal & St. J. R. Co.* 53 Mo. 509; *Illinois Cent. R. Co. v. Able*, 59 Ill. 181.

The proper limitation of that rule is stated in Wood's Railway Law thus: "But, generally, no recovery can be had if the cars are under such motion as to render it obviously dangerous for a person to attempt to leave them,"—p. 1136, citing *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 223; *Pennsylvania R. Co. v. Aspell*, 23 Pa. 147; *Damont v. New Orleans & O. R. Co.* 9 La. Ann. 441; *Gavett v. Manchester & L. R. Co.* 15 Gray, 501.

The author then proceeds: "And, under such circumstances, it is not sufficient to charge the company that the conductor advised the passengers to make the attempt. It is the duty of the passenger to exercise his own judgment, and, if the danger was so great that a man of ordinary prudence would not have attempted it, he is guilty of such contributory negligence as bars a recovery,"—citing *Chicago & A. R. Co. v. Randolph*, 53 Ill. 510; *Chicago, B. & Q. R. Co. v. Hazard*, 26 Ill. 378.

"When the danger is apparent, it must not be braved simply because the company is bound to stop the train, or because it is very important that the passenger should stop at that particular time." Wood, Railway Law, 1136.

But the rule is stated concisely to be: "But, in all cases, the question of liability must necessarily be determined by the facts and circumstances of each case,—whether the train was in rapid motion, . . . and whether the real danger was obvious." 2 Wood, Railway Law, 1137.

"But where a railway company fails to bring its train to a full stop at a station, it will be liable in damages for injuries sustained by a passenger in attempting to get off, if, under all the circumstances, it was prudent for him to make the attempt." Ill. 1148, 1149; *Prior v. St. Louis, A. C. & N. R. Co.* 72 Mo. 414; *Central R. & N. Co. v. Letcher*, 69 Ala. 106; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697 [24 L. ed. 548]; *Memphis & O. R. Co. v. Copeland*, 61 Ala. 376.

The italics in preceding quotations are those of the writer.

Abbott states the rule thus: "Alighting from the car at an unsuitable place is not contributory negligence, if the train is not stopped at a suitable one, and if there is not such apparent danger as would deter a person of ordinary prudence." 2 Abbott, Dig. Corp. 598.

Beach announces the rule thus: "As in the case of boarding a railway train in motion, so it is held not contributory negligence *per se* for a passenger to jump off a train which is moving." *Galveston, H. & S. A. R. Co. v. Smith*, 59 Tex. 406; *Loyd v. Hannibal & St. J. R. Co.* 53 Mo. 509; *Pennsylvania R. Co. v. Kilgore*, 32 Pa. 292; *Brooks v. Boston & M. R. Co.* 135 Mass. 21. Whether or not a railway company shall be held liable in damages for injuries sustained by a passenger in attempting to leave one of its trains while in motion will depend upon whether, under all the circumstances, it was prudent for him to make the attempt." Beach, Contrib. Neg. p. 157, § 53, citing the following authorities, viz.: *Price v. St. Louis, A. C. & N. R. Co.* 72 Mo. 414; *Doss v. Missouri, K. & T. R. Co.* 59 Mo. 27; *Parish v. Ruen*, 62 Wis. 273; *Langhoff v. Milwaukee & P. du O. R. Co.* 19 Wis. 489; *Curry v. Chicago & N. W. R. Co.* 43 Wis. 656; *Leaist v. Chicago & N. W. R. Co.* 7 L. R. A.

W. R. Co. 64 Wis. 228; *St. Louis, I. M. & S. R. Co. v. Person*, 49 Ark. 182; *St. Louis, I. M. & S. R. Co. v. White*, 48 Ark. 495; *Louisville, N. O. & T. R. Co. v. Mask*, 64 Miss. 733; *Hunter v. Cooperstown & S. V. R. Co.* 112 N. Y. 371, 2 L. R. A. 832, and many other cases.

In *Solomon v. Manhattan R. Co.* 103 N. Y. 437, 4 Cent. Rep. 775, it was held that, to justify a recovery, the act of the defendant must put the passenger to a sudden election between alternative danger or inconvenience, or create some situation "which interfered, to some extent, with his free agency, and was calculated to divert his attention from the danger, and create a confidence that the attempt could be made in safety."

This principle has been frequently maintained and upheld by different courts, and notably in the following, viz.: *South Covington & O. Street R. Co. v. Ware*, 84 Ky. 267; *Collins v. Davidson*, 19 Fed. Rep. 83; *Haff v. Minneapolis & St. L. R. Co.* 14 Fed. Rep. 553; *Lawrence v. Green*, 70 Cal. 417; *Chicago & N. E. R. Co. v. Miller*, 46 Mich. 532; *Cincinnati, H. & I. R. Co. v. Carpar*, 112 Ind. 26, 11 West. Rep. 221; *Stewart v. Boston & P. R. Corp.* 146 Mass. 605, 6 New Eng. Rep. 273; *Delaware & H. Canal Co. v. Webster (Pa.)* 4 Cent. Rep. 628; *St. Louis, I. M. & S. R. Co. v. Person*, 49 Ark. 182.

The rule was again formulated thus, in *Strand v. Chicago & W. M. R. Co.* 64 Mich. 216, 7 West. Rep. 470: "In order to make him so [negligent], he must, as in all other cases, decide upon facts as they appear, as a man of ordinary care would do under the same circumstances. It is not right of any passenger to run evident risks to his safety, but the rule of prudence binding on him must be that which, under just such circumstances, would restrain all men of ordinary prudence. If the mind of an ordinarily prudent man would be impressed with the belief of danger, he has no right to incur the danger. If the danger would not be apparent, he is not negligent in acting on that assumption."

To this list might be added an almost indefinite number and variety of cases to the same effect. But it is quite sufficient to say that, on the faith of those quoted and cited, the following principles are firmly established on American jurisprudence, viz.:

- (1) That it is not *per se* negligence on the part of a passenger to alight from a moving train.
- (2) The question is one of fact whether, under the particular circumstances, the passenger was guilty of negligence in attempting to thus alight; and, if it appear that he was expressly or impliedly invited to leave the train while moving at a slow rate of speed, he has the right to presume that it is safe for him to do so.
- (3) When a passenger, by the wrongful act of a railroad company, is compelled to choose between leaving the cars while they are moving slowly, or submitting to the inconvenience of being carried by the station where he desires to stop, it is liable for the consequences of the choice, provided it is not exercised negligently or unreasonably, and it is not want of ordinary care in the passenger to use the only means to get off the car of the defendant permitted.
- (4) To justify a recovery, the act of the com-

pany must put the passenger to a sudden election between alternate danger or inconvenience, or create some situation which interfered, to some extent, with his free agency, and was calculated to divert his attention from the danger, and create a confidence that the attempt could be made in safety.

(5) It is the duty of the passenger to exercise his own judgment, and, if the danger was so great that a man of ordinary prudence would not have attempted it, he is guilty of such contributory negligence as bars a recovery; for, when the danger is apparent, it must not be braved simply because the company is bound to stop the train, or because it is very important that the passenger should stop at a particular place; but, in all cases, the question of liability must depend upon whether the train was in rapid motion and the danger obvious,—the question being whether, under the circumstances, it was prudent in the passenger to make the attempt to alight, and that depends upon whether the danger was imminent and obvious.

I therefore respectfully submit that the mere fact of the plaintiff having attempted to alight

from defendant's train while in motion did not constitute his act contributory negligence, because it was voluntary and without an invitation, express or implied.

The act of the company put the plaintiff to a sudden election between alternative danger or inconvenience, and thus created a situation well calculated to divert his attention from that danger, and inspired a confidence in the safety of his attempt to alight therefrom. The danger does not appear to have been either apparent or imminent. I think the verdict of the jury and the judgment of the court should have been affirmed.

As was appropriately said in *Williams v. Pullman Palace Car Co.* 40 La. Ann. 420, in deciding a kindred question, "this court should seek to place its rulings and jurisprudence in line and in harmony with those of the Supreme Court of the United States, and of the courts of last resort of our sister States, whenever those decisions do not militate against the principles of our special and exceptional system of laws;" and it is in this spirit I have prepared this elaborate dissent, and in the hope of attaining this end that I place my views on record.

NORTH CAROLINA SUPREME COURT.

Richard B. ODOM *et al.*

v.

Nathaniel J. RIDDICK *et al.*

(.....N. C.....)

1. The undeclared lunacy of a grantor does not impair the title of a bona fide purchaser for value and without notice from his grantee.
2. A conveyance by a man of his real estate during the period in which the common-law right of married women to dower was suspended, barred all claim of his wife thereon although she did not join in the conveyance.

(January 14, 1890.)

CROSS appeals from a judgment of the Superior Court for Gates County confirming the report of a referee declaring voidable a deed to certain lands,—plaintiffs appealing from so much of the decree as made the avoidance of the deed conditional upon the repayment of the purchase money and refused to make it absolutely void, and defendants appealing from so much as held the deed voidable. *Affirmed on plaintiffs' appeal; reversed on defendants'.*

The action was brought by the heirs-at-law of one Oliver Odom to have a deed from him to his brother Richard declared null and void. Richard had disposed of the property conveyed by said deed and the persons holding title under his conveyance were made defendants.

The case was heard by a referee, who declared the deed voidable and directed that it be avoided upon repayment to defendants of the money paid by them for the property.

NOTE.—*Bona fide purchaser.*

See notes to *Smythe v. Sprague* (Mass.) 3 L. R. A. 632; *McCleary v. Wakefield* (Iowa) 2 L. R. A. 529. 7 L. R. A.

This decision was affirmed by the court, and both parties thereupon appealed.

Plaintiffs took the following among other exceptions:

1. That the court below held the findings of fact by the referee to be final.
3. That the avoidance of the deed was made to depend upon the condition that plaintiffs repay to defendants the amount of their purchase money.
6. That the deed was not held to be absolutely void as to Roxana B. Odom, wife of Oliver Odom.

Defendants excepted because the deed was held voidable and was avoided as to them upon repayment of their purchase money.

The further facts appear in the opinion.

Messrs. W. D. Pruden and L. L. Smith for plaintiffs.

Messrs. Battle & Mordecai, for defendants:

A deed executed by a lunatic without guardian, like that of an infant without guardian, is not void, but only voidable.

2 Bl. Com. * 191, 192; 3 Bacon, Abr. *Idiots and Lunatics*, F.; 2 Kent, Com. 451; *Riggan v. Green*, 80 N. C. 286, and authorities cited.

The ground upon which courts of equity interpose to set aside contracts and other solemn acts of idiots and lunatics is fraud.

1 Story, Eq. Jur. § 237; Adams, Eq. 183.

If a court of equity in any case sets aside the deed of a *non compos*, it will ordinarily administer the equity of having him pay back to the other party the money or other thing received of him; and when it appears that the consideration is full, and the lunatic is not able to put the other party *in statu quo*, or if the benefit received is actual and of durable character—in either case, the court of equity will not be inclined to set aside the conveyance.

Riggan v. Green, *supra*, citing *Carr v. Holliday*, 1 Dev. & B. Eq. 344, 5 Ired. Eq. 187.

A purchaser for value from one whose deed was declared by the jury to be fraudulent and void gets a good title if he had no notice of the fraud in his vendee's deed.

Young v. Lathrop, 67 N. C. 63; *Wade v. Saunders*, 70 N. C. 270; *Davis v. Council*, 92 N. C. 725; *Perry v. Jackson*, 88 N. C. 103.

Clark, J., delivered the opinion of the court:

The reference was by consent. By its terms the referee was vested "with power, sitting as a chancellor, to decide upon the facts, and all matters of law and equity arising upon the pleadings and testimony, with liberty to either party, to except as to the referee's rulings on such matters of law and equity, and to appeal therefrom." The parties reserved the right to except only to the referee's rulings as to the law. By any reasonable construction, his findings of fact were to be conclusive. He found as a fact that the defendants purchased the land for value, and without notice of any mental incapacity on the part of Oliver Odom.

Had the defendants purchased directly from Oliver Odom for value, and without notice of his mental incapacity to make a deed, a court of equity would not ordinarily set aside the deed. *Riggan v. Green*, 80 N. C. 236.

We do not see that the condition of the defendants is any worse because they bought mediately, and not immediately. The presumption of law is in favor of sanity; and this presumption is so strong that when a want of it is claimed, even in a capital case, the burden is on the defendant to prove it, the presumption of sanity being stronger than the presumption of innocence. When, therefore, a purchaser sees a regular chain of title, formal in all particulars, upon the registration books, executed by grantors of full age, and not *femes covert*, he has a right to rely upon the presumption of sanity; and if, without any notice, or matter to put him upon inquiry, and for fair value, he takes a deed, he should be protected. Any other doctrine would place all titles upon the hazard. If the title of an innocent purchaser for value, and without notice, can be upset for the alleged mental incapacity of one grantor, it can be done though the grantor may have been a very remote one. The evidence must necessarily be sought among those friendly to the heirs of such grantor,—the neighbors and acquaintances of the party of alleged incapacity; and it would be difficult for the grantee in possession to furnish proof of the sanity of every grantor through whom he claims. Every man who shows the abnormal condition of mind which incapacitates him to make a conveyance of his property is sure to attract the attention of those around him, who have the power, and sometimes exercise it, to conceal the fact. It is a safer rule to require his heirs, or those acting for them, to take prompt steps to have the deed set aside, and parties placed *in statu quo*, before the property is conveyed to other parties, and while the facts are capable of full investigation, than to subject a remote grantee to maintain the integrity of his title by rebutting allegations of incapacity in a *very* one of a long line of grantors.

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A purchaser for value, from one whose deed was declared by the jury to be fraudulent and void, gets a good title, if he has no notice of the fraud in his vendee's deed. *Young v. Lathrop*, 67 N. C. 63; *Wade v. Saunders*, 70 N. C. 270; *Davis v. Council*, 92 N. C. 725; *Perry v. Jackson*, 88 N. C. 103.

The fact that it is found here that the defendant's grantor obtained the deed without fraud or undue influence, for a full and fair price, and acting under advice of Oliver Odom's counsel, who had been his attorney for years, surely cannot be allowed to put the defendants in a worse plight than they would have been placed if their grantor had procured the conveyance by fraud and undue influence. The great teachers of English law say that persons of non-sane memory, etc., "are not totally disabled to convey or purchase, but only *sub modo*. Their conveyances are voidable but not void." 3 Bl. Com. 291; 2 Kent, Com. 451.

The deed of a person of unsound mind, not under guardianship, conveys the seisin. *Wait v. Maxwell*, 5 Pick. 217; *Crouse v. Holman*, 19 Ind. 80, and cases cited.

Story, Eq. Jur. § 227, says: "The ground upon which courts of equity now interfere to set aside the contracts and other acts, however solemn, of persons who are idiots, lunatics and otherwise *non compos mentis* is fraud. Such persons being incapable, in point of capacity, to enter into any valid contract, or to do any valid act, every person dealing with them, knowing their incapacity, is deemed to perpetrate a meditated fraud upon them and their rights." To same purport, Adams, Eq. 183, and cases cited.

This places the doctrine upon an intelligible basis, and delivers the courts from the evident injustice and insurmountable inconvenience of declaring that all contracts made with one apparently sane, but who proves to have been insane, are void *ab initio* for want of consenting mind. This doctrine would give a lunatic or his heirs restoration of property sold by him without return of the money received for it, as was actually held in *Gibson v. Soper*, 6 Gray, 279, and *Rogers v. Walker*, 6 Pa. 371. The correct rule is stated by Mr. Story, in section 224: "If a purchase is made in good faith, without any knowledge of the incapacity, and no advantage has been taken of the party, courts of equity will not interfere to set aside the contract, if injustice will hereby be done to the other side, and the parties cannot be placed *in statu quo*."

Buswell, Insanity, § 413, says: "A completed contract for the sale of lands, made by an insane vendor, without fraud or notice to the vendee of the grantor's insanity, and for a fair consideration, will not be set aside, either at law or in equity, in favor of the vendor or his representatives, except the purchase money be restored, and the parties fully reinstated in the condition in which they were prior to the purchase. This rule appears to be unquestioned in the English courts." To the same effect is the able opinion of Horton, *Ch. J.*, in *Gribben v. Maxwell*, 34 Kan. 8 (decided in 1885), in which numerous authorities are reviewed and commented upon; and also in *Behrens v. McKenzie*, 23 Iowa, 333, delivered by a very eminent judge (Dillon), and *Corbit v. Smith*, 7 Iowa, 60;

Allen v. Berryhill, 27 Iowa, 584; 2 Pom. Eq. Jur. § 946. See also *Scanlan v. Cobb*, 85 Ill. 206; *Young v. Stevens*, 48 N. H. 183; *Eaton v. Eaton*, 87 N. J. L. 108; *Freed v. Brown*, 55 Ind. 810; *Carr v. Holliday*, 5 Ired. Eq. 167.

In *Lancaster Co. Nat. Bank v. Moore*, 78 Pa. 407, a lunatic was held liable upon a note discounted for him by the bank; and Paxson, J., says: "It would be an unreasonable and unjust rule that such persons should be allowed to obtain the property of innocent parties, and retain both the property and its price. Here the bank, in good faith, loaned the defendant money on his note. The contract was executed, so far as the consideration is concerned, and it would be alike derogatory to sound law and good morals that he should be allowed to retain it to swell the corpus of his estate." To the same purport are *Person v. Warren*, 14 Barb. 488, and *Allis v. Billings*, 6 Met. 415.

The courts have gone further, and held that when the contract is fair and bona fide, executed and completed, and the parties cannot be again put *in statu quo*, and there was no notice of mental incapacity, the court will not set aside the contract at all. *Molton v. Camroux*, 3 Exch. 487, affirmed on appeal, 4 Exch. 17; *Yauzer v. Skinner*, 14 N. J. Eq. 389; *Niell v. Morley*, 9 Ves. Jr. 478; also *Lord Chancellor Truro*, in *Price v. Berrington*, 3 Macn. & G. 498 and *Lord Cranworth*, in *Elliot v. Ince*, 7 DeG. M. & G. 475.

It is clear, from these authorities, that the conveyances of an insane person, not previously declared insane, are voidable merely, and not void; that the right to set them aside is based upon the ground of fraud; and that the court will not usually interfere, unless there has been fraud, or a knowledge of the insanity by the other party, and will then place the parties *in statu quo*. When, therefore, as in this case, the grantee knew of the mental incapacity of the grantor, but it is found as a fact "that no fraud was practiced upon Oliver Odom, or undue influence exercised to induce him to make the deed; that he acted under the advice of his lawyer, who had been his counsel for years; that the price paid was a full and fair consideration for the land; and that the grant or was benefited by the making of the deed, as he and his family thereby received a home and support,"—it would seem that a court of equity would not set aside such conveyance even as between the parties thereto, and certainly not without restoring the *status quo ante*. *Selby v. Jackson*, 6 Beav. 192.

"Courts of equity ever watch with a jealous care every contract made with persons *non compos mentis*, and always interfere to set aside

their contracts, however solemn, in all cases of fraud, or when the contract or act is not seen to be just in itself, or for the benefit of such persons." *Riggan v. Green*, 80 N. C. 239.

The deed of Richard Odom passed the legal title, and is only voidable as to Oliver Odom upon the ground of fraud in taking title from one whom he knew to be mentally incapacitated. The property has been conveyed for a fair value to innocent parties, who took without notice.

It has been held in the leading English case of *Greenhalgh v. Dars*, 20 Beav. 284, by the Master of the Rolls (since Lord Romilly), that if a conveyance is made by an alleged lunatic under undue influence, and for an inadequate consideration, a purchaser from such grantee for a valuable consideration, and without notice, would be protected, as any other purchaser for value, and without notice, from a fraudulent alienee. The court instances the insecurity of purchasers, if any other doctrine should be laid down.

The case of *Ashcraft v. DeArmond*, 44 Iowa, 229, is not exactly in point, but illustrates the proposition that deeds from an undecared lunatic are voidable on the doctrine of fraud. It holds that where the grantee of a lunatic took for value, and without notice, a subsequent purchaser from such innocent grantee for value, though with notice of the original grantor's incapacity, would not be affected; and cites the well-established doctrine laid down in *Kerr on Fraud and Mistake*, 816, and cases there quoted. Indeed, the facts in *Riggan v. Green*, *supra*, are almost identical with this in every particular, and that case should be conclusive of this.

As to exception 6 of the plaintiff, it is sufficient to say: (1) Roxana B. Odom is not a party to this action; her rights, if any, are not set up in the complaint; and the plaintiffs claim under their father, and not under her. (2) The deed from Oliver to Richard Odom was executed February 21, 1866,—two years and a half before the married women's rights were enlarged by the Constitution of 1868, and more than a year before the Act was passed restoring to married women the common-law right of dower, March 2, 1867. There was no necessity then for a wife to join her husband to convey his land. *Sutton v. Askew*, 66 N. C. 187. See also Code, § 2115.

Our conclusion therefore is that, upon the facts found, judgment should have been entered for the defendants. This disposes of both appeals.

In the plaintiffs' appeal, no error; in the defendants' appeal, error, and reversed.

PENNSYLVANIA SUPREME COURT.

Stephen KELLY

Joseph M. BENNETT, *Appt.*

(....Pa.....)

1. The refusal of the court to grant a nonsuit is not assignable as error.

NOTE.—*Proximate and remote cause of injury.*

See *Read v. Nicholas*, *post*, 120.

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2. Only one point or subject should be embraced in an assignment of error.

3. Placing an iron railing surmounted with sharp points around an area in front of a house is not negligence such as to create a liability for injuries by one of such points to the hand of a traveler, which he puts out to save himself from falling when he slips on an icy pavement.

(February 2, 1890.)

APPEAL by defendant from a judgment of the Court of Common Pleas, No. 3, for Philadelphia County in favor of plaintiff in an action to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The case sufficiently appears in the opinion.

Mr. Andrew Zane for appellant.

Messrs. J. Campbell Lancaster and *William Henry Lex*, for appellee:

The existence of the fence was the proximate, and not the remote, cause of the injury. The peculiar injury which the plaintiff suffered is immediately traceable to the sharp picket fence, and did not arise from any other cause.

Hoag v. Lake Shore & M. & S. R. Co. 85 Pa. 293; *Pennsylvania R. Co. v. Kerr*, 62 Pa. 858; *Fleming v. Beck*, 48 Pa. 313; *Reach v. Parmeter*, 23 Pa. 196; *Wharton*, Neg. p. 60, §§ 73, 97.

Kelly stumbled or slipped; he might have recovered himself or he might have fallen to the pavement, but just at this point of the accident another independent agency intervened, and that agency alone, the sharp-pointed fence, inflicted the injury.

South Side P. R. Co. v. Trich, 10 Cent. Rep. 367, 117 Pa. 390.

The existence of such a fence was of itself a nuisance. It makes no difference that there are similar railings existing throughout the city.

Wood, Nuis. § 267; *Barnes v. Ward*, 9 C. B. 393; *Reinhard v. New York*, 2 Daly, 248.

Paxson, Ch. J., delivered the opinion of the court:

While this is a plain case for a reversal, we are embarrassed by the defective manner in which it was presented. The assignments of error are very carelessly or unskillfully drawn, and do not prove the case. Indeed, if we were to stand upon mere technicalities, we would be compelled to affirm the judgment. The first assignment is to the refusal of the court to grant a nonsuit, which we have said, at least a hundred times, is not assignable as error. The second and last assignment alleges error in not affirming the defendant's second, third and fourth points. The manner of assigning these errors is wrong, as our rules require separate assignments in such cases. Only one point or subject should be embraced in an assignment of error.

The defendant's first point is as follows: "If the jury believe that the accident occurred

by the plaintiff slipping on the pavement, by reason of ice or any other material, then the plaintiff cannot recover." Inadequate as this point is to reach the merits of the case, we nevertheless think it should have been affirmed, in view of the undisputed facts.

The defendant below is the owner of a dwelling-house at the northeast corner of Spruce and Quince Streets, in the City of Philadelphia. In front of his house on Spruce Street there was an iron railing about four feet high to protect an area-way, and perhaps the front of the house. The railing was pointed at the top, of the arrow-head pattern. The plaintiff, while walking along the pavement, on the afternoon of January 25, 1888, slipped by reason of the snow or ice or both, and in falling put out his hand, which came in contact with one of the points of the railing, and was lacerated. For this injury he recovered a verdict of \$782 in the court below.

The defendant was not shown to have been negligent in any respect. The railing was a lawful structure. The defendant has a right to protect his area in that manner. Had he not done so, and someone had fallen therein and been injured, there would have been more reason in charging him with negligence. It is said, however, that it should have been constructed without points. This is not so clear. The points are useful in preventing mischievous boys from climbing over it. What reason has the defendant to anticipate that the plaintiff would slip and fall precisely at that spot, and that, in doing so, he would reach out his hand and strike the railing? And if he had not such reason the railing cannot be regarded, under our cases, as the proximate cause of the injury. It will not do to say that the mere fact of the injury is evidence of negligence on the part of defendant. Had there been no railing there, the plaintiff might have fallen with his head against the sharp edge of the step and received a far worse injury. And, if he may recover in the one case, why not in the other? It will not do to hold that when a man slips upon an icy pavement, the owner of the pavement, or the fence, or the steps upon which he falls, must compensate him for any injury he may receive. Few men would be willing to own property under such conditions. This plaintiff has no case, and we will not dignify it by a further discussion.

Judgment reversed.

MINNESOTA SUPREME COURT.

STATE of Minnesota, *ex rel.* ST. PAUL, MINNEAPOLIS & MANITOBA R. CO.,
v.
DISTRICT COURT OF HENNEPIN COUNTY, *Resp't.*

(....Minn....)

*1. Upon the laying out of a public high-

*Head notes by DICKINSON, J.

NOTE.—Laying out highway across railroad. Land already taken by the exercise of eminent domain for a public use, and actually used for that
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way across the track and right of way of a railroad company, the latter is not entitled to compensation for providing and maintaining cattle-guards and sign-boards at the new crossing.

2. It is entitled to compensation for planking the road-way where it crosses the railroad tracks, and for the maintenance of the planking.

(December 26, 1889.)

purpose, may be taken by legislative authority for other public uses. When so taken, it is presumed that the second use is not inconsistent with or de-

CERTIORARI to the District Court of Hennepin County to review an order determining the amount to which relator was entitled as damages by reason of the laying of a public highway across its tracks. *Reversed.*

The case sufficiently appears in the opinion. *Messrs. Benton & Roberts*, for relator:

Railway companies are just as much the owners of their lands as private persons, and their lands cannot be appropriated without full compensation.

City Charter, chap. 10, § 5; *St. Paul, M. & M. R. Co. v. Minneapolis*, 85 Minn. 141.

The compensation should be a full equivalent for all damages sustained, and should be sufficient to reimburse the party whose land is taken for all additional expense caused by the improvement.

Winona & St. P. R. Co. v. Denman, 10 Minn. 267, 280, 283.

When highways and railways cross each other the law has made numerous requirements of the railroad companies. They must plank the crossings (Stat. 1887, chap. 15, §§ 1, 2, p. 71); maintain cattle guards (Gen. Stat. 1878, chap. 84, §§ 54, 55), and signs.

Id. 53.

Where the railway track is laid over existing highways, the burden of this extra expense justly rests upon the railway company.

State v. St. Paul, M. & M. R. Co. 85 Minn. 181.

By the same process of reasoning, where the municipality extends its highway across the railway, it should either assume the same burden or reimburse the railway for the burden so imposed.

Old Colony & F. R. R. Co. v. Plymouth Co. 14 Gray, 155, 162; *Grand Rapids v. Grand Rapids & I. R. Co.* 58 Mich. 641, 648; *Grand Rapids v. Grand Rapids & I. R. Co.* 9 West. Rep. 578, 66 Mich. 42; Rorer, Railroads, p. 54; *Massachusetts C. R. Co. v. Boston, C. & F. R. Co.* 121 Mass. 128; *State v. Bayonne* (N. J.) 17 Atl. Rep. 971;

structive to the former use. *Miller v. Craig*, 11 N. J. Eq. 175; *Talbot v. Hudson*, 16 Gray, 417; *Peoria & P. U. E. Co. v. Peoria & F. R. Co.* 105 Ill. 110; *Wood v. Macon & B. R. Co.* 68 Ga. 539; *Chicago & N. W. R. Co. v. Chicago & E. R. Co.* 112 Ill. 589; *Mills, Em. Dom.* 143.

The new use should be a different use, and the change should be for the benefit of the public; whether this change shall be such a benefit is for the Legislature to determine. *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.* 97 Ill. 506.

Under a general authority to condemn lands for streets, a street may be laid out across a railroad (St. Paul, M. & M. R. Co. v. Minneapolis, 85 Minn. 141), but not longitudinally on the railroad track. Under the condemnation of a right to cross, nothing is acquired but a mere right of way, and the place of crossing will remain in common use of the parties for the exercise of their several franchises. The power to invade the privileges of a corporation in such a manner will not be inferred from a naked grant of the power to condemn. *New Jersey S. R. Co. v. Long Branch Cars*, 39 N. J. L. 28.

The condemnation of such a right of crossing is for the benefit of the public. *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.* *supra*; *Chicago & W. I. R. Co. v. Illinois Cent. R. Co.* 113 Ill. 156.

In New Jersey a public road cannot be laid across a railroad within 500 feet of a public road. *State v. Capner*, 8 Cent. Rep. 625, 49 N. J. L. 555.

The railroad corporation across whose road another railroad or highway is laid out has the like

Robbins v. St. Paul, S. & T. F. R. Co. 23 Minn. 286.

Mr. Robert D. Russell, City Atty., for respondent:

Railroads entering cities are subject under the general authority given to towns and cities to have roads and streets laid across their track. The franchise is taken subject to any inconvenience that may arise from such opening.

Mills, Em. Dom. § 45; *Hannibal v. Hannibal & St. J. R. Co.* 49 Mo. 480; *Little Miami & C. & X. R. Co. v. Dayton*, 28 Ohio St. 510; *St. Paul, M. & M. R. Co. v. Minneapolis*, 85 Minn. 141; *St. Paul Union Depot Co. v. St. Paul*, 80 Minn. 359.

There are inconveniences and damages resulting from the exercise of the power of eminent domain either by a railroad corporation or an individual, which cannot be calculated and need not be considered.

St. Paul, M. & M. R. Co. v. Minneapolis, 85 Minn. 141.

There are also uncertain elements which cannot enter in. For example, in *Massachusetts C. R. Co. v. Boston, C. & F. R. Co.* 121 Mass. 124, the court says that it is not entitled to damages for the risk of being ordered by county commissioners, when in their judgment the safety and convenience of the public may require it, to provide additional safeguards for travelers crossing its railroad.

Massachusetts C. R. Co. v. Boston, C. & F. R. Co. 121 Mass. 124; *Proprietors of Locks & Canals v. Nashua & L. R. Corp.* 10 Cush. 335, 392; *Boston & W. R. Corp. v. Old Colony R. Corp.* 13 Cush. 605, 811; *Boston & W. R. Corp. v. Old Colony & F. R. R. Corp.* 3 Allen, 142, 146; *Old Colony & F. R. R. Co. v. Plymouth Co.* 14 Gray, 155; *State, Central R. Co. v. Bayonne*, 17 Atl. Rep. 971.

Dickinson, J., delivered the opinion of the court:

The writ of certiorari has been resorted to

right as all individuals or bodies corporate owning lands or easements, to recover damages for the injury occasioned to its title or right in the land occupied by its road. But it is not entitled to damages for the interruption and inconvenience occasioned to its business; nor for the increased liability to damages from accidents; nor for increased expense for ringing the bell; nor for the risk of being ordered by the county commissioners, when in their judgment the safety and convenience of the public may require it, to provide additional safeguards for travelers crossing the railroad; nor for the expenses of maintaining a flagman, alleged to be necessary to guard against the greater liability to accidents occasioned by the obstruction of the view along its railroad, at the crossing of a highway, by means of the abutments of the new railroad of the other corporation. *Massachusetts C. R. Co. v. Boston C. R. Co.* 121 Mass. 124; *Lake Shore & M. S. R. Co. v. Cincinnati S. R. Co.* 30 Ohio St. 604; *Old Colony & F. R. R. Co. v. Plymouth Co.* 14 Gray, 155; *Re First Street*, 63 Mich. 641. But see *St. Louis, I. & C. R. Co. v. Springfield & N. W. R. Co.* 96 Ill. 274; *Mills, Em. Dom.* 141.

A general authority to lay out streets and alleys will not justify the laying out of a street across depot grounds when the easement of the railroad company and of the city cannot reasonably co-exist. *Milwaukee & St. P. R. Co. v. Faribault*, 23 Minn. 167; *Prospect Park & C. R. Co. v. Williamson*, 91 N. Y. 553.

for the purpose of bringing here for review the action of the district court, upon an appeal by the relator to that court, in proceedings for laying out a street across the right of way of the relator, the Railroad Company, within the corporate limits of the City of Minneapolis. The objection urged by the relator, and upon which the action of the district court was based, was that the damages awarded by the commissioners were inadequate. In fact no damages were awarded. The taking in question was of a strip sixty feet wide, for the purpose of a public street, across the right of way of the relator. At the request of the Railroad Company, the commissioners made, in connection with their report to the court, special findings to the effect that it would cost: (1) for planking the railway crossing for the width of thirty-two feet, \$92.20; (2) for renewing and maintaining the same, \$250; (3) for cattle-guards across the railroad, \$211.98; (4) for renewing and maintaining the same, the interest at 6 per cent on \$500; (5) for signs at crossing, \$4.19; (6) for renewal and maintenance of the same, \$7.

The district court, deeming that the first, third and fifth of these items were allowable, made its order to the effect that the sum of those three items be awarded to the relator, and that in other respects the report of the commissioners be confirmed.

The motion on the part of the respondent to quash this writ is denied. Granting that the court was not authorized to thus fix the amount recoverable by the relator, but by the requirements of the city charter, it should have recommended the matter to the same, or to other, commissioners, it is enough, to entitle the relator to this remedy, that the court did, upon the report of the commissioners, determine that the relator was entitled to receive the sum of the three items above referred to, \$309.37, and no more, and made its order accordingly, confirming the report of the commissioner with this modification. This was a final determination of the matter, concluding the parties so long as that order should remain in force.

The relator contends that, upon the report of the commissioners, it was entitled to have awarded to it as compensation not only the sums therein specified as the cost of planking, cattle-guards and sign-boards, but also the further sums named for the maintenance of the same. The City of Minneapolis, which is the real party in interest opposed to the relator, claims that none of these items should be allowed. It should be conceded that the relator, in acquiring its right of way, whether by purchase directly, or by statutory proceedings under the power of eminent domain, acquired property rights which are protected from divestiture by the constitutional guaranty which declares that private property shall not be taken for public use without just compensation. *State v. Chicago, M. & St. P. R. Co.* 36 Minn. 402, and authorities hereafter cited.

Compensation must be allowed for whatever is to be regarded as a taking of the property of the corporation for other uses. We are now called upon to determine whether, in view of the duty imposed by General Statutes upon railroad companies to provide and maintain planking, cattle guards, and sign-boards at all highway crossings, the establishing of this highway

over the relator's right of way entitles it to compensation for the expense thus imposed; or, in other words, whether, in view of the fact that this statutory duty as respects this particular locality did not exist until this highway was laid out over the relator's road, and only by reason of its having been so laid out, it should be considered that the obligation to provide and maintain this plank crossing, these cattle-guards and this sign-board constitutes a taking of the property of the Railroad Company, or deprives the Company of any right of property before belonging to it.

For the present we will confine our attention to the cattle-guards and sign-boards. The necessity for these arises from the dangerous nature of the use of the railroad property; and it cannot now be questioned that, as a matter of mere police regulation, the State has the power to impose upon railroad companies the duty of maintaining these safeguards. There can be no doubt that, if no such requirement had ever been embraced in our General Laws, or in the charters of railroad corporations, and if all our railroads had been constructed without such devices for lessening the dangers incident to railroad operations, it would be within the police power of the Legislature to require all railroad companies to provide such safe-guards at all existing railway crossings.

It has been decided in this court that the police power of the State authorized such requirements as to the construction of cattle-guards and fences. *Gillam v. Sioux City & St. P. R. Co.* 26 Minn. 268; *Winona & St. P. R. Co. v. Waldron*, 11 Minn. 515.

It is but an exercise of the everywhere recognized police power of the State, regulating by reasonable and necessary means the use of instrumentalities otherwise attended with obvious and great danger to the public. No other principle is involved in such requirements, than is involved in imposing a reasonable limitation upon the speed of railway trains at street crossings, and within the limits of thickly populated municipal districts; or in requiring a bell to be rung or whistle blown at highway crossings, or the stoppage of trains at railway crossings, and in other like provisions which are found in the statutes of every State. Such statutory regulation of the use of property does not constitute a taking of the property, or its destruction. It is only the exercise of the power of the State to reasonably control the use of property and the conduct of the individual, so far as may be necessary for the public safety; and to such control every citizen and owner of property must submit without compensation. If the Legislature, then, could constitutionally, and without providing for compensation, have imposed this duty in the case supposed, after the railroad had been constructed and put in operation, by enacting a law requiring railroad companies to construct cattle-guards across their right of way, and to erect sign-boards to notify travelers of the existence of the railroad crossing, it will be found difficult to assign a reason in support of the relator's claim for compensation in this case. Although this street was not in existence when the railroad was constructed, and hence the requirement of the General Law did not impose the duty of putting in cattle-guards and sign-boards at this

place at that time, yet, as soon as the street was laid out and opened, the already existing law became applicable, and required these things to be done. But this was an exercise of the police power, as in the case before supposed. The circumstances, with reference to which the general police regulation, embodied in the General Law, had been framed, have now come to exist in respect to this particular locality, and the requirements of that law have become operative. There was no implied contract between the State and this corporation when it became incorporated that it should only be required to put in and maintain these safeguards at the crossings of streets then laid out, or at such as might be laid out prior to the construction of the railroad. The fact that not until after the construction of the railroad has the situation at this place come to be such as to require any protection from the dangers incident to railroad operation has very little bearing upon the case, if, as we think is self evident, the statutory requirement to which the corporation is subjected is merely a reasonable police regulation of its business, and not a taking or destruction of its property. When the Railroad Company accepted its charter, it received its franchises subject to the authority and power of the State, to impose such reasonable regulations concerning the use, in matters affecting the common safety, of its dangerous engine, and not merely subject to the then existing regulations as applicable to then existing conditions; and whether the obligation now in question had been imposed at this time by direct Act of the Legislature, or, as is the case, arises from the laying out of a new highway, to which the previously existing law becomes applicable, can make no difference.

The fallacy involved in the claim of the relator, and, as we think, in some decisions by which its claim is supported, arises from a failure to distinguish between rights of property which confessedly are protected under the Constitution from being devoted or appropriated to other purposes without compensation, and the very different matter concerning the manner in which the owner may use his property so as not to unnecessarily endanger the public. The claim of the relator involves an assumption that when the Railroad constructed its line of road, conforming to the requirements of the law as to all then existing highway crossings, it had a constitutional right, by virtue of its priority, to always afterwards operate its road unembarrassed, by being required to observe like precautions with respect to highways that might be thereafter laid out across the railroad, except upon the condition that it should receive compensation, not merely for whatever of its required property might be taken for the other use, but also for the expense and burden of conforming its own conduct to the newly-existing conditions,—of conforming to a general police regulation of the State, not before applicable. There was no such exclusive or superior right acquired by priority of charter, or of the construction of this railroad highway. It cannot be supposed that, when its franchises were granted to this relator to construct and operate this railroad, it was contemplated, either by it or by the State, that no more public highways should be laid out which

should increase the number of places where the ordinary police regulations would have to be complied with by the Railroad Company to its inconvenience and expense. On the contrary, it must have been understood and contemplated, especially in a new State rapidly advancing in population and in the development of its resources, where new towns were springing up, and new avenues for travel and traffic were becoming necessary, that new streets and roads would be and must be laid out, and that many of these would necessarily cross existing railroad lines. We cannot resist the conclusion that, so far as concerns the matter now under consideration, the charter of the relator was taken subject to the right of the State to impose this duty whenever, by reason of the establishing of new highways, it should become necessary; and hence the relator is not entitled to compensation for obedience to this requirement. *Lake Shore & M. S. R. Co. v. Cincinnati, S. & O. R. Co.* 80 Ohio St. 604; *Chicago & A. R. Co. v. Joliet, L. & A. R. Co.* 105 Ill. 388, 400, 404; *Hannibal v. Hannibal & St. J. R. Co.* 49 Mo. 480; *Bridgeport v. New York & N. H. R. Co.* 86 Conn. 255.

We have not failed to consider the decisions in *Old Colony & F. R. R. Co. v. Plymouth Co.* 14 Gray, 155; *Massachusetts C. R. Co. v. Boston, C. & F. R. Co.* 121 Mass. 124; *Chicago & G. T. R. Co. v. Hough*, 61 Mich. 507, and *State v. Bayonne* (N. J.) 17 Atl. Rep. 971,—to which we have before alluded as supporting the claim of the relator. It will be observed that in Massachusetts, while compensation is allowed to the railroad company for planking cattle-guards and sign-boards, it is denied for the expense of causing a bell to be rung at a new highway crossing; and that compensation is also refused for the expense of a flagman, rendered necessary at a street crossing by reason of the obstructions caused by a new railroad crossing, by an overhead bridge, a previously established railroad. The reasons which may be sufficient to exclude the right of compensation for the necessary expense, if it be an additional expense, of ringing a bell or keeping a flagman at a crossing, would seem to be applicable also as respects cattle-guards and sign-boards. We discover no distinction in principle.

As to the planking between the rails, where the street crosses the railroad, it seems to us that a distinction exists which should affect the conclusion. The planking has little, if anything, to do with the operation or safety of railway trains. The railway having been properly and lawfully constructed, the planking becomes a proper, and perhaps reasonably necessary, incident to the construction of the highway across the existing railroad. Independent of statutory regulation of the subject, it would have been the appropriate duty of the public authorities opening such a highway to make this necessary provision for the convenience of travelers on the highway, thus overcoming an obstruction to travel which lawfully existed upon the relator's property, and which could not be removed. This might be deemed a part of the work of constructing the highway, and making it fit for travel. But while the Legislature, as may have been expedient, in view of the peculiar uses to which the rail

way track is subjected, has required the Railroad Company, which necessarily has the general control of its own track, in all cases to provide and maintain the planking, that does not determine the question of compensation. If, as has been suggested, the planking is to be deemed a part of the new highway, the Railroad Company cannot be required to construct and maintain it over its own right of way without compensation. *Illinois C. R. Co. v. Bloomington*, 76 Ill. 447; *Erie v. Erie Canal Co.* 59 Pa. 174.

As respects this subject, we see no reason why the decisions above cited as supporting the relator's contention should not be followed. We therefore think that the Railroad Company was entitled to compensation for the expense of providing, and of maintaining, the planking. There can be no distinction in this respect between the original construction and the subsequent maintenance, and so the authorities above cited affirm. The law requires the Railroad Company to maintain the planking, and it must be assumed now, when damages are being assessed once for all, that this requirement of the law will remain unchanged.

The charter of the City of Minneapolis by which this proceeding is regulated provides that "the award of assessment of such commissioners shall be final unless set aside by the court for good cause shown. In case such report is set aside, the court may, in its discretion, recommit the same to the same commissioners, or appoint a new board, as it shall deem best."

We think that the report of the commissioners in this case would not justify the court in determining the question of the amount of damages upon the bare statement of the cost of putting down and of maintaining the planking. Whether there are any other considerations which could bear upon this matter, we do not know. This report should not be treated like the special verdict of a jury upon which judgment may be rendered, for the law contemplates an award by the commissioners.

The order of the court, dated on the 15th day of October, 1888, determining the amount which the relator is entitled to as compensation for this taking, is reversed, and the cause remanded, that the matter in controversy may be, by the proper order of the district court, committed again to commissioners, as prescribed by the Statute.

Esther EARL *et al.*, *Respts.*,

Eugene M. WILSON *et al.*, *Appts.*

(....Minn....)

*An Indian tribe within the State, recognized as such by the United States government, is to be

*Head note by VANDERBURGH, J.

NOTE.—*Marriage: validity governed by the law of place, where entered into.*

It is a principle of universal law that marriages valid by the law governing both parties when made must be treated as valid everywhere. *Bease v. Pelochoux*, 73 Ill. 238; *Hicks v. Skinner*, 71 N. C. 538; *Schefferling v. Huffman*, 4 Ohio St. 241.

A marriage contract as to its effect is governed by the law of the place where it is made. *Walker* 7 L. R. A.

considered as a separate community or people, capable of managing its own affairs, including the domestic relations, and those persons belonging to the tribe who are recognized by the custom and laws of the tribe as married persons must be so treated by the courts, and the children of such marriages cannot be regarded as illegitimate.

(January 17, 1890.)

APPEAL by defendants from an order of the District Court for McLeod County granting plaintiffs' motion for a new trial and setting aside the findings of the referee in favor of defendants in an action to determine an adverse claim to certain real estate. *Reversed.*

The land in controversy was granted by the United States under a scrip location made on behalf of one Henry F. Ortley, Jr., who died at the age of about eight years.

The defendants claim under a deed from the child's father executed after the death of the child. Plaintiffs claim under a deed from the child's mother executed subsequently to the execution of the father's deed.

Further facts appear in the opinion.

Messrs. Eugene M. Wilson and Francis G. Burke, for appellants:

Direct proof of a marriage is not essential, but may be established by circumstances from which marriage may be inferred.

Minn. Stat. 1878, p. 806.

Every reasonable presumption of law is to be allowed in favor of a valid marriage and legitimacy as against concubinage and illegitimacy.

State v. Worthingham, 23 Minn. 528; *Fox v. Burke*, 31 Minn. 819.

Continuous cohabitation as husband and wife establishes marriage relation without any actual ceremony.

Peet v. Peet, 52 Mich. 464.

If the father and mother of Henry F. Ortley, Jr., complied with all the customs of their tribe in entering into the marriage relation, and afterwards lived together as husband and wife, their actions constituted a marriage legal and binding and sufficient to justify the legitimacy of Henry F. Ortley, Jr., and to justify the heirship of the father in his property.

Smith v. Brown, 8 Kan. 608; *Watts v. Owens*, 63 Wis. 512; *Dyer v. Brannock*, 66 Mo. 419; *Morgan v. McGhee*, 5 Humph. 18; *Wall v. Williamson*, 8 Ala. 51, 52; *Wall v. Williams*, 11 Ala. 826; *Ohseldine v. Brewer*, 1 Har. & McH. 152; *Johnson v. Johnson*, 30 Mo. 72; *Sutton v. Warren*, 10 Met. 451; *Senser v. Bower*, 1 Penr. & W. 450, 452; *Kobogum v. Jackson Iron Co.* 76 Mich. 498.

Messrs. R. H. McClelland and H. J. Peck, for respondents:

A custom of cohabitation between parties will not constitute marriage under the law, so that the property rights growing out of legitimate marriage relations will apply.

v. Forbes, 31 Ala. 9; *Peake v. Yeldell*, 17 Ala. 638; *Laffite v. Lawton*, 25 Ga. 306; *McLeod v. Board*, 30 Tex. 238; *Wilcox v. Wilcox*, 46 Hun, 33, 10 N. Y. S. R. 746.

Its validity is not affected by the subsequent removal of the parties with their property into another State. *De Lane v. Moore*, 55 U. S. 14 How. 253 (14 L. ed. 409); *O'Neill v. Henderson*, 15 Ark. 235; *Smith v. Chapell*, 31 Conn. 539; *Young v. Templeton*,

"Marriage is a civil status of one man and one woman united in law for life."

Bishop, Marr. and Div. § 8; *Rapalje & L. Law Dict.*; Schouler, Husband and Wife, § 2.

The rights, obligations and duties arising from it are matters of municipal regulation over which parties have no control.

Frazer v. State, 8 Tex. App. 263, 30 Am. Rep. 140.

Cohabitation and reputation alone are not marriage.

Reading F. Ins. & T. Co. v. Riegel, 4 Cent. Rep. 637, 113 Pa. 204; *State v. Worthingham*, 23 Minn. 528; *Fox v. Burke*, 31 Minn. 319.

Cohabitation between an Indian man and woman, according to the customs of this tribe, which left the parties free to dissolve the connection at pleasure, is not a marriage.

State v. Ta-cha-na-tah, 64 N. C. 614; *State v. Harris*, 63 N. C. 1; *Rocks v. Washington*, 19 Ind. 53, 81 Am. Dec. 376; *Noel v. Ehling*, 9 Ind. 37; *Compo v. Jackson Iron Co.* 50 Mich. 578; *Fellowes v. Denniston*, 23 N. Y. 420.

Vanderburgh, J., delivered the opinion of the court:

The only question presented by the record is whether Henry F. Ortley, under whom defendants claim title, and Jane Ortley, were husband and wife, so that the former, under the Laws of Inheritance and Descent in this State, became entitled to the land in controversy as the heir-at-law of Henry F. Ortley, Jr., deceased, who was the patentee of the land, and is admitted to have been the child of the parties first named. It is denied by the respondents that Jane was the lawful wife of the first-named Henry Ortley. The case was tried before a referee, who found for the defendants on the issue presented, and among other facts that the child Henry F. Ortley, Jr., was born in 1849, in what is now the Town of Bloomington, Hennepin County, in this State, and that he died in the same place about the year 1859, and was a half-breed or mixed blood of the Sioux Nation of Indians; that at the time of his birth his parents had been living and cohabiting together as husband and wife, and continued so to do, from about the year 1848, for the period of sixteen years, during which time several children were born unto them, including Henry, and during all this time they continued to reside in Bloomington with and among the tribe of Sioux Indians, and that they were married about the year 1848, in accordance

with the usage and custom of the tribe with which they lived. And in respect to this Indian custom it is found that among the Indian tribe there was a custom or law that any member of the tribe who desired to obtain a wife might purchase one, and the man and woman would thereupon, in accordance with such custom, live and cohabit together as husband and wife without other or further marriage ceremony; and that, in accordance with the usage and established custom prevailing among them, the parties might either of them also divorce themselves by dismissing or abandoning the other, without further ceremony, and thereupon either was at liberty to take another husband or wife, and that among the tribe referred to there was no other custom, law or form of marriage. These parties must be deemed to be, as the referee found they were, husband and wife, under the custom and law of their tribe, and the sole remaining question is whether such Indian marriages should be treated as valid, and the children of such marriages legitimate. The distinct tribal relations of these Indians were during the time in question still maintained; and they were recognized by the United States as a distinct political community. *U. S. v. Shanks*, 15 Minn. 369.

And where the tribal relation is still recognized by the government as existing, in its dealings with them, the fact that their primitive habits have been modified by their intercourse with the whites does not authorize a State to treat them as subject to its laws in respect to their relations and dealings with each other. *Kansas Indians*, 72 U. S. 5 Wall. 787 [18 L. ed. 667].

The general rule is that marriages valid by the laws of the country where they are entered into are binding here, though not solemnized in accordance with the provisions of our laws; and the same rule must be adopted in relation to these Indian marriages, where the tribal relation still exists. Under the laws of the United States they are recognized as capable of managing their own affairs, including their domestic relations, and those persons who were recognized by the Indian custom and law as married persons must be so treated by the courts, and their children cannot be regarded illegitimate. *Kobogum v. Jackson Iron Co.* 76 Mich. 498, and cases cited; *Boyer v. Dively*, 58 Mo. 510; *Sutton v. Warren*, 10 Met. 452.

The estate of Henry F. Ortley, Jr., therefore, was inherited by his father, and the defendants

4 La. Ann. 254; *Wilder's Succession*, 22 La. Ann. 219; *Dubois v. Jackson*, 49 Ill. 49; *Dougherty v. Snyder*, 15 Serg. & R. 84; *Townsend v. Maynard*, 45 Pa. 198; *Le Prince v. Guillemot*, 1 Rich. Eq. 187; *Lott v. Bertrand*, 26 Tex. 654.

A marriage according to the custom of an Indian tribe need not be contracted in the territory of that tribe in order to be valid. *La Riviere v. La Riviere*, 97 Mo. 80.

Indians in tribal relations, not citizens of State.

Indians within a State are not citizens or members of the body politic, but are considered as independent tribes governed by their own laws and usages. *Holden v. Joy*, 84 U. S. 17 Wall. 211 (21 L. ed. 523); *Goodell v. Jackson*, 20 Johns. 668; *Jackson v. Wood*, 7 Johns. 290; *Strong v. Waterman*, 11 Paige, 607.

7 L. R. A.

No state laws have any force over Indians in their tribal relations. *Kansas Indians*, 72 U. S. 5 Wall. 787 (18 L. ed. 667); *New York Indians*, 72 U. S. 5 Wall. 781 (18 L. ed. 708); *United States v. Kagama*, 118 U. S. 375 (30 L. ed. 223); *United States v. Holliday*, 70 U. S. 3 Wall. 407 (18 L. ed. 182); *United States v. Shanks*, 15 Minn. 369 (Gil. 322); *Dole v. Irish*, 2 Barb. 639; *Hastings v. Farmer*, 4 N. Y. 293; *Cherokee Nation v. Georgia*, 30 U. S. 5 Pet. 1 (8 L. ed. 25); *Worcester v. Georgia*, 31 U. S. 6 Pet. 515 (8 L. ed. 438); *Wall v. Williamson*, 8 Ala. 48; *Wall v. Williams*, 11 Ala. 326; *Morgan v. McGhee*, 5 Humph. 12; *Johnson v. Johnson*, 30 Mo. 72; *Boyer v. Dively*, 58 Mo. 510; *Tuten v. Byrd*, 11 Swan, 108; *Jones v. Lancy*, 2 Tex. 342.

The civil laws of the State do not extend to an Indian country within a State (*United States v. Shanks*, 15 Minn. 369), nor to Indians maintaining tribal relations. *United States v. Payne*, 4 Dill. 389.

are the lawful owners of the land in controversy.

Order granting new trial reversed, and case re-

manded, with directions to render judgment for the defendants upon the report of the referee.

CALIFORNIA SUPREME COURT.

J. W. HANSON, *Respt.*,

v.

R. A. GRAHAM, *Appt.*

(....Cal....)

Where a man has a settled abode for the time being in another State for the purpose of business or pleasure, he is a nonresident within the meaning of the Attachment Law.

(January 27, 1890.)

A PPEAL by defendant from an order of the Superior Court for San Diego County refusing to dissolve an attachment. *Affirmed.*

Commissioner's opinion.

The case sufficiently appears in the opinion.

Mr. F. W. Burnett, for appellant:

A residence cannot be lost till another is gained.

Cal. Pol. Code, § 53.

Residence can only be changed by union of act and intent.

Eck v. Hoffman, 55 Cal. 501.

There must be a concurrence of act and intention, in order to effect such a change in the status of a party as to subject him to foreign attachment. He must not only intend to make the change permanent, but that intention must have reference to an accomplished fact so far as his own departure and selection of a new domicile are concerned.

Wade, *Attachm.* § 17.

Messrs. Henderson & McDonald for respondent.

Hayne, C., filed the following opinion:

This is an appeal from an order refusing to dissolve an attachment. The attachment was issued upon an affidavit that the defendant was a nonresident, and the motion to dissolve was upon the ground that the affidavit was not true, and that the defendant was a resident. The affidavits read upon the hearing consist in great part of mere conclusions and statements on information and belief. The following facts, however, appear to be undisputed: The defendant, Graham, was a contractor for the building of railroads and other similar works. In 1834 he left his former residence, and established himself in Victoria, B. C. In 1886 he left that place, and finally settled in San Diego, with the intention of engaging in business there. While in San Diego he lived in hotels and lodging houses. After about ten months, business became dull, and he stored his contractor's tools and implements, and in June, 1888, went to Chili for the purpose of engaging in business there. In October, 1888, the attachment was levied, at which time he had not returned from Chili. It further appears that the purpose of going to Chili was to get contracts in his line of business, of which he had heard. So much is undisputed. It does not

distinctly appear how long such contracts would take to fill. In this regard the plaintiff states in his affidavit, upon information and belief, that the defendant had gone to Chili with the intention "of engaging in railway contracting involving millions of dollars and years of time for completion, the said work necessitating an extended residence of many years' duration," and that, should it be necessary for him to return to the United States, such return would be only for the temporary purpose of arranging his business affairs in said County of San Diego preparatory to the removal of said outfit to the Republic of Chili.

The defendant produced many affidavits to the effect that Graham had stated before leaving that he intended to return shortly; and the affiants offer their conclusions to the effect that he always intended to return, and that he was still a resident of California. As above stated, the affidavits on each side are vague and unsatisfactory. We think that it sufficiently appears, however, that defendant went to Chili for the purpose of prosecuting his business of contractor there, and that, if successful in obtaining contracts, he would remain at least as long as would be necessary for their completion; and that he had been gone about four months without returning.

Upon these facts the question arises whether the judge of the court below was right in holding that the defendant was a nonresident. The Statute in relation to attachments provides that the writ may issue when the defendant is "not residing" in this State. Code Civil Proc. § 537.

In the next section it is provided that the plaintiff must present an affidavit that the defendant "is a nonresident." These two phrases seem to have been used as equivalent in meaning. Whether they are so in strictness or not need not be considered. But we think that the residence referred to is an actual, as contradistinguished from a constructive or legal, residence; and that there may be such an actual residence, notwithstanding a general intention to return to the place of legal residence or domicile. This was held in a well-considered case in Virginia, in which the facts were nearly the same as those involved here. There a person domiciled in Washington City removed to Virginia with the intention of remaining there for nine months, or for such additional time as might be required to complete certain contracts for building parts of a railroad. He rented his residence in Washington, but without any intention of abandoning his domicile there, and during his stay in Virginia he always claimed Washington as his place of residence, and declared his intention of returning there as soon as his contracts should be completed. Upon these facts it was held that, for the purposes of the Attachment Law, he was a resident of Virginia; and the court said: "It is apparent that the word 'residence,' like that of 'domicil,'

is often used to express different meanings, according to the subject matter. In statutes relating to taxation, settlements, right of suffrage and qualification for office, it may have a very different construction from that which belongs to it in the statutes relating to attachments. In the latter actual residence is contemplated, as distinguished from legal residence.

While, on the one hand, the casual or temporary sojourn of a person in this State, whether on business or pleasure, does not make him a resident of this State, within the meaning of the Attachment Laws, especially if his personal domicile be elsewhere; so, on the other hand, it is not essential he should come into this State with the intention to remain here permanently, to constitute him a resident." *Long v. Ryan*, 30 Gratt. 720.

Decisions similar in principle have been made in other States. *Frost v. Bristin*, 19 Wend. 11; *Krone v. Cooper*, 48 Ark. 547; *Morgan v. Nance*, 54 Miss. 311; *Burrill v. Jewett*, 2 Robt. (N. Y.) 701; *Haggart v. Morgan*, 5 N. Y. 428; *Nash v. French*, 4 Yeates, 241; *City Bank v. Morris*, 18 N. J. L. 184; *Stout v. Leonard*, 87 N. J. L. 495; *Swaney v. Hutchins*, 18 Neb. 206.

And the rule seems to rest upon sound principle. The reason of allowing an attachment against a nonresident was that it was one mode of acquiring jurisdiction in a suit against him. And this purpose would not be satisfied if the debtor could preserve a constructive residence in the State by virtue of a general intention to

return, when he was in fact residing in another State. The rule, indeed, has not gone so far as to cover the case of a mere transient journey. But where a man has a settled abode for the time being in another State for purposes of business or pleasure, we think that both reason and authority require him to be treated as a nonresident of this State, within the meaning of the Attachment Law. We have not overlooked section 52 of the Political Code.*

But if a different rule is there provided, we think that the provision was not intended to apply to the Attachment Law. In the light of these principles, we think that it does not appear that Graham was a resident of California after his departure for Chili. It having been shown that he left the State for the purpose of engaging in business in a foreign country, a prima facie case of nonresidence was made out, and we do not feel that we can say that the contrary was shown. We therefore advise that the order appealed from be affirmed.

We concur: *Belcher, C. C.; Foote, C.*

Per Curiam:

For the reasons given in foregoing opinion, the order appealed from is affirmed.

*That section provides: "In determining the place of residence, the following rules are to be observed: (1) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose. (2) There can only be one residence. (3) A residence cannot be lost until another is gained. . . . (7) The residence can be changed only by the union of act and intent." [Rep.]

ILLINOIS SUPREME COURT.

Lyman BAIRD et al., Appls.,
v.

Elias SHIPMAN, Admr., etc., of Joseph Gar-
nett, Deceased.

(.....III.....)

An agent who has complete control and management of real property of a non-resident is personally liable for injuries sustained by a third person in consequence of the dangerous condition of the premises at the time when they were leased by him to a tenant.

(January 21, 1890.)

A PPEAL by defendants from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of plaintiff in an action to recover damages for personal injuries resulting in death and alleged to have been caused by defendants' negligence. *Affirmed.*

The facts are fully stated in the opinion.

Mr. L. H. Bontell, for appellants:

Agents are not liable to third persons for damages caused by their negligence. The agent is liable to his principal for neglect, and the principal alone is liable to third persons.

Story, Ag. § 308; 8 Sutherland, Damages, p. 60; *Hell v. Joscelyn*, 3 Gray, 309.

But even in the case of a contractor, if the owner retains a supervisory power over the

work, it is held that the owner, and not the contractor, is liable to third persons for acts of negligence.

Schwartz v. Gilmore, 45 Ill. 455; *Chicago v. Jones*, 60 Ill. 387.

Messrs. Cameron & Hughes, for appellees.

An agent is in general not liable to third parties for acts of negligence, nor for a mere non-performance of duty. As such he is only liable to his principal, and the principal is liable to the third party.

To this general rule there are, however, certain well-known and well-recognized exceptions, among which are:

1. That he is personally liable to third persons for misfeasance, for doing something which he ought not to have done.

Bell v. Joscelyn, 3 Gray, 309, 63 Am. Dec. 741.

2. Where a principal engages an agent to do a certain work, and to take entire control of it, and the principal does not interfere, but leaves it entirely with the agent, the agent and not the principal will be liable to third parties for injuries or damages sustained by the negligent or unskillful manner in which the work is done.

Hilliard v. Richardson, 3 Gray, 349, 63 Am. Dec. 743; *Scammon v. Chicago*, 25 Ill. 424; *Schwartz v. Gilmore*, 45 Ill. 455; *Pfau v. Will-tamson*, 63 Ill. 16; *Hale v. Johnson*, 80 Ill. 185; *Kepperly v. Ramsden*, 88 Ill. 354.

3. Agents who have taken control of work

for their principals are liable to third parties for torts committed by the agents' sub-employés.
Blake v. Ferris, 5 N. Y. 48.

Per Curiam:

The following opinion of the Appellate Court fully presents the question arising upon this record:

GARNETT, P. J.:

This is an appeal from a judgment for damages, founded on the alleged negligence of appellants, by which the death of Joseph Garnett, appellee's intestate, is said to have been caused. The place where the injury happened was in a barn situated on premises on Michigan Avenue, in Chicago, belonging to Aaron C. Goodman, who was then, and for several years before had been, a resident of Hartford, Conn. Appellants were his agents for renting the premises during the years 1884 and 1885, and during both years were carrying on the real-estate business in Chicago. On the trial, evidence was given tending to show that they had in fact complete control of the premises, with the residence and barn thereon, repairing the same, in their discretion; and there was no proof that in such matters they received any directions from the owner.

The property was rented by appellants to Emma R. Wheeler and A. R. Tillman from April 1, 1884, to April 30, 1885, and to Emma R. Wheeler from May 1, 1885, to April 30, 1886. Both leases were in writing, and by the terms of each lease the tenants covenanted to keep the premises in good repair. The tenant in the last lease rented the premises to Nellie E. Pierce, who occupied the same from April 28 to September, 1885. The evidence tends to prove that when the lease was made to Emma R. Wheeler the large carriage door to the barn was in a very insecure condition, and that appellants, through one Warner, the manager of their renting department, verbally agreed with Mrs. Wheeler to put the premises in thorough repair. Nothing was done to improve the condition of the door; and on June 12, 1885, while the deceased, an expressman by occupation, was engaged in delivering a load of kindling in the barn for one of the parties living in the house, the door, weighing about 400 pounds, fell from its fastenings, and injured him to such an extent that he died the next day.

Appellants make two points: (1) that the verdict is clearly against the weight of the evidence; (2) that they were the agents of the owner (Goodman), and liable to him only for any negligence attributable to them.

There is nothing more than the ordinary conflict of evidence found in such cases, presenting a question of fact for the jury; and the finding must be respected by this court, in deference to the well-settled rule.

The other point is not so easily disposed of. An agent is liable to his principal only for mere breach of his contract with his principal; but he must have due regard to the rights and safety of third persons. He cannot in all cases find shelter behind his principal. If, in the course of his agency, he is intrusted with the operation of a dangerous machine, to guard himself from personal liability he must use proper care in its management and supervision,

so that others in the use of ordinary care will not suffer in life, limb or property. *Suydam v. Moore*, 8 Barb. 358; *Phelps v. Wait*, 30 N. Y. 78.

It is not his contract with the principal which exposes him to or protects him from liability to third persons, but his common-law obligation to so use that which he controls as not to injure another. That obligation is neither increased nor diminished by his entrance upon the duties of agency; nor can its breach be excused by the plea that his principal is chargeable. *Dolaney v. Rochereau*, 84 La. Ann. 1123.

If the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot escape this duty by abandoning its execution midway, and leaving things in a dangerous condition, by reason of his having so left them without proper safeguards. *Osborne v. Morgan*, 130 Mass. 102.

A number of authorities charged the agent, in such cases, on the ground of misfeasance, as distinguished from nonfeasance.

Mechem, in his work on Agency, § 572, says: "Some confusion has crept into certain cases from a failure to observe clearly the distinction between nonfeasance and misfeasance. As has been seen, the agent is not liable to strangers for injuries sustained by them, because he did not undertake the performance of some duty which he owed to his principal, and imposed upon him by his relation, which is nonfeasance. Misfeasance may involve, also, to some extent, the idea of not doing, as where the agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do under the circumstances,—does not take that precaution, does not exercise that care, which a due regard for the rights of others requires. All this is not doing; but it is not the not doing of that which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law, as a responsible individual, in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation." To the same effect are *Lottman v. Barnett*, 62 Mo. 159; *Martin v. Benoit*, 20 Mo. App. 263; *Harriman v. Stowe*, 57 Mo. 98; *Bell v. Josselyn*, 3 Gray, 309.

A case parallel to that now in hand is *Campbell v. Portland Sugar Co.* 63 Me. 552, where agents of the Portland Sugar Company had the charge and management of a wharf belonging to the company, and rented the same to tenants, agreeing to keep it in repair. They allowed the covering to become old, worn and insecure, by means of which the plaintiff was injured. The court held the agents were equally responsible to the injured person with their principals.

Wharton, in his work on Negligence, § 535, insists that the distinction, in this class of cases, between nonfeasance and misfeasance can no longer be sustained; that the true doctrine is that when an agent is employed to work on a particular thing, and has surrendered the thing in question into the principal's hands, then the agent ceases to be liable to third persons for

hurt received by them from such thing, though the hurt is remotely due to the agent's negligence, the reason being that the causal relation between the agent and the person hurt is broken by the interposition of the principal as a distinct center of legal responsibilities and duties, but that, even where there is no such interrupting of causal connection, and the agent's negligence directly injures a stranger, the agent having liberty of action in respect to the injury, then such stranger can recover from the agent damages for the injury. The rule, whether as stated by Mechem or Wharton, is sufficient to charge appellants with damages, under the circumstances disclosed in this record. They had the same control of the premises in question as the owner would have had if he had resided in Chicago, and attended to his own leasing and repairing. In that respect, appellants remained in control of the premises until the door fell upon the deceased. There was no interruption of the causal relation between them and the injured man. They were, in fact, for the time being substituted in the place of the owner, so far as the control and management of the property was concerned. The principle that makes an independent contractor, to whose control premises upon which he is working are surrendered, liable for damages to strangers caused by his negligence, although he is at the time doing the work under contract with the owner (Wharton, Neg. § 440), would seem to be sufficient to hold appellants. The owner of cattle, who places

them in the hands of an agister, is not liable for damages committed by them while they are under control of the agister. It is the possession and control of the cattle which fix the liability; and the law imposes upon the agister the duty to protect strangers from injury by them. *Ward v. Brown*, 64 Ill. 307; *Osburn v. Adams*, 70 Ill. 291.

When appellants rented the premises to Mrs. Wheeler in the dangerous condition shown by the evidence, they voluntarily set in motion an agency which, in the ordinary and natural course of events, would expose persons entering the barn to personal injury. Use of the barn, for the purpose for which it was used when the deceased came to his death, was one of its ordinary and appropriate uses, and might by ordinary foresight have been anticipated. If the insecure condition of the door fastening had arisen after the letting to Mrs. Wheeler, a different question would be presented; but, as it existed before and at the time of the letting, the owner or persons in control are chargeable with the consequences. *Grilley v. Bloomington*, 68 Ill. 47; *Tomie v. Hampton* (Ill.) 21 N. E. Rep. 800.

Neither error is well assigned, and the judgment is affirmed.

We fully concur in the legal proposition asserted in the foregoing opinion, and deem it unnecessary to add to what is therein said in support of that proposition.

The judgment is affirmed.

NEW YORK COURT OF APPEALS (3d Div.)

Riley READ, *Appt.*,

v.

Moses H. NICHOLS *et al.*

(.....N.Y.....)

1. A special question withdrawn from the jury by consent of both parties before the general verdict was rendered cannot be considered on appeal as part of the findings and verdict, even if the word "Yes" is written under it.
2. Where several buildings in succession take fire, each from another, and burn, the sparks which set the first one on fire being carried past the last one burned by a strong wind, which subsided and changed its direction before the last one took fire, while lack of fire

apparatus and ladders prevented the extinguishment of the fire at the beginning, the burning of the last building is not the proximate result of the setting fire to the first one.

3. An exception to "refusals to charge as requested" is not sufficiently definite, where some of the requests were given as requested, others modified and some refused.

(January 14, 1890.)

A PPEAL by plaintiff from a judgment of the General Term of the Supreme Court, Fourth Department, affirming a judgment of the Delaware Circuit in favor of defendants in an action to recover damages for the burning of plaintiff's buildings through the alleged negligence of defendants. *Affirmed.*

NOTE.—*Negligence; damages for injuries caused by.*

In general, if a voluntary act, lawful in itself, may naturally result in the injury of another, or the violation of his legal rights, the actor must, at his peril, see to it that such injury or such violation does not follow, or he must expect to respond in damages therefor; and this is true regardless of the motive or the degree of care with which the act is performed. *Georgetown, B. & L. R. Co. v. Eagles*, 9 Colo. 544.

Where a statute or municipal ordinance imposes upon a person a duty designed for the protection of others, if he neglects to perform the duty he is liable to those for whose protection it was imposed for any damages resulting proximately from such neglect, and of the character which the statute L. R. A.

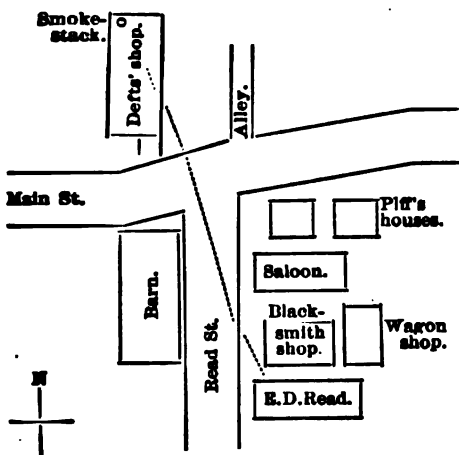
ute or ordinance was designed to prevent. *Osborne v. McMasters*, 40 Minn. 103.

The owner of an unguarded area, which is so near to an alley as to endanger persons passing along the alley, is liable for damages sustained to persons passing along the alley, by reason of such excavation being left unguarded. *Bond v. Smith*, 44 Hun, 219.

He was held liable in damages for an injury to the plaintiff, who fell into the area in the nighttime while searching for her child supposed to be in defendant's factory. *Crogan v. Schiele*, 1 New Eng. Rep. 305, 53 Conn. 186.

Where the owner of a lot situated in a large city uses gunpowder to blast out rocks on his lot, he is liable for the damage proximately and naturally resulting to the house of the adjoining owner from

Sparks from the smoke-stack connected with defendants' shop set fire to the house of one E. D. Read, which was communicated from there through the blacksmith shop, barn and saloon to plaintiff's houses situated on Main Street, as shown by the following diagram:



Plaintiff's houses were burned and he brought this action to recover *inter alia* damages therefor.

The other material facts appear in the opinion.

Mr. A. Taylor, for appellant:

What is the proximate cause of an injury is

ordinarily a question for the jury, and not a question of science or legal knowledge.

See *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469 (24 L. ed. 256); *Pennsylvania R. Co. v. Hope*, 80 Pa. 878; *Kellogg v. Chicago & N. W. R. Co.* 26 Wia. 224; *Kent v. Toledo, P. & W. R. Co.* 59 Ill. 849; *Perley v. Eastern R. Co.* 98 Mass. 414; *Higgins v. Dewey*, 107 Mass. 494; *Guille v. Swan*, 19 Johns. 381; *Vanderburgh v. Truax*, 4 Denio, 464; *Thomas v. Winchester*, 6 N. Y. 397; *Webb v. Rome, W. & O. R. Co.* 49 N. Y. 420; *Putnam v. Broadway & S. A. R. Co.* 55 N. Y. 108; *Pollett v. Long*, 56 N. Y. 200; *Smith v. British & N. A. R. M. Steam Packet Co.* 86 N. Y. 408; *Lowery v. Manhattan R. Co.* 99 N. Y. 138.

The case of *Ryan v. New York Cent. R. Co.* 85 N. Y. 210, should not be held to be controlling where there is a positive and unlawful act of the defendant which was the cause of the plaintiff's injury.

See *Lowery v. Manhattan R. Co.* 99 N. Y. 166. The true inquiry is whether the injury sustained was such as, according to common experience and the usual course of events, might reasonably be anticipated.

2 Sedgw. Damages, p. 862, note; *Etina Ins. Co. v. Boon*, 95 U. S. 117 (24 L. ed. 395).

The proximate cause is the efficient cause,—the one that necessarily sets the other causes in operation. It is only where the causes are independent of each other that the nearest is to be charged with the disaster.

Poeppers v. Missouri, K. & T. R. Co. 67 Mo. 715; *Bauter v. New York Cent. & H. R. R. Co.* 66 N. Y. 50; *Milwaukee & St. P. R. Co. v. Kel-*

the act of blasting, whether the damage was caused by rocks thrown against the house, or by a concussion of the air around it. *Colton v. Onderdonk*, 69 Cal. 155.

Where a child of tender years was injured by the explosion of a torpedo negligently left by the servants of a railroad company, and placed where children were in the habit of passing, such negligence was the proximate cause of the injury sustained. *Harriman v. Pittsburgh, C. & St. L. R. Co.* 9 West. Rep. 438, 45 Ohio St. 11.

The negligent act of a gas company's agent in turning off the gas from plaintiff's premises in such a manner that when plaintiff's wife went into the cellar with a lighted candle an explosion occurred was the proximate cause of the injury, and the company is properly held bound for his negligence. *Louisville Gas Co. v. Gutenkuntz*, 82 Ky. 432.

Damages for injury to a conductor, caused by a collision which would not have happened if a telegraph operator at a way station had delivered to the conductor the message despatched to him to hold his train at that station until another passed, instead of another order which he negligently handed him, may be mitigated by the fact that the conductor received the written order without inquiry; but a recovery is proper, as the first and proximate cause of the injury was the operator's negligence. *East Tennessee, V. & G. R. Co. v. De Armond*, 86 Tenn. 73.

The proximate, and not the remote, cause to be regarded.

To render a person liable for damage caused by his negligence, it must appear that the damage was the ordinary or probable consequence of his negligent act. *Kuhn v. Jewett*, 82 N. J. Eq. 647; *Scott v. Shepherd*, 1 Smith, Lead. Cas. *649, 7th Am. ed. 754, 2 7 L. R. A.

W. Bl. 862; *Sherp v. Powell*, L. R. 7 C. P. 259; *Broom, Maxims*; *Mayne, Damages*, 3d ed. 30.

The burden is on the plaintiff to sustain his allegations as to the injury sustained by him; to entitle him to recover, he must produce evidence sufficient to satisfy the jury that he has sustained an injury, and that such injury was the direct and proximate consequence of the defendant's negligence, to constitute an actionable tort. *Central R. Co. v. Freeman*, 75 Ga. 331.

The negligence must be the proximate, and not the remote, cause of the injury. *Henry v. St. Louis, K. C. & N. R. Co.* 76 Mo. 288; *McClelland v. Louisville, N. A. & C. R. Co.* 94 Ind. 276; *Lewis v. Flint & P. M. R. Co.* 54 Mich. 55.

Injury must be the proximate consequence of the act complained of; and if there be no intermediate efficient cause, the act must be considered as reaching to the effect. *Georgetown, B. & L. R. Co. v. Eagles*, 9 Colo. 544.

When injury was occasioned by one of two causes, for one only of which defendant is responsible, plaintiff must show that the damage was produced by that cause. *Searles v. Manhattan R. Co.* 2 Cent. Rep. 442, 101 N. Y. 661.

Whether a superintendent, in placing a dynamite magazine, should have known he was exposing men to danger, is a question for the jury. *Tissue v. Baltimore & O. R. Co.* 2 Cent. Rep. 506, 112 Pa. 91.

The question as to whether a given act of negligence was the proximate cause of the injury complained of, is, where the character of the facts are such that different conclusions may be drawn from them, a question for the jury. *Dunn v. Cass Ave. & F. G. R. Co.* 3 West. Rep. 424, 21 Mo. App. 188.

Whether public user of a path across railroad tracks exists, and whether the company exercised ordinary care as regards speed and signals in a given case, or was guilty of negligence which was

logg, supra; 1 Bouv. L. Dict. 247; *Markle v. Worcester*, 4 Gray, 412.

The factory of the defendants was a public nuisance. "Whatever unlawfully annoys or does damage to another is a nuisance."

8 Bl. Com. chap. 1, p. 51; 1 Sedgw. Damages, p. 239.

Every individual who suffers actual damage from a nuisance may maintain an action for his own particular injury though there may be others equally damaged.

1 Sedgw. Damages, p. 290, citing *Smith v. Lockwood*, 18 Barb. 209.

A nuisance, in legal phraseology, is applied to that class of wrongs that arise from the unreasonable, unwarrantable or unlawful use by a person of his own property. Generally, negligence is not an essential element in an action for nuisance.

Tremain v. Cohoes Co. 2 N. Y. 168; *Wilson v. New Bedford*, 103 Mass. 261; *Cahill v. Eastman*, 18 Minn. 324.

The erection or maintenance of a nuisance is sufficient, in either case, to create a liability against all persons concerned therein. Any person contributing to a nuisance is liable therefore either jointly with others or alone.

Chenango Bridge Co. v. Lewis, 68 Barb. 111; *Loose v. Buchanan*, 51 N. Y. 476; *Addison, Tort*, § 283.

Meers. H. & W. J. Welsh, for respondents:

As matter of law the damages are remote and not the immediate result of defendants' negligence, and they are not liable.

Ryan v. New York Cent. R. Co. 85 N. Y. 210; *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 293;

Pennsylvania R. Co. v. Kerr, 63 Pa. 353; *Toledo, W. & W. R. Co. v. Muthersbaugh*, 71 Ill. 572; *Reiper v. Nichols*, 81 Hun, 491; *Pennsylvania Co. v. Whitlock*, 99 Ind. 16, 60 Am. Rep. 71.

There must be a line somewhere where the liability ends, else private individuals and corporations run hazards of which they little dream, and courts universally may find an emergency in which they will be compelled to recognize some such doctrine as has been laid down positively in New York and Pennsylvania, and conditionally in Illinois.

5 Alb. L. J. 811.

Parker, J., delivered the opinion of the court:

The court submitted to the jury five written propositions, with instructions that each be answered as they should determine the fact to be. Plaintiff's counsel excepted to such submission. It is unnecessary to determine whether the question sought to be presented by such exception merits consideration, for it was subsequently waived. The consent of counsel for both plaintiff and defendants that the written questions be withdrawn, upon which consent the court withdrew them, constituted a waiver of the exception taken to their submission. The first of the five propositions submitted appears to have had the word "Yes" written underneath it, while the others do not purport to have been passed upon in any way. The plaintiff in this court insists that it should be regarded and treated as a fact found by the jury. This cannot be done, for it is not before us in such a way as to render it effectual for such purpose.

the proximate cause of the injury,—are questions of fact for the jury. *Taylor v. Delaware & H. Canal Co.* 4 Cent. Rep. 623, 113 Pa. 162.

Proximate and remote cause of injury. See notes to *Lapleigne v. Morgan's L. & T. R. & S. S. Co.* (La.) 1 L. R. A. 878; *Smethurst v. Independent Cong. Church* (Mass.) 2 L. R. A. 696; *Hill v. Port Royal & W. C. R. Co.* (N. C.) 5 L. R. A. 349; *Erickson v. St. Paul & Duluth R. Co.* (Minn.) 5 L. R. A. 786.

Rul. applied to contributory negligence.

Plaintiff's negligence, in order to bar a recovery, must have been a proximate cause of the injury. *Cornwall v. Charlotte, C. & A. R. Co.* 97 N. C. 11.

Where negligence is the basis of the action, the plaintiff must prove that his negligence did not proximately contribute to the injury for which he sues. *W. U. Teleg. Co. v. McDaniel*, 1 West. Rep. 273, 103 Ind. 294.

When a father sues for an injury to his minor child, his neglectful conduct proximately contributing to the injury is a bar to the action, unless the injury was caused by the wanton, reckless or intentional negligence of the defendant's employees, after having discovered the peril of the child, or when they ought to have discovered the peril. *Pratt Coal & Iron Co. v. Brawley*, 83 Ala. 371.

One whose vehicle standing on a street in violation of a municipal ordinance is injured by being driven against by another vehicle cannot recover, if such violation was the cause of injury. *Newcomb v. Boston Protective Dept.* 6 New Eng. Rep. 282, 146 Mass. 566.

In case of a collision between the cars of a railroad company and the engine of a dummy street-railway, the rule that the dummy line cannot recover if its negligence contributed proximately to the collision is not applicable to a passenger on the 7 L. R. A.

dummy line suing the railroad company for negligence. *Georgia Pac. R. Co. v. Hughes*, 87 Ala. 610.

Where a woman is fatally injured while attempting to put out a fire kindled by a locomotive on property in which she has no interest, and when her own residence was in no danger of being destroyed by the fire, the proximate cause of her injury is her own voluntary act, and she cannot recover in an action against the company. *Pike v. Grand Trunk R. Co.* (N. H.) 89 Fed. Rep. 255.

Injuries to a valuable mare, caused by a barbed-wire fence, are the proximate result of a wrongful act in leaving open the fence enclosing the pasture in which she was running, thus permitting her to escape. *West v. Ward*, 77 Iowa, 323.

Proximate cause of injury; instances.

The proximate cause of damage by fire carried from one building to another through intermediate means is a question for the jury. *Adams v. Young*, 3 West. Rep. 145, 44 Ohio St. 80.

Where fire has been negligently communicated to property, and by subsequent agencies it is carried to other property, the party first setting out the fire will be held liable. *Poeppers v. Missouri, K. & T. R. Co.* 67 Mo. 715; *Coates v. Missouri, K. & T. R. Co.* 61 Mo. 38; *Krippner v. Biehl*, 28 Minn. 130; *Atkinson v. Goodrich Transp. Co.* 60 Wis. 141; *Kellogg v. Chicago & N. W. R. Co.* 26 Wis. 223; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469 (24 L. ed. 356); *Henry v. Southern Pac. R. Co.* 50 Cal. 183; *Adams v. Young, supra*.

If, through the negligence of a railroad company, sparks and cinders alive with fire escape from its engine and set fire to a house, the company is liable for all the loss of life and property destroyed by such fire without contributory negligence on the part of the party bringing the action; and the loss

The jury stated to the court, through their foreman, that they had agreed upon a general verdict. Thereupon the court suggested the withdrawal of the special questions. Both counsel consented. The court announced that the special questions were withdrawn from the jury, and then a general verdict in favor of the defendants was rendered. The special questions having been withdrawn from the jury, by consent, before the general verdict was rendered, it is apparent that no basis exists upon which to predicate a holding that the special questions constituted a part of the finding and verdict of the jury. The jury rendered a verdict in favor of the defendants, and, the general term having affirmed, we have but to consider the exceptions taken by the plaintiff.

Our attention is directed by the appellant to but three exceptions, aside from those already considered: The first relates to the granting of a nonsuit as to the defendant Moses H. Nichols. The general term held that the evidence was not sufficient to warrant a verdict against him. Such holding is in accord with our view, after carefully considering the evidence adduced for the purpose of charging him with liability.

The second was in reference to the exclusion of testimony offered by the plaintiff for the purpose of proving the amount of damages sustained by the destruction of the buildings situated on Main Street. The evidence was excluded upon the ground that defendants' alleged negligence was not the proximate cause of such burning. In view of the verdict of the jury in favor of the defendants upon the issue submitted, and involving the liability of

defendants to the plaintiff for the negligent burning of other buildings on the same occasion, it is not apparent how the rejection of such evidence can be deemed to have resulted prejudicially to the plaintiff. The plaintiff sought to prove all the damages done to his real estate. The court excluded some evidence because considered too remote; and, the jury having found in favor of the defendants, it is not conceivable that the exclusion of certain elements of damage to plaintiff's real estate could have affected the result. If, then, it be conceded that the learned court erred in its ruling in that regard, the error is not of such a character as to justify a reversal of the judgment. But we are of the opinion that the ruling of the court was abundantly supported by authority.

May 29, 1882, a strong wind from the northwest carried sparks from a smoke-stack belonging to the defendants to the roof of an old, three-story wooden building, the property of one E. D. Read, a distance of 280 feet south, 22½ degrees east from the smoke-stack. The sparks were carried across Main Street, and nearly diagonally across Read Street, at its junction with Main, and past, but not over, the buildings in question to the E. D. Read house. The fire on the roof was seen as soon as it commenced to burn, but the Village of Hancock, in which these buildings were located, did not possess any fire apparatus, and there were no ladders in the vicinity of sufficient length to enable the persons present to either go upon the roof, or throw water upon it. From the E. D. Read building the fire communicated to the blacksmith's shop on the

of life is not too remote from the neglect to constitute a liability. *Rajnowski v. Detroit*, B. C. & A. R. Co. (Mich.) 41 N. W. Rep. 847.

Where defendant's negligent act was the proximate cause of a horse running away it was the primary cause of the injury, and defendant is liable. See *Lee v. Union R. Co.* 12 R. I. 883.

Where fire from a locomotive fell upon a horse on the street, rendering him unmanageable, and producing injury to a pedestrian on the sidewalk, the railroad company was held liable. *Lowery v. Manhattan R. Co.* 99 N. Y. 158.

For other cases of frightened horses running away and causing injuries, see *Billman v. Indianapolis C. & L. R. Co.* 78 Ind. 166; *Forney v. Geldmacher*, 75 Mo. 118; *Turner v. Buchanan*, 82 Ind. 147.

So a municipal corporation has been held liable for injuries caused by a horse frightened through its neglect. *Crawfordsville v. Smith*, 79 Ind. 308; *Atlanta v. Wilson*, 59 Ga. 544; *Bennett v. Efield*, 13 R. I. 120; *Perkins v. Fayette*, 68 Me. 152.

Where horses frightened by the upsetting of a vehicle, caused by an obstruction in the highway, due to the negligence of town authorities, ran away, and, after following the highway for some distance, turned upon a railroad track, and were killed by a passing train at quite a distance from such obstruction, it was held that the town authorities were not liable. *West Mahanoy Twp. v. Watson*, 8 Cent. Rep. 223, 113 Pa. 574.

Remote cause of injury; instances.

Where one places a steam boiler upon his premises, and operates the same with care and skill, so that it is no nuisance, in the absence of proof of fault or negligence on his part, he is not liable for

damages to his neighbor occasioned by an explosion of his boiler. *Pennsylvania Coal Co. v. Sanderson*, 4 Cent. Rep. 484, 113 Pa. 120.

Negligence in standing on the step of a car platform while the train is in motion is not the proximate cause of an injury received by being struck by the lever or signal of a switch, which scraped the sides of the cars as the train passed. *Boss v. Northern Pac. R. Co.* 5 Dak. 308.

Plaintiff's goods were shipped on a canal boat, and were injured by reason of an extraordinary storm. It appeared that the boat would have passed the point of accident before the flood, but that defendant used a lame horse and did not make the usual time. It was held, the act of God was the proximate cause, and defendant not liable. *Gleeson v. Virginia Midland R. Co.* (D. C.) 5 Cent. Rep. 442, 5 Mackey, 356.

Where evidence shows that defendant's negligence was a remote cause of plaintiff's loss, the court may instruct the jury to find for defendant. *West Mahanoy Twp. v. Watson*, 8 Cent. Rep. 223, 113 Pa. 574.

The mere act of shooting a dog, although in itself a tort, is not the proximate cause of an injury to another who is startled and frightened by the report of the gun, and in consequence, owing to previous delicate health, becomes seriously ill. *Renner v. Canfield*, 38 Minn. 90.

The stoppage of gas-pipe is not the proximate cause of an accident during an experiment for the purpose of increasing the pressure. *Taylor v. Baldwin*, 78 Cal. 517.

One who, to save himself from falling on an icy pavement, stretched out his hand, which was injured by coming in contact with a pointed railing in an area front, cannot recover damages from the owner of the building. *Kelly v. Bennett*, ante, 20.

north; thence in a westerly direction, across Read Street, to a barn of the plaintiff, which was destroyed. The next building to burn, situated northerly from the E. D. Read house, was Mallory's saloon. From that building the fire spread to and destroyed the buildings in question. After the E. D. Read house commenced to burn, and before either of the buildings of plaintiff on Main Street took fire, the wind died down, and changed to a slight breeze from the south. Unless, then, a party can be held liable for all buildings which may be burned, so long as the first cause can be traced to his negligent act in setting fire to his own or a neighbor's building, without reference to a change of wind, absence of fire apparatus, or other intervening and contributing causes, then the court did not err in holding that the burning of such of plaintiff's buildings as were situated on Main Street was not the proximate result of the alleged negligent act of the defendants in permitting sparks to escape so as to set on fire the E. D. Read house.

Certainly, the facts here presented are much more favorable to the defendants than they were in *Ryan v. New York Cent. R. Co.* 35 N. Y. 210. That case has been distinguished by this court in *Webb v. Rome, W. & O. R. Co.* 49 N. Y. 420; *Pollett v. Long*, 56 N. Y. 200, and *Livery v. Manhattan R. Co.* 99 N. Y. 158,—but it has never been overruled; and the rule still obtains in this State that when the facts are undisputed the court may, under some circumstances, determine, as a matter of law, whether the act complained of is the immediate or remote cause of the injury.

In the *Webb Case* the property of the plaintiff destroyed was contiguous to that of the defendant, and the evidence tended to show that from the place where the live coals dropped to the lands of the plaintiff there was an accumulation of combustible matter, and that it was a time of drought. Judge Folger, in delivering the opinion of the court, said: "Nor am I able to confine the act of negligence to the dropping of the coal from the engine, and thus, separating it from all the other concurring acts and omissions of the defendant, make that the solitary, prime cause of a series of causes."

In *Pollett v. Long*, *supra*, defendant's dam was defective, and in consequence gave way. The volume of water thus suddenly precipitated upon a dam below tore it out and a little further down the stream a third dam was washed away. In an action to recover for damages sustained by the tearing out of the third dam, the trial court charged the jury that, if there was sufficient water in the middle pond to materially increase the volume and force of

the stream, then plaintiff could not recover for injuries to the lower dam, as the damages would be too remote. This was held error. Judge Grover, after discussing the *Ryan Case*, said: "Assuming this rule was correctly applied in the case of *Ryan v. New York Cent. R. Co.* . . . it comes far short of sustaining the proposition under consideration."

In *Livery v. Manhattan R. Co.*, *supra*, a coal of fire dropped from an engine of the defendant upon the back of a horse, causing him to run away. The driver attempted to rein him against the curb-stone, for the purpose of arresting his progress. The wagon passed over the curb-stone, and thence over the plaintiff, injuring him. A recovery by the plaintiff was sustained. Judge Miller, in his opinion, said "that the *Ryan Case* is clearly distinguishable from the case at bar."

If it may be said that the rule laid down in the *Ryan Case* has been broadened somewhat by the decisions referred to, it cannot be contended that it has been so far modified as to permit a holding that the burning of the Main Street buildings was the ordinary and natural result of the act complained of. If it could be so held, then, however many buildings might be burned, if the fire but spread from one building to another, the negligent party would be liable to respond in damages to every owner, even if, as in this case, the course of the wind had so changed as to drive the flames and sparks of burning buildings in a direction other than was possible at the moment of the performance of the wrongful act. We think the court did not err in holding that the damages sustained by the burning of the Main Street buildings were not the proximate, but the remote, result of the acts complained of.

The third relates to the disposition of plaintiff's requests to find, and especially to the qualified manner in which the court charged the thirteenth request. At the close of the evidence the counsel for the plaintiff presented to the court thirteen separate requests to charge. Some were charged as requested, some charged in a modified form, and others refused. At the close of the charge counsel stated that he expected "to the refusals to charge as requested by plaintiff's counsel, in so far as the court did refuse, and to each of the refusals to charge as requested." An exception thus taken is not sufficiently definite and specific to present a question for review. *Smedis v. Brooklyn & R. B. R. Co.* 88 N. Y. 13; *Newall v. Bartlett*, 114 N. Y. 399.

The judgment should be affirmed.

All concur, except Follett, O'Brien, and Potter, J., not sitting.

NEW YORK COURT OF APPEALS.

George W. LAWTON *et al.* *Appts.*,

v.

William N. STEELE, *Respnt.*

(...N. Y....)

1. The taking of fish with nets in specified

NOTE.—Fisheries; power of State Legislatures to regulate.

It is plainly within the province of the Legislature L. R. A.

waters may be prohibited by the Legislature and the setting of nets for that purpose declared to be a public nuisance.

2. The public remedy for the abatement of a nuisance by judicial prosecution in rem or in personam is not exclusive when the Statute in a particular case gives a remedy by summary

ture to determine and regulate the use of all common and public rights and easements. Com. v. Essex Co. 18 Gray, 230.

abatement, and the remedy is appropriate to the object to be accomplished.

3. Where a public nuisance consists in the location or use of tangible personal property so as to interfere with or obstruct a public right or regulation, the Legislature may authorize its summary abatement by executive agencies, without resort to judicial proceedings, and any injury or destruction of the property necessarily incident to the exercise of the summary jurisdiction interferes with no legal right of the owner.

4. The destruction by a public officer of nets for catching fish, set in violation of law, is proper, reasonable and necessary for the abatement of the nuisance, and when done summarily under authority of a statute it neither constitutes a taking of property without due process of law nor renders the officer liable to damages therefor.

5. Where the void provisions of a statute are separable from the valid ones, the court will sustain the valid ones while rejecting the others.

(February 25, 1890.)

A PPEAL by plaintiffs from a judgment of the General Term of the Supreme Court, Fourth Department, reversing a judgment of the Jefferson Circuit in their favor in an action to recover damages for the conversion of their fishing nets by defendant. *Affirmed.*

The case sufficiently appears in the opinion.

Mr. E. C. Emerson for appellant.

Mr. Elon R. Brown, for respondent:

For the protection of the fish, and for the maintenance of equality in respect to the right to fish, the State may regulate fisheries, if the regulations are reasonable, and do not extend beyond the prevention of threatened injuries. See *Holyoke Water Power Co. v. Lyman*, 82 U. S. 15 Wall. 500 (21 L. ed. 13); *Com. v. Chapin*, 5 Pick. 199; *Com. v. Essex Co.* 13 Gray, 247; *State v. Snover*, 42 N. J. L. 341; *Doughty v. Conover*, 1d. 193.

In the last case the statute under consideration prohibited the use of fish nets at certain times of the year in particular counties. See also *Inland Fishing Comrs. v. Holyoke Water Power Co.* 104 Mass. 445, 6 Am. Rep. 247.

Fisheries, even in waters not navigable, are so far public rights that the Legislature of the State may ordain and establish regulations to prevent obstructions to the passage of the fish, and to permit the usual and uninterrupted enjoyment of the right of the riparian owners. *Holyoke Water Power Co. v. Lyman*, *supra*.

On the grant from Charles II., Duke of York, of what is now New Jersey, the soil under the navigable waters, with the right of fishing, both for shell fish and floating fish, passed, as an incident of sovereignty, in trust for the public. *Martin v. Waddell*, 41 U. S. 16 Pet. 367 (10 L. ed. 99); *Russell v. Jersey Co.* 56 U. S. 18 How. 426 (14 L. ed. 757).

Such soil and rights of fishing passed to the twenty-four proprietors from the Duke of York, and from them back to the Crown, upon their surrender in 1702. By revolution they passed from the Crown to the State of New Jersey. *Martin v. Waddell* and *Russell v. Jersey Co.* *supra*.

Whatever soil below high-water mark is within the exclusive ownership of a State is held by it subject to and in trust for the enjoyment of the public rights of fishery, and is under the control of the State to regulate the modes of that enjoyment, so as to prevent acts which would render the public right less valuable or destroy it altogether.

7 L. R. A.

The right and duty to regulate, control and protect the fisheries in navigable waters along the shores of the ocean and of the Great Lakes has always been within the province of the States owning the adjacent territory.

Smith v. Maryland, 59 U. S. 18 How. 71 (15 L. ed. 269); *Smith v. Levinus*, 8 N. Y. 473.

One owning all around a lake may not take fish contrary to statute if the lake connects with public waters.

State v. Roberts, 59 N. H. 256, 47 Am. Rep. 199.

The State possesses ample authority to rid the fisheries of such devices as are destructive of them without negotiations with or judicial proceedings against the offending owners who have constructed or placed such devices in the fisheries in violation of the law protecting the same.

Phelps v. Racey, 60 N. Y. 10, approved in *State v. Snover*, 42 N. J. L. 345; and *Magner v. People*, 97 Ill. 832; *Williams v. Blackwall*, 3 Hurlst. & C. 83; *Smith v. Levinus*, 8 N. Y. 473.

The Legislature may, by virtue of its police powers in the exercise of a reasonable discretion, declare that a nuisance which was not before a nuisance, or legalize a nuisance so that no one will have the right to abate it.

Coe v. Schults, 47 Barb. 65. See *Re Jacobs*, 98 N. Y. 98; *Reg. v. Crawshaw*, Bell, C. C. 803, 80 L. J. N. S. M. C. 58; *McLaughlin v. State*, 45 Ind. 838; *Monroe v. Gerspaes*, 38 La. Ann. 1011; *State v. Towler*, 18 R. I. 661; *Davis v. Sawyer*, 133 Mass. 239; *Sawyer v. Davis*, 186

Smith v. Maryland, 59 U. S. 18 How. 71 (15 L. ed. 269).

Each State owns the beds of tide-waters within its jurisdiction, subject to the paramount right of navigation. Fisheries belong to the State. *Ibid.*; *McCready v. Virginia*, 94 U. S. 391 (24 L. ed. 245).

The rights of navigation and commerce are always paramount to those of public fisheries. *Stockton v. Baltimore & N. Y. R. Co.* 1 Intern. Com. Rep. 411, 32 Fed. Rep. 9.

Me. Rev. Stat., chap. 40, § 70, prohibiting the use of a net, other than a dip-net, in fresh water, applies to the Grand Pond in Kennebec County, Maine. *State v. Towle*, 6 New Eng. Rep. 644, 30 Me. 349.

The spreading of nets by vessels from the lake, three miles up the Grand River from its mouth, is a violation of Mich. Laws 1885, Act No. 10. *People v. Kirsch*, 12 West. Rep. 62, 67 Mich. 539.

A law forbidding the catching of fish by seines, nets or traps, in the waters of the State, interferes with no constitutional right. *State v. Blount*, 36 Mo. 543.

North Carolina Acts 1875, chap. 115, § 153, does not preclude one engaged in a seine-fishery from removing stakes put to operate a pond-net. *Hettrick v. Page*, 32 N. C. 65.

Under the proviso to Tenn. Acts 1879, chap. 108, making the penalties prescribed inapplicable "to persons owning private ponds, and to those owning the land on both sides of a running stream, the same being closed by a substantial fence," one who catches fish with a net in such a stream by verbal permission from the owner of the land, although in his absence, commits no violation of the law. *Maney v. State*, 5 Lea, 518.

Vt. Act 1882, No. 117, § 2, prohibiting all net fishing in Lake Champlain, or in rivers emptying into the lake within ten miles from the mouth, is held constitutional as a regulation, and not prohibiting the fishing. *Drew v. Hilkner*, 56 Vt. 641.

Mass. 289; *Miller v. New York*, 109 U. S. 885 (27 L. ed. 971); *Leigh v. Westervelt*, 2 Duer, 618; *Harris v. Thompson*, 9 Barb. 850.

The means of abatement must likewise be within the reasonable discretion of the law-making power.

Kellogg v. Thompson, 66 N. Y. 88; *Rockwell v. Nearing*, 85 N. Y. 302.

Fish nets are within the definition of a nuisance.

Wood, Nuts. 1; *Stats v. Snover*, 42 N. J. L. 841; *Williams v. Blackwall*, 2 Hurlst. & C. 33; Penal Code, § 885.

The legislative discretion is properly exercised in providing that in the abatement of a nuisance deliberately caused, property of trivial value, used as a means to create it, should be destroyed summarily.

Penal Code, *Gambling Kits*, §§ 338, 345, 346.

Andrews, J., delivered the opinion of the court:

The conclusions of the trial judge that Black River Bay is a part of Lake Ontario, within the meaning of chap. 141 of the Laws of 1886, and that the nets set therein were set in violation of the Act, chap. 591 of the Laws of 1880, as amended by chap. 817 of the Laws of 1883, were affirmed by the general term. The trial judge in his careful opinion demonstrated the correctness of these conclusions, and nothing can be added to re-inforce the argument by which they were sustained.

The point of difference between the trial court and the general term relates to the constitutionality of the section of the Act of 1880, as amended in 1883. That section is as follows: "Sec. 2. Any net found, or other means or device for taking or capturing fish, or whereby they may be taken or captured, set, put, floated, had, found or maintained in or upon any of the waters of this State, or upon the shores or islands in any waters in this State, in violation of any existing or hereafter enacted statutes or laws for the protection of fish, is hereby declared to be, and is, a public nuisance, and may be abated and summarily destroyed by any person; and it shall be the duty of each and every (game and fish) protector aforesaid and of every game constable, to seize and remove and forthwith destroy the same, . . . and no action for damages shall be maintained against any person for or on account of any such seizure and destruction."

The defendant justified the seizure and destruction of the nets of the plaintiffs, as a game protector, under this Statute, and established the justification, if the Legislature had the constitutional power to authorize the summary remedy provided by the section in question. The trial judge held the Act in this respect to be unconstitutional, and ordered judgment in favor of the plaintiffs, for the value of the nets. The general term sustained the constitutionality of the Statute and reversed the judgment. We concur with the general term, for reasons which will now be stated.

The legislative power of the State, which, by the Constitution, is vested in the Senate and Assembly (§ 1, art. 3), covers every subject which, in the distribution of the powers of government between the legislative, executive and judicial departments, belongs by practice

or usage, in England or in this country, to the legislative department, except in so far as such powers have been withheld or limited by the Constitution itself, and subject also to such restrictions upon its exercise as may be found in the Constitution of the United States. From this grant of legislative power springs the right of the Legislature to enact a Criminal Code, to define what acts shall constitute a criminal offense, what penalty shall be inflicted upon offenders, and generally to enact all laws which the Legislature shall deem expedient for the protection of public and private rights, and the prevention and punishment of public wrongs.

The Legislature may not declare that to be a crime which in its nature is and must under all circumstances be innocent, nor can it in defining crimes, or in declaring their punishment, transgress any fundamental right secured by the Constitution. But it may, acting within these limits, make acts criminal which before were innocent, and ordain punishment in future cases where before none could have been inflicted. This in its nature is a legislative power which by the Constitution of the State is committed to the discretion of the legislative body. *Barker v. People*, 8 Cow. 686; *People v. West*, 8 Cent. Rep. 758, 106 N. Y. 293.

The Act in question declares that nets set in prohibited waters are public nuisances, and authorizes their summary destruction. The Statute declares and defines a new species of public nuisance, not known to the common law, nor declared to be such by any prior statute. But we know of no limitation of legislative power which precludes the Legislature from enlarging the category of public nuisances, or from declaring places or property used to the detriment of public interests or to the injury of the health, morals or welfare of the community, public nuisances, although not such at common law. There are, of course, limitations upon the exercise of this power. The Legislature cannot use it as a cover for withdrawing property from the protection of the law, or arbitrarily, where no public right or interest is involved, declare property a nuisance for the purpose of devoting it to destruction. If the court can judicially see that the Statute is a mere evasion, or was framed for the purpose of individual oppression, it will set it aside as unconstitutional, but not otherwise. *Re Jacobs*, 98 N. Y. 98; *Harlan, J.*, *Mugler v. Kansas*, 123 U. S. 661 [31 L. ed. 210].

There are numerous examples in recent legislation of the exercise of the legislative power to declare property held or used in violation of a particular statute a public nuisance, although such possession and use before the statute was lawful. The prohibitory legislation relative to the manufacture or sale of intoxicating liquors in various States has in many cases been accompanied by provisions declaring the place where liquor is unlawfully kept for sale, as well as the liquor itself, a common or public nuisance; and while the validity of prohibitory statutes in their operation upon liquors lawfully acquired or held before their passage, and in respect of the procedure authorized thereby, have been the subject of much contention in the courts, the right of the

Legislature by a new statute to impose upon property held or used in the violation of law the character of a public nuisance is generally admitted. See *Wynhamer v. People*, 18 N. Y. 878; *Fisher v. McGirr*, 1 Gray, 1; *Mugler v. Kansas*, *supra*.

The law-making power is not exhausted by a single exercise, nor limited to subjects covered by the common law.

The legislative power to regulate fishing in public waters has been exercised from the earliest period of the common law. The Statute, 2 Hep. VI., chap. 15, prohibited the use of nets in the Thames, if they obstruct navigation or the passage of fish. Lord Hale, in his treatise, *De Jure Maris*, page 23, says that "the fishing which the subject has in this or any other public or private river or creek, fresh or salt, is subject to the laws for the conservation of fish and fry, which are many."

In this State many statutes have been enacted, commencing at an early period, regulating the right of fishing in the waters of the State, prohibiting the use of nets or the taking of fish at certain seasons, and for the protection of certain kinds of fish. 1 Rev. Stat. Ed's ed. p. 687 *et seq.*; 4 Rev. Stat. Ed's ed. p. 96 *et seq.*

It has become a settled principle of public law that power resides in the several States to regulate and control the right of fishing in the public waters within their respective jurisdictions. *Smith v. Maryland*, 59 U. S. 18 How. 71 [15 L. ed. 269]; *Hooker v. Cummings*, 20 Johns. 101; *Smith v. Levinus*, 8 N. Y. 472; 8 Kent, Com. 415.

We think it was competent for the Legislature, in exercising the power of regulation of this common and public right, to prohibit the taking of fish with nets in specified waters, and by its declaration to make the setting of nets for that purpose a public nuisance. The general definition of a nuisance given by Blackstone, vol. 3, p. 215, is "anything that worketh hurt, inconvenience or damage."

It is generally true, as stated by a recent writer (Wood, on Nuisances, § 11), that nuisances arise from the violation of the common law, and not from the violation of a public statute. But this, we conceive, is true only where the statute creates a right or imposes an obligation and affixes a penalty for its violation, or gives a specific remedy which by the terms of the statute or by construction is exclusive. See *Bulbrook v. Goodere*, 8 Burr. 1770.

But the principle stated has no application where the statute itself prescribes that a particular act or property used for a noxious purpose shall be deemed a nuisance.

The Legislature, in the Act in question, acting upon the theory and upon the fact (for so it must be assumed) that fishing with nets in prohibited waters is a public injury, have applied the doctrine of the common law to a case new in instance but not in principle, and made the doing of the prohibited act a nuisance. This we think it could lawfully do. The more difficult question arises upon the provision in the second section of the Act of 1883, which authorizes any person, and makes it the duty of the game protector, to abate the nuisance caused by nets set in violation of law, by their

summary destruction. It is insisted that the destruction of nets by an individual, or by an executive officer so authorized, without any judicial proceeding, is a deprivation of the owner of the nets of this property, without due process of law, in contravention of the Constitution. The right of summary abatement of nuisances without judicial process or proceeding was an established principle of the common law long before the adoption of our Constitution, and it has never been supposed that this common law principle was abrogated by the provision for the protection of life, liberty and property in our State Constitution, although the exercise of the right might result in the destruction of property. This question was referred to by Sutherland, J., in *Hart v. Albany*, 9 Wend. 590. He said: "If this is a case in which the corporation or any other person had a right summarily to remove or abate this obstruction, then the objection that the appellants by this course of proceeding may be deprived of their property without due process of law, or trial by jury, has no application. Formal legal proceedings and trial by jury are not appropriate to, and have never been used in, such cases." See also opinion of Edmonds, Senator, in *S. O. p. 609*.

In the *License Cases*, 46 U. S. 5 How. 504 [12 L. ed. 256], Judge McLean, speaking of this subject, said: "The acknowledged police power of a State often extends to the destruction of property. A nuisance may be abated. Everything prejudicial to the health and morals of a city may be removed."

In *Rockwell v. Nearing*, 85 N. Y. 308, Porter, J., speaking of the constitutional provision, said: "There were many examples of summary proceedings which were recognized as due process of law at the date of the Constitution, and to them the prohibition has no application."

Quarantine and health laws have been enacted from time to time from the organization of our state government, authorizing the summary destruction of infected cargo, clothing or other articles, by officers designated, and no doubt has been suggested as to their constitutionality.

In *Hart v. Albany*, *supra*, a question was raised as to the validity of a city ordinance, subjecting a float moored in the Albany Basin to summary seizure and sale upon failure of the owner to remove the same after notice. The court held the ordinance to be void as not within the power conferred upon the city by its charter, but it was held that the common-law right of abatement existed, although the removal of the float in question involved its destruction.

Van Wormer v. Albany, 15 Wend. 263, sustained the right of the corporation to dig down a lot in the city, to abate a nuisance, although in the process of abatement buildings thereon were pulled down.

In *Meeker v. Van Rensselaer*, 15 Wend. 397, the court justified the act of the defendant, as an individual citizen, in tearing down a filthy tenement house which was a nuisance, to prevent the spread of the Asiatic cholera.

These authorities sufficiently establish the proposition that the constitutional guaranty does not take away the common-law right of

abatement of nuisances by summary proceedings, without judicial trial or process. But in the process of abating a nuisance there are limitations both in respect of the agencies which may be employed, and as to what may be done in execution of the remedy. The general proposition has been asserted in text books, and repeated in judicial opinions, that any person may abate a public nuisance. But the best-considered authorities in this country and England now hold that a public nuisance can only be abated by an individual where it obstructs his private right, or interferes at the time with his enjoyment of a right common to many, as the right of passage upon the public highway, and he thereby sustains a special injury. *Brown v. Perkins*, 13 Gray, 89; *Colchester v. Brooks*, 7 Q. B. 839; *Dimes v. Petley*, 15 Q. B. 276; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Harrover v. Ritson*, 87 Barb. 301.

The public remedy is ordinarily by indictment for the punishment of the offender, wherein on judgment of conviction the removal or destruction of the thing constituting the nuisance, if physical and tangible, may be adjudged, or by bill in equity filed in behalf of the people. But the remedy by judicial prosecution *in rem* or *in personam*, is not, we conceive, exclusive, where the statute in a particular case gives a remedy by summary abatement, and the remedy is appropriate to the object to be accomplished. There are nuisances arising from conduct, which can only be abated by the arrest and punishment of the offender, and in such cases it is obvious that the Legislature could not directly direct the sheriff or other officer to seize and flog or imprison the culprit. The infliction of punishment for crime is the prerogative of the court and cannot be usurped by the Legislature. The Legislature can only define the offense and prescribe the measure of punishment, where guilt shall have been judicially ascertained. But as the Legislature may declare nuisances, it may also, where the nuisance is physical and tangible, direct its summary abatement by executive officers, without the intervention of judicial proceedings, in cases analogous to those where the remedy by summary abatement existed at common law.

Marvin, J., in his able opinion in *Griffith v. McCullum*, 46 Barb. 561, speaking of the remedy for the abatement of nuisances, says: "That which is exclusively a common-law or public nuisance cannot be abated by the private acts of individuals. The remedy is by indictment or criminal prosecution, unless the statute has provided some other remedy."

The cases of *Hart v. Albany, Van Wormer v. Albany* and *Meeker v. Van Rensselaer*, *supra*, show that the public remedy is not in all cases confined to a judicial prosecution. But the remedy by summary abatement cannot be extended beyond the purpose implied in the words, and must be confined to doing what is necessary to accomplish it. And here lies, we think, the stress of the question now presented. It cannot be denied that in many cases a nuisance can only be abated by the destruction of the property in which it consists. The cases of infected cargo or clothing and of impure and unwholesome food are plainly of this description. They are nuisances *per se*, and their abatement is their destruction. So also there

can be little doubt, as we conceive, that obscene books or pictures, or implements only capable of an illegal use, may be destroyed as a part of the process of abating the nuisance they create, if so directed by statute. The keeping of a bawdy house, or a house for the resort of lewd and dissolute people, is a nuisance at common law. But the tearing down of the building so kept would not be justified as the exercise of the power of summary abatement; and it would add nothing, we think, to the justification, that a statute was produced authorizing the destruction of the building summarily as a part of the remedy. The nuisance consists in the case supposed in the conduct of the owner or occupants of the house, in using or allowing it to be used for the immoral purpose, and the remedy would be to stop the use. This would be the only mode of abatement in such case known to the common law, and the destruction of the building for this purpose would have no sanction in common law or precedent. See *Babcock v. Buffalo*, 56 N. Y. 268; *Barclay v. Com.* 25 Pa. 503; *Ely v. Niagara Co.* 86 N. Y. 297.

But where a public nuisance consists in the location or use of tangible personal property, so as to interfere with or obstruct a public right or regulation, as in the case of the float in the Albany Basin (*Hart v. Albany*, 9 Wend. 571) or the nets in the present case, the Legislature may, we think, authorize its summary abatement by executive agencies, without resort to judicial proceedings, and any injury or destruction of the property necessarily incident to the exercise of the summary jurisdiction interferes with no legal right of the owner. But the Legislature could not go further. It could not decree the destruction or forfeiture of property used so as to constitute a nuisance, as a punishment of the wrong, nor even we think to prevent a future illegal use of the property, it not being a nuisance *per se*, and appoint officers to execute its mandate. The plain reason is that due process of law requires a hearing and trial before punishment or before forfeiture of property can be adjudged for the owner's misconduct. Such legislation would be a plain usurpation by the Legislature of judicial powers, and under guise of exercising the power of summary abatement of nuisances, the Legislature cannot take into its own hands the enforcement of the criminal or quasi criminal law. See opinion of Shaw, *Ch. J.*, in *Fisher v. McGirr*, *supra*, and in *Brown v. Perkins*, 12 Gray, 89.

The inquiry in the present case comes to this: whether the destruction of the nets set in violation of law, authorized and required by the Act of 1883, is simply a proper, reasonable and necessary regulation for the abatement of the nuisance, or transcends that purpose, and is to be regarded as the imposition and infliction of a forfeiture of the owner's right of property in the nets, in the nature of a punishment. We regard the case as very near the border line, but we think the legislation may be fairly sustained on the ground that the destruction of nets so placed is a reasonable incident of the power of the abatement of the nuisance. The owner of the nets is deprived of his property, but not as the direct object of the law, but as incident to the abatement of the nuisance.

Where a private person is authorized to abate a public nuisance, as in case of a house built in

a highway, or a gate across it, which obstructs and prevents his passage thereon, it was long ago held that he was not required to observe particular care in abating the nuisance, and that although the gate might have been opened without cutting it down, yet the cutting down would be lawful. *Lodis v. Arnold*, 2 Salk. 458, and cases cited.

But the general rule undoubtedly is that the abatement must be limited by necessity, and no wanton and unnecessary injury must be committed. 8 Bl. Com. p. 6, *note*.

It is conceivable that nets illegally set could, with the use of care, be removed without destroying them. But in view of their position, the difficulty attending their removal, the liability to injury in the process, their comparatively small value, we think the Legislature could adjudge their destruction as a reasonable means of abating the nuisance.

These views lead to an affirmance of the order of the general term.

The case of *State v. Snover*, 42 N. J. L. 841, tends to sustain the conclusion we have reached. The action in that case was trespass, for entering the plaintiff's lands, bordering a non-navigable stream in New Jersey, and destroying a fish basket, in the waters diverted therefrom, placed for the catching of fish, contrary to a statute. The court held the statute to be a justification.

The case of *Williams v. Blackwall*, 2 Hurlst. & C. 33, arose under an Act of Parliament which authorized the summary destruction, by fish wardens, of what was known as salmon

engines, being fish nets set in violation of the Act. The case is not an authority upon the power of our Legislature under the limitations of the State Constitution, but the legislation upon which the action was founded shows that in a country governed by the principles of Magna Charta, such legislation is not deemed inconsistent with the fundamental doctrines of civil liberty. It is insisted that the provision in the Act of 1883 authorizes the destruction of nets found on the land, on shores or islands adjacent to waters, where taking of fish by nets is prohibited, and that this part of the statute is in any view unconstitutional. Upon this premise it is insisted that the whole section must fall, as the Statute, if unconstitutional as to one provision, is unconstitutional as a whole. This is not, we think, the general rule of law where provisions of a statute are separable, one of which only is void. On the contrary the general rule requires the court to sustain the valid provisions, while rejecting the others. Where the void matter is so blended with the good that they cannot be separated, or where the court can judicially see that the Legislature only intended the Statute to be enforced in its entirety, and that by rejecting part the general purpose of the Statute would be defeated, the court, if compelled to defeat the main purpose of the Statute, will not strive to save any part. See *Fisher v. McGirr*, *supra*.

The order granting a new trial should be affirmed, and judgment absolute ordered for the defendant on the stipulation, with costs.

All concur, except O'Brien, J., not sitting

IOWA SUPREME COURT.

J. G. C. RAPPLEYE, Assignee, etc., of
Young Brothers, *Appt.*,

v.

RACINE SEEDER CO.

(....Iowa....)

1. The right to assign a contract under Code, § 2084, giving the assignee a right of action in his own name, does not permit one who has ordered machines, agreeing to give his own notes therefor and turn over as collateral any notes taken by him from purchasers, to assign the contract so as to substitute another in his stead whose note must be accepted in lieu of his own.
2. A contract for the sale of articles for which the purchaser's note is to be taken may be rescinded on his insolvency before delivery, and the seller cannot be compelled to accept the note of the assignee for creditors.

(January 31, 1890.)

A PPEAL by plaintiff from a judgment of the District Court for Polk County in favor of defendant in an action to recover damages for the alleged breach of a contract for the sale of certain agricultural implements. *Affirmed.*

NOTE.—Contract; rescission. See notes to *Osgood v. Bauder* (Iowa) 1 L. R. A. 656, and *Katz v. Bedford* (Cal.) 1 L. R. A. 325.
7 L. R. A.

Statement by Granger, J.:

Action for breach of contract in the sale of certain seeders, in which the court, without the intervention of a jury, found the following facts:

"*First.* That prior to October 14, 1884, the firm of Young Bros., the plaintiff's assignors, were a copartnership engaged principally as manufacturers' agents in sale of agricultural implements throughout the State of Iowa, having their place of business at the City of Des Moines, in said State. *Second.* That on the 19th day of August, 1884, the Racine Seeder Company, of Racine, Wis., the defendant herein, made with said Young Bros. the contract introduced in evidence, and marked 'Exhibit A,' as alleged in plaintiff's petition. *Third.* That by said contract the defendant sold to Young Bros. nine hundred Strowbridge broadcast sowers, for which payment was to be made by the promissory notes of Young Bros. as implements were delivered, and in consideration for such purchase the defendant granted to said firm the exclusive privilege of selling said implements in the western half of the State of Iowa. Young Bros. were to canvass said territory, and solicit written orders for said Strowbridge sower, in the name of defendant, using blank orders prescribed by it; and the orders thus taken were to be turned over to the defendant, and thereupon the implements were to be shipped by the defendant to

the various purchasers, at the time stated in such orders. Young Bros. were further required to take promissory notes in settlement for implements thus sold, when sales were not for cash; and such notes were to be turned over to the defendant, in addition to the contracts before mentioned, as collateral security for the notes of Young Bros. If implements were sold for cash, the same was to be immediately applied by Young Bros. on the purchase price of the implements contracted for.

Fourth. That upon the faith of the above contract, Young Bros. proceeded to canvass the territory assigned them, taking orders for the said implements, and turning them over to defendant, and otherwise performing their part of said contract, and up to the 14th of October, 1884, had sold about three hundred of said implements, at prices varying from \$16.50 to \$18.75. Said contracts were identical in form with Exhibit A, hereto attached.

Fifth. That on the 14th day of October, 1884, the said Young Bros. made a general assignment for the benefit of creditors to one Isaac Henshie, who continued to perform the duties of said assignee until his death, on December 8, 1884; that the record of the instrument found on pages Nos. 10, 11, 12 and 13 of book No. 154 of Chattel Mortgage Records, in recorder's office of Polk County, Iowa, introduced in evidence, is a true copy of said general assignment; that by said assignment all rights under said contract of Young Bros. with defendant passed to said assignee; that the plaintiff in this cause is the successor in office to said Isaac Henshie as assignee of said Young Bros., duly appointed by the Circuit Court of Polk County, Iowa, on or about the 18th day of December, 1884.

Sixth. That on the 5th day of November, 1884, the defendant sent to Young Bros., recent place of business, by messenger, the letter of that date set out in defendant's answer herein, giving notice of its refusal to go on with the contract before mentioned; that the defendant intended by the notice given in said letter to put an end to the contract entirely, and the same was understood and treated by the assignee of Young Bros. as so intended; that soon after the service of the above notice the defendants entered the same territory which had been granted by said contract to Young Bros., made new contracts in its own name, with some of the persons with whom Young Bros. had contracted for the sale of said implements, and sold large numbers of the same to divers other persons in said territory.

Seventh. That, as soon as practicable after entering upon his duties as assignee of said Young Bros., the said Isaac Henshie sought legal advice with reference to his rights as such assignee under said contract, and was advised that he had a right under the law to go on with the same, and require performance thereof on the part of defendant; and there was evidence tending to show that he thereupon procured an agent to further canvass the territory named in said contract, and was otherwise arranging to go on with the same, when he received said defendant's letter of November 5, 1884, giving notice of its refusal to perform said contract. Such evidence was, in substance, that said assignee called in from the road one William Gracey, who had previously

been employed by Young Bros. to sell said Strowbridge sower, the goods handled by Young Bros., in said territory; that said Gracey was subsequently in the city; and that the account-book kept by the assignee showed an account with William Gracey, in which appeared the following entry: "October 20, 1884. Commenced work at sixty dollars per month and expenses;" that said Gracey received money from said assignee, and subsequently took the two orders for thirty-five of said Strowbridge sowers, which were introduced in evidence, and marked 'Exhibit B' (22 and 23), but this was no evidence that the defendant had knowledge of these matters; that at the time said letter of November 5, 1884, was received from the defendant said assignee had not had a reasonable time in which to perfect arrangements for going on with said contract.

Eighth. That said Strowbridge broadcast sower is a patented article, of which defendant was the sole manufacturer. About the month of February or March, 1885, however, a similar sower was put upon the market by the Joliet Wire Company, of Joliet, Ill., at less than this contract price; but this was considered by the defendant to be an infringement on the Strowbridge patent.

Ninth. That at no time has defendant either made or tendered to plaintiff, or to his predecessor in office, the said Isaac Henshie, or to said Young Bros., any compensation whatever for the labor or moneys expended by them, or for any portion of their performance of said contract, or made or offered in any manner to place the said persons, or either of them, *in statu quo*.

Tenth. That defendant never delivered, nor tendered a delivery of, any portion of said nine hundred Strowbridge sowers sold to said Young Bros., although such delivery was demanded, to the number of said implements named in said orders turned over to said defendant, if such orders constituted a demand; and said defendant refused to deliver any portion of said implements, or to perform its part of said contract in any respect whatever. But no demand was made upon defendant for performance of said contract, unless the delivery of said orders constituted such demand.

Eleventh. That neither the plaintiff nor his predecessor in office, the said Isaac Henshie, ever tendered the defendant any security in lieu of the promissory notes of Young Bros. agreed to be made, or made application to the court for authority to carry out said contract, or to require said defendant to accept any security in lieu of said notes, or gave defendant any notice that he intended to carry out said contract."

As a conclusion of law, the district court found with the defendant, and the plaintiff appeals.

Messrs. Cummins & Wright and N. B. Raymond for appellant.

Messrs. Lehmann & Park, for appellee:

In order to obtain the contract Young Bros. represented themselves as solvent when in fact they were insolvent. A party's false statement of his own solvency is ground for rescinding the contract which it induces.

1 Wharton, Cont. § 262; 5 Walt, Act. and Def. 680, and cases cited; *Owego Starch Factory v. Lendrum*, 57 Iowa, 573

The partial performance which the law considers as an obstacle to rescission is a partial performance as between the parties.

Benson v. Cowell, 52 Iowa, 187.

The requirement that parties should be placed *in statu quo* as a condition precedent to a rescission, does not hold in cases of fraud—these are an exception to the rule.

2 Parsons, Cont. 780; *Hendrickson v. Hendrickson*, 51 Iowa, 68. See also *American Wine Co. v. Brasher*, 4 McCrary, 247.

When the buyer becomes insolvent, the seller may withhold delivery of the goods until he is paid or secured.

Mihl's Mfg. Co. v. Day, 50 Iowa, 250; Benjamin, Sales, § 1016.

An assignee does not stand in all respects in the place of his assignor. He cannot in all matters continue the business of the assignor. "It can only be allowed from the necessity of the case, and where it is manifestly for the benefit and advantage of the creditors and those interested in the estate."

Burrill, Assignm. pp. 600-603.

The trustee has a right to elect to complete the contract by paying cash within a reasonable time.

2 Addison, Cont. p. 483. See also 1 Wharton, Cont. § 293; Benjamin, Sales, § 1119; *Smith v. Gordon*, 2 N. Y. Legal Obs. 825; *Streeter v. Sumner*, 31 N. H. 558.

Granger, J., delivered the opinion of the court:

1. The point receiving the principal attention in argument is as to the effect on the contract of the insolvency of Young Bros., and the assignment for the benefit of their creditors. Perhaps it may be better stated as a query, thus: Was the insolvency and assignment a justification for the defendant Company in rescinding the contract? The answer to this question is a practical determination of the case, as to the plaintiff's cause of action. Its consideration has led counsel for appellant to consider at some length the law as to the assignment of contracts, and it is urged that the assignment in question is within its contemplation. A salient feature of the case is the manner or method of payment by Young Bros. for the seeders. The contract was for 900 seeders, to be delivered on the orders of Young Bros., for which the firm was to give its notes. Young Bros. were to deliver the seeders to purchasers from them, and settle for the same either by receiving cash or notes. If cash, it was to be turned over to defendant, to apply on the notes of Young Bros. If notes, they were to be turned over to defendant as collateral security for the notes already given by Young Bros. It is said in argument that the district court held the rescission valid because, after the assignment, Young Bros. were not in a position to give their notes in pursuance of the terms of the contract; from which we infer this view of the court: That the defendant was entitled, under the contract, to the notes of Young Bros., aided collaterally by the notes taken by them in the sales of the seeders. As between defendant and Young Bros., nothing less could be regarded as a compliance with the contract. It could hardly be claimed that Young Bros., in a settlement for the machines,

could substitute in lieu of their note that of another person or firm, regardless of the question of solvency or value, even though aided by the collateral notes as agreed upon, for the sole and conclusive reason that their engagements are for notes signed by them. Such a rule needs no elaboration.

The argument, then, leads us to the query, Without reference to the statutory assignment for the benefit of creditors, could Young Bros. have so assigned the contract, without the consent of defendant, as to substitute another in their stead for performance, and whose note must be accepted in lieu of theirs by the defendant? This leads us to consider the authorities cited. Counsel for appellant quotes from Code, § 2084, as follows: "Instruments in writing, by which the maker promises . . . to pay or deliver any property or labor, or acknowledges any money or labor or property to be due, are assignable by indorsement thereon, or by other writing; and the assignee shall have a right of action in his own name." Counsel then say: "Under the very broad language of this provision, this court has held that all contracts are assignable, even in cases where, by the terms of the instrument, its assignment is prohibited," and reference is made to *Moorman v. Collier*, 33 Iowa, 138, and *First Nat. Bank v. Carpenter*, 41 Iowa, 518.

Section 2084 is a part of the chapter on "Notes and Bills;" and the section deals only with instruments in writing, and tells how they may be transferred, and who may sue thereon. In both of the cases to which reference is made the court had under consideration the validity of the transfer of an instrument in writing for the payment of money; and the language used in each case is not too broad, if properly limited by the subject of its application. In *Moorman v. Collier* the language relied on is that "all instruments, under our statute, are assignable;" and the statement takes as authority Revision, § 1796, which corresponds with section 2084 of the Code, and the language of the case is only as to "instruments." It does not say, "all contracts." The case evidently means all instruments for the payment or delivery of money, property or labor, as specified in the section and chapter. The case of *First Nat. Bank v. Carpenter* was an action on a written guaranty, which was held assignable; and in its discussion this language is used: "Generally, by the common law, a guaranty is not negotiable, or in any manner transferable, so as to enable the assignee to maintain an action thereon. . . . But under our Statutes this and every other kind of contract is assignable." It cites for support Code, §§ 2082-2087, inclusive; and it is said in the opinion that "even in a case where, by the terms of the instrument, its assignment is prohibited, it may be assigned." The sections referred to are the six first sections in the chapter on "Notes and Bills," which chapter, of course, has reference to other instruments than notes and bills; and the provisions, in brief, as to assignments are that a party entitled to recover on an instrument or an open account may transfer his right of recovery to another; but there is nothing in the language of the chapter to indicate a legislative intent to authorize a party to a contract by assignment to transfer his obliga-

tions to perform to a third party, and thus effect his release, without the consent of his obligee.

Let us suppose that A contracts in writing to render service, as a traveling salesman, to B, for a specified compensation. Under the law, if B shall be indebted to A on the contract, A may assign his claim. But suppose A should assign his contract to C, whereby C was to receive the pay and render the service. Must B accept that? B has contracted for the services of A. He is entitled to that; and, before B can be required to pay either to A or his assigns, he must have what he contracted for. The law will permit a person to assign what is his, either in possession or by right of action, but not his obligations to another; and such is the substance of the provisions of the Statutes on the subject of assignments referred to.

Thus we think that Young Bros. could not, without reference to the assignment for the benefit of creditors, have so assigned the contract in question, without the consent of the defendant, as to have required defendant to have accepted in lieu of theirs the notes of their assignee.

We may then inquire if there is anything in the statutory assignment for the benefit of creditors to change the rule? It is urged that the statutory provision as to assignments for the benefit of creditors is broad enough to enable the assignee to execute any contract that might come into his hands. The difficulties of the case are not with the provisions of the Statute as to the authority of the assignee. They are more with his incapacity or indisposition to execute the contract. We should not lose sight of the real question under consideration by a contemplation of what the assignee could have done if defendant, after insolvency, had been willing to deliver the seeders. It may be conceded that the contract could thus have been executed by the assignee on behalf of Young Bros. But the query is, Had the defendant the right to refuse delivery of the seeders after insolvency and assignment? In other words, had it the right to terminate the contract? If it were a case of insolvency without the assignment, we think it would be conceded on authority that the obligation to deliver could only be on a tender of a cash payment in lieu of notes agreed upon. *Pardes v. Kanady*, 100 N. Y. 121, 1 Cent. Rep. 250.

Does the fact of the assignment affect the rights of the defendant? The reason of the rule in cases of insolvency is too manifest to need explanation. A person who contracts to deliver property on a credit, in anticipation of a solvent purchaser, ought not to be required to deliver it after insolvency, which is a practical confession by the purchaser of his inability to comply with the terms of the contract. If to the fact of insolvency is added that of an assignment for the benefit of creditors, why should the rule be changed? If the delivery is excused in case of insolvency because the property will not be paid for, the same reasons exist for excusing the delivery after assignment. If the insolvent did not possess a right to enforce the contract except by cash payment, he could convey no greater right to his assignee. The argument deals with the question of the right of appellant to a delivery of the seeders

upon cash payment therefor. To our minds, the record does not present the question for consideration. The contract was not to pay cash, but to settle by note. After insolvency defendant was not required to anticipate a readiness for cash payment; and, if either Young Bros. or plaintiff desired to make such payment, a tender to that effect should have been made. Soon after the assignment, defendant, as it should, gave notice that because of the insolvency and dissolution of the partnership the contract was rescinded. This notice was to Young Bros. If the assignee then desired to pay in cash, and have the seeders delivered, the proposition or tender should have been made. But neither the pleadings in the case, nor the findings of the court, deal with this question. The case in the district court seems to have been tried upon an issue as to the right of the assignee to carry out the contract by giving his note in lieu of that of Young Bros. The pleadings and findings have to do with a willingness on the part of the assignee to carry out the contract; but it appears only to have been a carrying out of the contract as Young Bros. were authorized to do, and not by payments in cash. A reference to the eleventh finding shows that the assignee has never in any manner indicated to defendant a purpose or desire to secure or perform the contract. Insolvency, in such cases, implies an inability to perform, on which the defendant might rely until otherwise assured.

Appellant contends, with much zeal, that the mere fact of insolvency does not put an end to the contract of sale; and several authorities are cited in support of the rule. It is not necessary for us to state an opinion on a state of facts so broad. The case *Re Phania Bessemer Steel Co.*, L. R. 4 Ch. Div. 106, cited by appellant, bears upon the question of when the facts will justify a seller on credit in refusing to deliver because of the subsequent insolvency of the purchaser. The facts in that case are that the Carnforth Iron Company, in October, 1874, contracted to supply iron to be delivered monthly, and to be paid for in installments, but on credit. The installments were delivered till in February, 1875, when the purchasing company called a meeting of its creditors, and said it was carrying on business at a loss, and was short of capital, and asked for an extension of time, which the creditors refused. The selling company then refused to deliver the iron except upon cash payments, and the purchasing company then rescinded the contract. The selling company then asked for damage, which the court held could not be recovered; holding that there was no such declaration of insolvency as to justify the selling company in refusing to deliver. The syllabus of the case, which appears to be supported by the opinion, deduces a rule as follows: "In order to justify the vendors, in such a case, in exercising their right of refusal to deliver, there must be such proof or admission of the insolvency of the purchasers at the time as amounts to a declaration of intention not to pay for the goods." The case does not appear to be an authority against the right of refusal to deliver where the fact of insolvency exists, and is so evidenced as to amount to a declared purpose not to pay. It is the fact of the insolvency that seems to be

the turning point in the case, and that would surely seem to be the reasonable rule.

The case of *Morgan v. Bain*, L. R. 10 C. P. 15, also cited by appellant, was one for the delivery of iron on credit; and the purchasers became insolvent. Lord Coleridge, *Ch. J.*, in his opinion, said: "It is not disputed that upon the occurrence of insolvency the vendor would not be bound to deliver to the insolvent purchaser an installment of the iron becoming due, without a tender of the price." Brett, *J.*, in the same case, said, without committing himself to the theory that the mere fact of insolvency would *per se* put an end to the contract, that such fact, with that of notice to the seller of the insolvency, would justify an assumption by the seller that the purchaser intended to abandon the contract. The notice upon which he relied, and gave his adherence to the holding in that case, was the commencement of insolvent proceedings under the Bankrupt Act. In this case the fact of the insolvency is unquestioned, and a like notice is given by an insolvent proceeding for the benefit of creditor. Hence it seems the defendant, in this case, is within any of the rules cited. Other authorities cited by appellant are all more favorable to his position.

2 Defendant presented a counterclaim, based on an open account alleging a balance due of \$27.98, as to which the court established a claim against the estate of Young Bros. for \$27, based on the following finding of facts: "Twelfth. On defendant's counterclaim, the court finds that defendant received orders from Young Bros. for the goods mentioned in the account under dates September 5, 6, 8, 15 and 17, 1881; that these orders were treated in the usual way, the usual directions given for shipping, and the goods charged on the books to Young Bros.; that both of Young Bros.

were on the witness stand, and neither of them denied having received the goods; that, the balance of defendant's counterclaim not being denied, the defendant should recover the sum of \$27.98, less the sum of \$300 due the plaintiff for commission earned by Young Bros. under the contract of 1883, declared on in plaintiff's petition."

It is urged that the proofs are not sufficient to sustain the finding. The argument concedes a practical dispute in the testimony, and the finding has the force of a verdict by the jury. The evidence is such that we cannot interfere.

3. It is next said that it was error to enter a personal judgment against the assignee. The assignment is in these words: "The court erred in rendering a personal judgment against the plaintiff herein for the balance due upon defendant's counterclaim, for the reason that such judgment is contrary to law and the evidence. Said defendant was entitled only to the establishment of his claim as a creditor of said estate." The assignment is not sustained by the record. The judgment of the court is merely the establishment of a claim against the estate. It is not a personal judgment. It would only be subject to *pro rata* payment, like other claims. The wording of the judgment is "that such be and is hereby established as a claim against the estate of Young Bros., and against the said Rappleye as their assignee." These words have no other meaning than the establishment of the claim.

It would appear that appellant has based this assignment rather upon statements in the abstract with reference to the judgment than upon record of the judgment as copied in the abstract.

Affirmed.

GEORGIA SUPREME COURT.

W. H. PATTERSON, *et al.*, *Piffs. in Err.*,

Anna Leckie, *Defendant*, and Bryan LAWRENCE, *Claimant*.

(...Ga....)

1. A court of law having equity juris-

isdiction cannot exercise it without pleadings suitable for the purpose.

2. The exercise of a power of appointment by will on the part of one having a life interest in trust property with power of appointment as to the portion remaining after her death, to confirm title to a person who had previously

NOTE.—Execution of power to appoint by will.

A wife may have power to appoint certain property by will and not by deed or by deed and not by will. *Re Harvey's Estate*, L. R. 13 Ch. Div. 216.

If the power authorize an appointment by deed, its execution by her may be "immediate" during her lifetime; if by will only, then the disposition cannot take effect until after her death. See *Hulme v. Tenant*, 1 Lead. Cas. in Eq. 4th Am. ed. 600; *Bradley v. Westcott*, 13 Ves. Jr. 445, 451; *Reid v. Shergold*, 10 Ves. Jr. 370, 380; *Anderson v. Dawson*, 15 Ves. Jr. 522; *Hentley v. Thomas*, Id. 596; *Richards v. Chambers*, 10 Ves. Jr. 580; *Socket v. Wray*, 4 Bro. Ch. 43; *Lee v. Mugeridge*, 1 Ves. & B. 118; *Nixon v. Nixon*, 2 Jones & La T. 416; and see *Noble v. Willcock*, L. R. 8 Ch. 778; *Bishop v. Wall*, L. R. 3 Ch. Div. 194; 3 Pom. Eq. Jur. 31.

The same formalities are not necessarily requisite in executing a power, as in disposing of separate property; the terms prescribed by the power should

furnish the criterion. *Sohley v. McCeney*, 36 Md. 266.

The appointee under a special power must be competent to have taken immediately from the donor. *Robinson v. Hardcastle*, 2 T. R. 241.

If a married woman has a life estate, and she is clothed with a general power of appointment over the corpus of the property, and she exercises the power, the appointed property is not thereby made applicable to the payment of her debts, excepting only those which are fraudulent, that is, her liabilities arising from fraud. *Vaughan v. Vandergestegen*, 2 Drew. 165, 363; *Shattock v. Shattock*, L. R. 2 Eq. 182, 35 Beav. 439; *Hobday v. Peters*, 28 Beav. 354, 358; *Blatchford v. Woolley*, 2 Drew. & Sm. 204; *But see London Chartered Bank of Australia v. Lempière*, L. R. 4 P. C. 572; 3 Pom. Eq. Jur. 30.

While a wife may execute a power of appointment conferred upon her, in favor of her husband, yet she cannot convey her land directly to him except as allowed by Code, §§ 1835, 1836. *Sims v. Ray*, 36 N. C. 37.

purchased it for a valuable consideration from the appointor and trustee under an order of court, does not make the property assets of the appointor's estate liable in equity for her debts.

3. Property disposed of by will under a power of appointment cannot be held liable for the appointor's debts even if it otherwise might be, unless the appointor's assets are insufficient to pay such debts.

(November 18, 1886.)

ERROR to the Superior Court for Richmond County to review a judgment in favor of claimant and against plaintiff in an action to recover a demand against a decedent's estate out of property alleged to be assets thereof. *Affirmed.*

The facts sufficiently appear in the opinion.

Mr. Leonard Phinixy, for plaintiffs in error:

The execution of a general power of appointment converts the estate into assets for the payment of debts, and the creditor has a preference over the appointee.

Cutting v. Cutting, 20 Hun, 860; *Tallmadge v. Still*, 21 Barb. 84; *Harrison v. Battle*, 1 Dev. & B. Eq. 218; *Jenney v. Andrews*, 6 Madd. 264; *Vaughan v. Vanderstegen*, 3 Drew. 165; 1 Story, Eq. Jur. § 176, note; 2 Sugd. Powers, 28, 29; 2 Wms. Exrs. 1685; Schouler, Exrs. p. 222; 4 Kent, Com. p. 340; *Clapp v. Ingraham*, 126 Mass. 200-202; *Johnson v. Cushing*, 15 N. H. 298, 41 Am. Dec. 694; *Com. v. Duffield*, 12 Pa. 279 281; *Barford v. Street*, 16 Ves. Jr. 185.

The appointee will be treated as a trustee for the creditors.

Johnson v. Cushing, *supra*; *Leigh v. Smith*, 8 Ired. Eq. 442, 42 Am. Dec. 182.

The court below had before him all the papers and all the evidence, was sitting both as judge and jury, and could have framed an equitable judgment or decree. No objection was made to the forum, the pleadings, or the evidence, in the court below. It is too late to make it here.

Murr v. Eddleman, 80 Ga. 660.

Mr. Bryan Cumming, for claimant:

In *Brundies v. Cochran*, 112 U. S. 851 (28 L. ed. 769), the court says that under the common law "a judgment against the party having a power of appointment, with the estate vested in him until and in default of appointment, was defeated by the subsequent execution of the power in favor of a mortgagee."

See *Com. v. Duffield*, 12 Pa. 277; Story, Eq. Jur. § 176, note 5; 4 Kent, Com. 340; *Cook v. Walker*, 15 Ga. 457, 462.

Blandford, J., delivered the opinion of the court:

On the 12th of March, 1866, Samuel Leckie, of Richmond County, conveyed to John Coskery, as trustee, and his successors in office, a certain tract or parcel of land in the City of Augusta, "in trust, for the sole and separate use, benefit and behoof of Anna Leckie, wife of the said Samuel Leckie, wholly free from, and not subject to, the debts, contracts or liabilities, past, present or future, of the said Samuel Leckie, or any future husband of the said Anna Leckie, for and during the term of her natural life, and, on her death, to such

person or persons, or for such purpose or purposes, as she, the said Anna, by her last will and testament, duly executed, may designate and appoint. But, should the said Anna die without having made and executed such last will and testament, then the said property, or any property which may be then held in lieu thereof, shall be equally divided, share and share alike, between Samuel Leckie, the son, and Louisa Jones Leckie, the daughter, of the said Samuel and Anna, the child or children of a deceased child to stand in place of and represent the parent." And power was given to the trustee, with the consent of Anna Leckie, to sell the property, the proceeds to be reinvested in other property. Samuel Leckie, Sr., died July 9, 1874. Samuel Leckie, Jr., died July 20, 1877, leaving issue.

On the 14th of April, 1886, the judge of the superior court, at chambers and in vacation, granted an order authorizing the sale to Bryan Lawrence of the property conveyed by said deed of trust, the consideration being \$2,500, and the sale private. Notice of the application for this order of sale was not given to the minor heirs-at-law, and they were not present, or represented by guardian *ad litem*, when the order was granted. On the 15th of April, 1886, a deed was made to Bryan Lawrence, reciting that it was in pursuance of said deed of trust and order of court. This deed was signed by Anna Leckie and by Luke Dunn, trustee. The money arising from the sale of said property was partly used in paying off incumbrances in the nature of taxes and judgments against the trust property, and \$500 of the same was invested in the name of Luke Dunn, trustee, in stock of the Mutual Real Estate & Building Association, which stock the trustee obtained leave to sell by an order of the superior court, granted on the 16th of December, 1886. It is not known what became of the remainder of the purchase money.

On the 9th of February, 1888, Anna Leckie made a will, in which she devised to Bryan Lawrence the land already conveyed to him under the order of sale. On the 20th of February, 1888, she died. On the 18th of December, 1888, this property was levied on under a *fi. fa.* obtained upon a judgment in favor of Patterson & Co. against Anna Leckie, July 2, 1877. A claim was thereupon interposed by Lawrence. The case was submitted to the judge of the superior court, without the intervention of a jury, for his judgment and decision thereon. Upon the trial, William H. Fleming testified that he drew Mrs. Leckie's will and was a witness to it; that he thought she made it in order to confirm the title in Lawrence to the property for which he paid \$2,500 on the 15th of April, 1886; that the witness at the time of said sale had paid the proceeds to the trustee in her presence; and that she made the will freely because she thought she was morally bound to give a good title if she could possibly do so. The court held and decided that Lawrence got a good title as against the creditors of Mrs. Leckie, and that his claim must therefore be sustained. To this judgment of the court below the plaintiffs in execution excepted, and assigned error therein.

It is insisted by counsel for the plaintiffs in error that, inasmuch as this property was con-

veyed to a trustee for the use of Mrs. Leckie during her lifetime, with a power of appointment in her by will, and, inasmuch as she exercised that power by her will, the property was assets for the payment of her debts. Whether, according to the current of authority, this property would be equitable assets for the payment of the debts of the appointor in this case would depend: (1) upon whether Mrs. Leckie had any other property sufficient to pay her debts; (2) upon whether this power of appointment was an absolute right of property; and (3) upon whether the appointee was a volunteer, or a bona fide purchaser of the property appointed to him.

It is very manifest, in this case, that the power of appointment was exercised by the testatrix, on account of the fact that the property had been previously sold by the testatrix and her trustee to the claimant, for a valuable consideration; and this would take the case out of the general rule that where property is conveyed to one for life, with a general power of appointment by deed or will, and such power is exercised, the property is converted into assets in equity for the payment of the appointor's creditors. This distinction is clearly recognized in the authorities hereinafter referred to. It is manifest from this record that the power of appointment was exercised in favor of Lawrence, because of the purchase which he had previously made from the appointor and her trustee, and for which he had paid a valuable consideration; and, furthermore, this property cannot be considered assets of the appointor, so as to make it liable for her debts in a court of law. All the authorities treat it as only equitable assets. According to most of them, this power of appointment is such an equitable relation to the property as would make it liable in equity for the appointor's debts. Where the power of appointment is not exercised, all the authorities agree that the property is not liable, either in law or in equity, for the payment of the debts of the person in whom the power resided.

The plaintiffs in error contend that, inasmuch as equitable jurisdiction is conferred upon courts of law in this State, there is no necessity for them to resort to a court of equity. This might be true if the plaintiffs in error had had pleadings suitable for the purpose, but in this case there are no pleadings, except the execution and the entry of the sheriff thereon, and the claim interposed by the defendant in error,

and the mere issue, thus made up, as to whether the property is or is not subject. It is certainly a proceeding at law, and not an equitable proceeding. There are no allegations by which a court of law could exercise the jurisdiction of a court of equity. Before a court of law could exercise such jurisdiction, there must be sufficient pleadings to authorize it to do so.

A power of appointment is not an absolute right of property. *Holmes v. Coghill*, 7 Ves. Jr. 506.

It is not an estate, and has none of the elements of an estate. *Burleigh v. Clough*, 52 N. H. 267; *Goodill v. Brigham*, 1 Bos. & P. 197; *Eaton v. Straw*, 18 N. H. 320; 4 Kent, Com. 319; *Pulliam v. Byrd*, 2 Stro. Eq. 134; *Livingston v. Murray*, 68 N. Y. 485; *Willman v. Holmes*, 4 Rich. Eq. 475.

An unexecuted power of appointment vests no interest in the donee, whether annexed to a particular estate or not, and therefore is not assets for the payment of the debts of the deceased donee. *Harrison v. Battle*, 1 Dev. & B. Eq. 213.

We do not decide whether the execution of a general power of appointment would convert an estate into assets in equity for the payment of debts. Upon this subject see *Cutting v. Cutting*, 20 Hun, 360; *Tallmadge v. Sill*, 21 Barb. 34; *Harrison v. Battle*, 1 Dev. & B. Eq. 213; *Harrington v. Harle*, 1 Cox, Ch. 131; *Jenney v. Andrews*, 6 Madd. 264; *Fleming v. Buchanan*, 3 De G. M. & G. 976; *Vaughan v. Vanderstegen*, 2 Drew, 165; *Shattock v. Shattock*, L. R. 2 Eq. 187; *Wales v. Bowditch* (Vt.) 4 L. R. A. 819; 1 Story, Eq. Jur. § 176, note; 2 Sugd. Powers, 28, 29; 2 Wms. Exrs. 6th Am. ed. 1695, 1686.

In *George v. Milbunke*, 9 Ves. Jr. 190, and *Hart v. Middlehurst*, 3 Atk. 377, it is held that it is against volunteers only that creditors have this preference in equity, and a bona fide purchaser under a voluntary appointee would be protected. We think the cases referred to are sufficient to illustrate the rule we have laid down in this case.

We are forced to the conclusion that the judgment of the court below is right: (1) because the proceeding is not an equitable proceeding to subject this property to the payment of the debts of the donee; (2) because the appointee in this case was not a volunteer, but was a bona fide purchaser; and (3) because it is not shown that deceased did not have sufficient assets to pay plaintiff's claim.

Judgment affirmed.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF ILLINOIS.

Anthony J. THOMAS *et al.*

v.

WABASH, ST. LOUIS & PACIFIC R. CO.

(40 Fed. Rep. 126.)

1. A title reading "An Act to Facilitate the

Norm.—Statutes; constitutional provisions as to title of Act.

See notes to Titusville Iron Works v. Keystone Oil

7 L. R. A.

Carriage of Passengers and Property by Railroad Companies" is insufficient, under a constitutional provision requiring the title of an Act to express the subject thereof, to sustain a statute which, after providing that all railroad companies having a terminus upon any navigable river shall have power to own water craft for transportation across it, provides that no right shall exist to condemn any real estate for landings, and that the

Co. (Pa.) 1 L. R. A. 861; *People v. McElroy* (Mich.) 2 L. R. A. 609; *Astor v. New York Arcade R. Co.* (N. Y.) 2 L. R. A. 789; *Evansville v. State* (Ind.) 4 L. R. A. 98.

Act shall apply only to such railroad companies as owned the landing for such water craft.

2. A statute giving to any railroad company that owns landing places the right to own water craft for transportation across a navigable river at its terminus, but which declares that no right shall exist under the Act to condemn any real estate, and that the Act shall apply only to such companies as own the landings for such water craft, is in violation of the constitutional provision against local or special laws for granting any special or exclusive privilege, immunity or franchise.

3. If constitutional and unconstitutional provisions of an Act are perfectly distinct and separable, the former may stand though the latter fail.

(October 15, 1883.)

INTERVENING petition by the St. Louis & Cairo and the Mobile & Ohio Railroad Companies for the condemnation of certain land in the possession of plaintiffs as receivers of the Cairo, Vincennes & Chicago Railroad Company, to be used for an incline and transfer boat landing. *Judgment for petitioners.*

The case sufficiently appears in the opinion.

Messrs. Lansden & Leek, E. L. Russell and H. S. Greene for petitioners.

Messrs. John M. Butler and S. P. Wheeler for the receivers.

Allen, J., delivered the following opinion:

This case has been before the court, in one form and another, for nearly two years. The intervening petitioners instituted proceedings in the Circuit Court of Alexander County, Ill., to condemn one acre and a fraction of land, situated between the bank of the Ohio River and the water for the purpose of building thereon an incline, to be used for the transportation of cars down to the river, and thus, by means of transfer boats, form an unbroken connection with railroads on the other side, for the benefit of their through freight and passengers. The strip of land sought to be condemned being in the possession of Thomas & Tracy, receivers, appointed by the court, of the Cairo & Vincennes Railroad, and claimed by them as the property of that corporation, the case was transferred to this court, and afterwards a hearing was had before the district judge and a jury, resulting in a holding by the court that the strip of land was subject to condemnation for the purposes set forth in the intervening petition, and the assessment by the jury of damages, to be paid by the St. Louis & Cairo and the Mobile & Ohio Railroad Companies, in the sum of \$5,000. Subsequently, upon argument before the circuit and district judges, a rehearing was granted in the case, upon the distinct ground that the Act of the Illinois Legislature, entitled "An Act to Facilitate the Carriage and Transfer of Passengers and Property by Railroad Companies," approved May 24, 1877, presented an insuperable barrier to such condemnation. 34 Fed. Rep. 774.

Afterwards, upon further argument, the matter was postponed, pending the suggestion of the court that the receivers sell to the intervening petitioners for a fair price, to be agreed upon, so much of the ground as might be necessary for the purposes of their incline. The St. Louis & Cairo and their lessees, the Mobile

& Ohio Railroad Company, having, as they report, wholly failed, after repeated efforts, to purchase from the receivers the land for their incline, asked that the constitutionality of the Act of the Legislature before referred to, and popularly known as the "Water-Craft Act," be set down for argument. There being no serious contention that any other difficulty to the condemnation than this Water-Craft Act existed, and its constitutionality being challenged by attorneys for intervening petitioners, the court set down the question for argument, and it was ably and elaborately argued, by eminent counsel, representing the receivers, as well as the St. Louis & Cairo Railroad Company and its lessees, the Mobile & Ohio, before the district judge. So much of the Act in question as is here necessary to be considered is as follows: "An Act to Facilitate the Carriage and Transfer of Passengers and Property by Railroad Companies.

"Section 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly, that all railroad companies incorporated under the laws of this State, having a terminus upon any navigable river bordering on this State, shall have power to own for their own use any water-craft necessary in carrying across such river any cars, property or passengers transported over their lines or transported over any railroad terminating on the opposite side of such river to be transported over their lines; provided, that no right shall exist under this Act to condemn any real estate for landing for such water-craft, or for any other purpose. And this Act shall only apply to such railroad companies as own the landing for such water-craft."

The validity of this Act is denied, and the counsel questioning its constitutionality contend:

First, that it is in conflict with the 13th section of the 4th article of the Constitution of Illinois, which is in the following language: "Every bill shall be read at large on three different days in each House; and the bill and all amendments thereto shall be printed before the vote is taken on its final passage, and every bill having passed both Houses shall be signed by the speakers thereof. No Act hereafter passed shall embrace more than one subject, and that shall be expressed in the title. But if any subject shall be embraced in an Act which shall not be expressed in the title, such Act shall be void only as to so much thereof as shall not be so expressed; and no law shall be revived or amended by reference to its title only, but the law revived or the section amended shall be inserted at length in the new Act."

And, *second*, that it is in conflict with section 23 of the same article, which provides: "The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say . . . for granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever."

Third, that it is in conflict with article 11, § 14, of the State Constitution of 1870, which reads as follows: "The exercise of the power and the right of eminent domain shall never be so construed or abridged as to prevent the taking by the General Assembly of the property

and franchises of incorporated companies, already organized, and subjecting them to the public necessity, the same as of individuals."

In addition to these objections, it is contended that the Act is also repugnant to the spirit and import of the State and Federal Constitutions, intended to secure equality of rights to every citizen, natural and corporate. Grave and important constitutional questions are thus brought before the court, and its decision upon them demanded.

It is with extreme unwillingness that a federal court will assume to hold as void the Acts of the Legislature of a State, especially when such Acts have not been passed upon by the state court. And if any well-grounded doubt exists as to their constitutionality, whenever by any system of fair reasoning any possible construction that is consistent with reason can be given by which the courts can hold them constitutional, and give such interpretation to the statutes as to make them valid, they will always do so. But courts, however unpleasant the duty, will always, when properly called upon, considerably review the acts of a co-ordinate branch, and, while hesitating to hold them void for unconstitutionality, yet, when they find them in bold defiance of the Constitution, seeking to override some valuable right or privilege of the citizen or of the public, will not shrink from the performance of the high duty imposed upon them by the law.

The first objection argued to the validity of a portion of the Water-Craft Act, namely, that it embraced subjects not expressed in the title, must be tested and disposed of by the decisions and their analogies of the Supreme Court of Illinois, this 18th section of the 4th article of the State Constitution having repeatedly been before that tribunal for exposition and interpretation. The object of the constitutional provision was praiseworthy. Its evident purpose was to prevent fraudulent and vicious legislation, by requiring the title to give a fair indication of the substance of the Act,—such a certain indication as would notify members of the Legislature, the public at large, and more particularly all persons having an interest in the matter, of the contents of the Act, so as to put them on their guard. Whenever the title of the Act has a scope so clear as to indicate its general purpose, then its more specific purposes may be left to the body of the Act itself. The title of this Act is: "To Facilitate the Carriage and Transfer of Passengers and Property by Railroad Companies." This title, it must be confessed, is at once captivating and delusive. The entire public would most likely unite, and the desire become a common one, to facilitate the carriage and transfer of passengers and property by railroad companies, but not the slightest intimation is given as to the means to be employed whereby this transfer is to be facilitated. Indeed, it would seem difficult, by any combination of words, to make a title to any Act more general. The body of the Act authorizes all railroad companies, having a terminus upon any navigable river bordering on the State of Illinois, to own for their own use any water-craft necessary in carrying across such river any cars, property or passengers transported over their lines, or transported over any railroad terminating on the opposite side

of such river, to be transported over their lines, with a proviso that no right shall exist under the Act to condemn any real estate for a landing for such water-craft, or for any other purpose, and that the Act itself shall only apply to such railroad companies as own the landing for such water craft. It is assumed that this Act confers a new power on railroad companies,—that of using and owning water-craft to transfer freight and passengers across the river; and it may be assumed that it also takes away from certain railroad corporations rights with which they had become vested under the General Incorporation Law of the State, particularly the power to make such terminal enlargements, and variations of their terminal privileges, not constituting a new enterprise, as the commerce of the country and the traffic of their roads require. It cannot be well questioned that railroads, whose lines terminated on the bank of one of the navigable rivers bordering on this State, where their business required it, had the power, prior to the Water-Craft Act of 1877, to extend their tracks, or build side tracks, to the edge of the water, and condemn land subject to condemnation for that purpose. Under this Act railroad companies cannot condemn land at all, however necessary it may be, to reach the water.

After such examination and reflection as I have been enabled to bestow on the question, I am unable to reach the conclusion that the title of this Act fairly or sufficiently gives notice or information of the scope and substance in the body, or indicates with reasonable certainty the purposes intended to be effected; but, on the contrary, I am clearly of opinion that the title is misleading, and not as broad as the Act. This view is supported by the following authorities: *People v. Mellen*, 82 Ill. 182; *Lockport v. Gaylord*, 61 Ill. 276; *People v. Wright*, 70 Ill. 888; *People v. Institution of Protestant Deaconesses*, 71 Ill. 229; *Middleport v. Aina L. Ins. Co.* 82 Ill. 565; *People v. Hazelwood*, 116 Ill. 327, 3 West. Rep. 588; *Leach v. People*, 122 Ill. 421, 10 West. Rep. 617; *Dolese v. Pierce*, 124 Ill. 140, 13 West. Rep. 866; *Cooley*, Const. Lim. 147-151.

The second point argued in connection with the alleged invalidity of the Legislative Act presents a most important question: Does the Water-Craft Act grant, and was it intended to grant, any special or exclusive privilege, immunity or franchise whatever to any corporation? If it does, it is special legislation, prohibited by the Constitution. The fundamental idea of the authors of the Constitution, expressed in a declaration clear and explicit, was doubtless to secure some reasonable degree of equality and uniformity of right and privilege between the different railroads in the State, which are required to perform important services to the public. In the first part of the Act under consideration no principle of uniformity of right or privilege is violated. All railroad companies incorporated under the laws of the State, having a terminus on any of the navigable rivers on its borders, are given power to own for their own use water-craft necessary in carrying across such river cars, property or passengers transported over their lines, or transported over any railroad terminating on the opposite side of such river, to be transported over their lines. It has already been mentioned that

the concession seems to have been made, on the argument, of the grant of a new power to the class of Illinois railroads terminating on bordering navigable waters. Up to the approval of the Act in question, these railroads, by the General Incorporation Act, with the view of merely enlarging their terminal facilities, had the undoubted right of going to the water,—to transports or ferry-boats. It was because they did not possess the power to own and use such transports or ferry-boats back and forward between terminal points on opposite sides of these rivers that the Legislature was appealed to, and the new power given. The Legislature, in answering this appeal, did a wise thing, in the first clause of the Act, by granting to these railroad corporations the privilege of ferrying,—carrying goods and passengers through, on through cars, putting them on boats and transferring them across the river, and expediting railroad business and accommodating the public by simplifying the number of intervening agencies.

The Act, however, seems to have gone much further than the interests of commerce or of the public demanded. The parties seeking this legislative aid,—a ferry franchise, in addition to a railroad franchise,—were not satisfied with a general grant of power to all railroads having the same terminus, but sought to accomplish the double purpose of getting this new power for themselves, and keeping everybody else from getting it, as far as they could. By providing that no railroad company should be given power to condemn land for a landing for such water-craft, and that the Act should only apply to such companies as own the landing for such water-craft, the objectionable and vicious features of this legislation clearly appear. The new power enabled railroad companies owning land for a landing to own and use water-craft necessary in ferrying passengers and property across a river, but disabled companies not owning such land from exercising this most important franchise or privilege. I have had occasion before to state that, under the General Incorporation Act, railroad corporations, whose lines terminated on a bordering navigable stream, had the power to go to ferries, when they did so by merely enlarging their terminal facilities; but the portion of the Act now being considered takes away an existing power, by declaring that they shall not exercise the power of eminent domain to the extent of getting down to a ferry-boat; that they can neither use a transfer boat nor get to a landing. The additional power, or enlarged franchise, to own and use boats to carry freight and passengers across the river is limited "to such railroad companies as own the landing for such water-craft." Corporations not fortunate enough to own the land, it may be in consequence of a refusal by rival corporations to sell what they do not need for their own purposes, are denied alike the privilege of owning water-craft and of condemning land to reach a ferry-boat which may be used or owned by others. It cannot be denied that the operation of this part of the Act is partial and unequal.

Here are two railroad companies,—the Cairo & Vincennes, represented by the receivers, Thomas & Tracy, and the St. Louis & Cairo, by intervening petitioners,—both terminating

on the bank of the Ohio River at Cairo. They owe a common duty to the public, and this duty grows correspondingly with the demands of commerce, and public necessity and convenience. The Cairo & Vincennes answers the demand of the public for boats transferring across the river cars, freight and passengers connecting on the opposite side with other railroad lines, and thus securing unbroken transportation. The St. Louis & Cairo, when called on for a similar service, is unable to respond. It avows its willingness to do so, and its anxiety to discharge its duty to the public, but it does not own the land for a landing for transfer-boats. The owner of this land, the Cairo & Vincennes, will not sell it, and this Water-Craft Act prohibits its condemnation. Is it not perfectly manifest that the Cairo & Vincennes, under this Act, enjoys a special privilege or immunity over the St. Louis & Cairo? Or, to put it differently, are not all the railroads not owning land for a landing, and unable to purchase the same, discriminated against, and a special privilege granted to such, and such only, as own the landing? If in this controversy only these two Railroad Companies were interested,—if it were a contest of mere private right between them,—different considerations might arise. But they are both "railroad companies, incorporated under the Laws of this State," enjoying franchises to be used in the interests of the public. The one owning the landing would in all probability promise the public to serve it efficiently, faithfully and cheaply; but the public, unwilling to accept such assurances, very properly demand that all the avenues for the transaction of the commerce of the country be kept open, and that no agency be crippled which has for its object the promotion of the public interests.

In the discussion of this question, counsel for the receivers emphasized the argument that the Legislative Act could be upheld upon the ground that railroad companies terminating on a river bordering on a State, and owning a landing for water-craft, constitute a class: that the Legislature intended to classify railroads terminating on navigable bordering streams into such as owned land for a landing for water-craft and such as did not, and that a railroad corporation not owning a landing for water-craft can only claim such privilege, immunity or franchise as belongs to any other company or corporation in that class. A number of authorities were cited to sustain this view; among others *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155 [24 L. ed. 94].

This position cannot be sustained, nor do the authorities referred to support it. There is but one classification of railroad companies under the Act, and that is such as have "a terminus upon any navigable river bordering on this State."

The supreme court, in 94 U. S. *supra*, quotes approvingly, an Iowa case being under consideration, from *McAunish v. Mississippi & M. R. Co.* 20 Iowa, 848, wherein it is said: "These laws are general and uniform, not because they operate upon every person in the State, for they do not, but because every person who is brought within the relations and circumstances provided for is affected by the law. They are general and uniform in their

operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of persons within the scope of their operation." "The Statute" (of Iowa), says *Chief Justice Waite*, "divides the railroads of the State into classes, according to business, and establishes a maximum of rates for each of the classes. It operates uniformly on each class, and this is all the Constitution requires."

It seems probable that the authors of the Act under consideration prepared it with reference to this doctrine of classification. But it gives them no support. Every privilege, immunity or franchise enjoyed or used by one railroad company terminating on the Ohio River at Cairo should be extended to every other railroad terminating there. It is impossible, by any fair reasoning, or upon any principle of justice to the public, to sustain the contention that one of these railroad corporations loses an almost invaluable privilege of serving the public because only of not being able to purchase land for a transfer or ferry landing. All the incorporated railroad companies terminating at Cairo exercise their franchises by virtue of grants from the sovereign power. The State, in granting the charters, necessarily in every instance reserved the right to regulate and control the corporations in the public interest. No one or more of these companies can be permitted, under the semblance of a state grant or authority, to exercise rights and privileges in connection with facilitating the commerce of the country which are denied to others. And if the exercise of such power and authority by the one or more is rightful, the denial of the same immunities and privileges to others is illegal and oppressive; and any Act pretending to confer authority for such discrimination is void. The Water-Craft Act, therefore, has not only a false and deceitful title, but its purpose was to confer special privilege upon certain corporations, and to deny to others of the same class the exercise of

the same rights. The following authorities are referred to in support of this view, that the Act is in conflict with the 22d section of the 4th article of the Constitution of Illinois. *Frye v. Partridge*, 82 Ill. 273; *People v. Cooper*, 83 Ill. 586; *People v. Meech*, 101 Ill. 200; *Millett v. People*, 117 Ill. 305, 5 West. Rep. 155; *Cooley, Const. Lim.* 889-896.

The views already expressed and the conclusions reached render it unnecessary to consider the 14th section of article 11 of the Constitution of 1870, or the 2d section of the 4th article of the Constitution of the United States, both of which have been referred to as authority against the validity of the Act in question. They were cited to sustain the position that a statute is unconstitutional which selects particular persons, natural or corporate, from a class or locality, and subjects them to peculiar rules, or imposes upon them special obligations or burdens, from which others in the same locality or class are exempt. This position is so nearly self evident as not to require authority to support it. In my view, *the provisions of the Water-Craft Act, limiting the right to own and use boats and water-craft to such railroad companies as own the real estate for a landing, and withholding the right from companies not owning the land for a landing, are obnoxious to both objections urged against its constitutionality, and cannot be upheld as valid or binding.* Of course this conclusion in no manner affects provisions of the Act which are constitutional. The constitutional and unconstitutional provisions of this Act are perfectly distinct and separable, so that the first may stand, though the latter fall.

The salutary and useful provision permitting all Illinois railroad companies terminating on any navigable river bordering on the State to own and use water craft as a means of increasing their capacity to serve the public is unexceptionable; but the proviso restricting the use of this additional franchise to companies owning land for a landing is void.

MINNESOTA SUPREME COURT.

John WOOD, Jr., *Resp't.*,

v.

ST. PAUL CITY R. CO., Impleaded,
etc., *Appl't.*

A. & P. ROBERTS & CO., *Resp'ts.*,

v.

SAME, *Appl't.*

Robert ALLISON *et al.*, *Resp'ts.*,

v.

SAME, *Appl't.*

(....Minn.....)

*1. Whether the authority of notaries public to administer oaths be of statutory origin, or founded on customary law, it is now universal, and should be judicially recognized as one of their general powers, and affidavits, authenticated by the official seals of notaries of

*Head notes by MITCHELL, J.

7 L. R. A.

other States, placed on the same footing as their authentications of commercial documents.

2. An affidavit to a statement of account for a mechanics' lien, under Gen. Stat., chap. 90, sworn to before a notary in another State, and authenticated by his official seal, is sufficient.

(January 20, 1890.)

APPEAL by defendant, The St. Paul City Railway Company, from orders of the District Court for Ramsey County denying its motions for new trial in actions to enforce certain alleged mechanics' liens in which judgments had been entered for plaintiffs. *Affirmed.*

The cases sufficiently appear in the opinion.

Mr. H. J. Horn, for appellant:

Such a lien is the creature of statute and can only exist by virtue of a compliance with its provisions.

Rugg v. Hoover, 28 Minn. 404.

The oath of the claimant or his agent verify-

ing the account or claim is an indispensable requisite of the Statute.

§ 7, chap. 90, formula in § 18, *Id.*; *Colman v. Goodnow*, 38 Minn. 9.

The oath required implies an oath administered by an officer authorized so to do, by the laws of Minnesota, and administered within his jurisdiction.

The Statutes of this State have in several instances given foreign notaries power to act. But not in a case such as the present.

See Gen. Stat. 1878, chap. 26, § 7; chap. 78, §§ 85, 86; chap. 40, § 7, subd. 2.

Expressio unius est exclusio alterius.

The State obviously, to prevent inconvenience to nonresident claimants, authorizes an agent to make the oath.

See § 7, chap. 90; *Clark v. Schatz*, 24 Minn. 300; 2 Jones, Liens, § 1451; *Benedict v. Hall*, 76 N. C. 113; *Kirksey v. Bates*, 7 Port. (Ala.) 529; *Chandler v. Hanna*, 73 Ala. 390.

Messrs. Rogers, Hadley & Selmes, for Wood and Roberts *et al.*, respondents:

A notary public is not merely an officer of the country by which he is appointed and in which he is authorized to act, but he is an officer recognized by all countries; and especial importance has always been attached to the office for the reason that certain official acts performed by him within the territory for which he is appointed are recognized as authoritative the world over; and among the acts which he is thus recognized as having the authority to perform is that of administering an oath.

Brooke, Notaries, p. 19; *Cole v. Sherard*, 11 Exch. 432; *Omealy v. Newell*, 8 East, 304; *Haggitt v. Iniff*, 5 DeG. M. & G. 910; *Ex parte Worsley*, 2 H. Bl. 275; *Watrond v. Van Moses*, 8 Mod. 321.

It is generally recognized in the courts of this country that affidavits may be taken before notaries public in the other States, and that they have the same effect and authenticity as if taken in the State where they are used.

► *Conolly v. Riley*, 25 Md. 402; *Stephens v. Williams*, 46 Iowa, 540; *Denmead v. Maack*, 2 McArthur, 477; *Fellows v. Menasha*, 11 Wis. 562; *Marshall v. Mott*, 13 Johns. 423; *Tucker v. Ladd*, 4 Cow. 47; *United States v. Libby*, 1 Woodb. & M. 221.

The notary public being an officer recognized the world over, his seal proves itself, and it is not necessary that it should be authenticated.

Conolly v. Riley, *Stephens v. Williams* and *Fellows v. Menasha*, *supra*.

In the absence of any evidence upon the matter, the presumption would be that the laws of Pennsylvania, like the laws of our own State, authorize notaries public to administer oaths.

Cooper v. Reaney, 4 Minn. 528; *Brimhall v. Van Campen*, 8 Minn. 18; *Conolly v. Riley*, *supra*; *Rape v. Heaton*, 9 Wis. 328; *Walsh v. Dart*, 12 Wis. 635; *Shumway v. Lenkey*, 67 Cal. 458; *Marsters v. Lash*, 61 Cal. 622; *Hickman v. Alrough*, 21 Cal. 228; *Allen v. Watson*, 2 Hill, L. 319; *Crafts v. Clark*, 38 Iowa, 237; *Wright v. Delafield*, 23 Barb. 498 513; *Hall v. Pillow*, 31 Ark. 32; Wharton, Ev. § 814.

Messrs. John B. & W. H. Sanborn, for Allison *et al.*, respondents:

All that the Statute requires is, that the

claimant shall make his statement in writing, make oath thereto and file in the office of the Secretary of State.

An oath is a pledge given by a person making it, that his attestation or promise is made under an immediate sense of his responsibility to God.

2 Bouvier, L. Dict. p. 248.

This pledge may be given, and this oath may be made, in any country, and before any officer authorized to administer an oath.

In the case at bar the officer before whom these oaths were taken was authorized to administer an oath by the laws of the State of Pennsylvania.

Purdon's Dig. pp. 1270-1273.

His certificate, signature and seal prove that the oath was administered, and this establishes these liens.

Browne v. Philadelphia Bank, 6 Serg. & R. 485.

In England, as far back as the memory of man extends, notaries public were authorized to administer oaths, and by the statutes of England, and the statutes of every State in the United States, they are now so authorized.

Brooke, Notaries, pp. 19, 20.

Under the common law and the practice of the courts of England, oaths and affidavits taken before notaries public in foreign countries, accompanied with evidence that, by the laws of such countries, they were authorized to administer oaths, have been received and used in England as far back as the history of jurisprudence runs.

Omealy v. Newell, 8 East, 304, 368, citing — *v. Brown*, decided by Lord Mansfield, and *Voght v. Elgin*, Hil. 38 G 8, decided by Lord Kenyon; *Cole v. Sherard*, 11 Exch. 432; *Haggitt v. Iniff*, 5 DeG. M. & G. 810.

The courts will take judicial notice of the official seal of a foreign notary public attached to an affidavit, and oaths and affidavits required by the laws can be lawfully taken before notaries public of foreign States having authority to administer oaths.

Conolly v. Riley, 25 Md. 402, 419, 420; *Fellows v. Menasha*, 11 Wis. 562, 563; *Denmead v. Maack*, 2 McArthur, 477; *Stephens v. Williams*, 46 Iowa, 540; *United States v. Libby*, 1 Woodb. & M. 225, 226.

Mitchell, J., delivered the opinion of the court:

Gen. Stat. 1878, chap. 90, §§ 6, 7 (relating to mechanics' liens), provides that the statement of the account, required to be filed and recorded, shall be verified by the oath of the party or his agent, but is entirely silent as to where or before whom such affidavits shall be made. To hold that the Statute requires them to be made within the State, or, if without the State, that the oath must be administered by a commissioner for the State of Minnesota, would be to put a construction upon the Act at once unauthorized by its language, and unsuited to the business habits and necessities of the country. Nothing short of express legislation would justify any such rule. We think these affidavits may be made in another State, before any officer authorized by the laws of such State to administer oaths. Of course, if taken in another State, they must be duly authenti-

ated, so as to show on their face the official character of the officer, as well as his authority to administer oaths.

In each of the present cases the affidavit was sworn to in Pennsylvania before a notary public of that State, who authenticated it by signing the jurat, and affixing his notarial seal. If, instead of being affidavits, these had been certificates of protest or authentications of similar commercial documents, it is elementary law that the notary's seal would prove itself, without any further proof of his official character or of his authority to do the act. A public notary is considered, not merely an officer of the country where he is admitted or appointed, but as a kind of international officer, whose official acts, performed in the State for which he is appointed, are recognized as authoritative the world over. Defendant's counsel concedes that this is true as to all his acts in the way of the authentication of what he terms commercial documents, but insists that, outside of such matters, a notary has no power, in the absence of statutory authority, to administer oaths. Although this is sometimes stated in the books as being the law, yet its correctness may well be doubted.

The powers of a notary, which is a very ancient office, are largely founded on customary law. The English notaries have always considered themselves authorized to administer oaths and whatever chance for doubt about it there might have been was set at rest by the Act of 5 and 6 Wm. IV., chap. 62, § 15; Brooke, Notaries, 20.

Affidavits taken before notaries in foreign countries have uniformly been received by the courts of England in judicial proceedings without any other proof of their official character or their authority to administer oaths than their notarial seals. *Omealy v. Newell*, 8 East, 364; *Watson v. Van Mose*, 8 Mod. 322; *Haggitt v. Iniff*, 5 De G. M. & G. 910; *Cole v. Sherard*, 11 Exch. 482.

It was said in *Omealy v. Newell*, *supra*, that

this had been the uniform practice "as far back as living memory could trace it." The same practice seems to have obtained in the American courts. *United States v. Libby*, 1 Woodb. & M. 231; *Denmead v. Manek*, 2 Mo. Arth. 473; *Tucker v. Ludd*, 4 Cow. 47; *Conolly v. Riley*, 25 Md. 403.

This practice has also long prevailed in this State, especially in the probate courts and in the proof of claims in insolvency proceedings. It is true, as counsel suggests, that these are rules of practice as to which the courts are to some extent a law unto themselves; but the fact is important, and in point, as a recognition, not only of the regularity of affidavits sworn to outside the State, but also of the general power of notaries to administer oaths without proof of statutory authority to do so. As a matter of fact, in every State and Territory in the Union notaries have power to administer oaths, and for the last forty years affidavits sworn to before a notary in any State of the Union, and authenticated by his notarial seal, have been admissible in all the federal courts, without any proof of their authority to administer oaths. It is true that perhaps in every State the powers of notaries, including that of administering oaths, have been regulated by statutes, which, however, are largely declaratory in their nature. But whether this authority be of statutory origin, or founded on customary law, the recognition of its existence has become so general, if not universal, that there is now no good reason why it should not be judicially recognized as one of the general powers of notaries, and affidavits authenticated by seals of notaries of other States placed on precisely the same footing as their certificates of protest or authentications of so-called commercial documents. Some other objections are raised to these affidavits, but none of them are, in our judgment, substantial.

The order appealed from is, in each case, affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Mary J. MOORE *et al.*

v.

John E. SANFORD *et al.*

(...Mass....)

1. The owners of lands taken under the provisions of chap. 290, Acts 1884, authorizing the taking of certain lands for the use of the Commonwealth, are not, by filing a petition for damages for such taking as prescribed

by such Act, estopped from instituting proceedings to dispute the validity of the taking and test the constitutionality of the Act, at least if they have not voluntarily proceeded to judgment upon their petition.

2. Although the determination of the Legislature is not conclusive of a purpose for which it directs property to be taken is a public use, yet it is conclusive, if the use is public, that a necessity exists which requires the property to be taken.

NOTE.—*Eminent domain; exercise of right a political, not a judicial, question.*

It is for the Legislature to determine what objects are of such public importance as to justify the exercise of the right of eminent domain. *Mims v. Macon & W. R. Co.* 3 Ga. 333.

The property or policy of the condemnation of private property for a public use is a legislative, and not a judicial, question; and courts will not interfere to declare the Act void unless it is plain that

there is an attempt to procure property for a private use or to accomplish an end not public in its character. *Central R. Co. v. Pennsylvania R. Co.* 31 N. J. Eq. 475; *Pittsburgh v. Scott*, 1 Pa. 309; *Baltimore & O. R. Co. v. Pittsburgh, W. & K. R. Co.* 17 W. Va. 312; *Varner v. Martin*, 21 W. Va. 534.

So the public necessity which exists for the use of the property and the extent to which the power should be exercised is a legislative question. *Sadler v. Langham*, 34 Ala. 311; *Parham v. Decatur Co.*

3. The reclamation of flats situated upon Boston Harbor and substantially useless in their original condition, for the avowed purpose of improving the harbor and of providing better and more complete accommodations for the railroad and commercial interests of the City of Boston, by filling such flats with solid earth, is a matter of such public benefit that the flats may be taken by the Commonwealth for such purpose under the power of eminent domain, notwithstanding a possible pecuniary benefit to the Commonwealth may be contemplated by the sale of the flats when filled. Hence chap. 290, Acts 1884, which provides for such taking, is not unconstitutional as authorizing the taking of land for a use not public.

(February 23, 1890.)

ON reservation by the Supreme Judicial Court for Suffolk County (Knowlton, J.) for the consideration of the full court, upon bill, answer, replication and agreed facts, of a suit brought to test the validity of an attempted taking of plaintiff's property under an alleged exercise of the right of eminent domain. *Bill dismissed.*

The case sufficiently appears in the opinion. *Messrs. Charles T. Gallagher and Hollis R. Bailey*, for plaintiffs:

The taking was unconstitutional, for the reason that the purpose for which the land was taken was not a public use.

Talbot v. Hudson, 16 Gray, 417; *Re Eureka Basin W. & Mfg. Co.* 96 N. Y. 42, 48. See *Lewis*, Em. Dom. § 205.

If a private use is combined with a public use in such a way that the two cannot be separated, the whole act of taking is invalid.

Lewis, Em. Dom. § 206; *Atty-Gen. v. Eau Claire*, 87 Wis. 400; *Sadler v. Langham*, 84 Ala. 811; *Harding v. Goullett*, 3 Yerg. (Tenn.) 41.

Plaintiffs have not lost their right to dispute the validity of this so-called taking of their land. They gave reasonable notice of their intention to test the validity of the taking, and brought this suit as soon after as they reasonably could, under all the circumstances.

Warren v. Spencer Water Co. 8 New Eng. Rep. 111, 143 Mass. 14.

Mr. Harvey N. Shepard, for defendants:

Petitioners have stood by and allowed the board of harbor and land commissioners, on behalf of the Commonwealth, to expend money upon said lands, and otherwise improve the same, without the least objection or protest on their part. Under these circumstances, the petitioners have waived any right to question the validity of the said taking, and this court is not now called upon to consider, upon this application by them, the constitutionality of the Act.

Gray v. Bartlett, 20 Pick. 186; *Pittkin v. Springfield*, 112 Mass. 509.

The taking was for filling and improvement of these flats as a material benefit to the Harbor of Boston, and an increase of its capacity, and an accommodation to its commercial and railroad enterprises. These are public uses, and the question of necessity belongs exclusively to the Legislature, and is determined by its Act.

Talbot v. Hudson, 16 Gray, 417; *Bancroft v. Cambridge*, 126 Mass. 438.

The Commonwealth can appropriate land, when compensation therefor is provided, in order to improve the harbor of its most important port, and to give better railroad facilities to its capital city.

Boston & R. Mill-Dam. Corp. v. Newman, 12 Pick. 467.

Devens, J., delivered the opinion of the court:

The first question presented by the report is whether the plaintiffs, by filing their petition under chap. 290 of the Act of 1884, for the damages sustained by the taking of their lands under the authority given by that Act, have admitted the validity of the taking, and thus waived any right by a proceeding such as that adopted in the case at bar, to dispute the validity of the taking and the constitutionality of the Act assuming to authorize it.

This cause does not belong to that class of cases where the selection of one remedy necessarily implies that any other remedy or any ground therefor is waived. It certainly would be unjust if a party who reasonably deemed that a statute by authority of which this property was taken, was unconstitutional, should be compelled to elect whether he would seek for damages under the Act, and thus formally admit that his property was lawfully taken, or abandon any claim therefor and rely solely on his remedy for an unlawful taking. As in Acts of the nature of that which we are considering, the time within which damages may be applied for is usually limited, it would be quite probable, before a decision could finally be reached as to the validity of the taking, the time within which he could apply for damages would have expired; and if such taking were held valid, he would thus be deprived of any remedy for the value of his property. His only safe course would be to file a petition for his damages under the Act while he proceeded by other means to test its constitutionality. If in the latter proceeding it was held that the taking was valid, he could then proceed under his petition for damages. The plaintiffs were entitled to have the question of the constitutionality of the Act determined, and under their petition for damages they were, by necessary inference,

Justices, 9 Ga. 341; *Sherman v. Buick*, 23 Cal. 255; *Contra Costa C. M. R. Co. v. Moss*, 23 Cal. 523; *Napa Valley R. Co. v. Napa Co.* 30 Cal. 435; *Indianapolis Water Works Co. v. Burkhart*, 41 Ind. 364; *Challies v. Atchison*, T. & S. F. R. Co. 16 Kan. 117; *Tracy v. Elizabethtown, L. & B. S. R. Co.* 80 Ky. 259; *North Missouri R. Co. v. Gott*, 25 Mo. 540; *Hingham & Q. Bridge & Turnp. Corp. v. Norfolk Co.* 6 Allen, 358; *Bonaparte v. Camden & A. R. Co.* Baldw. 205; *Concord R. Co. v. Greeley*, 17 N. H. 47; *Re Union Ferry Co.* 98 N. Y. 139; *Smith v. Gould*, 59 Wis. 681.

7 L. R. A.

The question of necessity or propriety may, however, be delegated to boards of commissioners or to the courts; but in the absence of such delegation the legislative determination is conclusive. *Lecoul v. Police Jury*, 20 La. Ann. 308; *Powers' App.* 29 Mich. 504.

See generally, as to the exercise of the power of eminent domain, *notes to Pittsburgh, W. & K. R. Co. v. Benwood Iron Works (W. Va.)* 2 L. R. A. 680, and *Barre R. Co. v. Montpelier & W. R. Co. (Vt.)* 4 L. R. A. 765.

compelled, in that proceeding, to admit that it was constitutional. *Pitkin v. Springfield*, 112 Mass. 509.

But the mere fact that they filed a petition for the purpose of saving their rights to damages if their view of the constitutionality of the Act proved erroneous ought not to prevent them from having that question settled in another proceeding to which the inquiry was appropriate. Perhaps, if they had voluntarily proceeded to judgment in their petition,—for the plaintiffs ought not to be allowed to experiment in order to ascertain what damages they might obtain before testing the constitutionality of the Act,—certainly if they had collected the damages which had been awarded under such a petition, it would be held that they had finally elected this as their remedy, and that they could not afterwards test the constitutionality of the Act to which they had thus given full assent. But the same effect should not be given to a petition filed only as a prudent precaution to guard their rights in a contingency that might thereafter arise.

In the case at bar it appears that the plaintiffs, living at a distance from the Commonwealth, knew of the taking only toward the expiration of the year; that they filed their petition hurriedly in order to protect such rights as they might have. While this took place in 1884, no answer to the petition was filed until 1886, nor was any movement made by either party for a trial of the petition until 1887, there having been negotiations between the parties looking to a settlement. An auditor was appointed to hear the petition in 1887 for the assessment of damages. Before this time, and before proceeding with the auditor, the counsel of plaintiffs informed the defendants that they intended to dispute and test the validity of the taking, and constitutionality of the Act, and the right of an auditor to proceed. It further appeared that during the year which followed, the then counsel for the plaintiffs became incapacitated by ill-health, and was compelled to go away for nearly a year, and that on his return other counsel was retained, who brought this bill forthwith when an auditor was appointed. The case is still pending before him, only a small part of the plaintiffs' evidence having been heard. Under these circumstances, the plaintiffs have not, by an election, deprived themselves of the right to test the validity of the taking. The delays which have occurred appear, with the exception of that resulting from the ill-health of their counsel, to have occurred from causes for which they were mutually responsible.

It is not contended by the plaintiffs that any requirement of the Statute was omitted in the taking of their land, or that proper provision was not made for compensation to them, but they urge that the Statute is unconstitutional, as the taking of the land which is authorized was not for a public use. While the determination of the Legislature is not conclusive that a purpose for which it directs property to be taken is a public use, it is conclusive, if the use is public, that a necessity exists which requires the property to be taken. In determining whether a statute is within the legitimate sphere of legislative action, all reasonable presumptions are to be made in favor of its valid-

ity, and it must be so regarded, unless it is shown to be otherwise by those who assail its constitutionality. *Opinions of Justices*, 8 Gray, 21; *Wellington, Petitioner*, 16 Pick. 96; *Talbot v. Hudson*, 16 Gray, 417.

The purposes of the Act as declared therein, its general structure, the nature of its provisions, its probable operation and effect, are all to be considered in determining whether it is a lawful exercise of legislative power.

If we examine the Act of 1884, we find that while it was contemplated that the flats owned by the Commonwealth, when filled, would be sold, and that a possible pecuniary benefit would accrue to the Commonwealth thereby, yet that the right of eminent domain which was to be exercised by taking certain flats owned by others without which the reclamation of flats could not be effected, was for the avowed purpose of improving the Harbor of Boston, and also of providing better and more complete accommodations for the railroad and commercial interests of the city by the solid land which would take the place of the flats over which the tide ebbed and flowed.

The Act of 1884 declares that "for the purposes of the reclamation of the Commonwealth's flats at South Boston, and the improvement of Boston Harbor, contemplated and authorized by chap. 289 of the Acts of the year 1875, the board of harbor and land commissioners is hereby authorized to take, in the name and behalf of the Commonwealth," certain lands of which the previous Act referred to had authorized the purchase. The Act of 1889, chap. 446, authorized the board of harbor and land commissioners to make certain purchases of flats for the purpose of making more available for sale the flats of the Commonwealth, "in the Harbor of Boston, and perfecting and improving the same." The Act of 1875, chap. 289, while in terms it does not speak of the improvement of the Harbor of Boston, authorizes the improvement, filling and sale of the Commonwealth's flats, requires a plan to be prepared to be approved by the governor and council, setting forth what portions of these lands, when reclaimed, shall be devoted to railroad or commercial purposes, and what to general purposes. Apparently the Act we are immediately considering was rendered necessary by the reluctance of other owners of flats to sell their property or join in the proposed improvement. The message of his excellency, the governor, in 1869, which has been made a part of the agreed facts is relied on by the plaintiffs to maintain their contention that the project which the Commonwealth entered into, and by reason of which their land was taken, was a mere land speculation.

But while this message, as to the Acts referred to, contemplates that portions of the land reclaimed may be sold to advantage, it also urges that their reclamation will benefit the Harbor of Boston, as well as provide important public accommodation. That the improvement of Boston Harbor is an object of a public nature, and thus that lands taken for this purpose are taken for a public use, can hardly be controverted. It is not necessary that the entire community should directly enjoy or participate in an improvement or enterprise in order to constitute a public use, and a benefit

to the principal harbor of the Commonwealth is much more than a local advantage. Now, when we consider that Acts of Incorporation have been granted, and fully recognized as constitutional, which authorized the taking of private property for the purpose of carrying forward enterprises such as the construction of railroads, or which tend to the prosperity and welfare of large portions of the community, should we be willing to say, even if no improvement of Boston Harbor formed a part of the purpose, that the Legislature might not properly provide for the reclamation of a large body of lands, such as flats, substantially useless in their original condition, for railroad and commercial purposes, by taking, with proper compensation, such of them as were necessary for the accomplishment of the object? *Talbot v. Hudson, supra; Danecraft v. Cambridge*, 126 Mass. 428; *Boston & R. Mill-Dam Corp. v. Newman*, 12 Pick. 487.

The plaintiffs offer no evidence that the declared purposes of the Act, or those fairly inferrible from it, were not its real purposes. Even if it be true that the Commonwealth, as the result of the enterprise, expects to sell its lands to advantage, many enterprises of great public utility are of advantage to individuals. *Boston & R. Mill-Dam Corp. v. Newman and Talbot v. Hudson, supra.*

If lands are taken for a public use and for the benefit of the community, it is not of importance that individuals, or, as in this case, the Commonwealth, may derive incidental advantage therefrom.

The cases cited by the plaintiffs to this proposition that if a private use is combined with a public use in such a way that the two cannot be separated, the whole act of taking is invalid, do not affect the case at bar. No land is here taken for a private use, although an incidental and private advantage may arise from such taking for a public use.

Bill dismissed.

William E. RAMSDELL, Admr., etc., *Appt.*,

NEW YORK & NEW ENGLAND R. CO.

(....Mass....)

An administrator has no right, under the Employers' Liability Act, chap. 270, Laws of 1887,

to recover damages on account of the death of his intestate from injuries caused by the employer's negligence, in addition to his right as legal representative to recover the damages which accrued to the intestate in his lifetime.

(February 27, 1890.)

A PPEAL by plaintiff from a judgment of the Superior Court for Suffolk County sustaining a demurrer to the complaint in an action to recover compensation for the death of plaintiff's intestate which was alleged to have resulted from the negligence of defendant's servants. *Affirmed.*

The declaration alleged that on January 8, 1889, plaintiff's intestate received personal injuries while in defendant's employ in consequence of which he died in a few hours. That the injuries resulted from a defect in some of the appliances furnished to plaintiff's intestate with which to do his work, which defect arose from, and had not been discovered and remedied owing to, the negligence of defendant or of some employé intrusted with the duty of seeing that such appliances were in proper condition. That plaintiff had duly given written notice to defendant of the time, place and cause of said injury. That plaintiff brings this action under the provisions of chap. 270, Laws of 1887, to recover compensation for the death of said intestate, and not for his suffering.

Defendant demurred and the demurrer was sustained, whereupon plaintiff took this appeal.

Messrs. C. G. Fall and G. D. Burrage, for appellant:

Section 2 of the Act says that, in cases of instant death, the damages shall be the same as may be recovered for death not instantaneous; and what these are, section 3 tells us by saying that, "in case of death," compensation, etc., "may be recovered in not less than \$500 and not more than \$5,000, to be assessed with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable." Here is a rational measure of damages for both cases of death— instantaneous and not instantaneous. Upon the defendant's contention, if there is any measure of damages at all for instantaneous death, it is one which is self-contradictory and inappli-

NOTE.—Action for damages for death caused by negligence.

Ind. Rev. Stat. 1891, § 286, providing that in certain cases a guardian may sue for injury or death of his ward, and that in a suit for injury the damages shall be for the benefit of the ward, gives a guardian no right of action for the death of a minor instantly killed, who has a mother living, where the guardian has paid no expenditures from the property of the ward as a result of the accident. *Louisville, N. A. & C. R. Co. v. Goodykoontz*, 119 Ind. 111.

Under the Texas constitutional provision for the bringing of an action for exemplary damages by "the surviving husband, widow or the heirs of his or her body," of one who has been killed by gross negligence, no one else can bring such action. Hence such an action by a parent cannot be maintained. *Winnt v. International & G. N. R. Co.* (Tex.) 5 L. R. A. 172.

Under Ky. Gen. Stat., chap. 57, § 8, providing that 7 L. R. A.

the "widow, heir or personal representative" of one killed by another's negligence may sue for damages, the word "heir" means "child," and does not include parents or collateral relatives. *Jordan v. Cincinnati, N. O. & T. P. R. Co.* (Ky.) 118 W. Rep. 1013.

Children claiming title to land by a deed executed in 1856 to their father who has left the State and has not been heard from for seven years, can sue as his heirs-at-law. *Henderson v. Bonar* (Ky.) 118 W. Rep. 800.

Damages for death caused by negligence. See note to *Louisville, N. A. & C. R. Co. v. Buok* (Ind.) 2 L. R. A. 530.

Statutory action for, see notes to *Cleveland Rolling Mill Co. v. Corrigan* (Ohio) 8 L. R. A. 238. *Winnt v. International & G. N. R. Co.* (Tex.) 5 L. R. A. 172.

For injuries inflicted beyond state limits, see note to *Usher v. West Jersey R. Co.* (Pa.) 4 L. R. A. 261.

cable. In such a case, the court will so construe the Statute as to save it from inconsistency and absurdity.

Com. v. Kimball, 24 Pick. 866, 870; *Philadelphia v. Ridge Ave. Pass. R. Co.* 102 Pa. 190, 197; *Com. v. Conyngham*, 66 Pa. 99; *Henry v. Tilton*, 17 Vt. 479, 486; *Jeffersonville v. Weems*, 5 Ind. 547; *State v. Clark*, 29 N. J. L. 96; *Gilkey v. Cook*, 60 Wis. 183.

The court has already decided that it ought to "construe the Statute liberally in favor of employes."

Ryal v. Mechanics Mills (Mass.) 5 L. R. A. 667.

Messrs. H. E. Bolles and R. M. Saltonstall, for appellee:

The Statute makes no provision for recovery by an administrator for the death of an employé in any case, whether instantaneous or otherwise.

The Statute creates two distinct causes of action,—the common-law action for damages sustained in the lifetime, which is made to survive by statute, and the statutory action based on the death. The damages which the employé suffered in his lifetime may be recovered by his administrator under section 1, clause 3, of the Act, and damages on account of instant death may be recovered in an action brought by the widow under section 2 of the Act.

Com. v. Metropolitan R. Co. 107 Mass. 236.

Knowlton, J., delivered the opinion of the court:

The plaintiff sues as administrator, and expressly states in his declaration that he brings his action "under the provisions of chapter 270 of the Acts of 1887, to recover compensation for the death of the said intestate, and not for his suffering." We are thus brought directly to the question whether this Statute, commonly called the Employers' Liability Act, gives an administrator a right of action on account of the death of his intestate, in addition to his right as legal representative to recover the damages which accrued to the intestate in his lifetime.

Clause 3 of section 1 of the Statute provides that, where an employé is injured from either of the causes previously named, "the employé, or, in case the injury results in death, the legal representatives of such employé, shall have the same right of compensation and remedies against the employer as if the employé had not been an employé of, nor in the service of, the employer, nor engaged in its work." This plainly gives an executor or administrator a right to proceed in the right of his testator or intestate and recover all damages which the deceased person suffered to the time of his death. It does not purport to make the death a substantial cause of action. It gives only "the right of compensation and remedies," and it gives them to the employé, or to his legal representatives in case of his death. It implies that his representatives are merely to succeed to his rights and remedies. But the law recognizes no "right of compensation" for the death of a person, and gives to a deceased person no remedies founded on his death. There are a few cases in which remedies are given by indictment, or to an executor or administrator for the benefit of relatives, where death has been caused by the fault of another, such as the negligence of a railroad corporation or

other common carrier of passengers, or the neglect of one whose duty it is to keep a way in repair. Pub. Stat. chap. 112, § 212; Stat. 1838, chap. 243; Pub. Stat. chap. 73, § 6, chap. 52, § 17.

These remedies are not general, but are strictly limited by statutes. Most of them are of a kind to which the Statute which we are considering could not apply. Moreover, when they exist they are given where death is instantaneous, or without conscious suffering, and also where it is not. *Com. v. Metropolitan R. Co.* 107 Mass. 236.

If this clause gave a right of action for the death of an employé as an extension to his representatives of a right which under one or two statutes belongs to the representatives of others, who are not employés, it would necessarily include the right where death is instantaneous. But manifestly that was not intended.

The next section of the Statute deals expressly with such cases in a different way. It is quite apparent that the third clause of the first section gives the legal representatives of a deceased employé merely a right to recover the damages to which the employé was entitled at the time of his death. This is conceded by the plaintiff in his argument.

Section 2 relates to cases, "where an employé is instantly killed or dies without conscious suffering," and in such cases gives a right of action to his widow, or, if there is no widow, and there are next of kin dependent on his wages for support, then to such next of kin. These two are the only sections of the Statute which give to anybody a right to sue. Section 3 relates to the amount of compensation and to the notice to be given as a condition precedent to the maintenance of a suit.

The damages to be assessed under this section in case of death are those to be recovered by the widow or next of kin in a suit brought under section 2. The expression "compensation in lieu thereof," does not very aptly characterize the recovery authorized; for there is no mode of estimating "compensation" for the death of a man, and the amount to be recovered is required to be assessed with reference to the degree of culpability of the employer. So, too, the words in the second section, which state that the recovery by the widow or next of kin shall be "in the same manner and to the same extent as if the death of the deceased had not been instantaneous, or as if the deceased had consciously suffered," can hardly be used with liberal accuracy, for there was no law under which a widow or next of kin could recover at all for the death of the husband or relative until this Statute was passed. The meaning obviously is that the right of action given in the first part of the section shall not be affected by the fact that the deceased died instantaneously or without conscious suffering. The words last quoted cannot point to a standard for the measurement of damages. No such standard exists under the circumstances and conditions to which they profess to refer.

The first section of the Statute is to be construed as giving a right of action to the employé, or in case of his death to his legal representatives suing in his right; the second section as giving a right of action to the widow or next of kin, without indicating anything as

to the mode of assessing damages; and the third section as settling the amount to be recovered, first, in cases under the first section, and secondly, in cases under the second section.

Judgment affirmed.

Lucius R. BATES *et al.*

INHABITANTS OF WESTBOROUGH.

Lucius R. BATES

INHABITANTS OF WESTBOROUGH.

(....Mass....)

1. A municipal corporation is liable for injuries to a land owner, caused by the backing up of water in a drain which he has a right to maintain, by reason of negligence on the part of the corporation in permitting the channel into which such drain opens, and which is part of the sewerage system of the corporation, to become obstructed, or in maintaining the same too small in size without any defect in the original plan, or of the diversion by it of surface water from its natural course, and turning such quantities of it into such channel that its capacity for carrying off the drainage is not equal to the demand made upon it.
2. The expiration of a license given to a town to maintain a drain over lands of the licensor will not relieve the town from liability for injuries caused by the subsequent obstruction of the drain when such drain was the necessary outlet of the sewerage system of the town, and there is nothing to show abandonment thereof on the part of the town, but its use is continued the same after as before the license expired, and the town afterward obtains the further right to continue it.

(February 27, 1880.)

ON defendants' exceptions from the Superior Court for Worcester County (Staples, J.), taken in actions to recover damages for in-

juries to plaintiffs' property by reason of the flooding thereof with surface water from a drain by reason of the alleged negligence of defendants, in which verdicts were returned for plaintiffs. *Overruled.*

The cases were brought for injuries occurring during different periods of time. In other respects they were similar, and were tried together.

At the trial plaintiffs relied alone upon the eighth count of the declaration, which is in substance as follows:

"And the plaintiffs say that they are and have been, from December 1, 1885, to the date of this writ, the occupants of a shop and a parcel of land connected therewith, . . . and that there is connected with the land which they occupy a ditch by which the land is drained, which ditch follows the natural drainage of the surface of the land; and they have had during all of the time of their occupancy of said land and shop a right to drain their land by said ditch; and said ditch has during such time been connected with and has entered into a common drain, which passes under Brigham Street, a public street in said Westborough, and thence under the Boston & Albany Railroad, and thence through the land of one Timothy A. Smith; and that said drain is the natural course of the drainage of the land occupied by the plaintiffs; and that they have had, during all of such time, a right of drainage through said common drain; but the defendants have constructed a large number of drains or sewers, through and by which large quantities of water, which would not otherwise flow through said Brigham Street drain, were turned into said Brigham Street drain, so as to choke it up, so that the water from the land occupied by the plaintiffs could not flow through said Brigham Street drain, but was kept and retained upon the said land. . . . And it was the duty of the defendants to keep said drain clear and unobstructed, but that the defendants carelessly and negligently allowed

NOTE.—Municipal corporation liable for creation of a nuisance.

A municipal corporation is no more exempt from liability in case it creates a nuisance, either public or private, than an individual. *Hughes v. Fond du Lac*, 73 Wis 388.

A general grant of power in a municipal charter to establish a sewer system affords no justification for the action of the authorities in unnecessarily exercising the power so as to create a nuisance injurious to private rights of property. *Edmondson v. Moberly*, 98 Mo. 523.

A municipal corporation is liable for its negligence in devising a plan of sewerage, as well as for improper construction according to the plan. *Seymour v. Cummins*, 119 Ind. 148.

While a city or town is not liable in tort for injuries caused by the plan or scheme of a sewer laid out by the board of aldermen, it is liable for the negligence of its servants in carrying out the plan in constructing the sewer. *Stock v. Boston*, 149 Mass. 410.

The construction of a sewer is not a public work for the benefit of the people of the State, so as to shield the corporation from liability to persons whose property is damaged during the progress of the work. *Denver v. Rhoads*, 9 Colo. 564.

Although a municipal corporation is not liable for failure to exercise discretionary power to build

culverts and sewers, if it undertakes to exercise that power it is bound to exercise reasonable care in the execution of the work, and is liable for damages occasioned by the negligent construction of such work. *Frostburg v. Hitchins*, 70 Md. 56.

A municipality constructing drains and sewers when under no obligation to do so is liable for damages where the work is performed negligently or the management thereof is negligent. *Philadelphia, W. & B. R. Co. v. Davis*, 10 Cent. Rep. 553, 68 Md. 231.

It is held in Canada that a municipal corporation may be sued for negligence in the construction of a sewer, for wrongfully obstructing a drain or watercourse or for diverting a stream of water on the plaintiff's land. *Farrel v. London*, 12 U. C. Q. B. 343; *Reeves v. Toronto*, 21 U. C. Q. B. 157; *Perdue v. Chinguacousy Twp.*, 25 U. C. Q. B. 61.

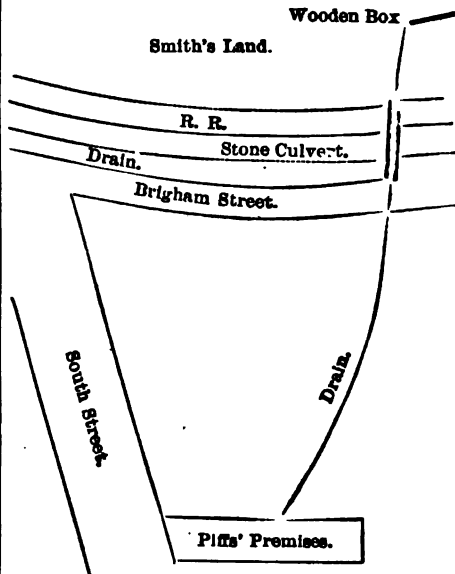
A municipal corporation is liable to one upon whose lands it conducts surface water wrongfully diverted from its natural channel. *Clark v. Rochester*, 43 Hun, 271; *Evansville v. Decker*, 84 Ind. 325; *Crawfordsville v. Bond*, 96 Ind. 236; *Lipe v. Hand*, 2 West. Rep. 814, 104 Ind. 508; *Rice v. Evansville*, 6 West. Rep. 242, 108 Ind. 7; *Terre Haute v. Hudnut*, 11 West. Rep. 333, 112 Ind. 542-548; *Pye v. Mankato*, 36 Minn. 373.

The City of Boston, which, acting under Mass. Stat. 1874, chap. 196, undertook to alter, deepen and

said drain to become obstructed, so that the water from the land occupied by the plaintiffs could not flow through said Brigham Street drain, but was kept and retained upon said land; . . . and said sewers were so badly and negligently constructed, and so negligently and improperly managed and cared for, that the said Brigham Street drain became filled with earth and refuse, so that the water from the land occupied by the plaintiffs could not flow through said Brigham Street drain, but was kept and retained upon said land, and the water collected by said drains and sewers was turned into said Brigham Street drain and into the aforesaid ditch, and thereby was caused to flow upon the land occupied by the plaintiffs; . . . and because said water was so collected by said defendants, said defendants were bound to keep said Brigham Street drain clear and unobstructed, but they allowed said drain to become so filled with earth and refuse that the water could not flow through said Brigham Street drain, but was kept and retained upon the land occupied by the plaintiffs; . . . and the defendants have entered upon the land of said Smith, and have obstructed and hindered the flow of the water upon said Smith land, and made and placed upon said land a box or trough, which was made of boards or planks, for the water to flow in, but said box or trough was so small and narrow that the water which passed through said drain under Brigham Street could not flow through said box or trough, but was stopped and held back, so that the water was kept back and retained upon the land occupied by the plaintiffs, to the great injury of the plaintiffs' business, and to their injury in a special manner, in that they were deprived of the use of their lands and buildings, for drying hats and bonnets, and large quantities of gasoline were lost and destroyed,

and their supply of gas was cut off, so that they could not carry on their business, and much other damage and injury was done to their business."

The following diagram gives the relative situation of the drains:



The jury returned verdicts in favor of plaintiffs, and defendants took exceptions.

The facts further appear in the opinion.

Messrs. Frank P. Goulding and W. T. Forbes, for defendants:

A town is not liable for the acts of the high-

widen a brook, and in so doing enlarge the culverts under roads above the land of an owner, so as to permit the water to flow down in excessive quantities, without having made a provision to enlarge the outlet or to keep the lower part of the stream unobstructed, to allow the excessive flow of water to escape, whereby such owner's property was damaged, is liable for the injury. *Boston Belting Co. v. Boston*, 149 Mass. 44.

Municipal corporation liable for creating nuisance. See notes to *Chapman v. Rochester* (N. Y.) 1 L. R. A. 296; *Seymour v. Cummins* (Ind.) 5 L. R. A. 128.

Liable in damages for neglect of duty.

Where a duty is a corporate duty in respect of its special or local interests, and not, as a public agency is, absolute and perfect, and not discretionary or judicial in its nature, and one owing to the plaintiff or in the performance of which he is specially interested, the corporation is liable in a civil action for the damages resulting to individuals by its neglect to perform the duty, or for the want of proper care or want of reasonable skill of its officers or servants acting under its direction or authority in the execution of such a duty, on the same principles and to the same extent as an individual or private corporation would be under like circumstances. *Lloyd v. New York*, 5 N. Y. 389; *McCullough v. Brooklyn*, 23 Wend. 458; 3 Dillon, Mun. Corp. 391.

But legal negligence cannot be predicated of an omission by a municipal corporation to do what it had no legal right to do. *Veeder v. Little Falls*, 1 Cent. Rep. 523, 100 N. Y. 343.

7 L. R. A.

A municipal corporation is liable for negligence in the ministerial duty to keep its sewers in repair as respects persons whose estates are connected therewith by private drains, in consequence of which such persons sustain injuries which would have been avoided had the sewers been kept in a proper condition. *Child v. Boston*, 4 Allen, 41; *Lloyd v. New York*, 5 N. Y. 389.

Chatsworth Run sewer in Baltimore is public, and the city is responsible for injuries from neglect to keep it in repair. *Krans v. Baltimore*, 2 Cent. Rep. 629, 64 Md. 491.

While a municipal corporation cannot be compelled to provide waterways of sufficient capacity to carry off all surface waters likely to accumulate in the streets, yet such as the city has provided it is bound to keep in repair and free from obstructions, so that, up to their original capacity, they shall be efficient. *Denver v. Rhodes*, 9 Colo. 554.

If the sewer is negligently permitted to become obstructed or filled up so that it causes the water to back-flow into cellars connected with it, there is a liability therefor on the part of the municipal corporation having the control of it. *Barton v. Syracuse*, 36 N. Y. 54; *New York v. Furse*, 8 Hill (N. Y.) 612; *Wilson v. New York*, 1 Denio, 595; *Mills v. Brooklyn*, 82 N. Y. 499; 2 Dillon, Mun. Corp. 936.

There is considered to be no liability in Massachusetts on the part of a city for failing to keep a public cesspool and sewer in repair, in consequence of which waste water accumulates and flows into neighboring cellars not connected with the sewer. *Barry v. Lowell*, 8 Allen, 127.

way surveyors, done in the course of constructing or repairing highways, which cause surface water to accumulate and flow upon lands outside the highways.

Flagg v. Worcester, 18 Gray, 601; *Barry v. Lowell*, 8 Allen, 127; *Franklin v. Fisk*, 18 Allen, 211; *Turner v. Dartmouth*, 18 Allen, 291; *Kennison v. Beverly*, 6 New Eng. Rep. 183, 146 Mass. 467; *Emery v. Lowell*, 104 Mass. 18, 16; *Merrifield v. Worcester*, 110 Mass. 216, 220; *Manners v. Haverhill*, 185 Mass. 165; *Tindley v. Salem*, 137 Mass. 171.

There is no allegation in the declaration that the box was put in during the time covered by the actions, nor that it was maintained during that time by the town. The only ground the liability of the town for this cause can be placed on is, that it created a nuisance on the land of Smith, and is liable perpetually for the continuance of said nuisance until abated, although its title, interest and right in the land ceased long before the injury complained of. A proposition so broad as that cannot be sustained.

Thompson v. Gibson, 7 Mea. & W. 459; *Perruddeck's Case*, 5 Coke, 100 b; *Westbourne v. Morand*, Cro. Eliz. 191; *Rosewell v. Prior*, 2 Salk 460; *Cheatham v. Hampson*, 4 T. R. 818; *Blunt v. Aikin*, 15 Wend. 522; *Waggoner v. Jermaine*, 8 Denio, 806; *Wood, Nuis.* 78; *McDermough v. Gilman*, 8 Allen, 264; *New Salem v. Eagle Mill Co.* 183 Mass. 10; *Prentiss v. Wood*, 182 Mass. 480.

Messrs. W. S. B. Hopkins and J. E. Bee-man for plaintiffs.

Holmes, J., delivered the opinion of the court:

These are two actions of tort depending upon the same state of facts to recover for the overflowing of the plaintiffs' land with water from the defendants' drain and set back in the plaintiffs' drain. There was evidence tending to show the following facts, which we assume to be true, for the purposes of this decision.

The plaintiff had gained a prescriptive right to discharge water from his land by a drain to a culvert running under Brigham Street, the Boston & Albany Railroad and beyond, the water being carried from the further side, of late years, by a box drain.

There is a system of drains under different highways, converging into one under Brigham Street, which also discharges through the same culvert. Some, at least, of these drains, including that through Brigham Street, were built by the defendant Town and belonged to it, and the Town had a right to discharge through the culvert. The box drain on the other side of the culvert was built by the Town upon land of one Smith, under a lease or license granted for a nominal sum. The lease expired more than six years before the date of the writ. But the box drain remained and received the drainage as before, of which it was the necessary outlet. Smith did not object, but, it seems, had further negotiations with the Town which have resulted in the building of a new drain since these actions were brought.

The effect of the system of drainage was to bring down and to discharge through the culvert more water, and to discharge it more rapidly than otherwise would have been the case. Within six years before the date of the writs,

the culvert had been filled up more or less, the box drain had failed at times to discharge the water freely, and the drain on the plaintiffs' side of the culvert had become filled up. From some or all of these causes, the plaintiffs' land was flowed as alleged.

The plaintiff got verdicts under instructions allowing him to recover if the Town had failed to use reasonable precautions in keeping the culverts free from obstructions or had been guilty of negligence in maintaining a box drain of too small size or in improperly constructing or negligently maintaining other drains, that by themselves, or in connection with the culvert, made a faulty arrangement for disposing of the surface water, and thus had caused the damage.

These, we believe, are the only facts needing mention. The plaintiff went to the jury on the eighth count alone, which made some of the defendants' requests for rulings immaterial, and we cannot adopt the defendants' construction of a further remark to the jury, upon which they base an important part of their argument. The jury were told that if they should find that not all the acts alleged in the eighth count operated to produce injury, but that some of them did, they could still find on that count in favor of the plaintiffs. We think that this was not intended and could not have been understood to mean that any one act alleged would be sufficient, but simply reinforced what had been said already, and meant that less than all the acts alleged would be enough if the facts found by the jury satisfied the conditions of liability which had just been stated to them in detail.

If a private land owner collects surface water into a definite, artificial channel and discharges it upon his neighbor's land, he is liable to an action. *White v. Chapin*, 12 Allen, 516, 530; *Curtis v. Eastern R. Co.* 93 Mass. 423, 481; *Rathke v. Gardner*, 184 Mass. 14, 16; *Juckman v. Arlington Mills*, 187 Mass. 277, 288; *Cassidy v. Old Colony R. Co.* 141 Mass. 174, 179, 1 New Eng. Rep. 606.

And when the defendant would be liable for a direct discharge, we apprehend that he would be liable also, if the water was reflected upon the plaintiff's land by an obstacle to its direct course, when that obstacle was set up by the defendant, or was negligently allowed to remain when he ought to remove it. We think also that it would not matter that some water would reach the obstacle if the defendant's drain were not there, provided the drain brings down more than otherwise would come, and causes the flooding of the plaintiff's land by this excess. *Curtis v. Eastern R. Co. supra*.

Again, the ordinary liability of a tortfeasor who should stop a drain belonging to the plaintiff, would exist if he should stop that drain by causing an otherwise lawful discharge of water into the outlet of the plaintiff's drain, the water thus discharged acting as a dam or obstacle to the plaintiff's water.

A town has no prerogative to flood the lands or to stop the drains of other land owners without paying for it, and if it does so without authority of law, it is liable to an action of tort. *Hill v. Boston*, 123 Mass. 844, 358. See *Hitchins v. Prossburg*, 68 Md. 100, 10 Cent. Rep. 539.

It is true that a town is not liable for interrupting the flow of surface water or for discharging or turning surface water upon adjoining land to a considerable extent, if not through a definite channel; but this is because no land owner is liable for doing so. *Emery v. Lowell*, 104 Mass. 18, 17, explaining *Barry v. Lovell*, 8 Allen, 128, and *Turner v. Dartmouth*, 18 Allen, 291. See *Gannon v. Hargailon*, 10 Allen, 106; *Franklin v. Fisk*, 18 Allen, 211; *Vates v. Smith*, 100 Mass. 181; *Morrill v. Hurley*, 120 Mass. 99.

So a town is not liable to an action at common law for acts which are done under a statute, for instance, in the repair of highways, or, it seems, in the construction of sewers, for which the statute provides a remedy by petition. *Emery v. Lovell*, *supra*, explaining *Flagg v. Worcester*, 18 Gray, 601; *Manning v. Lovell*, 130 Mass. 21, 22; *Nealley v. Bradford*, 145 Mass. 561, 5 New Eng. Rep. 515. See *Hull v. Westjill*, 138 Mass. 438; *Perry v. Worcester*, 6 Gray, 544; *Benjamin v. Wheeler*, 8 Gray, 409, 15 Gray, 486.

But the case is different when a city or town has caused the plaintiff's land to be flowed in a way which would be actionable as against a private person, and which cannot be taken to have been contemplated by the statute under which it acts, or to have been paid for by the compensation allowed in respect of the original scheme. Thus, in the instance of sewers, it is settled that if the plaintiff can prove that the injury was caused by the negligence of the city, either in the original construction of the sewer, or in not keeping it free from obstructions, he may maintain an action against the city. *Emery v. Lovell*, 104 Mass. 18, 17; *Merrifield v. Worcester*, 110 Mass. 216, 231; *Murphy v. Lovell*, 124 Mass. 564; *Tindley v. Salem*, 187 Mass. 171, 172; *Stinchfield v. Newton*, 142 Mass. 110, 115, 2 New Eng. Rep. 526; *Child v. Boston*, 4 Allen, 41, 52.

So if by a system of drains a city artificially diverts surface water from its natural course and accumulates it upon the plaintiff's land in such quantities as to create a private nuisance, it may be liable to an action. *Manning v. Lovell*, 130 Mass. 21, 25; *Brayton v. Fall River*, 113 Mass. 218, 226.

So if it negligently fails to keep a culvert under a highway in such condition as not to obstruct a natural stream. *Parker v. Lovell*, 11 Gray, 353.

Emery v. Lovell, and the cases following it, have reinforced the distinction established in *Child v. Boston*, that while no action lies for a defect or want of sufficiency in the plan or system of drainage adopted in the exercise of a quasi judicial discretion, under powers especially conferred by statute, the duty of keeping the common sewers in repair and free from obstructions after they have been constructed and have become the property of the city under such authority, is a ministerial duty, for neglect of which the city is liable to any person injured. The same is true of the duty actually to construct them with reasonable care and skill. And there is no difference in these duties whether the city has acquired the right to maintain the sewer by prescription or has laid it under the statute. See *Gould v. Boston*, 120 7 L. R. A.

Mass. 800, 806; *Phelps v. Mankato*, 23 Minn. 276, 279; *Bradbury v. Benton*, 60 Me. 194.

It was not intended to overrule or to modify the well settled rules which we have stated, by the decision in *Keniston v. Beverly*, 146 Mass. 467, 6 New Eng. Rep. 133. In that case the damage was caused by percolation from a catch basin which seems to have been incident only to an open gutter by the side of the highways. Assuming that there was evidence for the jury that there was such an artificial accumulation of water as to fall within *White v. Chapin* and *Manning v. Lovell*, and that the trouble was due to negligence in construction rather than to the plan adopted, still it may be that the town was not liable in the absence of such evidence that it did the work, as was found in *Deane v. Randolph*, 132 Mass. 475; *Wahiron v. Haverhill*, 143 Mass. 582, 3 New Eng. Rep. 688; *Doherty v. Bruntree*, 148 Mass. 495, 497.

It may be that defects in such a catch basin are to be regarded as defects in surface drainage within the limits of the highway, and therefore as defects in the repair of the highway the charge of which is committed by statute to the highway surveyors. Highway surveyors in the performance of their statutory duties are held to be public officers and not agents of the town, partly because of the town's want of control over them, and partly because the duty to repair the surface of highways is regarded as a public duty from which the town derives no special advantage in its corporate capacity. *Walcott v. Swampscott*, 1 Allen, 101; *Barney v. Lovell*, 98 Mass. 570, 571; *Tindley v. Salem*, 187 Mass. 171, 174; *Blanchard v. Ayer*, 148 Mass. 174, 176.

For these and perhaps other reasons, it is held that towns are not liable for defects in such repair apart from statute, except in such cases as we have mentioned. *White v. Phillips-ton*, 10 Met. 103, 110; *Bigelow v. Randolph*, 14 Gray, 541, 548; *Oliver v. Worcester*, 102 Mass. 489, 490; *Hill v. Boston*, 122 Mass. 344, 350.

It seems that this irresponsibility is not confined to nonfeasance or to damage in the highway, to persons traveling there, but extends to cases of misfeasance (see *Walcott v. Swampscott* and *Tindley v. Salem*, *supra*, *Manners v. Haverhill*, 135 Mass. 165), and to injury to persons or property outside of the highway. *Holman v. Townsend*, 13 Met. 297; *Smith v. Dedham*, 8 Cush. 522. See *Benjamin v. Wheeler* and *Turner v. Dartmouth*, *supra*; *Bratley v. Southborough*, 6 Cush. 141.

But it is settled by the cases which we have cited (*Emery v. Lovell*, etc.) that there is no such immunity with regard to sewers and main drains. These belong to the cities and towns by statute (Pub. Stat. chap. 50, § 1); and although the road commissioners who are given authority to maintain them, by the same section, are probably no more the agents of the towns than highway surveyors, when exercising highway surveyors' duties (*Barney v. Lovell*, *supra*; *Nealley v. Bradford*, 145 Mass. 561, 564, 5 New Eng. Rep. 515), still perhaps they have not so exclusive an authority over sewers, and at all events the interest of the towns in the sewers is so distinct from that of the public at large that they are held, with reason, to the ordinary responsibilities of owners. See, fur-

ther, *Oliver v. Worcester*, 102 Mass. 489, 500; *Haskell v. New Bedford*, 108 Mass. 208; *Hand v. Brookline*, 126 Mass. 324.

A further objection is taken by the defendants, with regard to the box drain, that a tenant is not liable to third persons for damages subsequently caused by a structure lawfully erected and simply left by him upon his landlord's premises after the expiration of his lease. We certainly are not disposed to deny that proposition when the circumstances are such that the tenant may be held to have abandoned the structure, and the landlord may be held to maintain it. *Blunt v. Aikin*, 15 Wend. 522; *Waggoner v. Jermaine*, 3 Denio, 806. See *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 49, 5 New Eng. Rep. 566.

But the tenant's liability will continue if he still maintains the structure, and in a case like this the question whether he does so or not will depend upon evidence which, necessarily, is slight, so far as it is drawn from subsequent acts. If the Town abandoned the drain, natural causes would still carry water through it as before; if it maintained it, there was nothing in particular for the Town to do, unless the drain should need repairs.

Perhaps the strongest evidence is found in the original transaction. Whether the leave to maintain the drain for five years, given by Smith, was a lease or a license, it is very plain that the limit of five years was fixed simply in

order to preserve rights. Neither party can have expected that the drain was to be given up at the end of that time. The case is wholly different from the ordinary one of a tenant leaving a fixture. The same need which led to the agreement was likely to continue, and it would seem from the report adopted by the Town that already the box drain was the necessary outlet of the system of drains and sewers belonging to the Town heretofore mentioned. It is a fair inference that what should be done later was left to further negotiations, which seem from the vote of November 8, 1887 to have been had, and to have been successful. So far as the Town added to its system of drains, it showed its intention to continue to use the box drain. It did continue in fact to discharge the water from that system through the box drain, and it negotiated with Smith, as we have said. There was ample evidence that the Town used the box drain after the five years. What would be the liability for bringing down water against an obstacle not under the defendant's control, under circumstances otherwise like the present, we need not consider. Any insufficiency that there may have been in the drain seems to have been due to negligence in its construction or maintenance, not to a defect in the original plan. See *Hill v. Boston*, 122 Mass. 344, 375; *Perry v. Worcester*, 6 Gray, 544, 547.

Exceptions overruled.

INDIANA SUPREME COURT.

Board of Commissioners of JAY COUNTY,
Appl.,
v.

David T. TAYLOR *et al.*

(.....Ind.)

A contract by which a board of county commissioners attempts to employ a legal adviser for a period of three years to commence three months in the future and after the time for the election of a person to fill the vacancy caused by the expiration of the term of office of one member of the board, the term of employment extending over a period during which all the members of the board as constituted at the time of the contract will retire therefrom unless re-elected, is against public policy and void.

(*Elliott and Coffey, JJ., dissent.*)

(February 4, 1890.)

APPEAL by defendant from a judgment of the Circuit Court for Jay County in favor of plaintiffs in an action upon a contract to pay plaintiffs for legal services to be rendered by them. *Reversed.*

The case sufficiently appears in the opinion.

Messrs. Thomas Bosworth and Frank H. Snyder, for appellant.

Messrs. Taylor & Hartford, appellees, in person.

Berkshire, J., delivered the opinion of the court:

The appellees sued the appellant upon the following contract:

This memorandum of agreement made this day between the Board of Commissioners of Jay County of the first part and Taylor and Hartford of the second part, witnesseth that the party of the first part has this day employed and hired the party of the second part as county attorney for Jay County, in the State of Indiana, for a period of three years from the 5th day of December, 1887; the said party of the second part hereby agreeing to attend to all litigations in which the Board of Commissioners of Jay County, is a party, in any of the courts of the State of Indiana, and at all times to render and give the Board of Commissioners of Jay County or any member thereof, legal advice at their reasonable request; and also to legally advise and direct any officer of said County of Jay as they may reasonably request from time to time, on all matters of law pertaining to their said offices.

In consideration of such legal services as aforesaid, the party of the first part, the Board of Commissioners of Jay County, promise and agree to pay the party of the second part, Taylor and Hartford, the sum of \$200 per year, payable quarterly; and in case they have to go to any other county to litigate any action in which the Board of Commissioners is a party, to pay their reasonable expenses, including

*NOTE.—See *Barnard v. Knox Co. (Mo.)* 2 L. R. A. 426.

railroad fare and board incurred in attending to such litigation.

In witness whereof, the party of the first part and the party of the second part have hereunto set their hands and seals this 14th day of September, 1887.

L. J. Craig,
R. McKinley,
Taylor & Hartford.

The complaint is in two paragraphs, to which demurrers were addressed and overruled by the court, and one of the errors assigned rests upon the ruling of the court in overruling said demurrers; but as counsel for the appellant waive this alleged error in their brief we are not called upon to consider the questions thereby raised.

The appellant answered the complaint in three paragraphs, the first being a general denial.

Demurrers were addressed to the second and third paragraphs; the demurrer to the second paragraph was overruled and the demurrer to the third paragraph sustained and exceptions taken.

At the request of the appellant the court made a special finding, and upon the facts found stated as conclusions of law that the contract was valid and binding upon the appellant, and that the appellees were entitled to recover the sum of \$50. The appellant excepted to the conclusions of law and judgment was rendered for the appellees.

The substance of the third paragraph of answer is about as follows: At the time the contract mentioned in the complaint was entered into, the Board had in its employ as its attorney and legal adviser one John M. Smith, whose term of employment continued until the — day of December, 1887, at which date the Board would be reorganized, the term of one of its members expiring and that of another commencing; that the said contract was an employment for a period of time commencing in the future and after the reorganization of the said Board, and was executed for the purpose and with the intention of binding the Board as it would be organized on said — day of December, 1887, to accept the services of legal advisers not of its own selection; that appellees never assumed the duties of county attorneys under the said contract, and that the Board as thereafter constituted had employed Thomas Bosworth as its legal adviser, who is still serving in that capacity.

The answer was not skillfully drawn and is not specific in its averments. If the averments in the answer were as broad as the facts stated in the special finding (not in detail, but as would be proper in pleadings), the questions intended to be presented could be considered with much more satisfaction by this court.

In considering the answer we must not overlook the character of the contract which is the foundation of the action.

The contract, to say the least of it, is a remarkable one, entered into under unusual circumstances and which would seem to indicate that the motive which prompted its execution was not the welfare of the public. By its terms and conditions the services of the appellees are contracted for for a period of three years from

December 6, 1887, and at a time when the Board had an attorney employed whose term of service would not expire for three months and not until after the reorganization of the Board, as stated in the answer. We know as a matter of law that within the time over which the employment under the contract extended the Board must be reorganized at least three times, because of the expiration and commencement of the terms of its members; that before the said 6th day of December, 1890, there will not be a single member of the Board whose term had commenced and was running at the date of the contract, unless thereafter re-elected.

It is admitted by the demurrer that the contract was entered into for the purpose and with the intention of binding the new Board (so to speak) to accept the services of legal advisers not of its own choosing.

If the contract, such as it is and entered into for the purpose stated in the answer, is not contrary to public policy, then the demurrer was properly sustained to the answer; but if not a valid and binding contract for the reason that it is against public policy, the demurrer should have been overruled.

In considering this question the effect upon the public interest must have a controlling influence. To assume that the contract is voidable only is to concede that the Board had the power to enter into such a contract, and if power existed to make the contract it must be regarded as valid and binding, unless tainted with fraud sufficient to avoid or rescind it.

The execution of the contract for the purpose of blinding the Board in the future and after there has been a change in its membership, will not of itself constitute fraud. *McCormick v. Boston*, 120 Mass. 499; *Bay State Brick Co. v. Foster*, 115 Mass. 481; *Benjamin v. Wheeler*, 8 Gray, 409; *Soon Hing v. Crowley*, 113 U. S. 708 [28 L. ed. 1145]; *Ogleby v. Atwell*, 105 U. S. 605 [26 L. ed. 1186].

The contract must be regarded as a valid and binding contract, or as void *ab initio* because of the fact that it is a contract which is against public policy.

The Board of Commissioners has authority to employ counsel in matters pertaining to the business of the county, and to give to the members of the Board legal advice in relation to their official duties.

If the contract in question is binding, the Board of Commissioners at one session may employ counsel to serve the Board as then organized, and at the same time employ counsel to serve it in advance and at a time when it is known the membership of the Board will be different.

It is true that under the contract in question the beginning of the term for which the appellees were employed was only postponed three months from the date of the employment, but in the mean time the term of office of one member of the Board expired and that of another began; and if, under such circumstances, attorneys could be employed three months ahead, why not for one, two or three years in advance?

But the most obnoxious feature which we find in the contract is the length of time for which the appellees were employed. We

know, as a matter of law, as we have already said, that the membership of the Board will be changed as much as three times from the date of the employment to the expiration of the time of service, unless some of its members are re-elected, and in that case the terms of office will be different. Unless some of its members are re-elected there must be an entire change in the membership of the Board between the date of the employment and the expiration of the time covered by the contract. This contract deprives the Board, as reorganized from year to year, of the right to employ its attorney for the next following year.

If such contracts are binding, then no difference how distasteful an attorney may be to the members of the Board, or how little confidence they may have in his ability, legal learning or honesty, so long as he performs the conditions of the contract on his part they are bound to recognize him, accept his services and assume the responsibility.

And if the contract in question, extending, as it does, over a period of three years, is valid, why may not a like contract covering a period of six, nine or a dozen years be upheld?

Our conclusion is that the contract is against public policy and void.

In *St. Joseph & Denver City R. Co. v. Ryan*, 11 Kan. 602, 15 Am. Rep. 357, it is said by the court: "Railroad corporations are, as we have seen, public agencies and perform a public duty. They are agencies created by the public, with certain privileges and subject to certain obligations. A contract that they will not discharge or by which they cannot discharge those obligations is a breach of that public duty and cannot be enforced."

This portion of the opinion is quoted with approval by the Supreme Court of Iowa in the case of *Williamson v. Chicago, R. I. & P. R. Co.* 53 Iowa, 126. See *Fuller v. Dame*, 18 Pick. 472, opinion by Shaw, Ch. J., which is a leading case upon the subject under consideration; *Guernsey v. Cook*, 120 Mass. 501.

In *Craft v. McConoughy*, 79 Ill. 346, the Supreme Court of Illinois said: "Whatever is injurious to the interest of the public is void on the ground of public policy." This language is quoted and approved in the recent case of *People v. Chicago Gas Trust Co.*, decided by the same court in a learned and exhaustive opinion. (Ill.) 22 N. E. Rep. 798.

In *Wiley v. Baumgardner*, 97 Ind. 66, whatever is injurious to public interest is recognized as contrary to public policy.

It is evident that the contract involved in

this litigation is of that character. It ties the hands of the Board of Commissioners and is prejudicial to the free exercise of its power and functions for the public good.

In *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, 46 Am. Rep. 527, the court says: "The common law will not permit individuals to oblige themselves by contract either to do or not to do anything when the thing to be done or omitted is in any degree clearly injurious to the public," citing *Chappel v. Brockway*, 21 Wend. 159. See *People v. Chicago Gas Trust Co. supra*.

The case of *Reubelt v. Noblesville*, 106 Ind. 478, 4 West. Rep. 509, is relied upon by the appellees. That case involved the right of the school trustees of the town to employ a school superintendent for the following school year, and before the reorganization of the school board in June, as provided by law. The appellee rested its case upon the construction to be placed upon § 4439, Rev. Stat. 1881, claiming that, by the provisions of that section, the board of school trustees as organized in May could not elect a superintendent for the next school year, and thereby bind the board as organized in June, and the case went off upon that question. In that case the employment was only for one year. We apprehend that, if the board of trustees had undertaken to employ the superintendent for three years, a different conclusion would have been reached.

We have not overlooked the suggestion made by counsel for the appellees that the Board of Commissioners is a corporation, and continues as such notwithstanding its membership may be changed, and is liable for all contracts which it has the power to make.

But the question before us is one of power, and, as we have said, we do not think the Board had the power to make the contract in suit.

The judgment is reversed, with instructions to overrule the demurrer to the third paragraph of answer.

Elliott, J.:

I dissent from the prevailing opinion because I think the contract operated to retain the attorneys and they are entitled to some compensation. An attorney who is retained is entitled to compensation, although he may not actually render any services.

Coffey, J., concurs with Elliott, J.

Petition for rehearing overruled April 5, 1890.

TENNESSEE SUPREME COURT.

LOUISVILLE & NASHVILLE R. CO.,
Appt.,
v.

GILBERT, PARKS & CO.

(.....Tenn.....)

1. To be valid a contract restricting a carrier's liability must be fairly obtained, just and reasonable.

2. A condition in a bill of lading which 7 L. R. A.

limits the carrier's liability is reasonable if coupled with compensating advantages to the shipper, and the latter has the alternative of getting rid of the condition by paying a reasonably higher freight rate.

3. A "fire clause" in a bill of lading exempting the carrier from liability for loss by fire is not valid, where transportation under the rules of the common law is not offered as an alternative, and no reduction of rates is made as a consideration for the exemption.

4. Mere acquiescence by shippers in the use of bills of lading containing a clause exempting from liability for fires will not show the reasonableness of the exemption, where the shippers have not had an opportunity of selection between bills of lading with and those without this clause.

5. New facts declared in an affidavit for a new trial will be insufficient if they transpired after the cause of action accrued and were in no wise connected therewith.

(Folkes, J., dissents.)

(January 30, 1890.)

APPPEAL by defendant from a judgment of the Circuit Court for Davidson County in favor of plaintiffs in an action to recover the value of certain cotton which was burned while in possession of defendant for transportation. *Affirmed.*

The facts are fully stated in the opinion.

Mr. Baxter Smith for appellant.

Messrs. Dickinson & Fraser for appellees.

Caldwell, J., delivered the opinion of the court:

On the 18th day of October, 1885, W. F. Embry, as agent of Gilbert, Parks & Co., delivered seven bales of cotton to the Louisville & Nashville Railroad Company at Columbia, Tenn., for shipment to his principals at Nashville. Before its departure, and while yet in the depot of the Company at Columbia, it was destroyed by fire. Thereafter Gilbert, Parks & Co. sued the Railroad Company for non-delivery. The action originated before a justice of the peace, from whose judgment there was an appeal to the Circuit Court at Nashville. Here the case was tried by his honor, the circuit judge, without a jury, and judgment was rendered in favor of the plaintiffs for the agreed value of the cotton, interest and costs. The Railroad Company has prosecuted an appeal in error to this court.

There is no controversy about the consignment, loss and value of the cotton; nor is there any denial that the defendant Company would be liable for the loss, under the rules of the common law. These are all conceded. But it is insisted in behalf of the Company that its common-law liability was limited by special contract, and that special contract is relied upon in bar of any recovery. The bill of lading under which the shipment was to be made is produced in evidence. It contains a fire clause which stipulates that the Company shall not be liable for loss or damage by fire. This is the special contract through which exemption from liability is sought. The plaintiffs deny the validity of that stipulation, and thus the issue for our determination is presented.

It is now too well settled to admit of debate that the common-law liability of common carriers may be limited by special contract, even to the extent of denuding them of the character of insurers, except as against their own negligence, or that of their agents and servants; and the limitation may be, and is generally, embraced in the bill of lading delivered to the shippers at the time. It is not every such special contract, however, that is effective. To be valid, it must be fairly obtained, and just and

reasonable. Under the English Railway and Canal Traffic Act of 1854 (17 and 18 Vict. chap. 81, § 7), such stipulations are called "conditions," and they can be upheld only when they "shall be adjudged . . . to be just and reasonable." The same criterion is uniformly applied in this country, and no limitations of the carrier's common-law liability, in whatever form made, will afford protection unless just and reasonable in the eyes of the law. *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 857 [21 L. ed. 627]; *Hart v. Pennsylvania R. Co.*, 112 U. S. 838 [23 L. ed. 720]; *Marr v. W. U. Teleg. Co.* 85 Tenn. (1 Pickle) 542; *Merchants Dispatch Transp. Co. v. Bloch*, 86 Tenn. (2 Pickle) 897.

Though such is the generally accepted test, the use of these words ("just and reasonable") will not always meet the requirements of investigation. What will be just and reasonable in one case may not be so in another. The justness and reasonableness of the condition or limitation must of necessity depend upon the peculiar facts and circumstances of every case, —the nature of the article to be conveyed, the hazard of the transportation, the surroundings of the parties at the time, and the mutual advantages given and received.

Referring to the burden and weight of proof, an eminent British author says: "The burden of proving the reasonableness of a condition lies upon the company. The most cogent evidence in favor of reasonableness is to show that the condition was not forced upon the customer, but that he had a fair alternative of getting rid of the condition, and yet agreed to it." *Redman, Railway Carr.* 2d ed. p. 66, citing *Lewis v. Great Western R. Co.* 47 L. J. N. S. Q. B. 181.

In further treating on the same subject, the same writer, on page 71, says: "To enable a company to rely on an alternative contract offered to the customer, it must appear that such alternative was itself reasonable. A company cannot offer the choice of two unreasonable conditions, and then rely on the one actually chosen,"—citing *Lloyd v. Waterford & L. R. Co.* 15 Ir. C. L. 87.

To the same effect as the latter quotation is the *Marr Case*, decided by this court in 1886. There the telegraph company was shown to have had four different rates of charges, with as many different degrees of liability. They were all held to be unreasonable, and the fact that the customer choosing one rate had the option of taking any one of the other three was of no avail to the company, in an action for damages. *Marr v. W. U. Teleg. Co.* 85 Tenn. (1 Pickle) 545.

The alternative must be both reasonable and bona fide. If either unreasonable or colorable only, it will be unavailing as a defense to the action against a carrier. A company standing before the public as a common carrier, and enjoying the advantages and franchises as such, must be ready to do the business of a common carrier, with the full measure of responsibility imposed by the common law; and it may at the same time offer to do the same business with a limited liability, the limitation resting upon a sufficient consideration. An offer or readiness to transport the goods of its customer with the one or the other degree of responsibility, at his

option, is as little as can be required of any common carrier. Less than this does not present a bona fide and reasonable alternative. Reduction of freight charges is the usual consideration for the diminution of responsibility on the part of the company. One of the leading principles deducible from the English cases is stated by Mr. Redman in these words: "A condition is reasonable which reduces a company's liability to a minimum, if it is coupled with compensating advantages to the customer (such as cheapness of carriage), and the latter has the alternative of getting rid of the condition by paying a reasonably higher rate." Redman, *Railway Carr.* p. 75, § 2.

This language puts the law clearly, and meets our unqualified approval. It is reproduced as the law of the two countries in a recent American work. 3 Am. & Eng. Cyclop. Law, 819.

These clauses, similar to the one before us, when based upon a sufficient consideration, have by the Supreme Court of the United States, and by this court, been held to be valid, and to protect the company from liability for loss by fire, caused otherwise than by the negligence of the company or its agents. *York Mfg. Co. v. Illinois C. R. Co.* 70 U. S. 3 Wall. 107 [18 L. ed. 170]; *Dillard v. Louisville & N. R. Co.* 2 Lea, 288.

In the latter case, the court said: "A lower rate of freight, or something equivalent, will be a sufficient consideration for the stipulation." 2 Lea, 298.

In the former it is broadly intimated that a reduction of charges will be presumed to be the consideration for such a stipulation, the language of the court being: "There is no evidence that a consideration was not given for the stipulation. The company, probably, had rates of charges proportioned to the risks they assumed from the nature of the goods carried, and the exemption of losses by fire must necessarily have affected the compensation demanded." 70 U. S. 3 Wall. 113 [18 L. ed. 172].

In speaking of the stipulation for a limited liability in a railroad ticket, the New York Court of Appeals said: "Like all contracts, to render such an one valid, it is indispensable that it have some consideration, which it would not have if the passenger paid the full fare fixed by law . . . If the service is reduced, the amount of the reward must be reduced in proportion; and, if the company is relieved from risk, it must make compensation for that relief by the reduction of fare or otherwise." *Bissell v. New York Cent. R. Co.* 25 N. Y. 442.

The performance of an act which a party is under a legal obligation to perform does not constitute a good consideration for a promise. Addison, Cont. § 4.

Hence a mere agreement by a common carrier to transport goods furnishes no consideration for a stipulation for less than common-law liability. Lawson, Carr. § 212.

Having laid down the principles of law by which this case must be decided, we proceed to give them application to the facts disclosed on the trial. In doing this it is necessary to state the material facts not already recited. I. Bailey says: "Have been freight agent at Columbia for the Louisville & Nashville Railroad Company, for about nine years. I received the cotton in 7 L. R. A.

question from W. F. Embry, agent of plaintiffs. Nothing was said about accepting the bill of lading. No objection was made to the same. The regular rate on the bill of lading was \$1 a bale. The regular tariff rate for each 100 pounds is 37 cents, and, estimating a bale of cotton at 600 pounds, would make the cost of shipping between those points (Columbia and Nashville) \$1.85 per bale. If this bill of lading had been declined (the one the cotton was shipped under), the shipper would have had to ship by the regular tariff rates, \$1.85 per bale, without the fire clause. I do not know how long this form of bill of lading has been in use, but it has been in use for several years, and was acceptable to the shipping public, and no complaint had been made of it. I do not think there was any fire clause in the one used prior to this. At the time the cotton was shipped I had no other form of bill of lading to ship cotton under. I had no authority as freight agent to make any different contract, or to ship goods under any other bill of lading than the one under which these goods were shipped. Nothing was said between Mr. Embry and myself about a special rate, but he took the bill of lading offered without objection, and shipped under this. I would not have shipped this cotton any other way. The rate of \$1 a bale has been such about six years, under the bill of lading such as this cotton was shipped under. I have no bill of lading to issue where goods are shipped under tariff rates. No cotton has ever been shipped under tariff rates. Every shipper in Columbia knows that I have the tariff rates posted up in my office. Have told W. F. Embry about the tariff rates, but do not remember when. The rate on cotton was the same before the insertion of the fire clause as it is now. If objection had been made about this bill of lading, I would have refused to receive the goods until I had authority from Mr. Champe. A schedule with the exemptions was posted up in a conspicuous place in my office at Columbia, but the name 'cotton' did not appear in it, but it would have come under our losses; and had frequently talked with Mr. Embry, plaintiff's agent, about the two rates before this shipping."

Mr. Champe testified. "I am general freight agent of the Louisville & Nashville Railroad Company at Nashville. If Mr. Bailey, our freight agent at Columbia, had informed me that Mr. Embry refused to ship his cotton under this bill of lading, in this case I would have instructed him (Mr. Bailey) to ship the said cotton by the regular rates of 37 cents per 100 pounds, which would have been done by telegraph. The only two rates we have are the rates under this bill of lading and the tariff rates. This bill of lading, as far as I know, has been in use a long number of years."

The foregoing is the whole of the testimony of these two witnesses. It is quoted at length, to show the whole case as made by the defendant. It introduced no other witness. Leonard Parks, one of the plaintiffs, stated, in substance, that he had been a shipper over the Louisville & Nashville Railroad Company many years; that the Merchants' Exchange at Nashville protested against the introduction of the fire clause in the defendant's form for bills of lading, and gave the Company notice of that protest; and that the rate from Columbia to Nashville was

not reduced when the fire clause was inserted, but remained the same as before.

Under these facts, we agree with the learned circuit judges in holding that the Company is liable for the value of the cotton. The special contract for exemption from liability for loss or damage by fire is by this record shown not to be just and reasonable. It was the primary duty of the Company to hold itself in readiness to transport goods, under the rules of the common law, with all the responsibility of a common carrier. This it did not do. Its agent was furnished with no form for bill of lading for such a shipment. More than that, he had no authority to receive the goods for shipment with such responsibility attaching to the Company. He says he had no authority to make any contract but the one he did make, and that he "would not have shipped this cotton any other way." He submitted no alternative to the plaintiffs, and had no authority from his principal to do so, and would not have done so if requested. True, he says he would have asked for permission to ship under contract without fire clause if the bill of lading with it had been refused by the customer, and Mr. Champe says he would have granted such permission. What stronger proof could there be that the Company was not offering, or ready, or was pretending, to do business, except upon the most restricted liability? Why the necessity of asking and granting permission to do a thing which the law requires it to be in constant readiness to do? This is the permission that should have been granted in the first instance. From the moment of his employment, the agent should certainly have been clothed with authority to do that which the law required him to do, and after that he could have been authorized to do that which the law permitted him to do. That he frequently talked with Embry "about the two rates" is an unimportant circumstance as we see it. If he at the same time told Embry what he tells the court,—that he was authorized to issue but the one bill of lading, and that he would ship the cotton no other way,—he would certainly not have made the case any better for the Company; and if he withheld those additional facts, they remain facts in the case nevertheless, and cannot be rejected because not disclosed to the customer.

Again, no consideration for the fire clause passed to the shipper. The responsibility of the carrier is reduced to a minimum, it is true, but there is no corresponding reduction in freight charges. There is no reciprocal concession of legal rights by carrier and shipper. The advantage is all on one side. It is distinctly shown that the rate charged under the bill of lading in this case is the same that was charged before the insertion of the fire clause, and that no reduction was ever pretended to be made on account of the introduction of such clause, and the customer's assent thereto. The agreement to carry for a price which the Company was accustomed to charge, without the fire clause, is no consideration for the diminution of liability by the insertion of such clause. It is said that it is bad faith on the part of plaintiffs to complain of this clause now, when they may have received the benefit of reduced rates in the past on account thereof. It is un-

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necessary to decide what force there might be in the suggestion, if based upon the real facts of the case. The answer to it upon this record is that no such benefit has been enjoyed by the plaintiffs. It is true one of the plaintiffs says he has been the defendant's customer for many years, both before and since the introduction of the fire clause; but it is also true, as already seen, that the price charged has been the same all the time.

It is still further suggested that the shipping public at Columbia have acquiesced in this form of bill of lading for some years without complaint. Such is the proof in the case; and this fact would go towards establishing the justness and reasonableness of the exemption claimed, if the Company had all the while been ready to carry goods with or without the fire clause, and had accordingly given its customers a fair opportunity of selecting for themselves which they would take. But acquiescence alone will not justify the limitation. The words of *Mr. Justice Bradley* in the *Lockwood Case* are pertinent at this point: "The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgie, or stand out and seek redress in the courts. His business will not admit such a course. He prefers rather to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this, or abandon his business." From defendant's own showing, our conclusion is that the stipulation relied upon is invalid, and affords no protection whatever.

The second and last assignment of error relates alone to new facts declared in an affidavit produced on the motion for a new trial. As to this, it is sufficient to say that such facts, if considered, could not possibly have changed the result, being alone with respect to matters transpiring subsequently to the shipment and loss of the cotton, and in no wise connected therewith.

Let the judgment be affirmed.

Folkes, J., dissenting:

I regret exceedingly my inability to concur with the majority of the court in the opinion just rendered. To my mind, a most dangerous and perplexing innovation is established, though clothed in the garb of harmless and well settled propositions. The objections to the opinion do not lie on the surface, but lurk in the application of those general principles to the particular facts of the case. Let us analyze the decision, and ascertain what is exactly the point adjudged. It is this: That a railroad company, dealing with a merchant who has been engaged for twenty years as a shipper over its road, issues a bill of lading for a reduced rate, containing the familiar, if not now almost universal, clause of exemption from loss by fire. The shipper has been in the habit of shipping the same character of freight, on the same character of bill of lading, for six or nine years, containing the same exemption. Nearly three years after the goods were lost by fire, without negligence on the part of the Company (so far as any proof tends to show), the shipper institutes a suit before a magistrate, in which it is stated upon

the face of the warrant that it is for a "debt due by failure to carry and deliver cotton according to contract." A judgment is rendered for the plaintiff, simply and alone because it was developed in the proof that the agent of the Railroad Company did not have on hand, at the time of shipment, any other form of bill of lading than the one used, and that no demand or request was made for any other form of bill of lading; but that, if the shipper had requested a form of bill of lading with the common-law liability of the carrier unmitigated, there would have been delay in the issuance of the same until such a time as it would have taken the agent to telegraph from Columbia, the point of shipment, to Nashville, to the office of the head of the transportation department, when a reply would have been instantly returned authorizing the agent to issue the form of bill of lading requested; in which event the freight charge would have been \$1.85 per bale, instead of \$1 per bale, the amount charged upon the bill of lading issued with the limited liability. That it is between forty and fifty miles from Columbia to Nashville, and it does not appear that there was any immediate occasion for haste in the shipment of the cotton, nor that the time taken in telegraphing for instruction would have delayed shipment beyond the period that it would necessarily have been delayed in waiting for the next regular freight train.

Such a conclusion and such a holding are not sustained by the authorities as I understand them. On the contrary, it appears to me to be in direct opposition to the principles settled in cases of the highest authority, which have been approved and announced by our own court. It is stated to be placed, by the majority of the court, upon the general principle that all contracts for the limitation of the common-law liability of carriers must be fair and reasonable,—a doctrine sound in its statement, but, as I respectfully submit, misconceived in its application to the case at bar. The reasonableness *per se* of the rule which allows a stipulation for exemption from loss by fire, not occasioned by the negligence of the carrier, is abundantly established by the overwhelming weight of authority; and in the language of this court in the case of *Dillard v. Louisville & N. R. Co.* 2 Lea, 298, "it subjects to less restraint the great interests of the commerce, upon which so much of our modern civilization rests,"—quoting in this case the language of the Supreme Court of the United States in *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 860 [21 L. ed. 627], where it is said by *Mr. Justice Bradley*: "A modification of the strict rule of responsibility, exempting the carrier from liability for accidental losses, where it can be safely done, enables the carrying interest to reduce its rates of compensation, thus proportionately relieving the transportation of produce and merchandise from some of the burden with which it is loaded." Again: "The natural presumption would be that the shipper was apprised of the contents of the receipt, and assented to its terms, and that a lower rate of freight, or something equivalent, will be a sufficient consideration for the stipulation;" and, to quote from the language of *Judge McFarland* in the case of *Ohnell v. Adams Exp. Co.* 1 Cent. L. J. 7 L. R. A.

188, "this . . . would certainly be so where the terms of the contract were in accordance with the course of business of the company, to which the shipper had assented in previous transactions."

The length to which the opinion of the majority goes makes extremely pertinent the language of this court in the case of *Dillard v. Louisville & N. R. Co.* *supra*: "Some courts, while yielding to the current of authority on the main point, have at the same time run counter to it, and involved themselves in useless refinements, by refusing to recognize what *Judge McFarland* very properly calls the 'natural presumption' arising from the acceptance by the shipper of a bill of lading embodying the stipulations, and by requiring an uncertain quantum of evidence *abundant* to establish a contract. It were better to adhere to the old law, and refuse to recognize the modern innovations, than to resort to such niceties, which must lead to harassing litigation, and render it difficult, if not impossible, for the profession to advise. It is the dictate of common sense that, when a written instrument is received in the execution of a contract, its contents are known and assented to, and *a fortiori* if there be nothing to raise a contrary presumption."

Now, I respectfully, but earnestly, submit that the opinion of the majority in this case is doing just exactly what was so earnestly reprehended in the case from which we have quoted, where the language of *Judge McFarland* in the *Ohnell Case* was adopted, as deploring the introduction of any modification requiring an "uncertain quantum of evidence, and resorting to such niceties as must lead to harassing litigation, and render it difficult, if not impossible, for the profession to advise." Heretofore, when the shipper presented to his counsel a bill of lading containing the "fire clause," further inquiry was made for the ascertainment as to whether or not there had been any negligence on the part of the Company, and, when told that there was no proof of negligence attainable, the lawyer could with certainty state that there was no liability. Under the new order of things which this opinion establishes, as I understand it, the attorney would proceed to inquire whether the shipper had been tendered or offered any other form of bill of lading, and when told that no such offer had been made he would then be told the company was liable because he, the shipper, "had not had an opportunity of exercising the option" of accepting a limited or unlimited liability bill of lading; and if the shipper should further inform his attorney that he had made no request for a different form of bill of lading, and that he had for years been shipping on identically the same form of bill of lading, he would be told that that would not prevent a recovery for the value of the freight, for the reason that in the case of *Louisville & N. R. Co. v. Gilbert* it had been decided that the railroad company would be liable unless it should, with the burden of proof upon it, affirmatively show that such opportunity had been tendered to the shipper, and declined by him; and that it would make no difference if in twenty years as a shipper no such bill of lading had been asked for, where the company had failed to provide such a form, or authorized its agent to issue

one, if the shipper had asked for it. In other words, it is not necessary to show that the shipper wanted another form of bill of lading, and it is not sufficient to show that he knowingly accepted the bill of lading containing the "fire clause;" but you must go further, and ascertain whether the agent of the Railroad Company would have issued him another form, containing the common-law liability, if he had asked for it. I very much fear that such a conclusion cannot but lead to unnecessary litigation, and great confusion and uncertainty in the administration of justice. It invites and renders necessary the performance of an idle ceremony, meaningless and deceptive, as a preliminary to the obtaining of the benefit by the common carriers of the country of the privilege that is abundantly and universally admitted to exist. The carrier must have on hand and tender a form of bill of lading which the previous dealings with the shipper has informed the carrier is not wanted. The plaintiff shows by his own testimony that he knew all the facts; that for twenty years he had been a shipper of cotton over this road. The opinion of the majority is not as full as it might be in its statement of the testimony of the plaintiff Parks, in this: that after stating that the Merchants' Exchange, in Nashville, had protested against the introduction of the "fire clause" in the defendant's form of bill of lading, and had given notice of that protest, it fails to show that this was after the loss of these goods by fire, or, at least, that the language of the witness is susceptible of this interpretation. The language of the plaintiff is as follows: "As a member of the Merchants' Exchange I know that the exchange held a meeting and protested against the insertion of this fire clause in this bill of lading and a copy of this protest was served against the Railroad Company after the loss of these goods by fire. I went to Louisville to see Mr. Knott who is the general traffic manager of this railroad. I told him that myself and other merchants of Nashville were anxious that he should make two rates for the shipment of cotton, one of which should exclude the fire clause." There being no punctuation of the above in the transcript, it is difficult to say whether the language, "after the loss of these goods by fire," applied to the time of the protest, or to the time of his going to Louisville to see Mr. Knott. But it is immaterial, for the reason that, if it applies to the time of the protest, it shows affirmatively that he had knowledge of the fire clause, and with that knowledge purposely accepted a bill of lading giving him the benefit of a reduced tariff, without calling for the common-law liability; and, if it applies to the time of his going to Louisville, of course it was incompetent, and should not have been admitted in evidence.

That the "fire clause" is not unfavorably considered, is shown by the case of *York Mfg. Co. v. Illinois C. R. Co.*, 70 U. S. 3 Wall. 107 [18 L. ed. 170]. In that case the plaintiff's positions were: *first*, that Trout & Co., agents at Memphis, who shipped the cotton and received the bill of lading, had no authority to consent to such a condition; *second*, that it did not appear that any consideration existed for such limited liability in the reduced rate of fare or other-
7 L. R. A.

wise. Let us see how this tribunal answered these questions. It said: "The first of these positions is answered by the fact that it nowhere appears that the agents disclosed their agency when contracting for the transportation of the cotton. So far as the defendant could see, they were themselves the owners. The second position is answered by the fact that there is no evidence that a consideration was not given for the stipulation. The company, probably, had rates of charges proportioned to the risks they assume from the nature of the goods carried, and the exception of losses by fire must necessarily have affected the compensation demanded. Be this as it may, the consideration expressed was sufficient to support the entire contract made."

This case has, in terms, been approved by this court in *Owens v. Adams Exp. Co.*, *supra*. If the spirit of this decision is followed, there is no trouble in reaching a fair and reasonable result in the case at bar. It would say that Embury did not disclose his principals. He confessedly knew of the fact that the Company had two rates,—one with, and one without, the "fire clause,"—for he had, in the language of the witness, "frequently talked with Embury, the plaintiff's agent, about the two rates before this shipment," and his knowledge and acceptance was the knowledge and acceptance of the plaintiff. Second, it would say that the proof shows that if dissatisfaction had been expressed with the \$1 rate, accompanied with the limited liability, the shipper could have obtained the \$1.85 rate, if he had waited for a few moments for a telegram from the agent at Nashville, and that, in the absence of proof that the necessity for the shipment of the cotton was so pressing that a delay would have been injurious, such delay would not be wrong or negligence on the part of the carrier, especially where it does not appear that there would have been any delay in the shipment; for the Company was under no obligation to send this cotton by a special lightning express, but had the right to hold it until the next regular freight train coming to Nashville. It would further say that a limitation in favor of the Company, and with a reduced rate, will not deprive the Company of its benefit, when the shipper has had the advantage of such reduced rate, simply because it appears, in a suit brought nearly three years afterwards, that the Company did not have on hand a form of common-law bill of lading. Moreover, it would have been held that, having gotten the benefit of the lower rate for the six or nine years, it was too late now to say that he was not bound because he was not offered any other rate.

The shipper is charged with knowledge of the law that authorized him to demand a common-law liability of the carrier, and his acceptance in silence of the bill of lading with the "fire clause" is a waiver of such demand of right, in the absence of fraud, where it appears that there was a difference in the freight charges for a limited and for an unlimited liability. Not having spoken when it was his duty to have done so, the law now enjoins silence, when he has for years pocketed the fruits of his silence heretofore. The limitation of the carrier's liability as an insurer against fire is not to be confused with limitations that are not favored, and

with efforts to avoid the consequences of the negligence of the carrier or his agents. When, therefore, we have to deal with a limitation against loss by fire, without fault or negligence on the part of the carrier, there is no reason why the same general principles applicable to knowledge and estoppel between individuals other than carriers should not apply. For instance, the presumption of acquiescence is made where the shipper receives a bill of lading containing this limitation without complaint; and that he is estopped to say that he was ignorant of the contents of the bill of lading, as we have already seen, is fully established in this State in *East Tennessee, V. & G. R. Co. v. Brumley*, 5 Lea, 401, and *Dillard v. Louisville & N. R. Co.* 2 Lea, 288. But suppose our predecessors had looked at the cases cited, and decided them in the spirit and on the logic of the case at bar, such presumption and estoppel would have been refused recognition. In the language of the opinion of the majority here, the inquiry there would have been, Is the limitation "fair and reasonable?" to be determined upon the facts of each case as it arises, "with the burden of proof on the carrier to show it fair and reasonable in each case." And it would have been held unfair and unreasonable to bind the shipper to a loss that, in his ignorance of the terms of the bill of lading, he had never assented to.

But we have only to turn to approved textbooks to see that this fire limitation is favored and that knowledge does estop in a contract with a common carrier, as with other people. Mr. Hutchinson, in his excellent work on Carriers, says, speaking of knowledge: "The theory upon which they all stand is that if a party, knowing his published terms, employs the carrier without objection, a contract according to those terms is implied between the employed and employer." Again, this author says: "Every man of ordinary intelligence knows that no individual or company engaged in the business of carrying to distant places now undertakes to carry his goods subject to the old common law liability of the carrier. He knows, moreover, that bills of lading are constantly given, not only as the evidence of the receipt of the goods, but as an express and direct notice that they will be carried on certain terms. Knowing this he cannot be willfully blind, and plead ignorance, when it was his duty to know; and knowing in such cases is assenting. If it was his intention to hold the carrier to his common-law liability, he should have said so, and have either declined to employ him, or sued him for his refusal, after tendering a reasonable sum for his services or risk." And he says this is in accordance with the English and American decisions, and adds: "Nor is there anything unreasonable in this." Hutch. Carr. §§ 238-240.

Now, if this be true of a shipper making his first shipment, how much more emphatic is it by way of estoppel against a shipper of twenty years with the same company, where the last six or nine years' business was upon the identical bill of lading sued on here. Does not his previous acquiescence and acceptance of this particular bill of lading, without complaint or demand, amount to a waiver of the offer or tender of another form? It would seem so. 7 L. R.A.

And if the offer or tender be waived, then it must be that the Company need not, as to such shipper, certainly, have had on hand, or been prepared to issue *instantly*, a common-law bill of lading, that the shipper's long course of dealing led the carrier to believe would not be called for. Again, at section 241 of Hutchinson on Carriers, it is said: "Accordingly, when the owner of the goods accepts a [bill of lading or receipt] he is conclusively presumed, in the absence of fraud and imposition, to have assented to all the terms and conditions."

We have at the present term held, what had been heretofore approved by this court, that an insurance company would be conclusively adjudged to have waived a written stipulation, in its policy, concerning the void character of insurance upon property on leased ground, where that fact is not written on the policy, because it would be a fraud upon the insurer to allow the insurance company to hold the premium on a policy known by it to have been void at the time of its issuance. *Home Ins. Co. v. Stone River Nat. Bank* (Tenn.) 12 S. W. Rep. 915.

Now, we are unable to see why the same principle would not preclude a party, who has for years accepted the benefit of a reduced rate of freight in consideration of a limited liability of the carrier, from defeating that stipulation by saying, after the loss, that "you did not give me an opportunity to elect which form of bill of lading I would take." The shipper, having gotten the benefit of the reduced rate, should not be heard to say the contract was void, and so known to him at the time. If the one proposition can be accepted as sound, I see no occasion for refusing to apply the same principle to this case. They both relate to insurance against fire only. It will not do to say that the public character and public duties of the carrier require that a different rule should be applied to it than would be applied in the case of the insurance company; for in the case at bar it concerns alone the benefit or advantage that the particular shipper has already derived by his silence, and gives the Company the benefit of a clause which has been repeatedly said to be reasonable.

Nor does it suffice to say that this court has held in *Marr v. Western U. Teleg. Co.* 85 Tenn. (1 Pickle) 529, that it is not necessary for a party dealing with one of these public corporations to speak. In the *Marr Case* there were four alternatives presented, all of which were held to be "unreasonable and oppressive," and the effort was to escape liability for a loss occasioned by the negligence of the telegraph company, while the exemption of the carrier from the liability of an insurer, for a sufficient consideration, is not unreasonable or unfavored; on the contrary, as we have seen and have said, adopting the language of the Supreme Court of the United States in *York Mfg. Co. v. Illinois C. R. Co.* 70 U. S. 8 Wall. 112 [18 L. ed. 171], there is no "good reason on principle why parties should not be permitted to contract for a limited responsibility. The transaction concerns them only. It involves simply rights of property, and the public can have no interest in requiring the responsibility of insurance to accompany the service of transportation in face of a special agreement for its relinquishment." But the opinion of the majority attempts to

make out a case, and seems to take it for granted that it has made out a case, where as a matter of fact there was no consideration for such limited liability, because, forsooth, it is said the rate of \$1 on the bill of lading with the "fire clause" was the same as the rate six or nine years before on the bill of lading without such "fire clause." The fact that the rate to-day on the bill of lading with the fire limitation is the same as it was years ago without such limitation is no proof that the rate of to-day is not fixed in consequence of such limited liability, even in the absence of all other proof on the subject. Before any probative effect can be given this fact or circumstance, to overcome the presumption of a consideration, you have to negative the idea and destroy the right of the carrier to change its tariff of charges from time to time, to meet competition, and other exigencies. I say, in the absence of proof (except that relied on by the majority as showing no consideration, to wit, \$1 before and \$1 after the adoption of the "fire clause") it does not follow that at the time of the issuance of the particular bill of lading sued on here there was not another and a higher rate for the full common-law liability. The consideration need not be great, because, in the language of the books, some consideration, however slight, is sufficient, and the consideration will be presumed from the manifest and absolutely necessary difference of responsibility.

But we are not left to fall back on these well-settled principles, nor to indulge in presumption; for the proof is clear and uncontradicted that at the time of the issuance of this bill of lading the rate for cotton, with the common-law liability, was \$1.85. This positive and uncontroverted proof surely cannot be overcome by a presumption predicated upon the mere fact that six or nine years before this time the Company carried the common-law liability at \$1, the same price that it now charges for the limited liability; nor can this proof be affected, one way or the other, by the fact that the Company had no printed bill of lading on hand, and had not instructed its agent in relation thereto. While, in the opinion of the majority, this fact may make the Company liable, as not giving the shipper opportunity to get something he did not ask for, and did not want, it cannot disprove the uncontradicted fact that there were two rates, one of which could be obtained *instantly* at \$1 with the limitation, and the other at \$1.85 without any limitation, obtainable by waiting until the agent could telegraph to the general freight department at Nashville. It must be noticed that there was no occasion to telegraph to Nashville to ascertain what the common-law liability rate was. This was known to the agent, and is positively testified to by him, and that it was \$1.85 per bale, and this was also known to the plaintiffs through their agent, Mr. Embry. The telegram was therefore necessary, not to ascertain the rate, but merely to get instructions as to the issuing of such a form. It does not seem that there was any more necessity for the Company to keep on hand a form of bill of lading that was never called for than there would be for a merchant to keep on hand goods for which there is no demand. Indeed it may be safe to say that the

Company would have a right to make a rule that where it was to be held liable as an insurer against loss by fire, for such combustible material as cotton, notice should be given the home office by the local agent, so that special provision might be made to protect itself by obtaining reinsurance, provided that it did not cause such delay as would incommode or injure the shipper. If the shipper wanted insurance, there were two avenues open to him to obtain it—one by paying the Company the increased rate of freight, the other, by insuring in a regular insurance company; and it is a matter of common information that insurance can be obtained from an insurance company, generally, for a smaller amount than is usually charged by the carriers for the insurance liability. Certainly it seems to me, with due deference to my learned associates that every principle of justice and fairness revolts at the idea of allowing the shipper to have insurance where he has knowingly refused to apply and pay for it, either to the transportation company or to the insurance company. To hold the transportation company now liable as an insurer is to do so upon *ex post facto* inquiry, *aliunde* the contract, and in violation of what I regard as elementary principles of law and morals.

If the opinion of the majority concerned alone the disposition of the case in hand, I would have been content with the mere announcement of my non-concurrence. But where the spirit and tendency of the decision appear to me hurtful, I deem it my duty to point out, even at the expense of weariness to myself and the bar, the dangers to which it may lead. The spirit and tendency to which I refer are to be found in the strictness with which the common law liability of the carrier is sought to be enforced, and the severe conditions imposed as necessary to obtaining the benefit of a contract for limited liability. Indeed, the difference between myself and the majority may be said to be that, in my opinion, a contract for exemption from loss by fire, not resulting from the negligence of the carrier, should be construed liberally and fairly, in accordance with the intention of the parties, in the absence of fraud or imposition, while the majority opinion applies a degree of strictness in considering such contract which, in many cases in practice, would amount to prohibition. It seems to me that every exemption or condition is, in the opinion of the majority, placed upon the same footing, and construed with equal strictness, without regard to the policy which should govern in the treatment of the sundry exemptions. This is happily illustrated by the quotation with which the majority opinion closes, as follows: "The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgie or stand out, and seek redress in the courts. His business will not admit of such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents, often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this, or abandon his business." Such language may be well enough in the case in which it was used, when

applied, as was done there, to a case where the carrier was seeking to obtain the benefit of a contract exempting it from a claim for damages for a personal injury to a passenger, occasioned by the carrier's own negligence; but the same language, when applied to a contract exemption for loss by fire, without negligence, becomes misleading, and tends, though unintentionally, to inflame the mind of the trier, whether judge or jury. The quotation I respectfully suggest is as inapplicable to the facts of the case at bar as it is to the law. To my mind the case in hand, instead of being viewed in the light of the quotation above, should have been decided in the light of the language of the same judge, in the same case, where, speaking of such exemption as is the subject of decision in the case at bar, he says: "A modification of the strict rules of responsi-

bility, exempting the carrier from liability for accidental losses, where it can be safely done, enables the carrying interest to reduce its rate of compensation, thus proportionally relieving the transportation of produce and merchandise from some of the burdens with which it is loaded;" which, as we have seen, has been approved by our own court. For the reasons stated, I am constrained to dissent from the views of the majority, both as to the conclusion reached, and the reasoning upon which such conclusion rests. This I do with great respect for my esteemed associates, whose views are the result of a careful consideration of the case. From my point of view, the judgment of the circuit court should be reversed, and judgment rendered here for the defendant.

MICHIGAN SUPREME COURT.

Jeremiah O'LEARY

v.

BOARD OF FIRE & WATER COMMISSIONERS of the City of Marquette, *App't.*

(....Mich....)

A municipal agency incorporated for the protection of the city from fire and for supplying water, and without means of raising money by taxation, is not liable to an action for injuries resulting from negligence of its servants.

(January 24, 1890.)

ERROR to the Circuit Court for Marquette County to review a judgment in favor of plaintiff in an action to recover damages for personal injuries alleged to have resulted from the negligence of defendant's servants. *Reversed.*

The case sufficiently appears in the opinion. **Mr. F. O. Clark**, for defendant, appellant:

A public corporation is not liable to an action by individuals, unless the right of action be given by statute.

White v. Charleston, 2 Hill, L. 571; *Detroit v. Blackeby*, 21 Mich. 84; *McCutchcon v. Homer*, 48 Mich. 486; *Kincaid v. Hardin Co.* 58 Iowa, 430; *Eastman v. Meredith*, 36 N. H. 284; *Dodd v. Olmstead Co.* 30 Minn. 96; *Bigelow v. Randolph*, 14 Gray, 541; *Illit v. Boston*, 123

Mass. 353; *Riddle v. Propria Locks and Canals on Merrimac River*, 7 Mass. 186; *Leont Tapp. v. Taylor*, 20 Mich. 143; *Cooley, Const. Lim.* 241-247; *Ang. & A. Corp.* 719-762; *Hamilton Co. v. Mighels*, 7 Ohio St. 109.

A township is not liable for the misfeasance or nonfeasance of one of its officers, but the remedy is against the delinquent officer himself.

Fish v. Dodge, 38 Barb. 163; *Robinson v. Chamberlain*, 84 N. Y. 389.

In order to create a right of action, against a quasi municipal corporation, as created by statute, there must be some statutory provisions for such liability or there is no right of action.

Hedges v. Madison Co. 6 Ill. 567; *Ang. & A. Corp.* §§ 24, 629; *Shearm. & Redf. Neg.* §§ 118, 139; *Morey v. Newfane*, 8 Barb. 652; *St. Johns v. McFarlan*, 38 Mich. 72; *Dargan v. Mobile*, 31 Ala. 469; *Forsyth v. Atlanta*, 45 Ga. 152; *Buttrick v. Lovell*, 1 Allen, 172; *Walcott v. Thompson*, Id. 101; *Hafford v. New Bedford*, 16 Gray, 297; *Fisher v. Boston*, 101 Mass. 87; *Grube v. St. Paul*, 34 Minn. 402; *Voorith v. Hoboken*, 6 Cent. Rep. 338, 49 N. J. L. 285; *Hines v. Charlotte (Mich.)* 1 L. R. A. 844.

Messrs. Mapes & Kinkade for plaintiff, appellee.

Campbell, J., delivered the opinion of the court:

Plaintiff was injured by falling into a ditch

NOTE.—Public agencies not liable for negligence of their servants.

A personal injury caused by the negligence of an agent or servant of a public charitable corporation does not give a right of action for damages against a corporation. *Fire Ins. Patrol v. Boyd*, 1 L. R. A. 417, and *note*, 120 Pa. 324.

So where the corporation was a public charitable institution (*McDonald v. Mass. General Hospital*, 120 Mass. 432); or was a mere agent to perform a duty for the benefit of the public under the authority of law. *Benton v. Boston City Hospital*, 140 Mass. 13.

But a corporation the membership in which is 7 L. R. A.

limited to officers and agents of fire insurance companies, being a private, and not a public, corporation, nor a public charity, is liable for the negligent act of its servants notwithstanding the fact that the saving of life and property is referred to in its charter in general terms. See *Newcomb v. Boston Prot. Dept. (Mass.)* 6 L. R. A. 778.

So a cemetery corporation is not a public charity and is liable to the owner of a grave for the negligent burial of a stranger therein. *Donnelly v. Boston Catholic Cem. Assn.* 5 New Eng. Rep. 741, 146 Mass. 163; *Old South Society v. Crocker*, 119 Mass. 23; *Evergreen Cemetery Assn. v. Beecher*, 3 New Eng. Rep. 308, 53 Conn. 551; *Re Deansville Cemetery Assn.* 66 N. Y. 590.

jug by the servants of defendant for laying water-pipes. He recovered damages to an extent not held by the trial judge to be beyond the merits of the case; and, if defendant is liable at all, there seems to be nothing in the record to show error in holding the judgment regular and proper in law, although, as not uncommon in such cases, the jury gave the plaintiff the benefit of all the disputed facts. But it is claimed that under the Statutes regulating its powers, and those of the City of Marquette, the defendant cannot be held legally responsible for the negligence of its servants in an action in tort for damages. That the individual wrong-doer, if there was one, by whose misconduct plaintiff was hurt, is responsible, is not disputed. Whether the corporation in charge of the public ways is liable is not before us. The sole question is whether this corporation, which is created to subserve certain important municipal purposes, has been made responsible by law for such accidents, when, if not incorporated, it is not shown that it would be, is the only matter for our consideration; and the differences existing under different charters are such as to leave the matter to be decided by its own facts. The defendant was incorporated by "An Act to Create a Board of Water Commissioners in the Village of Marquette, and to Define its Powers and Duties," approved March 2, 1869. The subsequent incorporation of the city merely made the necessary changes to meet the change in government. Although not in terms declared to be a corporation, the powers given them are in such language as to make them such. They are liable, as well as competent, to be impleaded, to make contracts, and hold property, to have a seal and make by-laws, and generally "to do all legal acts which may be necessary and proper to carry out the effect, intent and object of this Act." As all of their powers are confined legally to the scope of the Statute, it is necessary to consider them. The members derive their appointment from the corporate body of the city, and not from the people. By section 6 they are required "to examine and consider all matters relative to supplying said [City] of Marquette with a sufficient quantity of pure and wholesome water for domestic use, also to provide suitable and efficient means for the extinguishment of fires." This is the general and sole purpose of all their incidental powers. By subsequent sections they are empowered, under approval of the electors by vote on that question, to issue bonds to a limited extent, and, if unable to pay, to renew them. They are authorized to report to the city council, which is empowered, but not expressly required, to raise by tax any sums beyond the revenue of the Board necessary to pay principal or interest on the bonds, or "any deficiency in operating expenses." They are authorized, "after the necessary means have been procured, as herein provided," to purchase necessary lands and materials, and construct reservoirs, buildings, machinery, and fixtures to supply water, and to provide means for fire protection, and are given, for the purposes of the "fire department," the powers which were before possessed by the village. They are empowered to lay pipes for water, and to

build hydrants, and to employ such persons as they deem necessary to perform their duties. They have power to levy water rates on consumers on an equitable basis. They can procure lands by condemnation, where needed, and, on payment of the damages into the city treasury, may get the title. All materials contracted for or procured by them are exempt from execution.

It may be important, in this connection, to consider the legal position of this Board in its functions. While it is a local corporation, created to serve municipal purposes, it is in no sense a municipal corporation, within the legal meaning of that term. It has been settled in this State that there can be no municipal corporation that is not the direct representative of the people of its locality. *Atty. Gen. v. Detroit*, 58 Mich. 218; *Allor v. Wayne Co. Auditors*, 43 Mich. 76; *People v. Hurlbut*, 24 Mich. 44; *Metropolitan Police Board v. Wayne Co. Auditors*, 68 Mich. 576, 18 West. Rep. 487; *People v. Detroit*, 28 Mich. 233; *People v. Detroit*, 29 Mich. 108; *Buller v. Detroit*, 48 Mich. 552.

In several of these as in other cases the doctrine has been recognized that the establishment of corporations to act as municipal boards or agencies did not give them any governmental municipal authority; and it is difficult to see how the incorporation or non-incorporation of the same board can change its character in the performance of public duties. The furnishing of water and the establishment of a fire department are among the almost universal functions of cities; and the incorporation of water and fire boards appointed by the city is only a convenient way of removing that business from the constant interference of the ordinary city authorities, with such safeguards as are deemed best for that purpose. It was held in *Detroit v. Blackeby*, 21 Mich. 84, that cities and municipalities are not usually responsible in damages for the neglect of persons in public office, unless made so by statute; and it has been held in numerous cases since that the statute liability cannot be enlarged. *Detroit v. Putnam*, 45 Mich. 263; *McKellar v. Detroit*, 57 Mich. 158; *McArthur v. Saginaw*, 58 Mich. 357; *Williams v. Grand Rapids*, 59 Mich. 51; *Keyes v. Morcellus*, 50 Mich. 439.

On the other hand, it was held in *Detroit v. Corey*, 9 Mich. 165, that where a city is engaged in making a work which is its private property as a municipality, and not a mere public easement, and done under city employment or contract, it is responsible for injuries caused by neglect in its process of construction, as it is for any such action as directly injures private property. *Pennoyer v. Saginaw*, 8 Mich. 534; *Ashley v. Port Huron*, 85 Mich. 296; *Defer v. Detroit*, 67 Mich. 346, 11 West. Rep. 530.

But it is not usually liable in other cases. If this defendant was the representative directly of the people of Marquette to govern the city, with power to tax the people to carry out its plans, and held the property in its charge by proprietorship for its own purposes, it would seem to come within the *Corey Case*. But a city represents the people for all the strict purposes of local government, and has power to raise its own revenue. The Legislature, in re-

quiring towns, cities and villages, to answer in damages for neglect to keep roads in repair, at the same time found it necessary to remove one of the recognized difficulties arising from lack of funds, by enabling them to provide by taxation for all such purposes. The purposes for which the present municipal agency was created are entirely for the protection of the city from fire, and for promoting its health, by a supply of good water. The defendant is only enabled to obtain and hold such property as will be instrumental to that end. Every seizure of such property, if allowed, would be a diminution of the power of defendant to perform its public duties in regard to public health and safety. It not only has no taxing power, but the city has no power to give it any taxes, except such as will enable it to pay its bonds, and "meet any deficiency in operating expenses." Its property is not subject to execution. It cannot be true that such an agency can be officially liable to suits for liabilities, where it has no legal means of raising funds for payment. As already suggested, unincorporated boards are not so liable; and there is no obvious reason why the mere fact

of incorporation, with no change of powers, can change their liabilities.

We cannot consider, on this record, any other question but the liability of this Board. We know of no other instance in which a public board can be subjected to suit without means of raising money from the taxpayers. It is for the Legislature to determine how far, if at all, a body whose negligence, if it is so called, is imputed, and in no sense actual, shall be made subject to suit for the misconduct of its employés. There are many cases where such liability does not exist, except against the immediate individual wrong-doer. The person injured is not harmed any more where there are several persons liable than where there is only one. Imputed negligence is purely a question of public policy, and subject to legislative regulation. No one can be bound by this record, except the immediate parties to it, and it would be improper to go beyond it.

The judgment should be reversed, with costs, and without a new trial.

Champlin, Ch. J., and Morse and Long, JJ., concurred; Grant, J., did not sit.

LOUISIANA SUPREME COURT.

William MYHAN and Wife, *Appls.*,

v.

LOUISIANA ELECTRIC LIGHT & POWER CO.

(....La. Ann.....)

- *1. **A master who carries on an imminently dangerous undertaking, such as the generation and distribution of electricity, is bound to know the character and extent of the danger, and to notify the same to the servant specially and unequivocally, so as to be clearly understood by him.**
2. **Absence of actual knowledge is no exculpation.** Constructive or obligatory knowledge supplies it. Such knowledge is presumed, *juris* and *de jure*, to exist.
3. **The servant is not required to know**

*Head notes by BERMUDEZ, Ch. J.

latent, but only patent, defects. Actual knowledge must be established by the master, on whom rests the burden of proof.

4. **The servant has a right to assume superior knowledge in his employer,** to rely on his prudence and judgment, and to believe that he will not unnecessarily jeopard his person and life by avoidable risk.
5. **Verdict quashed, judgment reversed, and judgment rendered for plaintiffs for \$2,000.**

(December 2, 1890.)

APPEAL by plaintiffs from a judgment of the Civil District Court for the Parish of Orleans in favor of defendant in an action to recover damages for personal injuries resulting in death, and alleged to have been caused by defendant's negligence. *Reversed.*

NOTE.—Master not to expose servant to extraordinary risks.

It is the duty of the master, so far as he can, by the use of extraordinary care, to avoid exposing his servants to extraordinary risks, but he is not bound to guarantee them against such risks. *Southwest Virginia Imp. Co. v. Andrew*, 13 Va. L. J. 64, 17 Wash. L. Rep. 569; *Tissue v. Baltimore & O. R. Co.* 112 Pa. 91, 2 Cent. Rep. 596.

He must use reasonable diligence in seeing that the place where the service is to be performed is safe for that purpose, and to guard against the risk of accident to his employés. *Bennett v. Syndicate Ins. Co.* 30 Minn. 254; *Foster v. Pusey* (Del.) 13 Cent. Rep. 47; *Hungerford v. Chicago, M. & St. P. R. Co.* (Minn.) 43 N. W. Rep. 324.

Dangerous occupations demand correspondingly greater care on the part of persons engaged in them; but if one so engaged be injured by the neglect of the master, not freed from liability therefor by some contractual relation, such master cannot avoid such responsibility because such injured person was knowingly engaged in a dangerous em-

ployment. *Louisville, N. O. & T. R. Co. v. Conroy*, 63 Miss. 562.

The rule that where the dangers of employment are clearly known and open to observation as to both master and servant the former is not liable does not apply where a servant known to be inexperienced is set to work, without being cautioned, with machinery known to the master to be unusually dangerous. *Louisville, N. A. & C. R. Co. v. Frawley*, 7 West. Rep. 44, 110 Ind. 18.

It is the duty of the master who sets the servant to work in a place of danger, to give him such notice and instruction as is reasonably required by reason of the youth or inexperience of the servant. This duty is not confined to cases where the servant is a "man of manifest imbecility." *Atkins v. Merrick Thread Co.* 3 New Eng. Rep. 39, 142 Mass. 431.

It is the duty of the employer to inform the employé of increased danger in the change of machinery, unless the changes and increased danger are so apparent that he ought to take notice. *Hawkins v. Johnson*, 2 West. Rep. 290, 105 Ind. 29; *Brazil Block Coal Co. v. Gaffney*, 4 L. R. A. 860, 119 Ind. 455.

The facts are fully stated in the opinion.

Mr. George L. Bright, for appellants:

Where the injury is caused partly by the negligence of a fellow servant, and partly by the failure of the company to provide proper and suitable apparatus, the negligence of the co-servant will not exonerate the company from the consequences of its own default.

Towns v. Vicksburg, S. & P. R. Co. 37 La. Ann. 682; *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700 (27 L. ed. 266); *Ellis v. New York, L. E. & W. R. Co.* 95 N. Y. 546. See also *Sullivan v. Vicksburg, S. & P. R. Co.* 39 La. Ann. 800; *Moses v. Louisville, N. O. & T. R. Co.* Id. 650; *Hanson v. Mansfield R. & Transp. Co.* 38 La. Ann. 112; *Ketchum v. Texas & P. R. Co.* Id. 778; *Faren v. Sellers*, 39 La. Ann. 1020.

The caution required is according to the maturity and capacity of the child, a matter to be determined in each case by the circumstances of that case.

Washington & G. R. Co. v. Gladmon, 82 U. S. 15 Wall. 401 (21 L. ed. 114); *Sioux City & Pac. R. Co. v. Stout*, 84 U. S. 17 Wall. 657 (21 L. ed. 745).

If the defendant is guilty of gross negligence, he cannot set up a trifling negligence or inadvertence of the plaintiff as a defense.

Field, Damages, § 168, pp. 159, 168; *Wharton, Neg.* §§ 300, 301.

An employé has a right to rely upon the care and superior knowledge and judgment of his employer.

Wood, Mast. and S. 681, 788, 763; 2 *Wharton, Neg.* p. 975, § 215; *Ellis v. New York, L. E. & W. R. Co.* 95 N. Y. 546; *Faren v. Sellers*, 39 La. Ann. 1020; 2 *Thompson, Neg.* p. 975.

As to the proper amount of damages, see:

Choppin v. New Orleans & C. R. Co. 17 La. Ann. 19; *Summers v. Crescent City R. Co.* 84 La. Ann. 139; *Vredenburg v. Behan*, 83 La. Ann. 627; *Ketchum v. Texas & P. R. Co.* 38 La. Ann. 777; *Louisville, N. O. & T. R. Co. v. Thompson*, 64 Miss. 584; *Wardle v. New Orleans R. Co.* 35 La. Ann. 202; *Peniston v. Chicago, St. L. & N. O. R. Co.* 34 La. Ann. 778; *Washington & G. R. Co. v. Gladmon*, 82 U. S. 15 Wall. 401 (21 L. ed. 114); *Houston v. Vicksburg, S. & Pac. R. Co.* 39 La. Ann. 799; *Sioux City & Pac. R. Co. v. Stout*, 84 U. S. 17 Wall. 657 (21 L. ed. 745).

It is negligence in a mining company to fail to inform its employé of any danger from an unexploded blast in the vicinity of which such employé is working, of which the company or its foreman knows, or by the use of reasonable diligence ought to know. *Kelley v. Cable Co.* 7 Mont. 70.

In such case the employé has a right to presume that his employer has done his duty in reference to the ascertainment of any danger from such blast. *Ibid.*

An employé who contracts for the performance of hazardous duties assumes such risks as are incident to their discharge from causes open and obvious, the dangerous character of which he has opportunity to ascertain. *Southwest Virginia Imp. Co. v. Andrew*, 13 Va. L. J. 684, 17 Wash. L. Rep. 599.

He does not assume any risk incident to the use of defective appliances or machinery, of which he is ignorant. *Carpenter v. Mexican Nat. R. Co.* 39 Fed. Rep. 315.

The master is bound to see that the servant has 7 L. R. A.

Messrs. Farrar, Jonas & Kruttschnitt for appellees.

Bermudez, Ch. J., delivered the opinion of the court:

This is an action in damages, brought by a father and mother, under the provisions of article 2815 (2294), Rev. Civil Code, as amended in 1884 p. 94, No. 71. They aver, substantially, that their minor son, Edward, aged about eighteen years, while in the employ of the defendant Company, was, on the 8th of August, 1888, killed by the gross negligence and fault of the latter. The amount claimed is \$25,000. The defense is a general denial, and contributory negligence. The case was tried by a jury, who rendered a verdict in favor of defendant Company. From the judgment thereon against them the plaintiffs appeal.

The charge made against the defendant is that the accident occurred by its gross negligence and fault, which consisted in using wires which were not perfectly insulated, which formed a network on the floor, whereas they should have gone direct from the dynamo to the ceiling, and should have been placed beyond the reach of the employés. In exoneration, the Company charges, counter, that the young man, instead of approaching the dynamo No. 35 in the reasonable and proper manner required by the circumstances, did so, deliberately, from the front, and deliberately straddled the two current-bearing wires leading from it, one to the ceiling and one to dynamo 50, which was coupled with dynamos 35 and 36, into a series of three; that, by the movement thus occasioned, one of the wires touched the interior of the boy's thigh, and the other one the exterior of his buttock, thus making a circuit through his body, the shock of which threw him on the dynamo, and thence on the floor, where he lay upon these wires, breaking the circuit in his fall, and receiving the full force of it, which produced instant death.

The stubborn facts of the case are that Edward Myhan, a young man of about eighteen years, was in the employ of the Company, on the 8th of August, 1888, as night-oller, in the dynamo-room of their plant, in this city; that during the night of that day, while in the discharge of his duties as oiler, pressing tallow down in the box of a dynamo, he came in con-

knowledge of that fact. *McDonald v. Chicago, St. P. M. & O. R. Co.* (Minn.) 43 N. W. Rep. 380.

Such employé is entitled to recover of the company, which knew of or could have discovered their condition by the exercise of reasonable diligence. *Carpenter v. Mexican Nat. R. Co.* *supra*.

A master having charge of the work himself is guilty of negligence if defective appliances are furnished, or the structure upon which the servant is required to work is built in an unsafe manner. *Knapari v. Marsh*, 74 Wis. 562.

The servant is not necessarily guilty of contributory negligence because he works in the vicinity of dangerous machinery, knowing its condition, the measure of the duty of the two in that regard not being the same. *Wuotilla v. Duluth Lumber Co.* 37 Minn. 153.

So it is negligence on the part of a railroad company to allow its employé to pass over a defective bridge, known to the corporation and not known to the servant. *Nason v. West*, 2 New Eng. Rep. 74, 73 Me. 263.

tact with one or more wires, on or near the floor; and that he was instantly killed. There were only two persons present when the accident occurred,—the electrician in charge of the dynamo-room, and a fellow dynamo oiler.

The former (Crowley) says that from January, 1886, to August 14, 1888, he was employed by the defendant corporation as chief dynamo-man in their large plant in New Orleans. There were about 60 dynamos in the establishment, arranged on the floor in series of three, each three connected to the plug-board. He knew Edward Myhan, and had known him for nineteen months previous to his death, which occurred on August 8, 1888, at about 11 o'clock in the night, in the arc-light dynamo department of the defendant corporation. He was in the act of lubricating the dynamo box with tallow. Owing to the arrangement of the wires on the floor, he had to stand astride the wires in order to get at the box. While in this position, one of his legs came in contact with a wire, and he received the full force of the electric current. At that time the witness was about twenty feet away. His attention was attracted by a dull thud and a flash. On turning around, he saw Myhan on the floor. He had broken the circuit in his fall. The witness pulled one of the wires from under his body; raised him in his arms; sent for the superintendent, who at once came down. Myhan gave one or two gasps thereafter, and then expired.

The witness further states: Edward Myhan was killed by the fault of the Company defendant. The fault was in the arrangement of the dynamo wires. Part of the dynamos on the opposite side were properly arranged. Each dynamo was connected with the plug-board by two wires running from the dynamo to the ceiling direct. On the other side, where Myhan was killed, three dynamos were connected to the plug-board by two wires; part of these wires running along the floor of the building, and part of them along the ceiling. A proper arrangement would have been to connect each dynamo by two wires direct to the plug-board, and all the wires passing direct from the dynamos, to and along the ceiling, to the plug-board. The arrangement of the wires on the floor was the cause of the death of Edward Myhan; for, had they been connected from the dynamo to the ceiling, there would have been no danger in standing where Edward Myhan received the shock which caused his death. The Company, in the judgment of the witness, was negligent and careless in the arrangement of part of its wires on the floor. He says that he frequently told the manager of the Company, and also the superintendent, who were in charge of the plant, at different times during his services for the Company, that there was great danger in leaving the wires on the floor and unprotected. No notice, says he, was ever taken of the warning, except they would remark they would attend to it by and by, or when they got a new superintendent, or offered some excuse of the kind, until the day after Edward Myhan was killed, when the superintendent and the general manager told him to get carpenters and have nail poles put on the dynamo frames, to attach the knobs, known as "insu-

lators," to the poles, and raise the wires from the floor, and run them on the insulators, which he did.

Another witness (Sittig) a fellow servant of Myhan, who was also present at the sad occurrence, was heard. He was in the employ of the Company when he testified, and had been previously, and was in such employ when Myhan was killed. Myhan walked to the machine, straddled the wire, and put his hand on the cup; and, as he did so, one wire rested a little above his knee, on the left leg, and the other touched him on the right leg, on the inside, and he put both hands on the cup, and he fell with his back on the machine. Crowley ran him (witness) away, and told him he would get killed. He was walking to Myhan when he was killed. Saw him drop. He had his hand on the tallow cup, shoving down the tallow. He fell on the dynamo with his back. There were two wires attached to the dynamo, leading to another dynamo, near the end. There were three dynamos connected by wires, two leading to each dynamo. The wires were on the floor. Nearly all the dynamos were in this way,—three to the circuit. Wires were on the floor, where the men had to walk. The morning after the killing the witness went home, and when he returned, in the afternoon (6 P. M.), he found that some of the wires had been raised, with poles, overhead.

Two other witnesses (Burns and Bogel) testify in corroboration, except as to the circumstances of the accident. They establish the notices to the manager and superintendent; the dangerous character of the wires; the neglect, after notice, to remove them. The change of the wires after the accident is shown by another witness, Wilson.

An electrician (Derbin) employed in defendant's plant across the river says that the wires there are not laid on the floor, but run to the ceiling. Another electrician (Krapp), of the Edison Company, who had charge of the Edison station in the day-time, as dynamo-man, says that he is an electrician; has been in the business some four or five years. He has visited the dynamo-room in question. Some wires were placed overhead, and others, coming down, connecting one machine, partly laid on the floor and partly brought up again and brought back. There is no doubt the safer way is to lay the wires from the ceiling, as is usual. He would not run them on the floor, but on the ceiling. It is practicable to insulate wires. By passing rubber tubes over them, contact with them will not create a current. Commercial insulated wire will not do. He would not straddle wires; not in that situation.

There is other testimony in the record, to show the age, habits, qualities of Edward Myhan; his earnings; his devotion to his parents; their circumstances, and need of his assistance; the condition of his body after the accident; and also testimony to show that the notices testified to were not given.

We have been at some pains to state the facts as sworn to by the witnesses, although this was not strictly necessary. From the proof in the record, it more clearly appears that the young man was in the discharge of his functions as an employé of the Company when he came in contact with a charged wire, in consequence of

which he was instantly killed. It is therefore undeniable that the wire or wires which he touched, or which touched him, were dangerous. Had they not been dangerous, they would not have killed him. He might have received a shock only, even becoming unconscious; but he would not have died from contact therewith. The Company's representatives had been warned several times of the dangerous character and condition of the wires on the floor,—of the property, at least, if not the necessity, of running them up to the ceiling; but the warnings remained unheeded. The representatives of the Company, to whom it is said that the warnings were given, denied that they ever were; but this denial is of a weak character. The affirmative testimony, corroborated as it is, outweighs the negative, and justifies the inference that the notices given were unheeded, because they were forgotten. At any rate, it was the duty of the defendant Company to have known of the dangerous character and condition of the wires. The knowledge they ought to have had, the law presumes, *juris et de jure*, they had. Even had the Company's representatives sworn that they did not know of the same, such ignorance on their part would not have exculpated them. A superior is presumed to know, and in law knows, that which it is his duty to know, namely, whatever may endanger the person and life of his employé in the discharge of his duties.

In such cases the superior is bound specially to warn the employé of the nature of the danger, and will not be excused, in case of injury, unless he does prove that the employé well knew of the danger, and, notwithstanding, exposed himself willingly and deliberately to it. In this case there is no evidence showing that the Company, or any of its officers, ever notified Myhan of the dangerous character of the wires in question, about which he had to move, or that he knew of the same. The burden of positive proof was on the defendant. The great presumption, not to say the certain proof, is that he was totally unaware of the same; for it cannot for one instant be reasonably supposed that, had he known that by coming in contact with the wires they would have stricken him down dead, he would have done so, thereby committing suicide. It is manifest that, had the wires been laid as is usually done, or even been properly insulated, coming in contact with them could not have, as it did, produced death.

The testimony of the electrician in charge of the dynamo-room at the time the accident took place, and who was no longer in the employ of the Company when he testified, is clear that Myhan had to stand astride the wires to get at the box; but this seems to be denied by the Company, who says that Myhan could and ought to have got to them in another, which was the proper, way. Its theory on the subject is purely hypothetical. It in no manner accords with the established facts, and the great presumptions arising from them. Even if it were otherwise, the most material, the staring, fact remains, that the wires were dangerous; that the Company knew them to be such; that it did not specially warn Myhan, and did not show that he knew that they were of that character. The Company admitted their perilous

nature, not only by laying one in the very room, and in their plant across the river, in the manner in which they ought to have been placed, but also by having the wires put in the proper condition immediately after the accident.

Based on sound reason and justice, the law, as expounded by jurisprudence, is clear that it is not contributory negligence to engage in a dangerous occupation (Beach, Contrib. Neg. 870; Wood, Mast. and S. 763); that the risk assumed by the servants is the ordinary hazard, incident to the employment, and this is synonymous with unavoidable accident (Wood, Mast. and S. 738); that, unless the act is necessarily and inevitably dangerous, no negligence can be imputed (Beach, Contrib. Neg. 870; Wood, Mast. and S. 763); that the servant has a right to rely on the care and trust, the superior knowledge, information and judgment of the employer, and to act upon the presumption that the latter would not expose him to unnecessary risk, and has taken all necessary precautions (Wood, Mast. and S. 681, 738, 739, 749, 751, 763; 2 Thompson, Neg. 975); that an employé is not bound to inquire as to latent, but only patent, defects; that he has the right to presume that this inquiry has been made by the employer upon whom the duty devolves, and, although the servant may know of the defects, this will not defeat his claim, unless it is shown that he knew that the defects are dangerous (Whart. Neg. § 214; Wood, Mast. and S. 736-739); that the master is liable for subjecting the servant, through negligence, to greater risks than those which fairly belong to the employment, and the servant need only, in order to recover, to raise a reasonable presumption of negligence or fault on defendant's part. Wood, Mast. and S. 777; *Faren v. Sellers*, 39 La. Ann. 1020.

Considering the facts and the law, we are driven to the conclusion that the Company is responsible.

The other question to be considered is the quantum of damages to be allowed. This is not an easy task, in the absence of any rule or precedent by which to be governed. The testimony shows that the plaintiffs move in the humbler walks of life; that the husband is a policeman, on a salary of \$50 per month; that he has five children, and provides for three of them, and for his wife; that Myhan was at the time of his death between eighteen and nineteen years of age, with a bright prospect of existence before him; that he was then earning \$25 per month, which, as a dutiful son, he employed to minister unto the wants of his father's family. Of his presence among them, and of that assistance, they are forever deprived. The probability is that, as he was a robust young man, attentive to his duties, and kind to his parents, he would have advanced in life, and bettered his and their condition. In the course of years, he would have accumulated earnings to some reasonable extent, due regard being had to his personal wants and necessities. It is for the deprivation of his presence and support that his father and mother are entitled, under the provisions of the law, to relief. While we consider the claim which they have set up for indemnity at \$25,000 is excessive, and admit that it is almost impossible, systematically, to figure out by items what amount.

may prove to them an adequate relief, we think, under a somewhat instinctive appreciation, considering that, as it is a probability that in the course of time the circumstances of Edward Myhan might have changed, had he lived, an allowance of \$2,000 would not be unreasonable, and would relieve his parents awhile, to some extent, from the immediate consequences attending the severe injury inflicted on them.

It is therefore ordered and decreed that the

verdict of the jury herein and the judgment of court thereon be annulled and set aside; and it is now ordered and adjudged that the plaintiffs, William Myhan and Catherine Crow, his wife, receive from the defendant, the Louisiana Electric Light & Power Company, the sum of \$2,000, with legal interest thereon per annum from the rendition of judgment till paid, and all costs of suit.

IOWA SUPREME COURT.

L. L. PORTER

v.

J. W. POWELL, *Appt.*

(....Iowa....)

1. It is the legal, as well as the moral, duty of parents to furnish necessary support to their children during minority, and, although a parent cannot be charged for necessities furnished by a stranger for his minor child, except upon an express or implied promise to pay for the same, such promise may be inferred on the grounds of the legal duty imposed.
2. A partial emancipation of a daughter fourteen years of age by permitting her for three years thereafter to reside thirty miles away, controlling and using her own wages without furnishing her with any money or means of support, will not exempt the father from liability for necessary services of a physician employed by her in sickness, where it does not appear that he intended to waive the right to exercise parental authority over her.

(Beck, J., *dissenta.*)

(January 29, 1890.)

APPPEAL by defendant from a judgment of the District Court for Dallas County in

favor of plaintiff in an action to recover compensation for professional medical services rendered to defendant's minor daughter. *Affirmed.*

The court below found that plaintiff was entitled to recover from defendant for the services sued for, and rendered judgment in his favor, but certified the following question to this court for its opinion:

"Is a father legally liable to a physician [for the] latter's services in professionally treating the minor daughter of said father dangerously attacked with typhoid fever, who at the date of said treatment was seventeen years of age and was then and had been residing away from her father's house for three years prior to the rendition of said services, earning and controlling her own wages, and providing herself with clothing, at a place thirty miles distant from her father's place of residence, the father not furnishing or agreeing with his daughter to furnish her with any money or means of support but consenting to her absence from home; the said professional services being rendered at the request of the said minor daughter,—but were rendered and furnished without the procurement, knowledge or consent of defendant, and without knowledge of the sickness until

NOTE.—Obligation of parent to support infant child.

A father is bound to support his minor child if he be of ability, even though the child has property of his own. *Braden v. Mercer*, 5 West. Rep. 195, 44 Ohio St. 339; *Wood's Estate*, 13 Phila. 391; *Buckley v. Howard*, 35 Tex. 555; *McKnight v. Walsh*, 23 N. J. Eq. 136; *Stevens v. Stevens*, 23 N. J. Eq. 236; *Hines v. Mullins*, 25 Ga. 696; *Addison v. Bowie*, 2 Bland. Ch. 606; *Tompkins v. Tompkins*, 18 N. J. Eq. 393; *Myers v. Myers*, 2 McCord. Ch. 214; *Stovall v. Johnson*, 17 Ala. 14; *Thompson v. Dorsey*, 4 Md. Ch. 149; *Hillsborough v. Deering*, 4 N. H. 86; *Litchfield v. Londonderry*, 30 N. H. 247; *Cromwell v. Benjamin*, 41 Barb. 558; but compare *Re Marx*, 5 Abb. N. C. 224; *Holtzman v. Castleman*, 2 MoArth. 555; *Trimble v. Dodd*, 2 Tenn. Ch. 500.

If the father is not able to support them he will be allowed a reasonable compensation out of their estate for their support. *Dawes v. Howard*, 4 Mass. 97; *Newport v. Cook*, 2 Ashm. 382; *Dupont v. Johnson*, 1 Bailey, Eq. 279; *Godard v. Wagner*, 2 Strobb. Eq. 1.

It is only under peculiar circumstances that he will be allowed to charge them for their maintenance and education. *Tanner v. Skinner*, 11 Bush, 120; *Cowle v. Cowle*, 8 Ill. 435.

To obtain such allowance, he must show that he is without means (*Haas v. Roehrscheid*, 6 Ind. 67), and he will be allowed for their past maintenance. *Presley v. Davis*, 7 Rich. Eq. 105.

He is not necessarily absolved from this obligation. **L. R. A.**

tion because the child has voluntarily left home. *People v. Strickland*, 13 Abb. N. C. 473; *Gotts v. Clark*, 78 Ill. 223; compare, however, *Angel v. McLellan*, 16 Mass. 28.

An express or implied promise by the father is necessary to bind him for necessities furnished his infant child by a stranger. *Carney v. Barrett*, 4 Or. 171; *McMillen v. Lee*, 78 Ill. 448; *Freeman v. Robinson*, 38 N. J. L. 383; *Kelley v. Davis*, 49 N. H. 187.

The mother is not liable for their support and education during the life-time of the father. *Glad- ding v. Follett*, 95 N. Y. 652, 2 Dem. 58.

But if she has supported them out of her own estate she cannot claim reimbursement out of their estate without showing a contract with their guardian to pay therefor. *McDaid's Estate*, 14 Phila. 258.

A widow is bound to support them, if of sufficient ability. *Deidham v. Natick*, 16 Mass. 140; *Nightingale v. Withington*, 15 Mass. 272.

But she is not compellable, if the child has an estate sufficient for its own support. *Dawes v. Howard*, 4 Mass. 97; *Whipple v. Dow*, 2 Mass. 415.

By the common law, in Massachusetts the father is bound to support his minor children, even if he de erts them. *Gleason v. Boston*, 8 New Eng. Rep. 772, 144 Mass. 25; *Dennis v. Clark*, 2 Cush. 347.

A father must support a minor child, notwithstanding a decree divorcing his wife a *vinculo* for his misconduct allowed her alimony, but with no

demand was made for the payment of said services by plaintiff, the attendance of plaintiff being from day to day for a period of twenty days."

Messrs. W. W. Cardell and R. S. Barr, for appellant:

Parents are not obliged to support their minor children, independent of statute; for the statutes are only indemnifying in their nature in favor of municipalities, and do not extend to individuals.

Farmington v. Jones, 86 N. H. 271.

With this exception, the obligation is only a moral one, and, unless it is founded upon a prior legal liability, it has no binding force from a legal point of view.

Kelley v. Davis, 49 N. H. 187; *Raymond v. Loyl*, 10 Barb. 483; *Gordon v. Potter*, 17 Vt. 348.

While minor children live with and are supported by their parents, or one standing in loco parentis, their services belong to those holding the parental relation.

Monaghan v. School District, 38 Wis. 100; *Coffin v. Shaw*, 3 Ware, 82; *Benson v. Remington*, 2 Mass. 118; *Angel v. McLellan*, 16 Mass. 28.

Support and services are dependent upon each other.

The Etna, 1 Ware, 474.

As the statutes are intended only for indemnity of the public against paupers, and not for the reimbursement of the individual who may have relieved the sufferings and distress of needy persons, a promise cannot be inferred, even though notice be given by one who has provided the support.

Farmington v. Jones, supra.

Parents are not liable upon any contracts made by their minor children unless they have expressly or impliedly authorized them to be made.

1 Story, Cont. § 82 and note, 82b and note; *Raymond v. Loyl*, supra; *Weeks v. Morrow*, 40

provision for the child's support, whose custody is given her. *Pretzinger v. Pretzinger*, 18 West. Rep. 423, 45 Ohio St. 423; *Courtright v. Courtright*, 40 Mich. 683; *Plaster v. Plaster*, 47 Ill. 290.

The fact that on a decree for divorce the children were in the custody of a third person will not affect his obligations to support them. *McCarthy v. Hinman*, 35 Conn. 538.

But a father is not liable for its support after the custody of the child has been given to the mother by decree of court. *Brow v. Brightman*, 138 Mass. 187.

Emancipation of infant.

A child upon arriving at full age will be held *prima facie* to be emancipated. *Poultney v. Glover*, 23 Vt. 323.

But this rule does not apply to a child of unsound mind. *Scranton v. Danville*, 106 Pa. 446; *Overseers of Washington v. Overseers of Beaver*, 3 Watts & S. 548; *Shippin v. Gaines*, 17 Pa. 38; *Toby Twp. Overseers of Poor v. Madison Overseers of Poor*, 44 Pa. 60; *Penn. Twp. Overseers of Poor v. Selinsgrove Overseers of Poor* (Pa.) 8 Cent. Rep. 587.

Marriage of a minor son emancipates the son. *Dick v. Grissom*, 1 Freem. Ch. (Mass.) 423; *White v. Henry*, 24 Me. 581.

So a minor daughter is emancipated by marriage, and the consent of the father will be implied by the circumstances. *Bucksport v. Rockland*, 56 Me. 22, 7 L. R. A.

Me. 151; *Kelley v. Davis*, supra; *Owen v. White*, 5 Port. (Ala.) 435; *Clark v. Gotts*, 1 Ill. App. 455; *Bailey v. King*, 41 Conn. 305; *Kernolle v. Caldwell*, 46 Ind. 153; *Rogers v. Turner*, 59 Mo. 116; *Harper v. Lemon*, 33 Ga. 227; *Clark v. Clark*, 46 Conn. 586; *Byers v. Thompson*, 66 Ill. 421; 2 Kent, Com. 11th ed. 190, note 3; *Gordon v. Potter*, 17 Vt. 348.

There is no common-law liability to provide a maintenance for minor children, such liability being provided by—

43 Eliz. chap. 237; 1 Story, Cont. note 1, p. 240; 1 Bl. Com. 449; Story, Cont. notes bottom p. 142.

When a child voluntarily leaves its father, he is not liable for its contracts for necessaries. Story, C. nt. § 82 and note 1; 5 Wait, Act. and Def. § 1, p. 50.

Before the father can be held liable either an express promise or circumstances from which a promise may be inferred is essential, in all cases, to bind him for necessaries furnished his minor child by a third person.

Gotts v. Clark, 78 Ill. 229; *Fowlkes v. Baker*, 29 Tex. 135; *Schouler*, Dom. Rel. 329; *Swain v. Tyler*, 26 Vt. 9; *Thauer v. White*, 12 Met. 843; *McMillen v. Lee*, 78 Ill. 443.

Messrs. D. W. Woodin and F. H. Perry, for appellee:

The leading duties of the parents as to their children, recognized in the common law, are: first, to protect; second, to educate; third, to maintain, them.

Schouler, Dom. Rel. 3d ed. § 233; *Gilley v. Gilley*, 4 New Eng. Rep. 494, 79 Me. 292.

The father cannot by consent or any agreement dispose of his child and discharge himself of his obligations.

Hunt v. Hunt, 4 G. Greene (Iowa) 222.

Independent of any statute, parents are bound to contribute to the support of their minor children.

Johnson v. Barnes, 69 Iowa, 643; *Dawson v. Dawson*, 12 Iowa, 514; *Furman v. Van Sice*,

A father may give to an infant son his time, and in such case the son's earnings belong to the son. *Bobo v. Bryson*, 21 Ark. 387; *Lyon v. Bolling*, 14 Ala. 753; *Fairhurst v. Lewis*, 23 Ark. 425; *Rush v. Vought*, 55 Pa. 437; *Chase v. Smith*, 5 Vt. 556; *Tillotson v. McCallis*, 11 Vt. 477; *Morse v. Walton*, 6 Conn. 547; *Jenney v. Aden*, 12 Mass. 375; *Reams v. Watkins*, 27 Mo. 518; *Everett v. Sherfey*, 1 Iowa, 356.

Where a child has been emancipated he ceases to follow any settlement thereafter acquired by his father. *Orneville v. Glenburn*, 70 Me. 353.

The parol emancipation of a minor is revocable until acted upon. *Abbott v. Converse*, 4 Allen, 530.

A parent may emancipate an infant child, and confer a right upon it to acquire property and possess it as against all persons whatsoever. *Stanley v. Nat. Union Bank*, 115 N. Y. 122, 23 N. Y. S. R. 960.

A father who has given his son the right to his own wages can revoke the privilege whenever he chooses. *Agricultural & M. Asso. v. State* (Md.) 13 Atl. Rep. 37.

Children are not emancipated at twenty-one years of age, who are compelled to remain longer with their parents on account of some infirmity of body or mind rendering them incapable of taking care of themselves. *Poor Overseers of Greig Twp. v. Poor Overseers of New Berlin* (Pa.) 8 Cent. Rep. 523; *Poor Dist. of Curwensville v. Poor Dist. of Knox Twp.* (Pa.) 8 Cent. Rep. 535.

56 N. Y. 439, 445; *Gilley v. Gilley*, 4 New Eng. Rep. 494, 79 Me. 242; *Van Valkinburgh v. Watson*, 18 Johns. 480; *Garland v. Dover*, 19 Me. 411; *Dennis v. Clark*, 2 Cush. 352, 353; *Reynolds v. Sweetser*, 15 Gray, 80; *Hall v. Weir*, 1 Allen, 261; *Camerlin v. Palmer Co.* 10 Allen, 639.

Strangers can recover for necessities whether the father knew they were being furnished or not.

1 Parsons, Cont. 6th ed. pp. 809, 810.

Given, J., delivered the opinion of the court:

1. Appellant's contention is that the obligation of parents to support their minor children is only a moral one, and is not enforceable in the absence of statute or promise; that such promise is not to be implied from mere moral obligation, nor from the Statute providing for the reimbursement of the public; and that an omission of duty, from which a jury may find a promise by implication of law, must be a legal duty, capable of enforcement by process of law. At first glance, this view of the law seems opposed to our natural sense of justice; yet it is not without support in the authorities. Such is held to be the law in New Hampshire and Vermont. See *Kelley v. Davis*, 49 N. H. 187; *Harmington v. Jones*, 89 N. H. 271; *Gordon v. Potter*, 17 Vt. 348.

A different doctrine has long since been held in this State.

In *Dawson v. Dawson*, 12 Iowa, 513, this court held that "the duty of the parent to maintain his offspring until they attain the age of maturity is a perfect common-law duty."

In *Johnson v. Barnes*, 69 Iowa, 641, which was an action by the mother, who had been divorced, against the father, for support furnished their children, the court says: "As there was no promise, the question to be determined is whether one can be inferred in favor of a wife, who supports her child, as against her husband, who has without cause abandoned her and his child. The obligation of parents to support their children at common law is somewhat uncertain, ill defined and doubtful. Indeed, it has been said that there is no such obligation. . . . But we are not prepared to say that this rule has been adopted in this country, and it should be conceded, we think, that, independent of any statute, parents are bound to contribute to the support of their minor children, and that such obligation rests mainly on the father, in the absence of a statute, if of sufficient ability; and that, in favor of a third person, who supports a child, a promise to pay may and should be inferred on the ground of the legal duty imposed."

In *Van Valkinburgh v. Watson*, 18 Johns. 480, it is said: "A parent is under a natural obligation to furnish necessities for his infant children; and, if the parent neglect that duty, any other person who supplies such necessities is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent."

In 5 Wait, Act. and Def. 50, the author says: "The duty of parents to support, protect and educate their offspring is founded upon the nature of the connection between them. It is not only a moral obligation, but it is one which is recognized and enforced by law. . . . In 7 L. R. A.

order to hold the person liable in any case for goods furnished, either actual authority for the purchase must be shown, or circumstances from which such authority may be implied . . . The legal obligation of parents in respect to support extends only to those things which are necessary; and if a parent refuses or neglects to provide such things for his child, and they are supplied by a stranger, the law will imply a promise on the part of the parent to pay for them."

Without further citation of authorities, we announce as our conclusions that it is the legal as well as moral duty of parents to furnish necessary support to their children during minority; that a parent cannot be charged for necessities furnished by a stranger for his minor child, except upon an express or implied promise to pay for the same; and that such promise may be inferred on the grounds of the legal duty imposed.

2. It is further contended on behalf of appellant that the facts certified show an emancipation of his daughter, such as to relieve him from liability for the services sued for; that support and services are reciprocal duties, and if one is withheld the other may be withdrawn. Parents are entitled to the care, custody, control and services of their children during minority. To emancipate is to release, to set free. It need not be evidenced by any formal or required act. It may be proven by direct proof or by circumstances. To free a child, for all the period of minority, from care, custody, control and service would be a general emancipation; but to free him for only a part of the period of minority, or from only a part of the parent's rights, would be limited. The parent, having the several rights of care, custody, control and service during minority, may surely release from either without waiving his right to the other, or for a part of the time without waiving as to the whole. A father frees his son from service. That does not waive the right to care, custody and control, so far as the same can be exercised consistently with the right waived. He frees his son of eighteen from service for one year. That does not waive the right to his services after the year; and if the waiver has been for an indefinite period the parent may assert his right to the services of the child at any time within the period of minority, subject to the rights of those who have contracted with the child on the strength of the waiver as to services. In the law of contracts, where a father expressly or impliedly, by his conduct, waives his right generally to the services of a minor child, such child is said to be emancipated. The child may sue, under such circumstances, on such contracts as are made with him for his services. *Nightingale v. Withington*, 15 Mass. 272; *McCoy v. Huffman*, 8 Cow. 84; *Stiles v. Granville*, 6 Cush. 458; *Schouler*, Dom. Rel. § 267.

There is nothing in these authorities, nor any reason, against the view expressed, that emancipation may be general or limited. There is no direct evidence as to the purpose of the defendant with respect to his daughter; but we are to say, from the circumstances shown, whether they evidence either a general or limited emancipation.

The case of *Berrett v. Sherfy*, 1 Iowa, 358,

relied upon. That was an action to recover damages of the defendant for having harbored and retained the plaintiff's minor son in his employ. The issues and circumstances were quite different from those certified in this case. The court says: "There could be no such harboring as would render the defendant liable to the father in this action, if the son was in truth emancipated, and, if the son was not emancipated, it will still be a question whether there was such harboring as renders the defendant liable. By 'emancipation,' in this connection, we understand such act of the father as sets the son free from his subjection, and gives him the capacity of managing his own affairs as if he was of age."

The following is given as a condensed statement of the facts: "In the spring or summer of 1852, plaintiff's son, a minor of the age of seventeen, went to reside at defendant's house, and was then and afterwards employed by him as a hired hand for over one year, the defendant paying the son full wages for his services. In February, 1853, plaintiff sued defendant to recover for the services, in which suit the judgment was for the defendant. The son was of a dissatisfied and roving disposition, careless and improvident in his habits, not under parental control, and, either through willfulness or negligence, had not received the education proper for a person of his age and condition. In December, 1851, a misunderstanding arose between the parent and the child, which resulted in the son's leaving home, and residing and working at various places, before he went into the defendant's service. After said December, 1851, the father did not, apparently, have or exercise the proper and necessary control and authority over the said minor that a parent of a well-regulated family ought and should exercise, and permitted and sanctioned the hiring out of said minor at various places, and at different employments, away from home; but who made the contracts, or received the pay, is not stated nor proven. The father had also stated that he had no control over his son, and had in some instances waived his authority over him. It also appears that on the 11th of September, 1852, the plaintiff, by publication in a newspaper, forewarned all persons from crediting his said son on his account, avowing, 'also, therein that he would pay no debts of his contracting, and that he would not fulfill any contracts, or pay debts, entered into by him.' The court says: "From these circumstances, to mention none others, we think the court might fairly conclude there was a manumission or emancipation up to the time above stated, and that there was no liability for giving the son shelter, residence and a home. At least, we think it so fairly deducible from the facts that we should not disturb the conclusion."

The circumstances disclosed in this case are these: The defendant's daughter, at the age of fourteen, went to reside away from her father's house, at a place thirty miles distant, where for three years she contracted for, earned and controlled her own wages, and provided herself with clothing, her father consenting thereto, he not furnishing, or agreeing to furnish, her with any money, or means of support. That, while thus absent, she was dangerously attacked with typhoid fever, and at her request

was attended by the plaintiff, as her physician, from day to day, for a period of twenty-one days, which services were rendered without the procurement, knowledge or consent of the defendant. These circumstances are widely different from those in *Everett v. Sherkey*. Here there was no disagreement that resulted in the daughter leaving home; no want or waiver of parental authority; no dissatisfied and roving disposition; no statement by the father that he had no control over his daughter; and no publication by the father notifying persons not to credit her on his account. The circumstances disclosed in this case are such as are of frequent occurrence in this country. Parents, either from necessity or from a desire to teach their children to be industrious and self-supporting, emancipate them from service, for a definite or indefinite time, without any intention of thereby releasing their right to exercise care, custody and control over the child. The obligation of parents to support their minor children does not arise alone out of the duty of the child to serve. If so, those who are unable to render service because of infancy, sickness or accident—who most of all others need support—would not be entitled to it.

Blackstone, in his *Commentaries* (vol. 1, p. 446), says: "The duty of parents to provide for the maintenance of their children is a principle of natural law,—an obligation, says Puffendorf, laid on them, not only by Nature herself, but by their own proper act in bringing them into the world; for they would be in the highest manner injurious to their issue if they only gave their children life that they might afterwards see them perish. By begetting them, therefore, they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have the perfect right of receiving maintenance from their parents." This obligation to support is not grounded on the duty of the child to serve, but rather upon the inability of the child to care for itself. It is not only a duty to the child, but to the public. The duties extend only to the furnishing of necessities. What are necessities must be determined by the facts in each case. The law has fixed the age of majority; and it is until that age is attained that the law presumes the child incapable of taking care of itself, and has conferred upon the parent the right to care, custody, control and services, with the duty to support.

3. There being no direct evidence as to the purposes of the defendant with respect to his daughter, we are to say with what intention he consented to his daughter's going and remaining away from his home as she did. That he intended she should control her own earnings, at least until such time as he should declare otherwise, is evident; but that it was ever his intention that if, by sickness or accident, she should be rendered unable to support herself, he would not be responsible to those who might minister to her actual necessities, we do not believe. Such an inference from these facts would be a discredit to any father. In our view, there was, at most, but a partial emancipation,—an emancipation from service for an indefinite time. The father had a right at any

time to require the daughter to return to his home and service; and she had a right at any time to return to his service, and to claim his care, custody, control and support. There was no such an emancipation as exempted the father from liability for actual necessities furnished to his daughter. In view of the legal as well as the moral duty of appellant to furnish necessary support to his daughter during minority, and especially when unable, from infancy, disease or accident, to earn her own necessary support, we think he may well be understood as promising payment to any third person for actual necessities furnished to her. As already stated, what are necessities must be determined from the facts of each case. What would be necessary support to a child in sickness would not be necessary in health. The services sued for were evidently, necessary for the support and well-being of the defendant's daughter. As we have seen, he had not relieved himself from the duty to furnish her such support, and, from his obligation to do so, may be presumed to have promised payment to anyone who did furnish it in his absence.

Our conclusion is that the judgment of the District Court should be affirmed.

Beck, J., dissenting:

1. I cannot assent to the doctrines and conclusions announced in the majority opinion in this case. The facts are presented in the certificate of the judge upon which the case is brought here on appeal. We cannot look elsewhere for the facts. They are, briefly stated, these: The daughter was seventeen years old, and, with the father's consent, was at service thirty miles away from his home, and had been for three years, all the time controlling her own wages, and supplying her own wants, and receiving nothing for support or necessities from her father. The father had no knowledge that services were rendered to the daughter by plaintiff, or that his daughter was sick. It is not shown that the daughter was a pauper, or without means to pay the plaintiff. No presumption to that effect will be entertained.

2. These facts show that the daughter was emancipated by the father. Emancipation may be shown by circumstances from which may be inferred the consent of the father that the child may control his own time, earnings and actions. Slight circumstances tending to show such consent are sufficient, in the absence of contradictory evidence. *Schouler, Dom. Rel. § 267; Everett v. Sherfey, 1 Iowa, 356.*

3. Emancipation relieves the child of subjection to the parent, and bestows upon him the capacity of managing his own affairs as if he were of age (*Everett v. Sherfey, supra*; *Schouler, Dom. Rel. § 268*); and it also relieves the parent of all legal obligation to support the child. *Schouler, Dom. Rel. § 268.*

4. A parent is bound, neither at common law, nor by any statute of the State, to support his children who are of age. *Monroe Co. v. Teller, 51 Iowa, 670; Blackley v. Laba, 63 Iowa, 22.*

As I have shown, an emancipated child stands as to his obligation to his parent and the points exempt to or from obligation for his support, just as a child who is of age.

5. It may be that the parent would be under obligation to support a pauper child who is of full age, or that a promise would be implied on the part of the father to render such support. But that point is not in this case, as it is not shown or claimed that the child for whose support the father was sued is a pauper, or not possessed of ample means to pay plaintiff for the services rendered by him.

6. Doctrines as to the liability of the father for the support of his minor child, and his liability therefor upon a promise, express or implied, and upon other points of the law, are found in the majority opinion, to which I dissent. As tending to support my views, I cite the following decisions of this court: *Dawson v. Dawson, 12 Iowa, 512; Johnson v. Barnes, 69 Iowa, 641.* See, to the same effect, *Schouler, Dom. Rel. § 236.*

In my opinion, the judgment of the district court ought to be reversed.

ARKANSAS SUPREME COURT.

J. W. RUSSELL et al., Appts.,

v.

R. H. TATE et al.

(....Ark.....)

1. A town council has no power to appropriate funds of the town to aid in building a county court-house therein.

2. Where an illegal appropriation has been made by a town council and warrants drawn thereon, some of which have been paid, equity has jurisdiction of a suit to cancel the unpaid warrants, to compel repayment of the money paid and to annul the appropriation, and the recalling and cancellation of the unpaid warrants after suit is brought will not oust the jurisdiction; in such case the court may grant affirmative, as well as injunctive, relief.

NOTE.—*Towns and villages may be restrained from making illegal appropriations.*

In this country, the right of property holders or taxable inhabitants to resort to equity to restrain municipal corporations and their officers from transcending their lawful powers or violating their legal duties in any mode which will injuriously affect the taxpayers, such as making an unauthorized appropriation of the corporate funds, has been affirmed or recognized in numerous cases in many of the States. 2 Dillon, Mun. Corp. 829.
7 L. R. A.

A citizen and taxpayer of an incorporated city is entitled to an injunction to restrain an illegal appropriation of the money of the city. *Withington v. Harvard, 8 Cush. 66; New London v. Brainard, 22 Conn. 552; Harney v. Indianapolis, C. & D. R. Co. 32 Ind. 244; Scofield v. Eighth School Dist. 27 Conn. 490, 504; Webster v. Harwinton, 32 Conn. 131; Terrett v. Sharon, 34 Conn. 106.*

If an appropriation of money be made for two objects, one lawful and the other not, and it cannot be distinguished and separated, the whole will be

3. Taxpayers may maintain suits against town officers to prevent or remedy misapplication of town funds.

4. Although members of a town council are not liable for the exercise of their discretion in voting upon measures before them, yet where they vote an appropriation for their own benefit, which is paid, the transaction is a conversion of trust funds for which each of them, as well as the mayor who orders, and the treasurer who makes, the payment, will be liable; and the subsequent re-election of the same parties to office will not affect their liability.

(February 15, 1890.)

APPEAL by defendants from a judgment of the Circuit Court for Pope County in Chancery in favor of plaintiffs in an action to annul an alleged illegal appropriation of public money, and to compel a return into the public treasury of whatever had been paid under such appropriation. *Affirmed.*

This action was brought by taxpayers of the Town of Russellville against the mayor, aldermen and treasurer of said town.

The aldermen, among others, had, in consideration that the people would change the county seat of Polk County from Dover to Russellville, executed an approval bond for the use of the county to build a court-house at Russellville and donate the house and ground to the county. During the course of construction of the court-house appellants, in their capacity as town council of said town, on February 3, 1888, passed a resolution appropriating \$1,000 to assist in the completion of the court-house. Two warrants were drawn against this appropriation, one for \$675 and the other for \$325, the former being immediately paid.

On February 17 appellees filed a bill against appellants in chancery, alleging that they were citizens and taxpayers of said town and praying for a temporary injunction restraining the collection and payment of the \$325 warrant, and that finally it be perpetually enjoined, that

the appropriation to the court-house be quashed, and for the restitution to the town treasury of the \$675 already paid.

On the 27th of March the appellants, in their official capacity as town council, called in and destroyed the \$325 warrant.

At the town elect on held April 3 the appellants were all re-elected.

Appellants then filed a motion to dismiss so much of the complaint as related to the \$325 warrant, on the ground that the injunctive relief had been extinguished by its destruction, which motion was overruled. They then moved to strike from the complaint all that part which related to the \$675, which motion was also overruled. They then filed an answer in which they alleged, *inter alia*, that the destruction of the warrant was virtually the rescinding of the resolution of February 3, especially to the extent of the \$325 warrant, that the act diverting the \$675 from the public treasury was within the legislative discretion of the council and that defendants were not liable for their action in regard to that matter; that after the appropriation had been made and the money paid, the matter had been submitted to the qualified electors of the town, and the action of the board approved by a large majority, and appellants all re-elected to office, and that this estopped appellees from bringing suit.

The answer concluded with a demurrer upon the following, among other, grounds: want of proper parties plaintiff. The court had no jurisdiction of the subject in so far as it related to the \$675.

The court overruled the demurrer and after hearing entered a decree in favor of plaintiffs for the recovery of the \$675, enjoining defendants from attempting to renew the warrant for \$325, and from making any provision for the payment of the money mentioned in the resolution of February 3, 1888. From that decree defendants took this appeal.

Messrs. Wilson & Granger and G. W. Shinn, for appellants:

held void; otherwise the court will enjoin or relieve against the expenditure which is unlawful. *Roberts v. New York*, 5 Abb. Pr. 41; *Howes v. Racine*, 21 Wis. 514.

One or more taxpayers, without showing any other injury than that which they will suffer in common with other property holders of the municipality, may file a bill to restrain the allowance and payment of an illegal claim, or the collection of the tax for unauthorized objects, such as, for example, to pay a fraudulent or collusive judgment. *Barr v. Deniston*, 19 N. H. 170, 180; *Merrill v. Plainfield*, 45 N. H. 128; *Douglas v. Placerville*, 18 Cal. 648; *Drake v. Phillips*, 40 Ill. 388.

But, on the other hand, it has been decided in New York that resident citizens or taxpayers of a municipal corporation cannot, as such, merely, either on their own behalf or on behalf of themselves and all others having a like interest, maintain a suit to restrain or avoid corporate acts alleged to be illegal. This doctrine, left open in *Ketchum v. Buffalo*, 14 N. Y. 356, and *Gulford v. Chenango Co.*, 13 N. Y. 143, was first definitely established in *Doolittle v. Broome Co.*, 18 N. Y. 155, disapproving, on this point, *Adrian v. New York*, 1 Barb. 19; *Brower v. New York*, 8 Barb. 264; *Christopher v. New York*, 13 Barb. 587; *Milbau v. Sharp*, 15 Barb. 188, 244, and *De Baun v. New York*, 16 Barb. 302.

7 L. R. A.

Remedy against illegal acts of town authorities.

Assessments for local improvements by municipal corporations generally made a lien upon the lands declared to be benefited thereby; each separate land owner had some kind of legal remedy, either by action for damages against the officer enforcing the unlawful collection, or by writ of certiorari to review the assessment itself. But such remedy is inadequate when compared with the comprehensive and complete relief furnished by the single decree in equity. *Ireland v. Rochester*, 51 Barb. 415, 435; *Scotfield v. Lansing*, 17 Mich. 437; *Lafayette v. Fowler*, 34 Ind. 140; *Kennedy v. Troy*, 14 Hun. 308, 312; *Clark v. Dunkirk*, 12 Hun. 181, 187; 1 Pom. Eq. Jur. 276.

Injunction as a remedy.

An injunction will not be granted, in general, to restrain persons from acting as public officers. The legal remedy is, in general, adequate to test the right to a public office. *Campbell v. Taggart*, 10 Phila. 443; *Jones v. Granville*, 77 N. C. 280; *Sneed v. Bullock*, 77 N. C. 232; *Stone v. Wetmore*, 42 Ga. 601; *Sanders v. Metcalf*, 1 Tenn. Ch. 419; 3 Pom. Eq. Jur. 376.

Injunction will always be granted, if necessary, to protect, aid or enforce any equitable estate, interest or primary right, or to secure and render

The claim to have the \$675 refunded to the treasury of the town was a cause of action of a purely legal character, for which there was a full and adequate remedy at law, and therefore a court of chancery had no jurisdiction.

2 Story, Eq. Jur. 156.

A mandatory injunction will not be granted where the thing complained of is accomplished, and there is a remedy at law, although connected with the cause for injunction.

Rogers Locomotive & Mach. Works v. Eris R. Co. 20 N. J. Eq. 379; *Baxter v. Chicago Board of Trade*, 58 Ill. 146.

Nor will equity, because it has jurisdiction of one cause of action, retain the case to decide one purely legal.

Oakville Co. v. Double-Pointed Tuck Co. 7 Cent. Rep. 720, 105 N. Y. 658; *Chapman v. Lee*, 11 West. Rep. 650, 45 Ohio St. 356; Pom. Eq. Jur. § 178; *Lippincott v. Barton*, 7 Cent. Rep. 920, 42 N. J. Eq. 272; *Dugan v. Cureton*, 1 Ark. 42.

So far as the \$675 was involved, the right of action was in the town, not in private citizens.

2 Dillon, Mun. Corp. § 729, note 1; 3 Dillon, Mun. Corp. §§ 730 and note 1, 730a, 730b and note 1, 732; *Nixon v. School Dist. No. 92*, 32 Kan. 510.

An illegal act which will increase taxation cannot be questioned by a private citizen or taxpayer, unless it is specially injurious to him.

Dillon, Mun. Corp. §§ 735 and note 1, 736; *Bailey v. Culver*, 84 Mo. 581; *Ketchum v. Buffalo*, 14 N. Y. 871, 872; *Jones v. Little Rock*, 25 Ark. 301.

If appellees had no right to sue, they did not state a cause of action in their favor.

Wilson v. Galey, 1 West. Rep. 488, 108 Ind. 257; *Sinker v. Floyd*, 2 West. Rep. 218, 104 Ind. 291; *Tipton Co. v. Kimberlin*, 6 West. Rep. 885, 108 Ind. 449.

Mr. J. G. Wallace, for appellees:

Appellants as the town council, had no power to appropriate and use the revenues and moneys of the town to build a court-house for the county.

efficient any purely equitable remedy. So it will lie against corporations and their directors and officers, to restrain acts which are illegal, *ultra vires* or in violation of their fiduciary duties. *Lord Auckland v. Westminster Local Board of Works*, L. R. 7 Ch. 597; *Mills v. Northern R. of B. A. Co.* L. R. 5 Ch. 621; *Pudsey Coal Gas Co. v. Bradford*, L. R. 15 Eq. 167; *Pickering v. Stephenson*, L. R. 14 Eq. 322; *Cannon v. Trask*, L. R. 20 Eq. 609; *Dowling v. Pontypool C. & N. R. Co.* L. R. 18 Eq. 714; *Featherstone v. Cooke*, L. R. 16 Eq. 298; *Mair v. Himalaya Tea Co.* L. R. 1 Eq. 411; *Carlisle v. Southeastern R. Co.* 1 Macn. & G. 689.

On the ground that the remedy in equity is more direct, speedy and effectual than by certiorari, equity will entertain jurisdiction of a bill on behalf of taxpayers to enjoin misapplication of the moneys of the corporation. *Colton v. Hanchett*, 13 Ill. 615; *Mount Carbon Coal & R. Co. v. Blanchard*, 54 Ill. 240; *Wade v. Richmond*, 18 Gratt. (Va.) 583; *Harney v. Indianapolis*, C. & D. R. Co. 32 Ind. 244. See also *Sherman v. Carr*, 8 R. L. 431; 2 Dillon, Mun. Corp. 831.

The same doctrine has been expressly sanctioned by the Court of Appeals in Maryland, in a case in which it was held that residents and taxpayers of a city might file a bill in equity to restrain the corporation and its officers from taking steps to carry out a city ordinance creating a debt in violation of 7 L. R. A.

Tuck v. Waldron, 81 Ark. 462; *Buell v. State*, 45 Ark. 337; *Ottawa v. Carey*, 108 U. S. 110 (27 L. ed. 669), and authorities there cited; *Citizens Sav. & Loan Assn. v. Topeka*, 87 U. S. 20 Wall. 655 (22 L. ed. 455); Ark. Const. art. 12, § 5; *Halbut v. Forrest City*, 34 Ark. 246; *Jacksonport v. Watson*, 33 Ark. 704.

When a court of chancery acquires jurisdiction for one, it does for all purposes.

Conger v. Cotton, 87 Ark. 287; *Bentley v. Dilard*, 6 Ark. 85.

Jurisdiction always depends on the state of things existing at the time the action is brought.

Rates v. Martin, 34 Ark. 410; *Sule v. McLean*, 29 Ark. 612; *Price v. State Bank*, 14 Ark. 50.

The remedy for the recovery of the \$675, standing alone, is purely of equitable jurisdiction.

Ark. Const. art. 16, § 18; Mansf. Dig. §§ 929, 9731; *Taylor v. Pine Bluff*, 34 Ark. 607; *Dodge v. Wooley*, 59 U. S. 18 How. 331 (15 L. ed. 401); Bishp. Eq. § 49, p. 68; 1 Story, Eq. §§ 60, 534.

It does not matter that the money has been paid. Courts of chancery will decree restitution of it.

2 Story, Eq. § 1252; Dillon, Mun. Corp. §§ 729, 730; *Frost v. Belmont*, 6 Allen, 153.

Any person owning taxable property in the town may bring his bill in chancery.

Mansf. Dig. § 929; *Jacksonport v. Watson*, 33 Ark. 704; *Peabody v. Flint*, 6 Allen, 52; *Cooley*, Torts, 518; Story, Eq. § 1252 (a); Dillon, Mun. Corp. § 730, and notes; *Frost v. Belmont*, 6 Allen, 152; *Crampton v. Zabriskie*, 101 U. S. 601 (25 L. ed. 1070).

Sandels, J., delivered the opinion of the court:

An analysis of the case shows six questions for decision:

1. Has equity jurisdiction as to the matters stated in the bill?
2. Are residents and taxpayers proper parties plaintiff?
3. May affirmative, as well as injunctive, relief be had in such a proceeding?

the Constitution. If the right to maintain such a bill as this be denied, citizens or property holders would be without adequate remedy to prevent the injury which might result to them from the unauthorized or illegal acts of the municipal government or its officers and agents. *Baltimore v. Gill*, 31 Md. 375, 396; *New London v. Brainard*, 22 Conn. 532; *Merrill v. Plainfield*, 45 N. H. 126, and disapproving *Roosevelt v. Draper*, 23 N. Y. 318; and *Doolittle v. Broome Co.* 18 N. Y. 155. See also *Frederick v. Groshon*, 30 Md. 436; *Baltimore v. Porter*, 18 Md. 284; *Coulson v. Portland*, Deady, 481.

Injunction will lie to restrain the imposition or enforcement of illegal taxes and other public burdens, at the suit of taxpayers. *Wagner v. Meely*, 69 Mo. 150; *Curtenius v. Hoyt*, 37 Mich. 583; *Cattell v. Lowry*, 45 Iowa, 478; *Albany & B. Min. Co. v. Auditor Gen.* 37 Mich. 391; *Sinclair v. Winona Co.* 23 Minn. 404; *South Platte Land Co. v. Buffalo Co.* 7 Neb. 258; *Burlington & M. R. Co. v. York Co.* 7 Neb. 487; *George v. Dean*, 47 Tex. 73; *Douglass v. Harrisville*, 9 W. Va. 162; *Marsh v. Clark Co.* 43 Wis. 602; *Schettler v. Fort Howard*, 43 Wis. 48; *Hagaman v. Cloud Co.* 19 Kan. 394; *Worthen v. Badgett*, 32 Ark. 496; *New Orleans, M. & C. R. Co. v. Dunn*, 61 Ala. 128; *Wells v. Dayton*, 11 Nev. 161; *Union Pac. R. Co. v. Lincoln Co.* 3 Dill. 200; *Brown v. Concord*, 66 N. H. 875; *Rockingham T. C. Sav. Bank v. Portsmouth*, 53 N. H. 17; 3 Pom. Eq. Jur. 377.

4. Was the appropriation of the \$1,000 valid or void?

5. Are aldermen, as such, liable to an action for votes given upon measures before them?

6. What liability, if any, did the mayor ordering, the treasurer paying and the council receiving, the payment, incur by reason of this transaction?

The so-called appropriation was a nullity. *Jacksonport v. Watson*, 83 Ark. 704; *Sykes v. Columbus*, 55 Miss 115; Const. art. 12, § 5; *Misnot v. West Norbury*, 112 Mass. 1.

The officers of the city are trustees in the management and application of the funds of the people of the city. 2 Dillon, Mun. Corp. 915.

The application of municipal funds to illegal purposes by them is a breach of trust. 2 Dillon, Mun. Corp. 919 and notes.

Equity has jurisdiction to prevent the misapplication or waste of trust property. 2 Story, Eq. Jur. 1252 and note.

The fact that after the suit was brought the city council recalled and canceled the unpaid warrant did not oust the jurisdiction of the court. That was but a part of the purely equitable relief demanded. It was desired to prevent its re-issue and cancel the appropriation. Besides, under our chancery system, had the cancellation of the warrant been the only original ground of equity jurisdiction, it was not lost. *Price v. State Bank*, 14 Ark. 50.

Suits by taxpayers against towns and their officers to prevent or remedy misapplication of town funds are not only allowed by statute, but it is the prevailing doctrine in America that taxpayers may maintain them, in the absence of statute. Their relations to the municipality are analogous to those of stockholders to a private corporation. Mansf. Dig. § 929; *Jacksonport v. Watson*, supra; *Crampton v. Zabriskie*, 101 U. S. 601 [25 L. ed. 1070]; 2 Dillon, Mun. Corp. 914, 915; *Blaisie v. Staples*, 18 Grant, Ch.

(Canada) 67, cited in note on p. 902, Dillon, Mun. Corp.

There is no foundation in the authorities for the claim that the power of chancery is only injunctive. It would be a reproach to justice if it were true. In the present case, the appropriation was made, the warrant drawn, and the money paid by the treasurer, before an attorney could have comprehended the situation and have written the caption of a complaint.

Chancery has ample power to prevent further wrong and require reparation for that which has been done. 2 Story, Eq. Jur. 1252 and notes; *Frost v. Belmont*, 6 Allen, 152; *Citizens Loan Assn. v. Lyon*, 29 N. J. Eq. 110; *Atty-Gen. v. Boston*, 123 Mass. 400; *Atty-Gen. v. Dublin*, 1 Bligh, N. R. 312; *Atty-Gen. v. Poole*, 4 Myl. & Cr. 17; *People v. Fields*, 58 N. Y. 491; 2 Dillon, Mun. Corp. 909-912.

As against the liability of these defendants, it is contended that, a city council being in some sort a legislative body, its members are not liable for the exercise of their discretion in voting upon measures before them. This is true. *Jones v. Loosing*, 55 Miss. 109; *Freeport v. Marks*, 59 Pa. 253.

But here, after exercising their discretion in voting \$1,000 of the money of the town to pay an obligation which they and a few others had bound themselves to discharge, they or their building committee took the money. It was a conversion of trust funds, for which each of them, as also the mayor who ordered, and the treasurer who made, the payment, are liable. *Frost v. Belmont*, 6 Allen, 152; *Citizens Loan Assn. v. Lyon* and *Atty-Gen. v. Poole*, supra; *Atty-Gen. v. Wilson*, 1 Craig & Ph. 1; *Blaisie v. Staples*, 18 Grant, Ch. (Canada) 67.

The vote of confidence given appellants at the next ensuing city election does not affect their liability to repay the money which they took from the city treasury.

Affirmed.

KANSAS SUPREME COURT.

STATE OF KANSAS

v.

F. W. FULKER, *Appt.*

(....Kan.....)

*Intoxicating liquors transported from

*Head note by JOHNSTON, J.

NOTE.—Statutes relating to imported liquors, valid.

A state Act imposing a tax of fifty cents per gallon on all spirituous liquors brought into a State is constitutional, where the same tax is imposed on liquors manufactured in the State, although the mode of collection is different. *Hinson v. Lott*, 75 U. S. 3 Wall. 148 (19 L. ed. 387).

The state statute which makes it a criminal offense to solicit or take orders for spirituous liquors in the State, to be delivered at a place without the State, knowing or having reasonable cause to believe that if so delivered the same will be transported into the State, and sold in violation of law, applies to orders for liquors taken by salicamen traveling for business houses in other States. Such 7 L. R. A.

another State to a point in Kansas are subject to the laws of Kansas relating to the sale and disposition of such property, to the same extent and in like manner as are other intoxicating liquors already rightfully existing in the State, and cannot be sold at the place of destination, in the original packages or other form, except as the laws of the State prescribe. The police power of the State, so exercised, does not infringe on

a statute is not void as a state regulation of interstate commerce. *Lang v. Lynch*, 4 L. R. A. 331, 38 Fed. Rep. 489.

Stat. 1809, chap. 415, § 27, permitting an importer to sell in the original package liquors imported by him, legalizes such sale, although he knows that the purchaser intends to resell the liquor in violation of law. *Richards v. Woodward*, 113 Mass. 285.

Liquor purchased outside a prohibited district, by one who advances his own money therefor as the agent of the buyer, and not of the seller, the purchaser making no profit on the sale, is not a sale within the district, within Ala. Sess. Acts 1851-52, p. 202. *Dubois v. State*, 87 Ala. 101.

Orders taken for the sale and delivery of liquors in violation of the law of the State are part of the

the power delegated to Congress to regulate commerce between the States

(January 11, 1890.)

APPEAL by defendant from a judgment of the District Court for Marshall County overruling his motion for new trial in an action in which judgment had been entered sentencing him to fine and imprisonment after a verdict by a jury convicting him of unlawfully selling intoxicating liquors. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. A. L. Williams, D. C. Lockwood and Cal. T. Mann, for appellant:

Intoxicating liquors are an article of commerce.

Separate opinion of *Chief Justice Taney* in the *License Cases*, 46 U. S. 5 How. 577 (12 L. ed. 289); *Bowman Case*, 125 U. S. 501 (31 L. ed. 713); *Justice Field's* separate opinion in *Bowman Case*, 125 U. S. 493 (31 L. ed. 709); *Justice Catron's* separate opinion in *License Cases*, 46 U. S. 5 How. 600 (12 L. ed. 299); *Lot v. Hinson*, 75 U. S. 8 Wall. 150 (19 L. ed. 388).

The neglect or refusal of Congress to legislate and to prescribe rules governing commerce between the several States is virtually an expression on the part of Congress that commerce in the commodities upon which it is silent shall be free.

Le Loup v. Port of Mobile, 127 U. S. 640 (32 L. ed. 811); *Mobile Co. v. Kimball*, 102 U. S. 697 (26 L. ed. 239); *Robbins v. Shelby Tanning Dist.*, 120 U. S. 492 (30 L. ed. 695).

The police power of a State is one of the reserved powers; the commercial power of the national government is one by express grant from the several States; and where a reserved power comes in conflict with an express grant the reserved power must give way and the express grant stand.

Hannibal & St. J. R. Co. v. Huseen, 95 U. S. 468 (24 L. ed. 529); *Bowman Case*, 125 U. S. 465 (31 L. ed. 700).

The word "commerce," as used in the Constitution, means, not transportation simply, but the right to transport,—carries with it by necessary implication the right to sell the article or articles imported in their original form, or unbroken packages.

Gibbons v. Ogden, 22 U. S. 9 Wheat. 7 (6 L. ed. 24); *Brown v. Maryland*, 25 U. S. 12 Wheat. 447 (6 L. ed. 688); *Le Loup v. Port of Mobile*, *supra*.

Messrs. L. B. Kellogg, Atty. Gen., and W. A. Calderhead for the State.

contract of sale and as such render the entire transaction void, and no recovery thereon can be had. *Lang v. Lynch, supra.*

Where the order was made in New Hampshire, but the sale completed in New York, by selecting the liquors, separating them from a larger mass, marking, directing and delivering them there, it was held to be a sale in New York; and if legal there, an action for the price could be maintained in New Hampshire. *Boothby v. Plaisted*, 51 N. H. 436; *Schlesinger v. Stratton*, 9 R. I. 678; *Erwin v. Stafford*, 45 Vt. 800.

A sale of liquor is complete upon delivery to the carrier, and the fact that the order for it was taken in a country where the sale was prohibited by law, and that payment for it was received there, does not make the salesman taking the order and re-

Johnston, J., delivered the opinion of the court:

F. W. Fulker was prosecuted in the District Court of Marshall County upon an indictment charging him with unlawfully selling intoxicating liquors at the Town of Oketo, in Marshall County. The jury returned a verdict finding him guilty on five counts of the indictment, and on his motion to set aside the verdict the conviction was sustained as to the first two counts, and set aside as to the other three. The judgment of the court was that he should pay a fine of \$100, and be imprisoned in the jail of Marshall County for thirty days on the first count, and a like sentence for the conviction under the second count was pronounced. The defendant appeals, and alleges that the court erred in overruling his motion for a new trial.

The testimony offered on the trial showed that the defendant sold to numerous persons what were called "Prize Packages," being boxes about twelve inches square, in each of which there was a jug of whiskey. These boxes were shipped from Nebraska, and were sold in Kansas by the defendant in the same form and condition in which they were shipped. The defendant was in charge of the railroad depot and express office at Oketo, and the boxes were shipped by express from Blue Springs, Neb. Part of them, at least, were consigned by "M. L. R." to "M. L. Rawling," but who "M. L. R." was is not very clearly shown. Some of those who applied to purchase liquor from the defendant presented orders which purported to come from Rawling and from a man called "Ax," but the testimony indicates that the defendant sold to all who applied, regardless of orders, and that many sales were made when no such orders were presented.

At the close of the testimony the defendant asked the court to instruct the jury that if packages containing intoxicating liquors were sold by the defendant in the original packages as delivered for shipment in Nebraska, and as received by him in Kansas, such sales were not in violation of the Constitution and laws of Kansas relating to the sale of intoxicating liquors. The request was refused, and in charging the jury the court said: "I further instruct you that if you believe from the evidence beyond reasonable doubt the defendant knowingly sold intoxicating liquors at the place described in the complaint, and within two years prior to the 22d day of December, 1888, it would be no defense against such sales for

receiving the payment guilty of selling it there. *Pearson v. State (Miss.)* 4 L. R. A. 436.

Sales of intoxicating liquors by delivering them to a carrier to be sent C. O. D. at a place where the seller was licensed, to fill orders received by mail from the purchasers at a place where the seller was not licensed, do not violate the Pennsylvania Statute against sales without license. *Com. v. Fleming (Pa.)* 5 L. R. A. 470.

An order for the sale of intoxicating liquors, taken within a district where such sales are prohibited, on which delivery of the liquors is made to the carrier in pursuance of the order, at a place outside of such district, is not a sale within that district, where there is nothing to show an express intent to make the carrier the agent of the seller. *Herron v. State*, 51 Ark. 122.

the defendant to show by evidence that such intoxicating liquor so sold by him had been imported from another State over some route ordinarily used for the transportation of merchandise, in inclosed boxes, or packages, and that such intoxicating liquors had been so sold by the defendant in the original boxes or packages in which they had been placed for shipment in another State, without breaking said boxes or packages." The refusal of the first-mentioned instruction, and the giving of the second, presents the only question discussed upon the appeal.

It is urged that intoxicating liquors transported from another State to Kansas may be sold by the importer, or person to whom they are shipped, in the original packages, free from state control; and that, so far as our Constitution and laws would restrict or prohibit such sale, they violate the provision of the Federal Constitution which declares "that Congress shall regulate commerce among the several States." Counsel for appellant argue with great ability that in interpreting the commercial clause of the Constitution intoxicating liquors must be regarded as articles of commerce which may be imported from another State, and sold at the end of the transit in this State, the same as other commodities, and that the restriction of our laws upon the sale of liquors upon reaching Kansas is a direct burden on interstate commerce, and a usurpation by the State of a power exclusively vested in Congress. We cannot assent to this proposition. That the power to regulate interstate commerce belongs exclusively to Congress, and that the laws of a State which would encroach upon that power or directly interfere with such commerce cannot stand, all concede. Nothing in the Constitution or statutes of Kansas evinces any purpose on the part of the people of the State to trench upon this power, or antagonize the freest commercial intercourse with other States. It is not necessary to review at length the statutory provisions relating to the manufacture and sale of intoxicating liquors within the State. It is enough to say that they do not purport to restrict in any manner the transportation of liquors into or through the State. Such property may be carried over the State without burden or restraint, the same as any other commodity, and there is like freedom in bringing it in. When liquors are brought from another State, they are subject to no other or different regulation than like property produced in Kansas. Our law is enforced with perfect equality, without any discrimination between citizens of this and other States, or between liquor brought in and that already here.

The validity of our Statute has been repeatedly sustained by this court, and all question of the right of the State to enact such legislation has been set at rest by the decisions of the Supreme Court of the United States in *Foster v. Kansas*, 112 U. S. 201 [28 L. ed. 629], and *Mugler v. Kansas*, 123 U. S. 623 [31 L. ed. 205]. In the latter case it was held, after a most elaborate and learned treatment of the questions involved, that our laws were not repugnant to the Federal Constitution, and it was said that "it is difficult to perceive any ground for the judiciary to declare that the

prohibition by Kansas of the manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits."

It is argued that the unrestricted sale of liquors in the form in which they are shipped from another State is an essential element of traffic, and that, as the law of Kansas forbids such a sale, it constitutes a direct burden on interstate commerce. It must be remembered that our law does not absolutely forbid the use or sale of intoxicating liquors. They may not only be freely introduced and stored, but they may be sold for medical, scientific and mechanical purposes. A person may purchase and bring liquor into the State for his own use, without violating the Statute; and one so lawfully obtaining possession of intoxicating liquor may use it as he sees fit, by drinking it himself or giving it to another, provided it is done in good faith, and not as a shift or device to evade the provisions of the Prohibitory Act. *State v. Standish*, 37 Kan. 648.

So it appears that the law does not absolutely prohibit the importer from using or selling liquors, but it only requires that the sales shall be made for beneficial and proper purposes, and by duly authorized persons. It does not operate directly on commerce, or upon the introduction of liquors, but only provides that they shall be subject to a reasonable police regulation when brought within the territorial limits of the State. The fact that such regulations may to some extent diminish the traffic or incidentally affect interstate commerce does not render them invalid. "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution." *Sherlock v. Aling*, 93 U. S. 99 [23 L. ed. 819]; *Willson v. Black Bird Creek Marsh Co.* 27 U. S. 2 Pet. 245 [7 L. ed. 412]; *Gieman v. Philadelphia*, 70 U. S. 8 Wall. 718 [18 L. ed. 96]; *Cooley v. Philadelphia Board of Wardens*, 58 U. S. 12 How. 299 [13 L. ed. 996]; *Osborne v. Mobile*, 88 U. S. 16 Wall. 479 [21 L. ed. 470]; *Munn v. Illinois*, 94 U. S. 118 [24 L. ed. 77]; *Hall v. DeCuir*, 95 U. S. 485 [24 L. ed. 547]; *Pound v. Turck*, 95 U. S. 459 [24 L. ed. 525]; *Wheeling, P. & C. Transp. Co. v. Wheeling*, 99 U. S. 273 [25 L. ed. 412]; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365 [27 L. ed. 419]; *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455 [30 L. ed. 237].

The regulation and control of the liquor traffic is purely an exercise of the police power of the State, and between it and the commercial power conferred on the general government there is no antagonism. The commercial power is delegated to Congress, and cannot be limited by the States, but the police power is reserved to and remains alone with the State. These powers are to be exercised by the different departments of government, for the public good, and both are to be construed

relatively, and considered with reference to each other. The power to provide for the preservation of the morals, the health, the safety and lives of the people was never surrendered by the States, and it is a power which can be most advantageously exercised by local regulation. It is not denied that the unrestrained use of intoxicating liquor destroys the health, contaminates public morals, and produces disorder and crime. The Supreme Court of the United States sufficiently shows the necessity of police regulation of the traffic in the *Mugler Case*, where it is said that it could not "shut out of view the fact, within the knowledge of all, that the public health, the public morals and the public safety may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to everyone, that the idleness, disorder, pauperism and crime existing in the country are, in some degree, at least, traceable to this evil." By reason of this necessity, many local regulations, such as inspection, quarantine and pilot laws, which directly affect commerce, have been upheld.

In *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1 [6 L. ed. 23], Chief Justice Marshall said that "inspection laws, quarantine laws, health laws of every description" are component parts of that mass of legislation "not surrendered to the general government," which "can be most advantageously exercised by the States themselves;" that such laws "are considered as flowing from the acknowledged power of a State to provide for the health of its citizens."

In a case where the same court was considering the relative operations and limits of the commercial and police powers, it was said: "While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the State; while, for the purpose of self protection, it may establish quarantine and reasonable inspection laws,—it may not interfere with transportation into or through the State beyond what is absolutely necessary for its self protection;" and that "the police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise." *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465 [24 L. ed. 527].

This authority, in effect, concedes that although the State cannot, under the mere guise of exercising police power, limit or obstruct the federal power, yet it may go as far as it may be necessary to protect the lives, health and morals of its people without intruding upon the domain of federal authority. As the restriction of the liquor traffic is an acknowledged necessity, and as the State alone can effectually lessen or prevent the evils resulting from its use and sale, it would seem clear that laws enacted in good faith for that purpose by a State cannot be regarded as an infringement upon the delegated power "to regulate commerce." Although intoxicating liquors must be regarded as property, the quality or kind of property affects the question of whether it may be sold at the end of the transportation in the original form, or whether it shall be brought

under state regulation as soon as it comes within the limits of the State. It is not to be placed in the same category with grain, flour, dry goods and the like, which do not contain the elements of danger that liquor does. Powder, dynamite, nitro-glycerine and arsenic are property and the subjects of commerce, but all agree that a reasonable regulation of their introduction, use and sale by a State, whether they are in original packages or not, is a proper exercise of the police power.

In *Gilman v. Philadelphia*, 70 U. S. 8 Wall. 780 [18 L. ed. 101], this subject was under consideration, and it was held that while a state law requiring an importer to take out a license before he could sell a bale of imported goods was void, yet that "a State, in exercise of its police power, may forbid spirituous liquor imported from abroad or from another State to be sold by retail, or to be sold at all, without a license, and it may visit the violation of the prohibition with such punishment as it may deem proper."

If the point contended for, that liquor may be shipped from another State to any point in Kansas, and there sold in the original packages, should be upheld, it would virtually destroy, not only the Prohibitory Laws of Kansas and of some other States, but also the License and Local Option Laws of all the remaining States in the Union. The learned attorney-general, in speaking of the result to which this theory would lead, in his argument says that "it would seriously impair the efficiency of, if not practically destroy, our Prohibitory Law. In the one case 'original packages,' large and small, might become the ordinary merchandise of every corner grocery in the State; in the other case, every person who desired to engage in the saloon business could become at once an importer of 'original packages,' from the size of a pint flask to that of the jugs of whiskey imported from Nebraska in this case, and thus be able to ply his business without let or hindrance from our Prohibitory Law."

In *The License Cases*, 46 U. S. 5 How. 608 [19 L. ed. 286], where the New Hampshire case was under consideration, Justice Catron remarked: "To hold that the State License Law was void, as respects spirits coming in from other States as articles of commerce, would open the door to an almost entire evasion, as the spirits might be introduced in the smallest divisible quantities that the retail trade would require; the consequence of which would be that the dealers in New Hampshire would sell only spirits produced in other States, and that the products of New Hampshire would find an unrestrained market in the neighboring States having similar license laws to those of New Hampshire."

Every State in the Union has enacted laws to protect society from the admitted evils of the liquor traffic. Some have low license, some have high license, some have local option, and others have taken the advanced position of Kansas to prohibit its manufacture and sale, except for certain purposes generally regarded as beneficial. In many, if not all, of the license States, there are prohibitory features in the regulations imposed. Some of them are that liquor cannot be sold to minors or drunkards, nor sold on Sundays, election days, or at night,

nor sold at a place adjoining or near to churches and school-houses. Then again, the tribunals granting the license are generally invested with the discretion and authority to deny a license to any applicant if they do not regard him as a suitable person to engage in the traffic. So it is seen that all these regulations are more or less prohibitory in their character, and all are to be governed by the same principle, when considered in connection with the commercial power of Congress. The federal power, within its proper limits, must be regarded as paramount and controlling; but in delegating this power it was never intended that the people should be crippled in the police power of self protection, which was never surrendered, and which the States only can exercise. The federal power is always to be construed as a measure for the public good, and carries with it the implied exception that the right of self protection remains with the States,—a right which may always be exercised, although it may to some extent affect the exclusive commercial power of the general government. The Supreme Court of the United States has never held, nor do we think that it ever will hold, that the commercial power supplants and strikes down the police power of the States, as it would if the view contended for should prevail.

It should also be stated that the regulations imposed by Kansas do not conflict with any Act of Congress upon the subject. As the power exerted by the State in this instance operated on interstate traffic, and as it is a local regulation to protect the health, morals and safety of the people, is it not valid in any view, in the absence of congressional legislation upon the subject? It is said that, as to all subjects of a national character, and which require uniformity of regulation, the silence of Congress is a declaration of its purpose that commerce in that commodity shall be free; but as to subjects which are local in their nature, and can be best provided for by local regulation, the inaction of Congress does not preclude the exercise of power by the State, but her laws enacted in good faith would stand until they were displaced by federal legislation. *Mobile Co. v. Kimball*, 102 U. S. 681, 697 [26 L. ed. 288, 239].

In *Cooley v. Philadelphia Board of Wardens*, 53 U. S. 12 How. 299 [18 L. ed. 906], it was held that, while Pilot Laws were in their nature regulations of commerce, they were valid exercises of power lodged in the States, in the absence of legislation on the subject by Congress. The court said that "the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various, subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port, and some, like the subject now in question, as imperatively demanding that diversity which alone can meet the local necessities of navigation." And, in speaking of the Pilot Law, it was decided it was local, and not national, and that it was a subject likely to be best provided for by such systems or plans of regulation as the legislative discretion of the several States should deem applicable. In the case of *State Freight Tax*, 82 U. S. 15 Wall. 279 [31 L. ed. 162], it

was said: "Cases that have sustained state laws alleged to be regulations of commerce among the States have been such as related to bridges or dams across streams wholly within a State, police or health laws, or subjects of a kindred nature, not strictly commercial regulations. The subjects were such as in *Gilman v. Philadelphia*, it was said 'can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities, respectively.'"

Now, we have seen that the police laws, for the control of the liquor traffic, enacted with a view to guard the health, morals and safety of the people, differ widely in the several States, each State deciding for itself the policy to be pursued, and providing what it is deemed will best promote the public welfare; and, as above indicated, it is a subject that "can be best regulated by rules and provisions suggested by the varying circumstances of different localities."

In *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455 [30 L. ed. 287], it is decided that a system of quarantine laws, established by the Statutes of Louisiana, was a rightful exercise of the police power; and, although some of the rules of the system amounted to regulations of commerce, they applied to that class which States may establish until Congress acts in the matter, by covering the same ground or forbidding state legislation. Justice Miller, who pronounced the judgment, in speaking of the fact that Congress had enacted no such legislation, remarked that "no doubt they believed that the power to do this belonged to the States, or, if it ever occurred to any of its members that Congress might do something in that way, they probably believed that what ought to be done could be better and more wisely done by the authorities of the States, who were familiar with the matter." Is this remark not properly applicable to state legislation concerning the liquor traffic? May it not properly be said that the omission of Congress to provide regulations concerning the traffic was because they "believed that the power to do this belonged to the States," and could be done by them better and more wisely, because they were familiar with the matter? This view is supported to some extent by the following cases: *Wilson v. Black Bird Creek Marsh Co.* 27 U. S. 2 Pet. 245 [7 L. ed. 412]; *Gibbons v. Ogden*, 2 U. S. 9 Wheat. 1 [6 L. ed. 23]; *Gilman v. Philadelphia*, 70 U. S. 3 Wall. 713 [18 L. ed. 96]; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 178 [24 L. ed. 98]; *Munn v. Illinois*, 94 U. S. 135 [24 L. ed. 87]; *Escañaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678 [27 L. ed. 442]; *Parkersburg & O. R. Transp. Co. v. Parkersburg*, 107 U. S. 701 [27 L. ed. 588]; *Curdwail v. American River Bridge Co.* 113 U. S. 205 [23 L. ed. 950]; *Hamilton v. Vicksburg, S. & P. R. Co.* 119 U. S. 280 [30 L. ed. 893]; *Hue v. Gloer*, 119 U. S. 546 [30 L. ed. 489]; *Smith v. Alabama*, 124 U. S. 465 [31 L. ed. 508].

One of the latest cases which treats upon the subject is *Borman v. Chicago & N. W. R. Co.* 125 U. S. 482 [31 L. ed. 706], where the doctrine previously announced, that the non-action of Congress respecting foreign commerce is to be

taken as a declaration that the importation of articles into the State shall be unrestricted, is recognized. It is there said: "The power conferred upon Congress to regulate commerce among the States is, indeed, contained in the same clause of the Constitution which confers upon it power to regulate commerce with foreign nations," but in that connection it is also stated that "the same necessity, perhaps, does not exist equally in reference to commerce among the States." It seems to be held that a different inference is to be drawn from the non-action of Congress in respect to foreign commerce and its non-action in regard to interstate commerce. "Laws which concern the exterior relations of the United States with other nations and governments are general in their nature, and should proceed exclusively from the legislative authority of the nation. . . . and yet in respect to commerce among the States it may be, for the reason already assigned, that the same inference is not always to be drawn from the absence of congressional legislation as might be in the case of commerce with foreign nations. The question, therefore, may be still considered in each case as it arises, whether the fact that Congress has failed in the particular instance to provide by law a regulation of commerce among the States is conclusive of its intention that the subject shall be free from all positive regulation; or that, until it positively interferes, such commerce may be left to be freely dealt with by the respective States."

This case is certainly not an authority that a reasonable regulation of a State, enacted to promote the peace, morals and health of its people, and which somewhat restricts interstate commerce, should be held void. It would seem that the question, so far as interstate commerce is concerned, is regarded by the court as an open one, to be determined from the circumstances of each case as it arises. Is not a law such as that in question, and for the reason mentioned, within the police power of the State, to be exercised until Congress should provide to the contrary? We need not enter into an analysis of the numerous cases decided by the Supreme Court of the United States upon this subject, nor upon an extended discussion of the principles involved. There is a decision of that court which is directly in point upon the question before us, and must be held as decisive of the case.

In *Peirce v. New Hampshire*, 46 U. S. 5 How. 504 [12 L. ed. 256], the defendant was indicted and convicted for unlawfully selling a barrel of gin, which he purchased in Boston, transported to Dover, N. H., and there sold the same in the identical form in which it was carried to that State from Massachusetts. It was urged there, as here, that, as the liquor was transported into New Hampshire from another State, it might be sold in the "original package" or barrel, or the form in which it was transported; but the decision of the court was adverse to this claim, and it was expressly

held that liquors so imported from another State were subject to local police regulation, and could not be sold in the original form, except as the law of the State provided. The reasons given by the members of the court were somewhat at variance, but the case distinctly settled the question that the local regulation did not infringe upon the commercial power of the federal government, and that when liquors were brought into the State they were subject at once to its laws regulating their sale, use and disposition. The case, although much criticised, has never been overruled, and is of itself sufficient to control the decision of the present case.

Much reliance is placed upon what is said by the court in the case of *Boorman v. Chicago & N. W. R. Co.*, *supra*, and it must be conceded that it furnishes considerable ground for the argument made in behalf of the appellant in this case. The question presented there, however, was entirely different from the one before us. The State of Iowa attempted, by an Act of its Legislature, to exert power over persons and property beyond the limits of that State. It sought to prohibit common carriers from bringing liquors from a point outside of the State to a point within the State, unless they had been provided with written evidence of the right of the consignee to sell the same when it reached the State. It is therefore seen that it was a regulation directly affecting interstate commerce, and an effort to give the same effect beyond the territorial limits of the State. It cannot be regarded as an authority upon a question relating to an exercise of the police power of the State over persons and property within its own limits. The writer of the opinion is careful to distinguish it from *The License Cases*, and to prevent any misconception upon that point he states in the concluding part of the opinion that "it is not necessary now to express any opinion upon the point, because that question does not arise in the present case."

In the case of *Mobile Co. v. Kimball*, 102 U. S. 691 [26 L. ed. 238], as well as some other cases, the doctrine of *The License Cases* was referred to approvingly. The precise point we are considering was before the Supreme Court of Iowa in three recent cases, in each of which *The License Cases* were followed, holding that intoxicating liquors are subject to the police power of the State, and that the regulation of their sale in original packages or otherwise, when they arrive in the State, does not violate the provision vesting the commercial power in the general government. *Collins v. Hill*, 77 Iowa, 181, 8 L. R. A. 110; *Grouseendorf v. Howat*, 77 Iowa, 187; *Leasey v. Hardin*, 48 N. W. Rep. 188.

Our conclusion is that the district court did not err in instructing the jury, and hence its judgment will be affirmed.

All the Justices concur.

TEXAS SUPREME COURT.

George SCHONFIELD *et al.*, by Guardian
Ad Litem, *Piffs. in Err.*,

v.

Tilman P. TURNER.

(...Tex....)

1. A purchaser of a mutual benefit certificate from the person insured thereby, who takes an assignment thereof and is subsequently substituted as beneficiary therein, may, in case of the death of the insured, collect the money due thereon and retain the amount of his advances, including such assessments, etc., as he necessarily paid to keep the insurance in force, with lawful interest; but he will hold the residue as trustee for, and will be required to pay it over to, the heirs of the insured if no other person is particularly designated to receive it, where the laws of the society direct payment to the heirs, in the absence of any particular designation of a beneficiary.

2. The divorced wife of a member of a mutual benefit society is not entitled to share in the fund payable by the society to his heirs at his death.

(December 6, 1889.)

ERROR to the District Court of Rusk County to review a judgment in favor of plaintiff in an action to recover the amount due upon a mutual benefit certificate at the death of the member insured, to which the deceased member's heirs were made parties defendant. *Reversed.*

The case is fully stated in the opinion.

Messrs. Rufus Price and F. B. Sexton for plaintiffs in error.

Messrs. Booty & Young, J. H. Turner and Martin Casey, for defendant in error:

When the person whose life is insured voluntarily, without the request or solicitation of the person to whom the policy is made payable, procures an insurance on his life, and then has the loss made payable even to one having no insurable interest in his life, the policy is valid.

See authorities cited to *note in Currier v. Continental L. Ins. Co.* 57 Vt. 406, 52 Am.

Rep. 140; May, Ins. § 112; *Murphy v. Red*, 64 Miss. 617.

Every person has an insurable interest in his own life; and where any person procures a policy on his own life, and appoints another as his beneficiary, that beneficiary need not allege in his pleading an interest in the life of the insured.

May, Ins. § 106, p. 110; *Elkhart Mut. Aid B. & R. Assn. v. Houghton*, 103 Ind. 286, 53 Am. Rep. 516, and authorities cited; *Langdon v. Union Mut. L. Ins. Co.* 14 Fed. Rep. 272; *Bloomington Mut. B. Assn. v. Blue*, 120 Ill. 121.

The insurance of one's life by a party for the benefit of one not a relative is not void on the grounds of public policy, as tending to encourage the commission of crime. But if it were, no one but the insurer can raise the question; that cannot be urged by the heirs of the person insured.

Johnson v. Van Epps, 110 Ill. 562.

A sale and assignment of a policy of life insurance to one who has no interest in the life insured, made, not as a contrivance to circumvent the law, but as an honest and bona fide transaction, is valid.

See *Mutual L. Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245, 252 and cases there cited; *Bursinger v. Bank of Watertown*, 67 Wis. 75, 58 Am. Rep. 849, and authorities cited.

When the person whose life is insured is himself the actor in the matter, the amount of temptation held out to others to take his life may be left to his discretion.

Equitable L. Assur. Society v. Paterson, 41 Ga. 388, 5 Am. Rep. 535; *Bloomington Mut. Ben. Assn. v. Blue and Bursinger v. Bank of Watertown*, *supra*; *Murphy v. Red*, 64 Miss. 614; *Lamont v. Hotel Men's Mut. Ben. Assn.* 30 Fed. Rep. 817; *Lamont v. Grand Lodge Iowa L. of H.* 31 Fed. Rep. 177.

Henry, J., delivered the opinion of the court:

The order of Knights of Honor is an incorporated body. One purpose of its existence is

NOTE.—Mutual benefit certificate; transfer of.

There are some essential differences usually existing between the contracts evidenced by benefit certificates and the ordinary contract of life insurance. The certificate constitutes the contract and the holder thereof has power to change the beneficiary. *Presbyterian Assur. Fund v. Allen*, 4 West. Rep. 712, 106 Ind. 698; *Elkhart Mut. Aid, Benev. & R. Assn. v. Houghton*, 1 West. Rep. 284, 103 Ind. 286, 53 Am. Rep. 514; *Bauer v. Samson Lodge, K. of P.* 102 Ind. 282.

An assignment may be good between the parties, although the assent of the company is required by the terms of the contract and has not been obtained. *Marcus v. St. Louis Mut. L. Ins. Co.* 68 N. Y. 625; *Lee v. Murrell*, 9 Ky. L. Rep. (Ky. Superior Ct.) 104.

Where a member of a mutual benefit society obtains the insurance himself and pays the premiums, the fact that his assignee of the certificate of membership has no insurable interest in his life will not prevent such assignee from collecting the benefit. *Milner v. Bowman*, 5 L. R. A. 95, 119 Ind. 448.

The fact that a member of a mutual benefit society who assigned the membership certificate was insolvent L. R. A.

ent at the time of his death does not invalidate the assignment where it is not shown that he was insolvent at the time he made the assignment. *Ibid.*

A sale, for a valuable consideration, of mutual benefit certificates insuring a member's life, has been held void, not only by force of the society's regulations, where they prohibit such sales, but also as against public policy. *Stoelker v. Thornton* (Ala.) 6 L. R. A. 140.

Mutual assessment societies. See *Burdon v. Mass. Safety Fund Assn.* 1 L. R. A. 145, 6 New Eng. Rep. 840, 147 Mass. 380.

Remedy for refusal to levy assessment. *Jackson v. Northwestern Mut. Relief Assn.* 2 L. R. A. 788, 73 Wis. 507.

Benefit societies, what are. See *Rockhold v. Canton Mas. Mut. Benev. Assn.* (Ill.) 2 L. R. A. 420; property rights: *Merrill Lodge, I. O. G. T. v. Ellsworth*, 3 L. R. A. 841, 78 Cal. 106; dissolution: *Chicago Mut. L. Indemnity Assn. v. Hunt*, 2 L. R. A. 549, 127 Ill. 267; power to make by-laws: *Supreme Lodge, K. of P. v. Knight*, 3 L. R. A. 409, 117 Ind. 489; enlarged powers conferred by statute: *Marsh v. Supreme Council, A. L. of H.* 4 L. R. A. 332, 149 Mass. 512.

to furnish insurance upon the lives of the members of its subordinate lodges. In the year 1880 one David Schonfield became a member of the order. Among the objects of the corporation, its charter states one in the following language: "To promote benevolence and charity by establishing a widows' and orphans' benefit fund, from which, on satisfactory evidence of the death of a member of the corporation who has complied with its lawful requirements, a sum, not exceeding five thousand dollars, shall be paid to his family, or as he may direct."

The constitution of the corporation at the same date, among others, contained the following provisions: "Each applicant shall direct in his application to whom he desires his death benefit paid. The beneficiary may be changed as the member may thereafter direct, in accordance with the laws of this order, and such changes shall be entered in the benefit certificate. A member may at any time, while in good standing, surrender his certificate, which, together with a fee of fifty cents, shall be forwarded by the reporter of his lodge, under seal, to the supreme reporter, who shall thereupon cancel the old certificate, and issue a new one in lieu thereof to such member, payable as he shall have directed; said direction and surrender to be made on the back of the benefit certificate surrendered, signed by the member, and attested by the reporter, under seal of the lodge. In the event of the death of one or more of the beneficiaries designated by the member before the decease of such member, if he shall make no further disposition thereof, upon his death such benefit shall be paid in full to the surviving beneficiary or beneficiaries, each sharing *pro rata* as provided in the benefit certificate. In the event of the death of all the beneficiaries designated by the member before the decease of such member, if he shall make no other disposition thereof, the benefit shall be paid to the heirs of the deceased member, and, if no person or persons shall be entitled to receive such benefit by the laws of this order, it shall revert to the widows' and orphans' benefit fund."

When Schonfield first became a member of a lodge, he received a "benefit certificate," issued under the above-quoted charter and constitutional regulation, binding the supreme lodge of the corporation to pay out of the widows' and orphans' benefit fund to one Friedlander the sum of \$2,000, in accordance with and under the laws governing the order, upon satisfactory evidence of the death of said member and the surrender of the certificate; provided that the certificate had not been surrendered by said member, or canceled at his request, and another certificate issued in accordance with the laws of the order. After paying his dues for several years, Schonfield's health failed him, and he seems to have become very poor, having neither the money necessary for his personal maintenance or to pay his dues to the lodge. In this condition of affairs the appellee, T. P. Turner, furnished him \$50, and took from him a transfer of his benefit certificate. The transfer was made by Schonfield, by filling up and signing a blank transfer on the back of the benefit certificate. Subsequently, on the 28th day of June, 1884, the Supreme Lodge, Knights of Honor, upon Schonfield's surrendering the first certificate, issued to him, in lieu thereof, a sec-

ond one, for the same amount, payable to T. P. Turner, and similar in all respects to the first one. The laws of the order when the two certificates were issued, as well as the terms and conditions of the certificates themselves, were substantially the same, and so remained until the 1st day of July, 1884, when an amendment of the constitution of the order went into effect, whereby a clause of the constitution formerly reading that the insurance money be paid "to his [the member's] family, or as he may direct," was so changed as to read that it should be paid "to such member of his family, or person dependent on him, as he may direct, and may designate by name." After Turner purchased the certificate, he paid the required assessments and dues until Schonfield died, the whole amount paid out by him, including the \$50, having been, according to his own testimony, "\$75 or \$80." It seems that it was not considered by any of the parties necessary to consult Friedlander about the transfer, or the surrender of the first certificate, and that in fact he did not participate in either act.

David Schonfield, when he joined the order, had a wife and five minor children. He did not live with or provide for them, and it seems that none of the parties to the aforesaid transaction had any knowledge that he had a family, or that he had ever had a wife. He was divorced from his wife. He died on the 20th day of September, 1884. The corporation collected the money from its members; but, before it was paid to Turner, as the holder of the benefit certificate, the children of Schonfield, and their mother, asserted a claim to it, upon which the corporation declined to pay it to either party. Turner sued the corporation to recover the money. The corporation answered, admitting that it held the money, and asking that the five children of David Schonfield, who were all minors, and whose names were alleged in the answer to be, Emma, Bertie, George, Tibbie and Fred Schonfield, and their mother, Laura Schonfield Schuterlee, be made parties defendant. The defendant brought into court the amount of money in controversy, to be held by the clerk, and paid over to the party adjudged to be entitled to it. The record does not show that process was issued or served as prayed for by defendant, but Laura Schonfield Schuterlee, Emma Schonfield, Bertie Schonfield, Fred Schonfield and Tibbie Schonfield appeared by attorney and answered, alleging that they had been cited to answer. Afterwards an order was entered appointing a guardian *ad litem* for Emma Schonfield, Bertie Schonfield, George Schonfield, Fred Schonfield and Tibbie Schonfield. The record does not show that the minor George Schonfield was ever cited, or that any answer for him was ever filed. There was a suggestion of the marriage of Laura Schonfield Schuterlee, but her husband was never made a party, and never appeared or pleaded. A judgment was rendered, on the verdict of a jury, in favor of plaintiff. The minors, Emma Schonfield, Bertie Schonfield, George Schonfield, Fred Schonfield and Tibbie Schonfield, by their guardian *ad litem*, prosecute this writ of error to reverse the judgment.

Turner was not related by blood or otherwise to David Schonfield. He was not his

creditor, and consequently had no insurable interest in his life. It is contrary to public policy to allow anyone not owning such insurable interest to become the owner, by assignment or otherwise, of insurance upon the life of a human being. A creditor of the assured may lawfully become the owner of such insurance to an extent requisite to protect him from ultimate loss of his demand; and a purchaser or assignee of it will be recognized as having an interest in it sufficient to repay him the purchase or other money invested in it by him, including advancements, in the nature of dues, assessments and premiums, to preserve and keep the insurance in force, with lawful interest thereon. What amount a creditor, as such, may procure insurance for, and the rules regulating his collection of it, depend upon contingencies not necessary to discuss in this case. What the policy of the law forbids to be done must be treated by courts, when administering the law, as never having been done. The undisputed evidence is that Turner's first claim of ownership of the insurance was through an assignment to him of the Friedlander benefit certificate. The case, in this respect, comes directly within the decision of this court in the case of *Price v. Knights of Honor*, 68 Tex. 361, in which it is held that such a transfer is prohibited by law. The fact that subsequently Schönfield surrendered the transferred certificate to the lodge, and procured another one, payable directly to Turner, does not change the principle, or affect the result. The public policy that forbids such transactions is entirely independent of the consent or control of the insurer or the insured.

We think it clear that the laws of the order at the dates of the transactions in question recognized David Schönfield as the only beneficial owner of the insurance, and that the person named in the certificate, whether it was Friedlander or Turner, was only an appointee to collect and receive the money, in the event that

Schönfield died without otherwise disposing of it. The rule and the practice that permitted the member, and him alone, to dispose of the insurance at his own pleasure, without regard to any right or claim of any person to whom it had been issued or transferred, is utterly inconsistent with the idea of a beneficial interest in any person other than the member himself. That mode of dealing with it is consistent only with the proposition that the party in whose name it was, whether originally or by transfer, held it merely as a trustee, for the use and benefit of the member. Upon the death of the member the beneficial interest vested in his heirs. When the person designated to receive the insurance is held by the law incapable of taking it for his own use, on grounds of public policy, it will be entirely consistent with the manifest purposes of the order to make the same disposition of the money that would have been made if he had been dead. As we have seen, the laws of the order direct it to be paid, in that contingency, to the heirs of the member; not to the heirs of the holder or transferee of the benefit certificate. Such holder of the certificate may, no doubt, collect the money for the use of the heirs, and enforce such proper claims of his own against the fund as the law recognizes.

After allowing to appellee the \$50 originally paid, and amount subsequently paid by him for dues and assessments, with interest thereon at the rate of 8 per cent per annum, the remainder of the money belongs to the heirs of David Schönfield, as they existed at the date of his death. If his wife had then been divorced, she was not one of them, and is not in any capacity entitled to a share of the money. On another trial the exception to the pleading of plaintiff charging that she was divorced, instead of being sustained, ought to be overruled.

The judgment is reversed, and the cause is remanded.

WISCONSIN SUPREME COURT.

STANDARD OIL CO., *Appl.*,

v.

James M. LANE *et al.*, *Respts.*

(...Wis....)

A lien for the price of lubricating oil furnished for use on machinery in a mill is not given by a statute giving a lien for any materials furnished for the protection of any building or any machinery which becomes a part of the freehold.

(January 23, 1890.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Bayfield County denying its claim to a lien upon certain premises for the price of lubricating oil furnished for use upon machinery situated thereon. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs. Lamoreux & Gleason*, for appellant:

7 L. R. A.

Statutes giving mechanics' liens are remedial, and must be liberally construed.

White Lake Lumber Co. v. Russell, 22 Neb. 126; *Montandon v. Deas*, 14 Ala. 33; *Brown v. Pendergast*, 7 Allen, 427.

The court should not narrow the meaning of the term "protection." Even if the expression is special, but the reason general, the expression will be deemed general.

Brown v. Pendergast, *supra*.

Courts universally give a broad and liberal construction to the language of lien statutes.

Hazard Powder Co. v. Byrnes, 12 Abb. Pr. 469; *Dixon v. LaFarge*, 1 E. D. Smith, 723; *Keystone Min. Co. v. Gallagher*, 5 Colo. 23.

Messrs. Miles & Shea, for respondents:

In determining the question whether a lien attaches, the Massachusetts court construes a lien statute strictly because it is in derogation of the common law.

Trask v. Searle, 121 Mass. 229.

In this respect Illinois is in harmony with Massachusetts.

Stephens v. Holmes, 64 Ill. 336; *Canisius v. Merrill*, 65 Ill. 67, 2 Jones, Liens, § 1554.

The materialman's lien always goes on the theory that the material has become a fixture, part and parcel of the realty, or that it was purchased with that intention and understanding.

Spruhen v. Stout, 52 Wis. 517; *Dimmick v. Cook*, 7 Cent. Rep. 191, 115 Pa. 573; *Pond Mach. Tool Co. v. Robinson*, 38 Minn. 273.

Cole, Ch. J., delivered the opinion of the court:

We think the decision of the court below, holding that the plaintiff was not entitled to a lien for its debt, was correct and must be affirmed. Its claim was for lubricating oil sold, to be used, and actually used, on the machinery in the mill situated on the premises described in the complaint. There is no dispute about the facts of the case. The only question is, Does the Statute give a lien for the claim for oil furnished for such purpose? It is contended on the part of the plaintiff that it does, because, it is said, the oil was necessary to protect the machinery against the effects of friction while it was in motion, and to prevent it from wearing out. The solution of the question involved depends entirely upon the construction of the Statute giving mechanics' liens. The Statute provides, in effect, that every person who, as principal contractor, architect, etc., performs any work or furnishes any materials in or about the erection, construction, protection or removal of any dwelling-house or other building, or any machinery erected or constructed so as to be or become a part of a freehold upon which it is to be situated, shall have a lien for such labor and materials. § 8314, as amended. See 2 Sanb. & B. Ann. Stat. 1841.

Lubricating oil sold to be used, and actually used, in operating the mill machinery, may protect such machinery against the effects of

friction, and thus preserve it from injury. But is it the intent of the Statute to give a lien for everything used on machinery which may protect it, and preserve it or keep it from wearing out? The Statute seems to go on the principle that materials used and labor performed on machinery which enhance its value, and become a part of such machinery, should be entitled to a lien. This appears to be the object of the Statute. It is clear that it is not everything used in operating machinery, and which tends to preserve it, that is embraced within the meaning of the Statute. Many things may serve to preserve machinery, and make it operate more efficiently and easily, which do not protect it in the sense of the Statute. Illustrations of this view were given on the argument, and others might be suggested. It will be noticed that the word "protection" is used in connection with "erection, construction and repairs," as well as "removal." And while the word "protect" often means to cover, shield or defend from injury, harm or danger of any kind, the word imports in the Statute something used or furnished for the machinery which not only preserves it from injury, but becomes a part of the machinery itself. The statutes of the different States giving mechanics' liens are so dissimilar that we derive but little aid from the decisions under them. The question is new in this State, and we are not prepared to say that lubricating oils used upon the machinery of a mill, though they may preserve and keep it from wearing out, are "material," within the meaning of the Statute. While this court has been disposed to give the Statute a liberal construction, so as to include all claims coming fairly within its provisions, yet it seems to us that the contention of the plaintiff can only be sustained by a forced and unnatural interpretation of the language used by the Legislature.

The judgment of the Circuit Court is affirmed.

7 L. R. A.

PENNSYLVANIA SUPREME COURT.

Re Change of Grade of WASHINGTON STREET.**J. Addison CAMPBELL'S APPEAL.****Re Opening of RUAN STREET.**

(....Pa.....)

1. **The classification of cities for the purpose of facilitating the convenient exercise of corporate powers** necessary for the proper regulation of municipal affairs is not prohibited by the Constitution; and as the several cities have different needs growing out of the differences in their size and situation, it may be upheld as a necessary means for enabling the Legislature to make provisions adapted to secure to each class of cities the corporate powers and the number, character, powers and duties of officers best adapted to its needs, without an infraction of the constitutional prohibition against local legislation.
2. **The legislation for the several classes** into which cities are divided, which is authorized by the power of classification, must relate to the exercise of the corporate powers possessed by cities of the particular class to which the legislation relates or to the number, character, powers or duties of the officers employed in their management; all other legislation is unauthorized.
3. **Local or special laws relating to proceedings in road cases** are prohibited by the Constitution and cannot be upheld under the power to classify cities for purposes of legislation; hence, sections 3-17 of the Act of May 6,

1887, which attempt to provide a peculiar code of procedure in road cases for the City of Philadelphia unlike that in the rest of the State, are unconstitutional and void.

4. **Sections 1 and 2 of that Act**, although in form local, since they in fact repeal provisions of the Road Law peculiar to Philadelphia and make such law conformable to that in force in the rest of the State, may be upheld.

(Clark and McCollum, JJ., dissent from the last proposition.)

(Parson, Ch. J., and Mitchell, J., dissent from the judgment.)

(February 17, 1890.)

CERTIORARI to the Court of Quarter Sessions for Philadelphia County to review a judgment quashing proceedings to ascertain and award the damages caused to abutting property owners by the change of grade of Washington Street, in the 21st Ward of the City of Philadelphia. *Affirmed.*

In 1878 an ordinance of councils of the City of Philadelphia changed the grade of Washington Street. On March 29, 1887, an ordinance directed the paving of a portion of this Street. The work was done in the latter part of the year 1887, and in laying the pavement the contractor filled up the Street to the grade line established in 1873, to the injury of certain property owners. They thereupon filed a petition under the Act of May 6, 1887 (Pub. Laws 1887) in the court of quarter sessions to recover damages for the injuries thus occasioned. In pur-

NOTE.—Statute, classification of cities by, constitutional.

Under the Constitution it is intended that the Legislature should by general laws provide for the incorporation of cities, towns and villages, or for change or amendment of their charters; and it was not designed to repeal or change charters in force at the adoption of the Constitution. *Guild v. Chicago*, 82 Ill. 472.

So, under the Territorial Organic Law, the Legislature has power to establish municipal corporations. *Deits v. Central City*, 1 Colo. 323.

The Pennsylvania Statute, designed to establish a uniform and general system of government for all the cities of the Commonwealth, does not apply to cities then organized under existing charters until they have accepted its provisions or suffered a repeal of their charters. *Re Henry Street*, 123 Pa. 344.

The Legislature may classify cities according to their population. *Kilgore v. Magee*, 85 Pa. 401; *Wheeler v. Philadelphia*, 77 Pa. 338.

But designating counties as a class according to a minimum population which makes it certain that but one county can avail of the benefits of the law is an evasion of the constitutional provision. *Devine v. Cook Co.* 84 Ill. 590.

It may delegate authority incident to municipal governments to cities, but only by general law; and ordinances adopted in different municipalities may be variant in their terms as public policy may require. *Covington v. East St. Louis*, 78 Ill. 548.

Under the constitutional provision against local and special legislation, the classification of cities with a view of legislating for each class separately is unconstitutional unless necessity therefor exists. *Ayers' App.* 2 L. R. A. 577, 122 Pa. 263.

7 L. R. A.

A statute dividing cities into classes cannot go into effect until the terms of all the members of a council in office at the time of its approval have expired. *Ibid.*

The Missouri Constitution, providing for four classes only of cities, does not prevent the application of general laws to cities having special charters. *Rutherford v. Hamilton*, 97 Mo. 543.

Population may be made the basis of classification in statutes relating to municipal bodies and their police powers, but such a classification cannot be made the means of evading the constitutional interdict of local or special laws, where the classification is plainly illusory. *State v. Hoagland*, 51 N. J. L. 62.

The office of the Classification Act, dividing cities into classes on the basis of population, is to provide a classification as a rule of construction for the convenience of municipal legislation. *Ibid.*

In order to observe the uniformity required by Nev. Const., art. 4, § 25, classification of counties must be based upon reasonable and actual differences: the legislation must be appropriate to the classification, and embrace all within the class. *State v. Boyd*, 19 Nev. 43.

The requirement that the system of county government shall be uniform is not considered to import universality in the operation of the law. Such construction would defeat much useful legislation. *Ibid.*

A statute giving towns containing one or more unincorporated villages of 1,000 inhabitants each certain enlarged powers does not violate the constitutional provision that "the Legislature shall establish but one system of town and county government." *Land, Log & Lumber Co. v. Brown*, 8 L. R. A. 472, 73 Wis. 294.

Streets in Cities of the First Class and Regulating Proceedings Therein," and it provides a system applicable only to the City of Philadelphia. The objection is now made that this Act is local in its operation, while it relates to a subject upon which local legislation is forbidden by the Constitution. On the other hand, it is insisted that it relates to all cities of the first class, and to a subject upon which local legislation is authorized by the classification of the cities of the Commonwealth under the Act of 1874.

In examining the question thus presented for decision we will consider, in the first place, the object of the classification of cities and the basis on which classification rests; second, the legislation which classification authorizes for the several classes into which cities are divided; third, some of the subjects upon which legislation is not authorized by our system of classification; fourth, the proper application of our conclusions to the cases before us.

The cities in this State are divided into classes by the Act of May 28, 1874. The object of the classification is stated in the body of the Act in these words: "For the exercise of certain corporate powers, and having respect to the number, character, powers and duties of certain officers thereof, the cities now in existence or hereafter to be created in this Commonwealth are divided into three classes."

The first class embraced cities containing a population of 800,000 and upwards. The second class included all cities whose population exceeded 100,000 and did not exceed 300,000. The third class was made up of all cities having less than 100,000 inhabitants. The object of classification being thus clearly stated in the body of the Act which ordains it, we are not left to conjecture. The Legislature has declared its object in providing a system of classification to be to facilitate the convenient exercise of "certain corporate powers" necessary for the proper regulation of municipal affairs.

The necessity for making such provision grows out of the differences in size and situation of the several cities, and the resulting differences in their needs as to the "number, character, powers and duties" of the officers required for the proper and convenient government of each class. The basis of classification is the population for whose well-being the city is to provide.

Whether the classification of cities for any purpose was constitutional was a question that came to this court first in *Wheeler v. Philadelphia*, 77 Pa. 338; and it was upheld as necessary for the proper and convenient government of the cities of the State. This necessity was forcibly stated in the opinion of the court delivered by the present chief justice. Speaking of the system of laws relating to the City of Philadelphia he said: "We have but to glance at this legislation to see that the most of it is wholly unsuited to small inland cities, and that to inflict it upon them would be little short of a calamity. Must the City of Scranton, over 100 miles from tide water, with a stream hardly large enough to float a bateau, be subjected to quarantine regulations and have its lazaretto? Must the legislation for a great manufacturing and commercial city, with a population approaching 1,000,000 be, regulated by the neces-

sities of an inland city of 10,000 inhabitants?"

The force of the argument in support of classification in *Wheeler v. Philadelphia*, and it is the only line of argument by which it can be sustained, lies in the evident necessity for the possession and exercise of other and, in some respects, different, "corporate powers" by the city on the sea board from those required by the inland city; by the city with a population of 1,000,000, from those required by the city of 10,000. These great differences in population render it necessary that there should be corresponding differences in the "number, character, powers and duties" of the officers by whom the municipal governments are to be conducted and the municipal necessities provided for; and classification was sustained as a necessary means for enabling the Legislature to make provisions adapted to secure to each class of cities the "corporate powers" and the "number, character, powers and duties" of the officers best adapted to its needs, without an infraction of the Constitution.

With this glance at the object and basis of classification, let us proceed to inquire what kind of legislation is authorized by it? I reply, negatively, that it does not authorize legislation on subjects not relating to municipal affairs. For this reason we held that an Act of Assembly relating to mechanics' liens in cities of a given class was a local law and forbidden by the Constitution. *Davis v. Clark*, 106 Pa. 377.

Liens may be divisible into classes by reference to their own peculiar characteristics, but not by reference to the size of the city or town in which the building subject to the lien may happen to stand.

An attempt was made to classify counties by reference to the number and geographical situation of the cities they contained, but this court refused to sustain it. *Scowden's App.* 96 Pa. 422; *Com. v. Patton*, 88 Pa. 258.

An Act relating to street railways in cities of the third class came under consideration in the recent case of *Weinman v. Wilkinsburg & E. L. P. R. Co.* 118 Pa. 192, 11 Cent. Rep. 54, and the Act was held to be local and therefore unconstitutional, not relating to the municipal affairs of the cities of the third class, but to certain corporations that happened to be located within them.

This case was followed by *Ayars' App.* 123 Pa. 266, 2 L. R. A. 577, in which the general doctrine was clearly stated by Justice Sterrett in harmony with the line of cases just cited. But answering affirmatively, I will adopt the words of the Act of 1874 and say that classification authorizes such legislation as relates to the exercise of the "corporate powers" possessed by cities of the particular class to which the legislation relates, and to the "number, character, powers and duties" of the officers employed in the management of municipal affairs.

These are the purposes contemplated by the Legislature; they are the only purposes for which classification seems desirable; they are the only purposes for which it has been upheld by this court. In order that a given Act of Assembly relating to a class of cities may escape the charge of being a local law it is necessary, as was said in *Weinman v. Wilkinsburg & E. L. P. R. Co.*, *supra*, that it should "be applicable to all the members of the class to which it relates

and be directed to the existence and regulation of municipal powers and to matters of local government." A law that will bear the application of this test is within the purposes for which classification was designed and therefore constitutional. A law that will not bear its application is local and offends against the Constitution.

Among the many subjects of legislation which classification presents we may call attention to such as the establishment, maintenance and control of an adequate police force for the public protection; the preservation of the public health; protection against fire; the provision of an adequate water supply; the paving, grading, curbing and lighting of the public streets; the regulation of markets and market houses; of docks and wharves; the erection and care of public buildings, and other municipal improvements. These are mentioned, not because they include all the subjects for the exercise of municipal powers, but as a suggestion of some of the more obvious ones, and as an illustration of the character of the subjects upon which legislation for the classified cities may be necessary. These classes are thus seen to embrace, not mere geographical subdivisions of the territory of the State, but organized municipalities which are divided with reference to their own peculiar characteristics and needs; and the legislation to which they are entitled by virtue of such division is simply that which relates to the peculiarities and needs which induced the division. In this way each class may be provided with legislation appropriate to it, without imposing the same provisions on other classes to which they would be unsuitable and burdensome.

We come now to inquire what legislation remains forbidden to cities notwithstanding classification. I reply that all legislation not relating to the exercise of corporate powers or to corporate officers and their powers and duties is unauthorized by classification.

In art. 8, § 7, the Constitution declares that the Legislature shall not pass any local or special law "regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceeding or inquiry before courts, aldermen, justices of the peace, sheriffs, commissioners, arbitrators, auditors, masters in chancery or other tribunals." The same section forbids the passage of any local or special law fixing the rate of interest, exempting property from taxation, changing the laws of descent, affecting the estates of minors, and many other purposes, among which is, "authorizing the laying out, opening, altering or maintaining roads, highways, streets or alleys." It is very clear that the purpose of the constitutional provision is to require that laws relating to the several subjects enumerated in section 7 shall be general, affecting the whole State, so that the rule upon all these subjects shall be uniform throughout every part of the territory in which the Constitution itself is operative.

For example, there cannot be one rate of interest in cities of the first class, another in those of the second or third, and still another for the rest of the State, but the rate when fixed by law must apply to all parts and divisions of the State alike. The same thing is true of the Law of Descents, and so on through the entire list of subjects upon which local and special legisla-

tion is forbidden. If classification can relieve against the constitutional prohibition as to one of these subjects, it can relieve as to all. If it can justify a change in the practice in the courts of law or the proceedings to assess damages for an entry by virtue of the right of eminent domain, it can by the same reasoning justify a change in the Law of Descents, or the settlement of estates, or the rate of interest, and sweep away the entire section with all its safeguards. But a statute is not above the Constitution. The Classification Act is subject to the limits which art. 8, § 7, prescribes, and it cannot transcend a single one of them. For that reason the courts of law in Philadelphia have the same jurisdiction and powers, and proceed in the same manner, as the courts in the other counties of the Commonwealth. The system of practice, so far as it rests on statutory provisions, must be the same. The same proceedings are had on writs, the same method for securing the benefit of the exemption of property from levy and sale, the same writ of habeas corpus for one who is restrained of his liberty, the same procedure for one whose land is entered and appropriated to public or to corporate uses. These are the civil rights of the citizens of Pennsylvania as such, and they are not affected by the size of the town in which he lives or the value of his land, any more than by the color of his skin.

They are the safeguards provided by the Constitution for the protection of the weak as well as the strong, the dweller in the country as well as the resident in "cities of the first class," and no system of classification of cities or other divisions of the State can disturb them.

It now remains for us to apply the conclusions which we have reached to the Act of 1837, and to the cases under consideration. That Act contains seventeen sections. The first and second of these provides for the assessment of damages for the opening of streets plotted or projected by the city. The remaining sections provide a peculiar and somewhat cumbrous Code of Procedure in road cases for the City of Philadelphia unlike that in use in the rest of the State. They add a lawyer to the board of viewers, who is also appointed by the court; they clothe him with the powers of a master in chancery; empower him to admit and exclude evidence without regard to the wishes of the viewers, and seal a bill of exceptions to his rulings that is to be returned with the report for the examination of the court. The viewers are thus stripped of all power over the course of their inquiry, and have nothing left them except to fix the damages from such evidence as the master permits them to hear. It is obvious that these sections do not relate to the exercise of any corporate power of cities of the first class or to the ("number, character, powers and duties") of the municipal officers, or to any subject under the control of the city government. On the contrary, they relate to the practice and procedure in common-law courts of the County of Philadelphia over which the city has no control, and to the adjustment of the compensation due the property holder for an invasion of his close under the right of eminent domain,—a subject as exclusively within the jurisdiction of these courts

as an indictment for a crime or an action of trespass *quare clausum fregit*. The only connection the city has or can have with such a proceeding is as a party to the litigation because liable to pay the damages assessed. The city appears, like any other suitor, to ask or object to the appointment of viewers, or to the confirmation of their report, and it is bound, like any other suitor, by the judgment rendered.

It was suggested on the argument that real estate is more valuable in the city than in the country, and that for this reason a different mode for assessing damages done by the opening of a highway ought to prevail. But the constitutional convention evidently did not think so. It made no provision for classifying litigation by reference to the sums in controversy or the location of the property involved, and this is the first time I have ever heard the suggestion made that such a classification was desirable. Courts of justice weigh legal rights in the scales of reason, not in those of commerce, and protect the citizen whose scanty possessions are in the country with the same jealous care as the holder of corner lots in a great city. The established forms of procedure in courts of law are the same for all suitors. The value of the subject of litigation, the wealth of the litigants, their personal character, their race or previous condition, are circumstances of which the law takes no notice. The courts represent the Commonwealth of Pennsylvania; wherever they sit their process goes out in the name, and their judgments are enforced by the power, of the Commonwealth, and their proceedings are no more affected by the classification of cities than are those of the legislative or executive departments of the state government.

It is also suggested that the constitutionality of the Act of 1887 is a legislative and not a judicial question, and that it should be left only to the judgment of the Legislature. This suggestion is as destitute of foundation as that we have just considered. The Legislature must exercise its powers within the lines laid down by the Constitution. What it shall do within these lines is a question that addresses itself to the wisdom and discretion of its members. Whether it shall disregard them and do that which the Constitution forbids is a question which, when such legislation is attempted, belongs to the courts. When they decline, if they ever do, to compel obedience to the Constitution, all check upon legislative power will be gone, and the door to all sorts of local and special laws which the Constitution proposes to close will be open as wide as in the worst days of omnibus legislation. What the law shall be upon a subject over which the Legislature has power is a legislative question. Whether the rate of interest shall be 4 per cent or 6 or 10, is a legislative question; for the Legislature has ample power over the whole subject. But whether there shall be one rate in Philadelphia, another in cities of the second class, still another in cities of the third class, and one different from all these for the rest of the State, is a judicial question, because the Constitution declares that laws on this subject shall be general and uniform; local laws providing different rates for different parts of the State would be a violation of the Constitution, and the duty of the courts to declare them

absolutely void would be plain and imperative. So the manner in which taxes shall be levied and collected, and at what rate, are legislative questions. Whether the law be wise or unwise, easy or severe in its operation, the courts cannot interfere so long as it is general and uniform; but a tax of 10 cents on a dollar of the last adjusted valuation of the valuable real estate in cities of the first class, and of ten mills on the valuation of property in the rest of the State would violate the Constitution. Whether the law imposing such unjust and unequal taxes shall be executed is a judicial question.

Whether the proceedings in road cases shall be wholly changed or not is for the Legislature to determine.

It may give us an entirely new system of procedure in such cases if it so decides. But when it attempts to change the practice in one city or class of cities alone, it is attempting local legislation of a mischievous kind which the Constitution forbids, and the question whether such a law shall be enforced is as purely a judicial question as it is easy to conceive.

Applying the conclusions we have reached to the Act of 1887, we hold that all the sections except the first and second are in violation of the Constitution and must fall. What is the situation of the two remaining sections? In answering this question let us see just how the law stood in the City of Philadelphia on the subject to which they relate when they were passed. The Act of 1874 made it the duty of road viewers in all cases where they located a road, public or private, to assess the damages to be sustained by property holders, if any, unless claims for such damages were released, and make return of such assessment with their report. This was a general law and was intended, probably, to cover all cases where damages might be sustained by reason of laying out and opening of public highways. In Philadelphia streets are projected by the city officers in advance of the immediate wants of the neighborhood and plotted on the city plans. These are called plotted streets. When it is desirable to open such a street, viewers are appointed by the court of quarter sessions to go upon the ground, investigate and report upon the necessity for such opening. When their report is confirmed and the opening determined upon, another view is appointed to assess damages done by, and benefits derived from, the opening of the new street. Did the Act of 1874 impose the duties of both sets of viewers upon that appointed to determine the necessity for opening the street? This question came first into this court in the *Case of Jackson Street*, 83 Pa. 328, and it was held that the Act of 1874 was inapplicable to the case of plotted streets, and that damages must be assessed under the local laws applicable before that Act was passed. This case was followed some years later by *Magnolia Ave.*, 117 Pa. 56, 9 Cent. Rep. 611. The consequence of this ruling was to leave plotted streets remaining under the local system, while other streets were brought under the General Law.

The Acts of 1858, 1864 and 1866 were local, relating only to the City of Philadelphia. Under their operation the viewers who decided to open the road had nothing to do with the ques-

tion of damages; and the viewers who adjusted the damages had nothing to say upon the necessity for opening the street. This inconvenience had been removed by the General Law of 1874 as to all the streets except the plotted ones.

What remained to be done was to repeal the local system and extend the provisions of the General Law relating to the duty of the viewers appointed to lay out streets, to those appointed to open streets laid out and plotted by the city. This is effectually done by the first and second sections. It is true that the form of the Act of 1887 is not that of a general law, not does it in terms profess to repeal the local system and extend the General Law in its place, but in substance and effect it provides for just the change needed. The fact is of more importance than the form, and the fact is that the Act of 1887 wipes out the old system by which the necessity for opening a street went to one view and the damages to another, and puts in its place the provisions of the General Law committing the assessment of damages to the viewers whose report in favor of opening made the assessment necessary. In this way both subjects come to the attention of the same viewers at the same time; and upon their report both subjects come to the attention of the court at the same time. These sections do not simply tend to uniformity, but they accomplish it. Their effect is to bring under one system, and that the system provided for the whole State, by general law, all cases of assessments of damages and benefits upon the laying out of new, or the opening of plotted, streets. It is true these sections relate only to cities of the first class, but so did the local laws which they supply. The remedy is as broad as the evil to be corrected. A law which repeals a local law must of necessity affect only the locality in which the local law prevailed, but it is not therefore a local law within the meaning of the Constitution. It does not set up, but it destroys, a local system and thereby extends the general law over the territory previously withdrawn from its operation. So with the Act of 1887 so far as the first and second sections are concerned. They take away the previously existing system for the assessment of damages for the opening of plotted streets which was local and rested on local laws, and put the system provided by general law in its place. For this reason we think they do not offend against the Constitution. These conclusions lead us to affirm Washington Street and to reverse the proceedings in Ruan Street.

Let judgment be entered accordingly.

Clark, J., and McColum, J., concur in the judgment, but dissent from so much of the opinion as sustains the constitutionality of sections 1 and 2 of the Act of May 6, 1887.

Paxson, Ch. J., dissenting:

The difficulty we have had in deciding this and other cases involving the constitutionality of legislation affecting classified cities ought to admonish us that we are at sea without any recognized, intelligent rule to guide us. We have been struggling towards "uniformity," and making that a test of the constitutionality of this class of legislation, whereas the very object of classification is to allow a differ-

ent rule in the classified cities from that prevailing in the rest of the State. I need not at this late day discuss the reasons which induced this court in *Wheeler v. Philadelphia*, 77 Pa. 338, to adopt the principle of classification. It is sufficient to say that without it there might have been a dead lock in machinery of the government. Our present difficulty, and in my opinion it is a serious one, I think may be fairly attributed to our departure from the principles there laid down. The doctrine upon which that case rests is that legislation for classified cities is not local, and if it applies to classes, and not to persons or things of a class, it is not special. There is no other ground upon which classification can be sustained. An Act passed for all cities of a class is a general law and not local, for the reason that its operation is not confined to any one city. And if it applies to all persons or things of a class it is not a special law. As was said in *Wheeler v. Philadelphia*: "This construction does not open the door to special legislation. It permits legislation for classes, but not for persons or things of a class. As an illustration, it could not be held to authorize the Legislature to open a particular street in a city of either class named in the Act referred to."

It was this kind of special legislation which was the cause, in a great measure, of the adoption of this feature of the Constitution. It had often happened that when the courts or the councils of a city had refused to open a particular street, interested parties would procure the passage of an Act of Assembly ordering such opening. This was the evil which was prohibited by the Constitution, and it can no more exist now under classification than it can without it.

If, then, legislation for classified cities is neither local nor special, it does not come within the prohibition of art. 8, § 7, of the Constitution. It follows logically from this, as I view it, that it is for the Legislature to say what legislation is needed for a classified city, and that it is not a judicial question at all. This is a plain rule, easily understood, which leaves the Legislature free to enact such laws as the wants of classified cities require. Concede that it must be limited to matters affecting their government. What can be more vital to the good government and welfare of a city, and to the material interests of its inhabitants, than the control of its streets? Why may not a classified city have the power to direct the opening of streets and the assessment of the damages therefor? Must the damages for the widening of Chestnut Street, which may amount to millions of dollars, be assessed precisely in the same manner as for the opening of a road in the Hemlock Forests of Pocono Mountains? Why should we have an iron-clad, inflexible rule which cannot be enforced without injury to the one section or the other, when neither section demands it, or would be benefited by it? In my opinion all that relates to the local affairs of the municipality, the control of the streets, its gas and water supply, its markets and many other matters which might be mentioned, are proper subjects of municipal control and may be safely left to such municipalities. As to all such matters those communities can best govern themselves, and I

do not think the Constitution prohibits, or was intended to prohibit, legislation conferring upon them such powers. If one class of cities desire certain regulations regarding its streets, or any other matter affecting the welfare of its inhabitants, why should it not have them when no other community is objecting or is injured thereby. And why should such regulations, if conferred upon one class of cities which desires them, be forced upon another class, or upon rural districts which do not desire them, and to whose wants they are utterly unsuited? The answer, and the only answer, to this, is, "We must have uniformity." This is all very well so far as the Constitution enjoins uniformity, but in my opinion neither that instrument nor the common good and welfare of the people require this principle to be carried to the extent claimed for it in the affairs of municipalities. It would be as reasonable to declare that all men should wear coats of the same size whether they fit them or not.

I am unable to see that the opinion of the majority of the court furnishes any fixed rule by which such legislation can be measured in

the future. This particular case is decided, but if it furnishes a rule by which a lawyer can safely advise his clients in reference to future legislation, unless upon precisely similar facts, I fail to see it. If the legislation in regard to streets in the cities must be uniform with the rule in all other parts of the State, upon what subjects and to what extent may legislation be applied to classified cities? Until this question is answered specifically, I contend we have no rule at all. We have nothing but theories, and the most astute lawyer cannot safely pronounce an Act relating to classified cities constitutional, until after such Act has been passed upon by this court. In other words, the General Assembly may legislate for classified cities subject to the veto of this court. In my opinion it would be better to leave this whole subject to the wisdom of the Legislature, where, under the constitutional division of the powers of the government, it properly belongs.

For the reasons thus briefly indicated I dissent from this judgment.

Mitchell, J., concurs in this dissent.

MARYLAND COURT OF APPEALS.

AMERICAN TELEPHONE & TELEGRAPH CO. OF BALTIMORE CITY, App't.,

George A. SMITH,
and NINE OTHER CASES.

(.....Md.....)

The construction of a telegraph and telephone line on a railroad company's right of way imposes an additional servitude or burden on the land for which the owners are entitled to compensation unless it is constructed by the railroad company in good faith for its own use and benefit in the operation of the road and to facilitate its business, or is reasonably necessary for that purpose.

(Stone, J., dissents.)

(December 17, 1889.)

APPEALS from orders of the Circuit Court for Baltimore County. *Affirmed.*
The case is stated in the opinion.

NOTE.—*Telegraph line along right of way of railroad.*

A line of telegraph on a railroad right of way is an additional burden (see *Atlantic & P. Tele. Co. v. Chicago, R. I. & P. R. Co.* 6 Biss. 158; *Lewis, Em. Dom.* 181), unless constructed for the use of the railroad company in the operation of its road and dispatch of its business. *W. U. Tele. Co. v. Rich.* 19 Kan. 517.

It is a proper use of its right of way where a railroad erects a telegraph line thereon or suffers the "line to be erected by a telegraph company for the joint use of both companies." *W. U. Tele. Co. v. Rich.* 19 Kan. 517; *Pierce v. Drew*, 136 Mass. 75; *New Orleans, M. & T. R. Co. v. Southern & A. Tele. Co.* 53 Ala. 211; *W. U. Tele. Co. v. Am. U. Tele. Co.* 65 Ga. 160; *Baltimore & O. Tele. Co. v. Morgan's L. & T. R. & Steamship Co.* 37 La. Ann. 833; *Lewis, Em. Dom.* 355.

A railroad company can make a contract with a
7 L. R. A.

See also 26 L. R. A. 443; 41 L. R. A. 403; 45 L. R. A. 223.

Mr. Robert R. Boarman for appellant.
Messrs. David G. McIntosh and W. Gill Smith, for appellee:

The averments of the bill are sufficient to authorize granting an order of injunction.

Western Maryland R. Co. v. Owings, 15 Md. 204; *Frederick v. Groshon*, 80 Md. 496.

A line of telegraph or telephone upon a railroad right of way is an additional burden.

Lewis, Em. Dom. § 1888; *Mills, Em. Dom.* § 55; *Atlantic & P. Tele. Co. v. Chicago, R. I. & P. R. Co.* 6 Biss. 158.

The utmost extent to which any exception to this rule is carried is where the telegraph line is constructed for the use of the railroad company, in the operation of its road, and the dispatch of its business.

W. U. Tele. Co. v. Rich. 19 Kan. 517.

A right of way is an interest in land, which cannot be created, except in the mode and manner prescribed by the Statute.

Hays v. Richardson, 1 Gill & J. 886; *Baltimore & H. R. Co. v. Algire*, 63 Md. 819.

Assuming the Railroad Company had a right

telegraph company, permitting it to establish a line of wire on its right of way, but cannot make an exclusive contract. In so doing it seeks to add an unlimited franchise to one which is itself limited. *W. U. Tele. Co. v. Am. U. Tele. Co. supra*; *Mills, Em. Dom.* 407.

The use by a telegraph company of the right of way of a railroad, for the purposes of erection and maintenance of a telegraph line, is an encroachment on the exclusive rights of the railroad. *Atlantic & P. Tele. Co. v. Chicago, R. I. & P. R. Co. supra*; *Southwestern R. Co. v. Southern & A. Tele. Co.* 46 Ga. 43.

And a special authority to a telegraph company to build upon, over or under any public road, street or highway is to be construed strictly and does not authorize construction over a railroad. *New York City & N. R. Co. v. Central U. Tele. Co.* 21 Hun, 261; *Lewis, Em. Dom.* 355.

of way which it could assign, the grant is void as against public policy.

W. U. Teleg. Co. v. Am. U. Teleg. Co. 65 Ga. 160.

Miller, J., delivered the opinion of the court:

These ten cases were argued together, and as they present substantially the same questions, they will be disposed of in one opinion. They are all bills filed by separate land owners in Baltimore County seeking to enjoin the "American Telephone & Telegraph Company of Baltimore City," a corporation incorporated under the General Corporation Law of this State, from erecting telegraph poles, and constructing a telegraph or telephone line of wires on and over the lands of the several complainants. Eight of the appeals are from orders granting preliminary injunctions upon the several bills. It is well settled that in deciding an appeal from such an order this court can look only to the case made by the bill, though the defendant is required to file an answer before he can appeal, and the answer must appear in the record. *Blackburn v. Craufurd*, 22 Md. 447.

The question then is, Does each of these eight several bills make out a case for the granting of such an injunction?

The bills all aver and charge in substance that the defendant Company has recently deposited large and heavy poles upon the lands of the complainants along the line of the Maryland Central Railroad, and is engaged in setting up said poles, or is about to do so, without their permission or consent; that the erection of these poles and the stringing of wires thereon is injurious to their property and is an appropriation of private property for public use without compensation or tender thereof to the complainants, and that they are entitled to have the defendant restrained and enjoined from erecting said poles and stringing wires thereon on and over their lands until it has acquired the right to do so by condemnation of the lands for such use, or otherwise.

We have no doubt as to the sufficiency of these averments or of the jurisdiction of a court of equity to grant an injunction in such cases. A corporation created for the purpose of transmitting messages by telegram or telephone is, with respect to its right to construct its lines over private property, just as much subject to the provisions of art. 8, § 40, of the Constitution as is a railroad or any corporation clothed with the power of taking private property for public use. *Lewis, Em. Dom. § 172; Mills, Em. Dom. § 21.*

This clause of the Constitution is too plain to admit of any doubt, and the averment that the defendant is proceeding or threatens to proceed to construct its line of poles and wires on and over the complainants' land without their leave or license, and without paying or tendering to them compensation for the use of their lands for this purpose, is of itself enough. The court could not properly refuse an injunction in the face of such averment. The nature of the damage complained of, whether irreparable or not, has nothing to do with the question when thus presented. *Western Maryland R. Co. v. Owings*, 15 Md. 199.

We shall therefore affirm the orders appealed

from in these eight cases without considering the question whether the appeals or any of them should be dismissed because of the fact that the answers of the defendant are not under its corporate seal.

In the other two cases [those of Smith and McIntosh], the appeals are from *pro forma* orders refusing to dissolve the injunctions upon bills, answers and proof. In these cases the defendant corporation in its answers avers that it is proceeding to construct its line of poles and wires along and on the right of way of the Maryland Central Railway Company, under a contract with that company made on the 29th of April, 1889, for the use and benefit of the railway company in operating and running its cars; that the railway company has the right to place telegraph poles and wires, and telephone wires and poles, over and upon its right of way for the use and operation of its railroad, and as many as may be necessary for operating its road, and for the safety of the public who travel over the same, for the purpose of facilitating the business of the road, and increasing its passenger travel and freight tonnage; and that the railway company could do this itself or employ some other company to do it for it, and the complainants have therefore no right to interfere.

These answers disclose what is obviously the real controversy in all these cases. On the one side the land owners from whom the railroad company obtained the right of way for the construction of its railroad insist that the construction of this telegraph and telephone line will impose an additional servitude or burden on their lands for which they are entitled to compensation, and that the line cannot be constructed until the corporation or corporations undertaking its construction have first complied with the requirement of the Constitution in regard to taking private property for public use. On the other hand the Telegraph & Telephone Company contends that it is constructing this line upon the right of way of the railroad company under a contract with that company for its use and to facilitate the operation of its road, and to increase its business, and in this contention it is aided by the railroad company. The right to construct this line has also been placed in argument, upon other grounds which will be noticed hereafter.

Before considering the facts we must ascertain the law applicable to such cases, and this is not altogether free from difficulty. Not many instances have occurred in which land owners have asserted such claims, and the cases in which the precise question before us has been raised are comparatively few. In the most recent text book on Eminent Domain it is said: "A line of telegraph on a railroad right of way is an additional burden unless constructed for the use of the railroad company in the operation of its road and dispatch of its business." *Lewis, Em. Dom. § 141.*

In *Mills, on Eminent Domain*, § 59, the author approvingly quotes part of the opinion of the court in *W. U. Teleg. Co. v. Rich*, 19 Kan. 517. That case is also referred to by *Lewis*, has been strongly pressed upon our attention, and therefore requires a careful examination. It was a suit by a land owner against the Western Union Telegraph Company to recover dam-

ages for cutting down trees on his land. The trees were on or close to the right of way of the Atchison, Topeka & Santa Fé Railroad, and were cut down to make room for the telegraph poles and to prevent interference with the telegraph wires. The defendant sought to prove that the telegraph line was built jointly by it and the railroad company under an arrangement for its joint use by the two companies, and introduced a witness to prove that the line of telegraph was built jointly by the two companies for the use of the railroad company in the moving of its trains and the transaction of its business, that it was part of and necessary to its business, and was built on and over the right of way of the railroad company. The lower court rejected this testimony, and this ruling was held to be erroneous. This was the sole question decided and in deciding it the court said: "A telegraph line, if not indispensable to a railroad, tends so much to facilitate its business, and to the speedy and safe running of its trains, that the railroad company has a right to build it, to use its right of way therefor, and to remove all obstructions thereon to its fullest and most uninterrupted and beneficial use. Although it may have but an easement in the land, and that easement limited to its use for railroad purposes, yet a telegraph is so convenient, if not indispensable, that it may cut down every tree and bush on the right of way if necessary for the most constant and efficient use of a telegraph line built by it over and upon such right of way, just as it may dig away a hill or fill up a ravine for the sake of a water tank or a station-house. By so doing it gives the adjacent land owner no claim for damages. Such use is contemplated in the original condemnation, and the damages resulting therefrom are part of the damages included in the assessment thereof. In short, the railroad company may use its right of way not merely for its track, but for any other building or erection which reasonably tends to facilitate its business of transporting freight and passengers, and by such use in no manner transcends the purposes and extent of the easement, or exposes itself to any claim for additional damage to the original land owner. So that if the railroad company had built this line by itself and independent of the defendant and in doing so had only cut down trees upon its right of way, it is clear that the plaintiff would have no cause of action therefor. Does the fact that it took a partner in the construction and use of the telegraph expose it, or such partner, to any liability to the land owner for the full value of the trees cut down upon its right of way? We think not. If the railroad company could build by itself without liability, it did not assume liability by building with another. Whatever it could do and would have done for its own use and benefit, and was so done, was, so far as the land owner is concerned, *damnum absque injuria*, no matter who bore the expense; or perhaps, more correctly, it was damages already paid for. We do not question that every additional burden cast upon the land outside of the purpose and scope of the original easement, no matter in whose behalf, gives the land owner new claim for compensation. But such compensation is limited to the extent of the additional

burden. Of course if the trees were not upon the right of way, it is immaterial whether the defendant built the line alone, or jointly with the railroad company, for, in the latter case, either would be responsible for the entire damages. We cannot, of course, pass upon this question of fact, for we cannot tell what the testimony, if admitted, would have disclosed. It is enough that the testimony offered ought to have been admitted, and then the jury instructed that if the facts were as defendant sought to prove them to be, the defendant was liable for only the damages caused by the additional burden, if any, its use of the telegraph cast upon the land."

We have thus quoted this opinion at length, because it is a very clear statement of the law which we are willing to accept. It recognizes the right of the land owner to compensation for every additional burden cast upon the land outside the scope of the original easement, and that whether a given structure creates an additional servitude is a question of fact, depending on the circumstances of each case to be determined by the tribunal having jurisdiction to try the same, and before which it is tried. We cannot adopt the view taken by counsel for the appellant that this question must in all cases be determined by the judgment and opinions of the railroad officials or employees. In a case where the question was whether a certain building was a necessary building within the terms of a railroad charter, that question was determined by this court itself upon proof as to the character of the building, its location and the purposes for which it was constructed and used. *Hamilton v. Annapolis & E. R. Co.* 1 Md. 560.

We entertain no doubt whatever as to the right of a railroad company to construct on and over its right of way a telegraph or telephone line, for its use in the operation of its road and dispatch of its business; and it may do this by itself, or may employ another company to do it, or may do it conjointly with another company. If, then, this line is in process of construction, or is about to be constructed over the right of way of this railway company in good faith for the use and benefit of the latter in the operation of its road and to facilitate its business, or is reasonably necessary for that purpose, the land owners have no ground of complaint because such use of their land is within the scope of the original easement for which they have already received compensation. But, on the other hand, if this is not the motive for its construction, and the main object in constructing it is to establish an extensive line of telegraph and telephone communication through this and other States for general commercial purposes, for the use and benefit of the defendant, and such a line is not reasonably necessary for the purposes of the railroad, then it will be a new easement and put a new and additional burden upon the land for which the owners are entitled to compensation. This question will be decided when we come to consider the facts; but we must first notice the other grounds upon which the right to construct this line is sought to be placed.

By an Act of Congress, approved July 14, 1866, it is provided among other things "that any telegraph company now organized, or

which may hereafter be organized under the laws of any State in the Union, shall have the right to construct, maintain and operate lines of telegraph over and along any of the military or post-roads of the United States, which have been or may hereafter be declared such by Act of Congress," provided such lines "shall not be so constructed as to interfere with the ordinary travel" on such roads, and provided also "that before any telegraph company shall exercise any of the powers or privileges conferred by this Act such company shall file its written acceptance with the postmaster general of the restrictions and obligations required by this Act." Congress afterwards, in 1872, declared all the railroads in the country which are now or may hereafter be in operation to be "post-roads." There is nothing in these records to show that the defendant has filed its acceptance of the Act of 1866, but as this can readily be done it is proper we should give our views of the construction and effect of these Statutes. We cannot suppose it was the intention of Congress by these enactments (even if it had the power to do so), to put the right of way of every railroad in the country at the mercy of the telegraph companies, and allow the latter to use them for the construction of their lines without making compensation to anyone therefor. Such a construction was wholly repudiated by *Judge Drummond* in the case of *Atlantic & P. Teleg. Co. v. Chicago, R. I. & P. R. Co.* 6 Biss. 158, and by *Judge Harlan* in *Western Union Teleg. Co. v. American Union Teleg. Co.* 9 Biss. 72. In the latter case it is expressly said that under this Act the telegraph companies must obtain the consent of the owners of the right of way or condemn the same for telegraph purposes and make compensation therefor. We have not been able to discover that the views of these judges on this point have ever been overruled by the supreme court in any of its numerous decisions on this Statute. On the contrary, in *Pensacola Teleg. Co. v. Western Union Teleg. Co.*, 96 U. S. 1 [24 L. ed. 704], that court said: "This Act gives no foreign corporation the right to enter upon private property without the consent of the owner, and erect the necessary structures for its business; but it does provide that whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges;" and again: "No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph companies, for no such an attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only national privileges are granted."

In all the cases in the supreme court where telegraph companies have constructed their lines on the right of way of railroad companies in the States, they appear to have done so by consent or under agreement with such companies, and in none of them has the question as to the right of the land owner to compensation for the addi-

tional burden thereof cast upon his land arisen. We have always understood that the right of way of a railroad chartered by and running through a State is the private property of the railroad corporation, and that the land through which it runs, subject to the easement of the railroad, is the private property of the respective land owners, and we cannot understand how Congress, by declaring such road to be a "post-road," can deprive either the railroad corporation or the land owners of these property rights, or how it can confiscate them for the benefit of telegraph companies; nor do we think it was the intention of Congress by these enactments to do any such thing. Whatever may be their effect in other respects, we think it clear they are not susceptible of the construction, and have not the effect sought to be given them by counsel for the appellant. In our judgment they do not give a telegraph company, when it proceeds to construct its lines over a railroad right of way, immunity from the restriction by which the Constitutions of all the States, as well as of the United States, have carefully protected the owners of private property when taken by the exercise of the power of eminent domain. In our opinion, therefore, these Acts give no aid to the defendant in regard to the question now before us; and much less does the subsequent Act, approved June 23, 1879, which is also relied on. This latter Act is the Appropriation Bill for the support of the army for the fiscal year ending June 30, 1880, and in a paragraph making an appropriation for the cost of telegrams and for other purposes a clause is interjected which declares that "telegrams are authorized to be transmitted by railroad companies which may have telegraph lines and which shall have filed their written acceptance" of the Act of 1866, "for the government and for the general public at rates to be fixed by the government." It is obvious this clause has no bearing on the question now under consideration.

Again, it is contended that the defendant is empowered to construct this line by the statute law of this State, and cannot be restrained from doing so by injunction; but for any damage done to private property thereby the owners must seek redress by an action at law. For this position reference is made to the sections of the Code relating to telegraph companies, Code, art. 23, §§ 222-226.

All that need be said in regard to these sections is that, if they contain any provision authorizing the construction of telegraph lines on and over private property in the first instance, and then requiring the property owners to seek compensation afterwards by an action at law for damages, it is in conflict with the constitutional provision referred to, which requires the just compensation agreed upon or awarded by a jury to be first paid "or tendered," that is before the property is taken. This provision of the Constitution is of course controlling, and that it applies to the case of property taken for the construction of telegraph lines, there can, we think, be no reasonable doubt, for we regard it as now well settled that use of property for this purpose is a "public use." "A telegraph or telephone line," says Lewis, "designed for the service of the public and subject to regulation by the Legislature, is a public use

for which property may be taken." Lewis, Em. Dom. § 172.

The term "public use" says Mills, "is flexible and cannot be confined to the public use known at the time of the framing of the Constitution. All improvements that may be made, if useful to the public, may be encouraged by the exercise of eminent domain. Any use of anything which will satisfy a reasonable demand for facilities for transmission of intelligence or of commodities would be a public use." Mills, Em. Dom. § 21.

The good sense of this proposition commends it to our approval and we adopt it. Casting an additional burden for such a purpose, on land already subject to an easement, is just as much taking it for public use as was the taking of it for the original easement; and as we have shown, courts of equity have in this State jurisdiction to prevent by injunction the prosecution of the work until the compensation is paid or tendered. The injunction does not, of course, prohibit the construction of the work but only suspends it till this provision of the Constitution has been complied with.

We must now examine the facts disclosed by the records in these two cases, for the purpose of deciding the question above stated.

"The Maryland Central Railway Company" is a recent successor to all the property, rights and franchises of "the Baltimore & Delta Railroad Company, a corporation formed under the Act of 1878, chap. 195, by the consolidation of three other companies, the eldest of which was incorporated by the Act of 1868, chap. 814. It has also acquired the property and franchises of "The Maryland Central Railroad Company," which was incorporated by the Act of 1867, chap. 121. Its road is a single-track narrow-gauge railroad running through Baltimore and Harford Counties from Baltimore City to the Village of Delta, in Pennsylvania, close to the Maryland line, a distance of forty-five miles, which was not completed and open for traffic throughout its entire length until the 21st of January, 1884. Three grants of right of way through complainants' lands were made in 1878 and 1879, and embrace strips of varying width, one being sixty-six, one forty and the other thirty feet. All the grants express that the land is to be used "for railroad purposes only," and the company could have acquired it for no other purpose by condemnation.

At the time the road was completed it had a line of telegraph poles with one wire thereon, which had been constructed by Augustus G. Davis under a contract with the company dated the 8th of August, 1883. By this contract Davis agreed to construct and maintain, at his own cost, a first-class telegraph line "along the right of way from Baltimore to Delta," the poles to be thirty-five feet in height, and to have thereon "for the exclusive use of the company, one number-nine galvanized wire," and "to furnish one set of telegraph instruments at every railroad station on the line," as the company may direct, and where it may have a station agent or operator and a station house. The company, on its part, agreed, among other things, to permit its operators to transact commercial telegraphic business on this line, "until such time as the business demands or necessities" of the company "may require the exclu-

sive use of said wire," at which time Davis agreed "to furnish another, or other wire or wires for such business." He was also to receive the entire receipts from "commercial business for five years, and to have the right to place on the poles, at his own cost, as many wires for telephone, telegraph or other purposes, as he may require," provided he did not overburden the poles, "or render them unsafe for the wire or wires" of the company. It was also agreed that at stations where the company has no operators and Davis had "an operator or telephones," the company shall have "free use of the same, or either of the same, for railroad purposes or business." It was also agreed that the wire or wires designated as above for the use of the company should connect not only with its North Avenue station in Baltimore, but with such city offices as Davis may establish, he to deliver, free of charge, in the city, all messages relating to railroad business." The contract was to continue for ten years, with the privilege to the company of continuing it for another ten years, or of discontinuing it at its election; but if discontinued at any time, the company was bound to purchase the line of poles, wires and instruments used for its railroad business at a valuation to be fixed by arbitrators. Finally it was agreed that the company should have the privilege, "at its own expense, of placing an additional wire upon said poles for its own exclusive railroad business." With this line thus built by Davis, and with the single wire thereon, the railway company has managed the running of its trains, and conducted all the telegraphic communication necessary for its business since the road was completed to the present time. That line still exists, is still in operation performing all the necessary work of the company, and has, with all its appurtenances and instruments, been assigned and transferred to the railway company by the contract recently made with the defendant. There was and is no mechanical difficulty whatever in putting on these poles as many wires as the company may ever need for its business purposes, and its financial inability to do so, or to employ telegraph operators at all its stations, has nothing to do with the question we are to decide.

This was the state of things when the defendant Company intervened. It took out its Maryland charter on the 19th of March, 1880, and on the 19th of April following made the contract with the railway company. By this the Davis contract is annulled, and the railway company grants to the defendant the right, at its own cost, "to erect, maintain and operate a telegraph and telephone line upon, over and along the line of railway of said railway company between the City of Baltimore and the Village of Delta, and along, upon and over one side solely and only of the right of way." By the other clauses of this contract there is, so far as we can discover, after a careful examination of them, not a single substantial privilege granted to the railway company which it did not have under the Davis contract.

Shortly after the execution of this contract the defendant commenced placing on and erecting along this right of way, for the purpose of constructing its line, pine and cedar poles brought from Canada, which are long, heavy

and large, varying in diameter from thirteen to nineteen inches. These poles whenever put up have arms ten feet in length for the support of wires, and are notched for a number of other similar arms. It is obvious that a structure of this character, and thus equipped, is not being put up in order to subserve or promote the business purposes of this railroad, and in no sense of the term can it be regarded as necessary, or reasonably necessary, therefore.

The bills charge that the corporate body called "The American Telegraph & Telephone Company" is organized for the purpose of establishing lines of communication at long distances by telegraph and telephone, and proposes to do business between the City of New York and cities south of it. This charge is not denied by the answers, and that such is the design of those engaged in the prosecution of this enterprise, and that the line over the right of way of this railroad is to be but a link in the chain of such communication, we have no doubt. This is shown by the character of the structure proposed to be built, by the testimony showing who are the corporators in the Maryland charter, and who own its stock, as well as by the terms of the contract itself made with the railway company, and still more conclusively by the fact, testified to by one of the witnesses, that the line has left the railroad at Forrest Hill before reaching its Delta terminus, and is being constructed towards another town in Pennsylvania. We think it clear that no intelligent person can read these records without coming

to the same conclusion. Whether it be true or not that a railroad can be better managed as to the running of its trains by the telephone than the telegraph, the Davis contract provided for the use of telephones, and gave the railway company the free use of them whenever they were used by Davis. Again, assuming that this telegraph and telephone line would be a convenience to the railway company and save it some expense, still convenience and saving of expense do not meet the requirements of the law, as we have stated it, on the question before us.

We have thus considered the facts and circumstances of these cases, and find and decide that the construction of this new and additional line will impose a new servitude on the land of these complainants, and shall therefore affirm the orders appealed from.

Several other questions are presented by the briefs of counsel and have been to some extent argued by counsel, but the views we have expressed render it unnecessary to notice them at length. It is proper, however, to say that if any of the poles of this line, as erected, infringe upon the lands of the complainants outside of the railroad right of way, or if any of them have been guyed or stayed by wires fastened to trees standing on such land out of such right of way, these facts of themselves would entitle the complainants to an injunction.

Orders affirmed and causes remanded.

Stone, J., dissents.

Petition for reargument denied.

RHODE ISLAND SUPREME COURT.

Phillip S. TAGGART *et al.*

v.

NEWPORT STREET R. CO.

(....R. I....)

1. A provision in the charter of a street railway company requiring publication of notice to abutters upon streets in which it proposes to lay its tracks a certain time before their location does not require the insertion in the notice of a designation of the motive power intended to be used; especially where another section of the charter requires the use of such motive power as the city council shall direct.

2. A location of the tracks of a street railway company under authority of a city ordinance permitting the use of horse power only is not affected by the amendment of the ordinance so as to permit the use of electricity and the acceptance by the company of such amendment.

3. A charter permitting a street railway company to use horse or other power does not mean other animal power, but will permit the use of electricity as a motive power.

4. Where authority is given to a street railway company by one section of its charter to use electricity as a motive power, and such authority is broad enough to permit its use by means of any system of application which is approved as suitable, and the only successful way of using such power is to place poles upon the sidewalks, the placing of poles there will not be

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held to be prohibited by a subsequent section of the charter providing that the company shall not incur any portion of the streets not occupied by its tracks, especially where such provision is copied from the charters of companies authorized to use horse power only.

5. The use of electricity by a street railway company as a motive power will not render its use of the street an imposition of an additional servitude thereon which will require the making of additional compensation therefor to the owner of the fee, where it does not appear that the occupation of the street is any more exclusive than though the road was operated by horse power.

6. The court will not take judicial notice that electricity, as used by a street railway company for the propulsion of its cars, is dangerous.

(January 18, 1890.)

BILL in equity to enjoin the erection and maintenance by defendant of poles and wires upon the public streets of the City of Newport for the purpose of propelling its cars by electricity. *Dismissed.*

Defendant was incorporated April 24, 1885, with the corporate name of the Newport Horse Railroad Company.

Its charter contained the following provisions:

"Sec. 2. Notice to abutters on streets or highways in which it may be proposed to lay the tracks of said corporation shall be given by

the publication in one or more newspapers published in said City of Newport, fourteen days at least before the location of any such tracks, and also by posting in three public places in said city and towns aforesaid notice of said proposed location fourteen days at least before the same shall be made."

"Sec. 5. Said tracks or road shall be operated and used by said corporation with steam, horse or other power, as the councils of said city or towns may from time to time direct, and said corporation shall have power, from time to time and at all times, to fix such rates of fare as they may deem expedient, not exceeding ten (10) cents for each passenger between any two points on said road."

"Sec. 7. Said corporation shall put all streets and highways, and every portion thereof over or through which they shall lay any rails, in condition satisfactory to the highway authorities of said city and towns, and they shall keep and maintain in repair such portions of the streets and highways as shall be occupied by their tracks, and shall be liable for any loss or injury that any person shall sustain by reason of carelessness, neglect or misconduct of any of its agents and servants in the management, construction or use of said tracks or streets; and in case any damage shall be recovered against said city or either of said towns by reason of any such misconduct, defect or want of repairs, said corporation shall be liable to pay to said city or town any sums thus recovered against them, together with all costs and reasonable expenditures incurred by them in the defense of any such suit or suits in which recovery may be had, and said corporation shall not incur any portion of the street or highways not occupied by said tracks.

"Sec. 8. Whenever any estate abutting on a street or highway upon or over which the rails of said corporation shall be laid shall be injured thereby, the said corporation shall be liable to pay the owner or owners thereof, the damages thereby occasioned to said estate."

The corporate name of the company was changed to "Newport Street Railway Company" by Act of May 31, 1889.

The following notice was given under section 2 of the Act of April 24, 1885.

NOTICE.

HEARING ON LOCATION OF NEWPORT HORSE RAILROAD.

The Newport Horse Railroad Company, having presented its petition to the city council of the City of Newport praying for permission to construct, maintain and use a railway or railways with convenient single or double tracks and turnouts for cars and carriages, to be used for the transportation of passengers only, upon and over the streets above named, and crossing Thames Street and Bellevue Avenue, notice is hereby given that there will be a hearing upon said petition before the joint standing committee on streets and highways at the council chamber in the City Hall on Wednesday, September 5, 1888, at 8 o'clock P. M., at which time you may be present and be heard in relation thereto.

By order of Committee on Streets and Highways. Edward Newton, Chairman.

Newport R. I., August 25, 1888.

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On January 24, 1889, the city council of Newport passed an ordinance by which the Acts relative to the incorporation of the defendant were permitted to take effect within the limits of the city, and permission was granted to it to locate tracks, to be used with horse power and passenger cars only in certain named streets, and regulations as to the use of the streets, etc., were established.

On March 5, 1889, the above ordinance was amended so as to permit the company to use an electric system of motive power on its cars.

Section 2 of said ordinance was as follows:

"Sec. 2. Said Railroad Company is hereby authorized to erect and maintain, under the direction of the joint standing committee on streets and highways, a double line of poles, one line on each side of the street, in all of the streets and highways above named (except as hereinafter provided) for the support of its over-head wires used in connection with its electric system of motive power," etc.

When defendant proceeded to erect poles pursuant to the above ordinance this bill was filed by certain owners of property on streets upon which the poles were about to be erected, to enjoin it from so doing.

Messrs. Jabien L. Daires, Arnold Green and Patrick J. Galvin for complainants.

Messrs. Francis B. Peckham and Darius Baker for respondent.

Durfee, Ch. J., delivered the opinion of the court:

This bill is brought by the complainants as abutters on certain streets in the City of Newport, along and over which the tracks or rails of the defendant Company's street railway have been laid. The object is to have the Company enjoined from erecting or maintaining certain poles and wires in the streets in front of their estates. Said poles were erected to support said wire over said tracks for the conduction of electricity, which is used as a motor for the passenger cars traversing said tracks. The poles are placed along the margins of the sidewalks of said streets about 120 feet apart, and are placed so by permission of the city council of the City of Newport, given by ordinance.

The case was submitted on bill and answer, no replication having been filed. The bill alleges several grounds of relief. We will consider them severally as alleged.

The first ground is that the Company did not give notice, as required by section 2 of the Act of Incorporation. Said section provides for notice to abutters to be given by publication and posting at least fourteen days before the location of tracks proposed to be laid. The bill alleges that the purpose for which the notice was required was to apprise the abutters "of the nature and extent of the proposed use of the streets and highways," and to afford them an opportunity to appear before the city and town councils having power over the matter and be heard in relation thereto. The bill admits that a notice was given in August and September, 1888, but avers that it was defective in that it did not set forth that any other than horse power was intended to be used. The answer states that said notice did not refer to the matter of power, and maintains that any

reference to it therein was unnecessary, since section 2 prescribes notice only before action in regard to the location of the tracks. This is so. It is section 5 that relates to the power. That section provides that "said tracks or road shall be operated and used by said corporation with steam, horse or other power, as the councils of said city and towns may from time to time direct." No notice is required before such direction.

The ordinance in regard to location was passed January 24, 1889. It permitted the use of horse power only. The ordinance permitting the use of electricity was passed March 5, 1889. It seems to us that the latter ordinance was clearly authorized by section 5 in the words above quoted. The previous location of the tracks was not affected thereby.

The second ground alleged is that the right to use electricity is not given. The language in regard to the power to be used is that above quoted, namely, that the road shall be operated "with steam, horse or other power as the councils of said city and towns may from time to time direct." The complainants contend that the word "steam" must be struck out because it has been decided that steam cannot be used without compensation to the owners of the fee for the new servitude imposed, and no compensation is provided for, and because, "steam" being struck out, "other power" must be construed to mean other power similar to horse power, *i. e.*, other animal power. We do not find the argument convincing. Allowing that "steam" must be struck out for the reason given, it does not follow in our opinion that "other power" must be construed to mean other animal power. Horse power is the only animal power which has ever been used for the traction of street railway cars in our northern cities, and it is the only animal power which could have occurred to the General Assembly as fit to be used. The suggestion that "other power" may mean mules cannot be entertained. The Act of Incorporation was passed in the winter of 1885, when the idea that electricity might be brought into use as a motor was already familiar, and nothing seems more probable than that the words "other power" were inserted with a view to its possible employment. We do not think the second ground valid.

The third ground is that the erection of the poles on the sidewalks is in effect prohibited by the Act of Incorporation. The seventh section, which relates to the repairs of the street where the tracks are, and to damages for negligence on the part of the Company, concludes as follows, to wit: "And said corporation shall not incumber any portion of the streets or highways not occupied by said tracks." The poles are certainly in a portion of the streets not occupied by the tracks; but do they incumber that portion, in the meaning of the word as it is used? To incumber, according to Webster, is "to impede the motion or action of, as with a burden; to weigh down; to obstruct, embarrass or perplex." To incumber, as used in said section 7, doubtless means to obstruct or hinder travel by putting things in the way of it. The poles are very slightly in the way of travel, being placed as hitching posts, lamp-posts, electric-light poles, telegraph and telephone poles are placed, near the front margins

of the sidewalks. We are not inclined to say, however, that they do not incumber because they are placed as they are, but only that it does not follow that they incumber because they are so placed. Take, for instance, a lamp-post or an electric light pole. It is slightly in the way, and, if it served no useful purpose in regard to the street, might justly be deemed to incumber it. But it supports a lamp, or an electric light, which illuminates the street at night and so improves the street for its proper uses. It is not, therefore, an incumbrance in any proper sense of the word. The real question is, as it seems to us, whether the words "And said corporation shall not incumber any portion of the streets or highways occupied by said tracks," were intended to restrain the city council of the City of Newport from authorizing the use of electricity for a motor in the manner in which it is used by the Company.

We have already decided that the council has power by section 5 to authorize the use of electricity, so that the question relates only to the manner of using, and is, whether the council has power to authorize the use in said manner. It seems to us that the provision that the tracks or road shall be operated by "steam, horse or other power, as the councils of said city and towns may from time to time direct," is broad enough to empower said councils not only to authorize the use of electricity as a motor but also to authorize its use by means of any system of application which it approves as suitable; and it further seems to us that the concluding words of section 7 have their full meaning when applied to the Company acting of itself, without extending them to city and town councils acting under section 5 or to the Company acting under said section as authorized by such councils. It appears that said concluding words were copied from charters of street railway companies which were only authorized to use horse power, and in which of course they could have had no such application as is here contended for. It also appears from the allegations of the answer that the mode of using electricity which has been adopted is the only mode in which it can be successfully used by the Company for the operation of the road. These are things which confirm our view. Our conclusion is that the power conferred by section 5 is not qualified by the concluding words of section 7, and that the poles complained of, having been erected under section 5 as part of the apparatus for supplying the railway with its motive power, are to be regarded, not as incumbering the streets, but as ministering to their uses and as increasing the facilities for travel which they afford to the public.

The fourth ground alleged is that if the Act of Incorporation authorizes the use of electricity for the operation of said street railway and the erection of the poles as ancillary thereto, it is unconstitutional and void because it authorizes the imposition of an additional servitude upon the streets without providing for any additional compensation to the owners of the fee of said street. We think it is settled by the greater weight of decision that a railroad constructed in a street or highway and operated by steam in the usual manner imposes a new servitude and entitles the owner of the fee to

an additional compensation, but that a street railway operated by horse power, as such street railways are ordinarily operated, does not impose any new servitude and does not entitle the owner of the fee to any additional compensation. *Mills*, Em. Dom. § 205 and cases cited; *Angell*, Highways, § 91 *d*, note 1 and cases cited; *Newell v. Minneapolis*, L. & M. R. Co. 85 Minn. 112; also 25 Am. Law Reg. N. S. 481, and cases cited in the note.

The distinction is often stated as a distinction between steam and horse railroads, but the distinction properly rests, not on any difference in motive power, but in the different effects produced by them respectively on the highways or streets which they occupy. A steam railroad is held to impose a new servitude, not because it is operated by steam, but because it is so operated as to be incompatible with the use of the street in the other usual modes, or, in other words, so as practically to exclude the usual modes of use. *Pierce*, Railroads, 284. A steam railroad on a street so operated as to be consistent with the use of the street in the usual modes has been held not to impose a new servitude. *Newell v. Minneapolis*, L. & M. R. Co. *supra*; *Fulton v. Short Route Railway Transfer Co.* 85 Ky. 640.

It is not the motor, but the kind of occupation, whether practically exclusive or not, which is the criterion. *Briggs v. Leviston & A. Horse R. Co.* 79 Me. 368, 4 New Eng. Rep. 546.

A steam railroad, as ordinarily operated, it has been said, comes into serious conflict with the usual modes of travel, and is a perpetual embarrassment to them, in greater or less degree according as the business of the railroad is greater or less or as the running of the trains is more or less frequent; whereas the ordinary street railway, instead of adding a new servitude to the street, operates in furtherance of its original uses, and, instead of being an embarrassment, relieves the pressure of local business and local travel. *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62. See also *Atty-Gen. v. Metropolitan R. Co.* 125 Mass. 515; *Citizens Coach Co. v. Camden Horse R. Co.* 83 N. J. Eq. 267; *Elliot v. Fair Haven & W. R. Co.* 32 Conn. 579; *Hobart v. Milwaukee City R. Co.* 27 Wis. 194.

The only considerable privilege which the horse-car has over other vehicles is that, being confined to its tracks, it cannot turn aside for other vehicles, while they are forced to turn aside for it; but this is an incidental matter, insufficient to make the horse railroad a new servitude. *Shea v. Potrero & B. V. R. Co.* 44 Cal. 414.

The street railway here complained of is operated neither by steam nor horse power, but by electricity. It does not appear, however, that it occupies the streets or highways any more exclusively than if it were operated by horse power. The answer avers that "electricity, besides being as safe and as easily managed as horse power for the propulsion of street cars, is more quiet, more cleanly and more conven-

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ent than horses, both for residents on the streets used by said cars and for the public generally, and also causes much less wear and injury to the streets and highways than is occasioned by street cars of which horses are the motive power." These averments, the case being heard on bill and answer, must be taken as true. We see no reason to doubt their truth. It is urged that electricity is a very dangerous force, and that the court will take judicial notice of its dangerousness. The court will take judicial notice that electricity developed to some high degree of intensity is exceedingly dangerous, and even fatally so, to men or animals when it is brought in contact with them, but the court has no judicial knowledge that, as used by the defendant Company, it is dangerous. The answer denies that it is dangerous to either life or property. It is also urged that the cars, moving apparently without the application of external force, alarm and frighten horses. This, so far as it is alleged in the bill, is denied in the answer. We see no reason to suppose that this form of danger is so great that, on account of it, the railway should be regarded as an additional servitude. The answer alleges that a great many street railways, operated by electricity, in the same manner as the railway of the defendant is operated, are in use in various towns and cities in different States, and that many others are in process of construction.

Reference has been made to cases which hold that telegraph or telephone poles and wires erected on streets or highways constitute an additional servitude, entitling the owners of the fee to additional compensation, and from these cases it is urged that the railway here complained of is an additional servitude by reason of the poles and wires which communicate its motive powers. There are cases which hold as stated, and there are cases which hold otherwise. But assuming that telegraph and telephone poles and wires do create a new servitude, we do not think it follows that the poles and wires erected and used for the service of said street railway likewise create a new servitude. Telegraph and telephone poles and wires are not used to facilitate the use of the streets where they are erected for travel and transportation, or, if so, very indirectly so; whereas the poles and wires here in question are directly ancillary to the uses of the streets as such, in that they communicate the power by which the street cars are propelled.

It has been held, for reasons which we consider irrefragable, that a telegraph erected by a railroad company within its location for the purposes of its railroad, to increase the safety and efficiency thereof, does not constitute an additional servitude, but is only a legitimate development of the easement originally organized. *Western U. Teleg. Co. v. Rich*, 19 Kan. 517.

Our conclusion is that the complainants are not entitled to the relief prayed for on the ground alleged, and that *the bill be dismissed, with costs.*

PENNSYLVANIA SUPREME COURT.

Louis S. FISKE *et al.*, *Plffs. in Err.*,
v.
FIRST NATIONAL BANK of Butte, Mon-
tana.

(.....Pa.....)

**A letter from one expecting a consign-
ment of goods** for sale on commission to a
bank, stating that the writer will honor the con-
signor's drafts with bill of lading attached, must
be read in the light of a usage of trade known to
both parties for the consignor to draw for an
amount not exceeding three fourths of the value
of the consigned goods, and will render the writer
liable only for such amount.

(March 17, 1890.)

ERROR to the Court of Common Pleas,
No. 4, of Philadelphia County to review a
judgment in favor of plaintiff in an action to
recover the amount of certain drafts which
plaintiff had cashed in reliance upon an alleged
promise by defendants to honor them. *Re-
versed.*

The case sufficiently appears in the opinion.
*Messrs. Frank P. Prichard and John
G. Johnson* for plaintiffs in error.

*Messrs. J. Levering Jones, Hampton
L. Carson and Alfred I. Phillips*, for de-
fendant in error:

A promise to accept a draft to be drawn in
the future, describing it with reasonable cer-
tainty, is equivalent to an actual acceptance.

Coolidge v. Payson, 15 U. S. 2 Wheat. 66 (4
L. ed. 185); *Steman v. Harrison*, 42 Pa. 49;
Spaulding v. Andrews, 48 Pa. 411.

The payer of a draft is not bound to see that
an acceptor receives a consignment intended to
cover the draft, although he knew that the ac-

ceptance was given on the sole faith and credit
of the shipment.

Craig v. Sibbett, 15 Pa. 238; *Bockoren v.
Bank*, 11 W. N. O. 570.

The words "with bill of lading attached,"
added to the acceptance, are intended to mark
the transaction or serve some purpose between
the drawer and acceptor, but do not concern
the payee.

Tassey v. Church, 4 Watts & S. 346; *Mer-
chants Bank v. Griswold*, 72 N. Y. 472; *Cuff-
man v. Campbell*, 87 Ill. 99; *United States v.
Bank of Metropolis*, 40 U. S. 15 Pet. 898 (10 L.
ed. 781).

McCollum, J., delivered the opinion of the
court:

The defendants were engaged in the business
of receiving and selling wool on commission,
in the City of Philadelphia, and James R. Reid
was a shipper of wool, doing business at Butte,
Montana. On the 23d of May, 1887, the de-
fendants wrote to the plaintiff as follows:
"We expect to have some business with Mr.
Jas. R. Reid when the wool season opens, in
which case we will honor his drafts with bill
lading attached."

On the 12th of August, 1887, the plaintiff
cashed Reid's draft on the defendants for
\$4,007.80 with bill of lading attached for
22,285 lbs. of wool shipped by Reid to defend-
ants at Philadelphia, and on the next day a
like draft for \$2,752.97 with a like bill of
lading attached for 14,951 lbs. of wool. The
defendants refused to honor these drafts, or to
receive the wool described in the bills of lading
attached, on the ground that Reid in drawing
drafts for these amounts had exceeded his au-
thority. The drafts with the bills of lading
attached were returned to the plaintiff, and at

NORM.—Bill of exchange or draft; acceptance.

The acceptance of a bill of exchange is the
drawee's agreement to pay it when it falls due.
Gallagher v. Nichols, 60 N. Y. 438; *Ray v. Faulkner*,
73 Ill. 460; *Byles, Bills*, 187; *Chitty, Bills and Notes*,
313; *Bouvier, L. Dict.*

It is a promise to pay it according to its terms.
Bonnell v. Mawha, 37 N. J. L. 200.

A promise to accept may be enforced as a valid
contract. *Mason v. Dousay*, 35 Ill. 424; *Bissell v.
Lewis*, 4 Mich. 450; *Bank of Rutland v. Woodruff*, 84
Vt. 89.

An agreement for an acceptance is equivalent to
an acceptance if it describes the bill particularly,
and if the bill be taken on the faith of it. *Coolidge
v. Payson*, 15 U. S. 2 Wheat. 66 (4 L. ed. 185); *Payson
v. Coolidge*, 2 Gall. 233; *Russell v. Wiggins*, 2 Story,
213; *Wildes v. Savage*, 1 Story, 223; *Read v. Marsh*, 5
B. Mon. 8; *Crowell v. Van Bibber*, 18 La. Ann. 637;
Banorjee v. Hovey, 5 Mass. 11; *Murdock v. Mills*, 11
Met. 5; *Goodrich v. De Forest*, 15 Johns. 6; *Burns v.
Rowland*, 40 Barb. 368; *Bayard v. Lathy*, 2 McLean,
462; *Steman v. Harrison*, 42 Pa. 49; *Ulster Co. Bank
v. McFarlan*, 5 Hill, 432; *Ontario Bank v. Worthing-
ton*, 12 Wend. 593; *Bank of Michigan v. Ely*, 17
Wend. 508; *Cassel v. Dows*, 1 Blatchf. 336; *Storer v.
Logan*, 9 Mass. 55; *Jones v. Council Bluffs Branch
Bank*, 34 Ill. 313.

A letter promising payment of a bill amounts to
an acceptance (*Wynne v. Raikes*, 5 East, 614; or
a telegram. *Whilden v. Merchants & P. Nat. Bank*,
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64 Ala. 1; *First Nat. Bank v. Clark*, 61 Md. 401; *Central
Sav. Bank v. Richards*, 100 Mass. 413; *Coffman
v. Campbell*, 87 Ill. 98.

An agreement on the part of a stranger to the
bill to pay it at maturity if the drawee does not is
an acceptance for honor or an acceptance *supra
protest*. 1 *Randolph, Com. Paper*, § 5; *Jackson v.
Hudson*, 2 Camp. 447; *Byles, Bills*, 190. See also
Markham v. Hazen, 48 Ga. 570; *Walton v. Williams*,
44 Ala. 347; *May v. Kelly*, 27 Ala. 497; *Jenkins v.
Hutchinson*, 13 Q. B. 744; *Davis v. Clarke*, 6 Q. B. 16;
Lewin v. Brunetti, *Lutw.* 371 (Fol. 398); *Brunetti v.
Lewin*, *Carth.* 129.

Letters of credit.

A letter requesting one person to make advances
to a third person on the credit of the writer is a let-
ter of credit. *Mechanics Bank v. New York & N.
H. R. Co.* 4 Duer, 430, 13 N. Y. 599; *Birkhead v.
Brown*, 5 Hull, 634; *Story, Bills*, § 459; 2 *Daniel, Neg.
Inst.* 300.

The liability of one who accepts or agrees to ac-
cept a bill is governed by the law of the place of ac-
ceptance. *Boyce v. Edwards*, 29 U. S. 4 Pet. 111 (7
L. ed. 799); *Soudder v. Union Nat. Bank*, 91 U. S.
408 (23 L. ed. 245). Compare *Lonsdale v. Lafayette
Bank*, 18 Ohio, 126. See *note* to *Hoppe v. Savage*
(Md.) 1 L. R. A. 648.

Agreement to accept promise by telegram. *Lind-
ley v. First Nat. Bank*, 3 L. R. A. 709, 76 Iowa,
622.

Reid's instance the bills of lading were forwarded to Justice Bateman & Co., wool merchants in Philadelphia, who had them indorsed by the consignees, delivered them to the carrier, received the wool described in them and sold it in the market for its full value. The proceeds of this sale were received by the plaintiff and were \$1,430.82 less than the amount called for by the drafts. This action was brought to recover the difference.

The rights of the parties depend on the proper construction of the defendants' letter. The plaintiff contends that it constituted an undertaking, on their part, to honor all drafts which Reid might draw upon them, with bill of lading attached, without regard to the value of the consignment.

It is averred in the affidavit of defense that the plaintiff knew that the business referred to in this letter was the shipping of wool for sale on commission; that it was a usage of the trade for the shipper when he consigned the wool to his factor, to draw on the latter for any amount not exceeding three fourths of the value or selling price of the wool at the time of its arrival at the place of its destination, and for the factor to make advances on the wool by paying these drafts. It is further averred that "it was understood by the plaintiff that the drafts to be honored by the defendants were to be honored on the security of the wool, bills of lading for which were attached to the drafts, and were not to exceed in amount the customary advances on such wool."

A usage, if known to the parties to a transaction to which it relates, is obligatory, and, unless excluded by the terms of the contract, enters into and is regarded as a part of it, as much as though it had been written therein. *Stultz v. Dickey*, 5 Binn. 287; *Hurah v. North*, 40 Pa. 241.

It is admissible to add incidents to a contract which are not inconsistent with its terms, and to ascertain the intention of the parties in reference to matters about which the contract is silent. *Clarke's Browne, Usages and Customs*, p. 167.

The usage described in the affidavit is not unreasonable or in conflict with positive law. It does not contradict the terms of the instrument on which the plaintiff relies, but it explains them and gives effect to the intention of the parties. The letter of the defendants must be read in the light of the usage known to the parties and applicable to the transaction between them. When so read it is fatal to the plaintiff's claim for the overdraft.

We think the affidavit presents a good defense to the action.

Judgment reversed, and procedendo awarded.
Clark, J., absent.

Patrick McCULLOUGH, Committee, etc.,
of Thomas J. McAneny, a Lunatic, *Appt.*,

EXPRESSMEN'S MUTUAL BENEFIT ASSOCIATION of Pennsylvania.

(..... Pa.)

The insanity of a member of a benefit society brings him within the provisions of its rule that
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every member who, through sickness or other disability, is unable to follow his usual business or some other occupation whereby he may earn a livelihood for himself and family, shall be entitled to certain benefits.

(March 10, 1890.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas, No. 3, of Philadelphia County in favor of defendant upon a point of law reserved after verdict for plaintiff in an action to recover sick benefits alleged to have accrued by reason of membership in a mutual benefit association. *Reversed.*

The case sufficiently appears in the opinion.

Messrs. John F. Develin and W. Horace Hepburn, for appellant:

Insanity has always been regarded as a disease and comes strictly within the meaning of the term "sickness;" when, therefore, by the laws of a society, benefits are promised on account of sickness, a member who has become insane is entitled to sick benefits.

Burton v. Eyden, L. R. 8 Q. B. 295; *Kelly v. Ancient Order of Hibernians*, 9 Daly, 292; *Niblack*, Mut. Ben. Societies, § 173; *Pellazzino v. St. Joseph's Society*, 16 Cin. L. Bul. 27.

Mr. Thomas R. Elcock, for appellee:

A member of an incorporated beneficial society does not stand in the relation of a creditor to the society.

St. Patrick's Beneficial Society v. McVey, 92 Pa. 510.

If the benefits are not a debt, the committee of his estate cannot have an action for their recovery.

Mitchell, J., delivered the opinion of the court:

The jury have found for the plaintiff, and we must therefore assume that all the necessary facts were duly proved. This disposes of a considerable part of the argument for the appellee, and leaves open to us only the question of law involved in the point reserved, whether insanity is sickness or disability within the meaning of the contract.

The operative words are contained in the following passages from the constitution and by laws of the Association:

Const., art. 9: "Every member . . . who through sickness or other disability is unable to follow his usual business or some other occupation whereby he may earn a livelihood for himself and family shall be entitled to such sums (as weekly benefits) as the by-laws shall specify;" and

By-Laws, art. 13, § 1: "Any member who after twelve months' membership, through sickness or disability is unable to follow his usual or some other business or occupation whatsoever, . . . shall receive," etc.

We cannot regard the meaning of this language as at all doubtful. That insanity is a sickness in some senses of the word is beyond question, and such legal authorities as appear to have considered the question hold that it is sickness within the meaning of such charters and articles of association as the defendants.

Thus, in *Burton v. Eyden*, L. R. 8 Q. B. 295, an action against a "friendly society," the English designation of associations like the present appellee, the words of the by-law were, "during any sickness or accident that may be

fall him." Blackburn, J., said: "I am of opinion that lunacy is sickness within the meaning of the rules of this society. . . . Insanity depends on the state of mind and body of the person. . . . It certainly seems to me that lunacy is a sickness affecting the health of the body in such a way as to prevent a man's ability of earning his livelihood. If it were not the intention to include it, the rules of the society should be framed so as expressly to exclude it," and Quain, J., said further: "I am also of opinion that insanity is sickness within the society's rules. . . ." The words entitling the member to relief are, "during any sickness or accident," except certain excluded cases, insanity not being one.

In *Kelly v. Ancient Order of Hibernians*, 9 Daly, 293, Van Brunt, J., says: "Insanity has always been considered a disease, and comes strictly within the meaning of the term 'sickness.'"

And in *Pellozzino v. St. Joseph's Society*, 16 Cin. L. Bul. 27, it is assumed by Harmon, J., apparently without question by either party, that insanity entitles a member of such a society to sick benefits.

But even if the extent of the word "sickness" were doubtful, the present case is relieved of all difficulty by the additional phrase "other disability." The purpose of the Association is defined by article 2 of the Constitution as the accumulation of a fund to enable the members "to assist each other in cases of accident, sickness or other distress, and their families in case of death." The common class of those who are expected to need the benefits is defined in article 9, as already said, as those who, through sickness or other disability, are unable to follow their usual or some other business whereby they may earn a livelihood for themselves and their families. To this class is added another in article 10, to wit: the families of members who die, and members themselves whose wives die. The latter are clearly examples of that pecuniary distress which is enumerated in the Constitution among the ills which it is the object to relieve. But the main idea throughout is the assistance of those who are incapacitated for earning their living, and the condition that the incapacity shall be from "sickness or other disability" is as comprehensive as language could well make it. If insanity is not sickness, it is certainly disability and clearly within the prescribed condition for aid. Certain excepted cases are specified, but not only is insanity not one of them, but all of those which are thus specified, such as want of membership for twelve months, arrearages to the association, or sickness originating from intemperance, vicious or immoral conduct, either fail in some necessary requirement, or bear some taint of fault which takes them out of the category of the innocent unfortunate for whom the relief is intended. If any of these exceptional facts were charged against the plaintiff, the verdict of the jury has settled them in his favor, and there is no reason shown why he should not have the relief to which, under the rules of the Association, his disability entitles him.

Judgment reversed, and now judgment for plaintiff on the verdict.

Clark, J., absent.

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Oliver ROOP and Wife, *Appts.*,

REAL ESTATE INVESTMENT CO.

(...Pa....)

A married woman is not empowered to bind herself by a judgment note, by the provisions of the Married Person's Property Act of June 3, 1887 (Pub. Laws, 332); at least if it is not given in the management, or for the benefit of her separate estate, or in the prosecution of any business in which she is engaged or for necessities.

(February 24, 1890.)

A PPEAL by defendants from an order of the Court of Common Pleas, No. 3, of Philadelphia County discharging a rule to open a judgment entered against them on a judgment note, and to let them into a defense. *Reversed as to the female defendant.*

The facts sufficiently appear in the opinion. *Mr. Thomas Diehl*, for appellants:

The bond of a married woman is void.

Dorrance v. Scott, 8 Whart. 309; *Sellers v. Heinbaugh*, 9 Cent. Rep. 768, 117 Pa. 224.

Those cases which permit married women to bind their separate property are exceptions to a general rule of sound policy, and ought to be strictly confined within the limits prescribed.

Schlusser's App. 58 Pa. 495.

"The Married Person's Property Act" of June 3, 1887, should be construed in accordance with the doctrine announced in the above case.

Endlich, Married Women, § 101; *Mahon v. Gormley*, 24 Pa. 82; *Huyler v. Atwood*, 26 N. J. Eq. 504; *New England Nat. Bank v. Smith*, 48 Conn. 327.

The record reveals no contract within the power of a married woman to make, and the judgment entered in the court below is irregular and void.

Ringwalt v. Brindle, 59 Pa. 51; *Com. v. Hoffman*, 74 Pa. 111; *Post v. Wallace*, 110 Pa. 125.

The record and pleadings must disclose a cause of action against a married woman within the provisions of the Act, and, if not, the defect is fatal, and the judgment entered will be reversed.

Park v. Kleeber, 87 Pa. 254; *Dearie v. Martin*, 78 Pa. 58; *Hecker v. Hoak*, 98 Pa. 242; *Hoff v. Koerber*, 103 Pa. 398; *Gould v. McFall*, 1 Cent. Rep. 853, 111 Pa. 67; *Fenn v. Early*, 4 Cent. Rep. 288, 118 Pa. 268; *Needham v. Woolens*, 14 W. N. C. 526; *Baker v. Singer Mfg. Co.* 122 Pa. 370.

Mr. John J. Ridgway, for appellees:

Whenever the consideration goes into the married woman's actual or constructive possession the contract is a contract for the benefit of her estate.

Williams v. King, 43 Conn. 561-572; *Battin v. Dillaye*, 87 N. Y. 85; *Turner v. Turnquist*, 85 N. Y. 521; Endlich, Married Women, § 131.

NOTE.—Married women; disability to contract. See note to *Speier v. Opfer* (Mich.) 2 L. R. A. 845.

The power given to her by statute does not extend to a joint contract with her husband. *Ibid.*

Executory contracts of, *Cook v. Walling* (Ind.) 3 L. R. A. 709.

Paxson, Ch. J., delivered the opinion of the court:

This was an appeal from the order of the court below refusing to open a judgment entered by the *Real Estate Investment Co. v. Oliver Roop and Fanny C. Roop*, appellants, in the sum of \$680. The said Fanny was the wife of the said Oliver Roop, but this does not appear on the face of the note upon which the judgment was entered. The petition which was filed in the court below is not printed in the paper book, hence we have no certain knowledge of the specific grounds upon which the judgment was asked to be opened, and we might well dismiss the case for this reason alone. We learn from the docket entries, however, that the application was on behalf of both defendants, and from the agreements of counsel, (a) that the note was usurious; and (b) that the defendant, Fanny C. Roop, was a married woman, and as such, had no power to bind herself by a judgment note.

As to the first proposition, the depositions show that only \$500 was loaned to the defendants; but as the plaintiff concedes this, and also alleges that it was a loan with the judgment note as collateral, and that no more than the \$500 with interest is claimed, there would seem no good reason why the court below should open the judgment and order an issue to try a fact which is not disputed.

The second ground of relief is more serious. On behalf of Fanny C. Roop, it was contended "that, as the record of the judgment reveals no contract within the power of a married woman to make, it is irregular as to Fanny Roop and cannot stand." The judgment is entirely regular upon its face, as the record does not show that Fanny C. Roop is a married woman. The depositions do show it, however, and the fact is not denied.

The plaintiff contends that under the Act of June 8, 1837 (Pub. Laws, 332), known as the "Married Person's Property Act," a married woman has the power generally of confessing judgments, and refers us to the third section of said Act as confirming it. Said section is as follows: "A married woman may make, execute and deliver leases of her property, real and personal, and assignments, transfers and sales of her separate personal property, and notes, bills, drafts, bonds or obligations of any kind, and appoint attorneys to act for her, and it shall not be necessary for her husband to be made a party thereto or joined therein."

This language is certainly very broad, and is a part of the legislation, commencing in 1848, the object of which evidently is to emancipate married women from the restraints of the common law to a certain extent, and to enable them to act as a *feme sole* in respect of their property. It is not necessary for us to express an opinion of the wisdom of this legislation. We have followed the Legislature cautiously, and have, as was our duty, given effect to these Acts to the extent of their plainly expressed meaning; but it is so radical in its character, and so wide a departure from the common law, that we have been careful not to extend the force of any of these Acts by judicial construction.

The Act of 1887 certainly does go very far in 7 L. R. A.

enlarging the powers of married women. The first section gives them the power of a *feme sole* as to the acquisition, ownership, possession, control, use or disposition of property of any kind in any trade or business in which they may engage, or for necessities, and for the use, enjoyment and improvement of their separate estate, and to "make contracts of any kind, and to give obligations binding herself therefor." The only restriction upon the powers thus conferred is found in the proviso at the end of the section. It is as follows: "Provided, however, that a married woman shall have no power to mortgage or convey her real estate, unless her husband join in such mortgage or conveyance."

The second section declares that a married woman may bind herself by contracts relating to any trade or business in which she may engage, or for necessities, and for the use and enjoyment of her separate estate, and may sue and be sued, etc., in all respects as if she were a *feme sole*; "provided, however, that nothing in this or the preceding section shall enable a married woman to become indorser, guarantor or security for another."

Then follows the third section, which I have already quoted. It was contended that this section gives her the general power to contract, which would of course include the power to confess a judgment. If, however, it was intended to confer this broad power, and place a married woman on the same plane with a *feme sole* it could have been done in a few lines, declaring that hereafter a *feme covert* should have the same power to contract debts as a *feme sole*. For such a purpose it was unnecessary to frame an Act with seven sections. We do not think it was intended to confer a power to contract generally. Of what use would be the restriction, contained in the first section, that she shall have no power to mortgage or convey her real estate without her husband joining in such mortgage or conveyance, if she may bind her real estate by confessing a judgment for general purposes? The third section must be read in connection with the other sections and the Act considered as a whole. Viewed in this light, it unfetters a married woman, subject to the restrictions before mentioned, for three purposes, viz., (1) where she engages in trade or business; (2) in the management of her separate estate; and (3) for necessities. For any of these purposes she may bind herself and her estate or business by her contract, and I have no doubt may lawfully confess a judgment. But beyond this we do not think the Act confers any power. It is entirely proper that the law should clothe her with sufficient power to properly manage her separate estate. And when it authorizes her to embark in business it is right that she should be held to her contracts, which can only be done by authorizing her to make such contracts. So in regard to necessities. If she may purchase them she should be authorized to bind herself and her estate for them in the usual manner and by the usual forms by which contracts are made by persons *sui juris*. But we are not disposed to say that for every purpose she may make contracts and bind her estate generally, as may a *feme sole*. The Legislature must say so in

language too clear to be misunderstood before we will subject the estates of married women to such a peril as this.

It was conceded that this judgment was given by a married woman. It was not pretended that it was done in the management of, or for the benefit of, her separate estate; or in the prosecution of any business in which she was engaged, or for necessities. On the contrary, if not given as surety for her husband, it was given upon his importunity, and to aid him in his business, one of the very perils from which the law ought to protect a married woman.

The judgment, having been confirmed without authority, is void as to Fanny C. Roop.

The order of the court below is reversed as to Fanny C. Roop, and the judgment against her is stricken from the record.

Levi S. UPDEGROVE, Appt.,

v.

PENNSYLVANIA SCHUYLKILL
VALLEY R. CO.

(....Pa.....)

A release to a railroad company of a right of way across certain land, with a further release of the company from all claims for damages by reason of the taking and using of the land for said railroad, or by reason of the construction and maintenance of the said railroad on and over said land, will bar the owner of the land from subsequently recovering damages for the overflowing of his land by water by reason of the construction of a ditch and culvert by the railroad company in the particular manner for drainage purposes long after the original construction of the road.

(February 24, 1890.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas of Chester County entered upon a verdict directed for defendant in proceedings arising upon an appeal by plaintiff from the report of a jury of view refusing to assess damages against defendant for the alleged taking and occupying of certain of plaintiff's land. *Affirmed.*

Plaintiff was and still is the owner of a farm in Chester County, Pa. In 1882 the defendant Company constructed its line of railroad across his farm so cutting the same as to leave about fifteen acres of land between the railroad and the Schuylkill Canal. The natural slope of the land was toward the canal. In 1888, nearly six years after the original construction of the railroad, the Company dug a ditch on the upper side of its road-bed by which the natural drainage of the water was diverted from the places where it had formerly been into other and different places. The ditch was commenced at the point nearly a half mile distant from a point upon the land which the Company had obtained from plaintiff at which a culvert was constructed under the railroad and from which a ditch was run through plaintiff's land to the canal. By reason of this ditch large quantities of water were made to run over plaintiff's land which would not otherwise have

done so, and at certain seasons of the year the quantity became so great that it overspread the banks of the ditch and deposited earth and stone upon plaintiff's land and left the same boggy, wet and unfit for cultivation a large part of the year. Plaintiff presented his petition to the Court of Common Pleas of Chester County for a jury of view to assess the damages which he claimed by reason of this alleged appropriation of his land and the essential damages to his farm which resulted from this action of the Railroad Company. Viewers were appointed who reported adversely to his claim and he then appealed to the Court of Common Pleas. Defendant admitted the injury, but claimed that no action would lie for the recovery of damages therefor by reason of a release which it had received from plaintiff at the time that it purchased from him its right of way. The court charged the jury in substance that this release would bar a recovery in that action and directed them to return a verdict for defendant. Plaintiff thereupon took this appeal.

The material portions of the release appear in the opinion.

Messrs. J. Howard Jacobs, William M. Hayes and R. Jones Monaghan, for appellant:

If the release in this case had been an absolute deed of the land to the Railroad Company, to be used by it for the construction of a railroad, it is entirely clear that the action of the Railroad Company in diverting the surface water which accumulated on the appellant's farm from its ordinary course, where, by the natural declivity of the land, it was accustomed to flow, through artificial ditches constructed for that purpose, would render it liable to respond in damages for their injury to the appellant's lands.

Ang. Watercourses, § 108 J; *Kauffman v. Griesemer*, 26 Pa. 407; *Miller v. Laubach*, 47 Pa. 154; *Pennsylvania Coal Co. v. Sanderson*, 4 Cent. Rep. 475, 113 Pa. 146; *Huddleston v. West Bellevue*, 1 Cent. Rep. 861, 111 Pa. 110.

With much greater force must this be true in the case in hand where their only right is that of a right of way for the construction and maintenance of a railroad.

Pennsylvania S. V. R. Co. v. Walsh, 124 Pa. 544; *Pennsylvania S. V. R. Co. v. Ziemer*, Id. 571.

No such contract as the one in question is ever understood or could lawfully be made to release one of the contracting parties from its acts of negligence or its wrongful injuries to the rights or property of the other. An express release to a carrier does not include acts of negligence.

3 Wood, Railway Law, § 425; *Am. Exp. Co. v. Sands*, 55 Pa. 140; *Pennsylvania R. Co. v. Butler*, 57 Pa. 837; *Grogan v. Adams Exp. Co.* 5 Cent. Rep. 298, 114 Pa. 528; *Pennsylvania R. Co. v. Raiordon*, 12 Cent. Rep. 177, 119 Pa. 581.

There have been an injury and destruction, as well as a taking of the appellant's land, by this action of the Railroad Company, which renders it a trespasser subject to ouster, but appellant may waive the trespass and proceed under the Statute.

McClinton v. Pittsburg, Ft. W. & O. R. Co. 66 Pa. 409; *Delaware, L. & W. R. Co. v. Burson*, 61 Pa. 869.

Mr. John J. Pinkerton, for appellee:
The direction of a verdict for defendant was proper.

North & West Branch R. Co. v. Swank, 105 Pa. 555; *Hoffeditz v. Southern Pa. R. & Min. Co.* 4 Pa. Sup. Ct. Dig. 598.

Plaintiff could not dictate to the Railroad Company how the road should be constructed.

New York & E. R. Co. v. Young, 83 Pa. 182.

With its discretion, exercised within the limits of its Act of Incorporation, no court has any control or right to interfere.

Parke's App. 64 Pa. 140; *Struthers v. Dunkirk, W. & P. R. Co.* 87 Pa. 282; *Cleveland & P. R. Co. v. Speer*, 56 Pa. 834.

Per Curiam:

It was decided in *North & West Branch R. Co. v. Swank*, 105 Pa. 555, that "an agreement between a land owner and a railroad company to sell the latter a right of way across the premises of the former covers all damages, of whatever sort, suffered by the land owner, all for which he is legally entitled to compensation." The same principle was recognized in the later case of *Hoffeditz v. Southern Pennsylvania R. & Min. Co.* 4 Pa. Sup. Ct. Dig. 598, not yet reported.

In the latter case the plaintiff had, for the consideration of \$1,000, released the company from all suits, claims, demands and damages whatever, for, upon or by reason of their entry upon and taking and occupying the land on which the railroad was built, and the location and construction of said railroad and works connected therewith. The plaintiff brought suit to recover damages for the flooding of his land. His allegation was that the culvert built by the company to carry off the water was too small for that purpose in times of freshets, and that the construction of the road caused a larger

body of water to accumulate at that particular spot than had been the case before such construction. Upon the trial of that case the court below reserved the question whether the release was a bar to a recovery by the plaintiff, and subsequently entered judgment thereon for the defendant, which was affirmed by this court. It was said in the opinion: "We are unable to see any ground upon which the plaintiff could rest a claim for damages." The cases cited rule the one in hand. The defendant Company obtained from the plaintiff a release for the right of way of eighty feet in width across said farm. The agreement further released the said Company from all claims for damages by reason of the taking and using of the land for said railroad, or by reason of the construction and maintenance of the said railroad on and over said tract of land. The plaintiff contended that about six acres of his land was repeatedly overflowed and rendered unfit for cultivation, by reason of the construction of a ditch and culvert by the Railroad Company, which he alleged threw water upon his land which would not have otherwise flowed there. The learned judge below instructed the jury that "these ditches and culvert, and this discharge of water is the result, the necessary result, of the construction of that road." We see no error in this. It is in direct line with the rulings of this court in the cases above cited. A release of the right of way to a railroad company would be a vain thing if the company is to be subsequently subjected to litigation for every injury or damage resulting to the property by reason of the construction of the road. All these matters are supposed to be in the contemplation of the parties when the company pays its money for the right of way and obtains a release therefor.

Judgment affirmed.

INDIANA SUPREME COURT.

ADAMS EXPRESS CO., Appt.,

v.

John B. HARRIS et al.

(...Ind....)

1. An intermediate carrier can derive no benefit from a contract between the

first carrier and the shipper, limiting the carrier's liability, where such contract neither provides that its stipulations shall inure to the benefit of any other than the first carrier nor designates any other carrier along the line as an intermediate carrier.

2. Where the title of the cause gives the full names of the plaintiffs, they need not be repeated in alleging that plaintiffs are partners.

NOTE.—Common carriers; liability for loss of goods.

A common carrier has two distinct liabilities, one for losses by accident or mistake where his liability is that of insurer; the other for losses by default or negligence, where his liability is that of an ordinary bailee. *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 363 (21 L. ed. 635); *Dorr v. New Jersey Steam Nav. Co.* 11 N. Y. 485, 4 Sandf. 126.

Liability may be restricted by contract.

It is a well-established rule of law that a carrier may restrict his common-law liability as insurer. *Fibel v. Livingstone*, 64 Barb. 179; *Christenson v. Am. Exp. Co.* 15 Minn. 270; *Pennsylvania R. Co. v. Henderson*, 51 Pa. 315; *Farnham v. Camden & A. R. Co.* 55 Pa. 53; *Davidson v. Graham*, 2 Ohio St. 181; *Graham v. Davis*, 4 Ohio St. 362; *Illinois Cent. R. Co. v. Adams*, 42 Ill. 474.

7 L. R. A.

The right of the carrier to limit its responsibility has been recognized by the Supreme Court of the United States since its decision in the case of *New Jersey Steam Nav. Co. v. Merchants Bank*, 47 U. S. 6 How. 344 (12 L. ed. 465); but to be valid the limitation must in all cases be reasonable (*The Colon*, 9 Benedict, 354; *Rintoul v. New York Cent. & H. R. R. Co.* 17 Fed. Rep. 906; *May v. The Powhatan*, 5 Fed. Rep. 375), and to be reasonable it must not stipulate for exemptions from liability for the consequences of its negligence, or that of its servants or agents. *Inman v. South Carolina R. Co.* 129 U. S. 128 (32 L. ed. 612); *Merchants D. Transp. Co. v. Bloch*, 86 Tenn. 397; *Coward v. East Tenn. V. & G. R. Co.* 16 Lea, 225; *Dillard v. Louisville & N. R. Co.* 2 Lea, 238; *Southern Exp. Co. v. Caldwell*, 88 U. S. 21 Wall. 234 (23 L. ed. 556). See note to *Richmond & D. R. Co. v. Payne* (Va.) 6 L. R. A. 849.

It is not just and reasonable in the eyes of the

3. A complaint against "Adams Express Company" need not specifically allege that it is a corporation. That fact is imported by its name.

4. A common carrier waives his right to detain goods for the freight if he puts his refusal to deliver them to the owner upon the ground that they are not in his possession at the place where a demand is duly made.

5. Where a corporation invests an agent with general authority to adjust claims against it, the declarations of that agent, made while endeavoring to secure an adjustment of the claim, are competent evidence against his principal.

6. A limitation of liability in the bill of lading will not control where the damage is an effect of the carrier's negligence, and where it does not appear that the limitation was in consideration of a lower rate of freight.

(May 9, 1889.)

A PPEAL by defendant from a judgment of the Circuit Court for Morgan County in favor of plaintiffs in an action to recover damages for injuries to plaintiffs' property while in defendant's possession for purposes of transportation, alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Jordan & Matthews, for appellant:

The stipulations and conditions in the bill of lading inure to the benefit of the intermediate carrier the same as to the initial carrier.

U. S. Exp. Co. v. Harris, 51 Ind. 127; *Maghes v. Camden & A. R. Transp. Co.* 45 N. Y. 514, and cases cited; 2 Greenl. Ev. § 210.

The declarations of an agent cannot bind his principal unless they are part of the *res gesta*.

Pittsburgh, C. & St. L. R. Co. v. Theobald, 51 Ind. 249, and cases cited; *La Rose v. Logansport Nat. Bank*, 102 Ind. 846; *Williamson v. Cambridge R. Co.* 8 New Eng. Rep. 750, 144 Mass. 148.

Messrs. Adams & Newby for appellees.

Elliott, Ch. J., delivered the opinion of the court:

The material facts pleaded by the appellees as their cause of action are these: On and prior to the 17th day of January, 1885, they were partners engaged in business as nurserymen; on that day a lot of fruit trees was delivered to the United States Express Company

at Champaign, Illinois; the trees were owned by the plaintiffs and were directed to them at Mooresville, Indiana. The United States Express Company undertook to carry the trees to Indianapolis, and there deliver them to some other carrier, to be transported to their destination. A written contract was made between the United States Express Company and the plaintiffs, which contained, among other things, these provisions: that the person or corporation to whom the trees shall be delivered for transportation from the end of that company's line to their destination shall not be deemed the agent of the company, but shall be deemed the agent of the plaintiffs; that the company shall not be liable for injury to the goods unless it "be proved to have occurred from the fraud or gross negligence of the company or its servants; nor shall any demand be made upon the company for more than \$50, at which sum said property is hereby valued." There is no provision in the contract for the benefit of any carrier except the United States Express Company, nor is any other carrier named.

The trees were delivered to the defendant in good condition at Indianapolis, and it carried them to Mooresville. After they had reached there, the plaintiffs went to the office of the defendant, prepared to pay the charges and receive the trees, and although they were then in the possession of the defendant's agent, he denied that they had been received. On a subsequent day the plaintiffs went again to the defendant's office, received the trees and paid the freight on them. The trees were so injured through the negligence of the defendant as to be utterly valueless. The plaintiffs had sold the trees to divers persons, and had agreed to deliver them on the 19th day of October, 1885. The refusal of the defendant to deliver the trees when first demanded caused the plaintiffs to lose the profits of the sales made by them, for the reason that the delay prevented them from delivering the trees to the purchasers in accordance with their contract.

The contention of the appellant is that the contract between the United States Express Company and the plaintiffs bound both them and the appellant; that the latter, when it accepted the goods for transportation, became bound to comply with the provisions of the contract and secured a right to all its stipulations in favor of the first carrier, and that the

law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants; nor can it arbitrarily, or without the consent of the shipper, place a value upon articles received for carriage and in this manner limit the amount of recovery against it in case of loss. *Rosenfeld v. Peoria, D. & E. R. Co.* 1 West. Rep. 151, 103 Ind. 121. See note to *Missouri Pac. R. Co. v. Ivey* (Tex.), 1 L. R. A. 500; *North America Ins. Co. v. Easton* (Tex.) 3 L. R. A. 425.

Limit to liability.

The same reasons do not exist against contracts limiting the amount of recovery as exist against contracts for total exemption from liability; hence the rule as expressed in *Southern Exp. Co. v. Moon*, 39 Miss. 822; *The City of Norwich*, 4 Benedict, 271; *United States Exp. Co. v. Backman*, 28 Ohio St. 144; *Black v. Goodrich Transp. Co.* 55 Wis. 319; *Chicago*, 7 L. R. A.

St. L. & N. O. R. Co. v. Abels, 60 Miss. 1017; *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 30 Kan. 845.

The agreement limiting the carrier's liability may be either written or printed. *Felge v. Michigan Cent. R. Co.* 62 Mich. 1.

A shipper who signs a contract limiting the carrier's liability cannot evade its effect on the ground that he did not know its contents, where he had opportunity to read it or hear it read. *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 387; *Hutchinson v. Chicago, St. P. M. & O. R. Co.* 37 Minn. 524; *Myers v. Wabash, St. L. & P. R. Co.* 6 West. Rep. 685, 90 Mo. 98.

Where a contract signed by the shipper is fairly made, agreeing on a valuation of the property shipped, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the

contract continued in force for the benefit of all the parties until the goods were delivered at their destination.

The opposing contention is, that the contract between the United States Express Company and the plaintiffs did not inure to the benefit of the appellant, and that, when it accepted the goods for transportation, it received them under the law and became bound by the ordinary rules which prevail in cases where there is no special contract.

If the appellant had been designated in the contract with the first carrier as one of the intermediate carriers, or if the contract had provided that its stipulations should inure to the benefit of all the carriers, then the contention of the appellant would find strong support from the authorities. *U. S. Exp. Co. v. Harris*, 51 Ind. 127; *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397; *Halliday v. St. Louis, K. C. & N. R. Co.* 74 Mo. 159, 41 Am. Rep. 309; *Evansville & C. R. Co. v. Androscooggin Mills*, 89 U. S. 22 Wall. 594 [22 L. ed. 724]; *Maghee v. Camden & A. R. Transp. Co.* 45 N. Y. 514; *Manhattan Oil Co. v. Camden & A. R. & Transp. Co.* 54 N. Y. 197.

But the contract does not provide that its stipulations shall inure to the benefit of any other carrier than the one with whom it was made, nor does it designate any other carrier along the line. Its provisions apply only to the carrier with whom the contract was directly made, and they leave it to that carrier to select the carrier from the termination of its line to the end of the route. The authorities are sub-

stantially agreed that in such a case the intermediate carrier cannot successfully claim the benefit of the provisions of the original contract. *Martin v. Am. Exp. Co.* 19 Wis. 336; *Bancroft v. Merchants Despatch Transp. Co.* 47 Iowa, 262, 29 Am. Rep. 482; *Merchants Despatch Transp. Co. v. Bolles*, 80 Ill. 473; *Camden & A. R. Co. v. Forsythe*, 61 Pa. 81; *Aina Ins. Co. v. Wheeler*, 49 N. Y. 616.

The rule declared by the decisions we have referred to is the only one that can be defended on principle; for, where the contract designates only one carrier, there is no privity between the owners and the designated carriers; but, where the contract is a through one, by designated carriers there is a privity of contract, for it is justly inferable that the contract was intended for the benefit of all who perform services under it. So, too, where the contract declares that it is for the benefit of intermediate carriers it may be enforced, since it is a contract for the benefit of a third person, and, as it is beneficial to him, it is natural to presume that its terms were assented to and formed the contract under which the goods were transported. Where, however, the contract is solely for the benefit of the original parties it is not possible to apply this rule to it.

Where, as here, the names of the plaintiffs are given in full in the title of the cause, it is unnecessary to repeat them in alleging that the plaintiffs were partners. It is sufficient to allege that the plaintiffs were partners, without again giving their names.

The name of the defendant imports that it is

contract will be upheld; the valuation and limitation of liability in the bill of lading, being just and reasonable, is binding on the shipper. *Newburger v. Howard & Co's Express*, 6 Phila. 174; *Squire v. New York Cent. R. Co.* 98 Mass. 239; *Hopkins v. Westcott*, 6 Blatchf. 64; *Belger v. Dinsmore*, 51 N. Y. 168; *Oppenheimer v. U. S. Exp. Co.* 60 Ill. 62; *Magnin v. Dinsmore*, 56 N. Y. 163, 62 N. Y. 35, 70 N. Y. 410; *Earnest v. Southern Exp. Co.* 1 Woods, 573; *Elkins v. Empire Transp. Co.* 81* Pa. 315; *South and North Ala. R. Co. v. Henlein*, 52 Ala. 606, 56 Ala. 398; *Muser v. Holland*, 17 Blatchf. 412; *Harvey v. Terre Haute & I. R. Co.* 74 Mo. 538; *Graves v. Lake Shore & M. S. R. Co.* 137 Mass. 33, approved in *H. rtv. Pennsylvania R. Co.* 112 U. S. 333 (23 L. ed. 719; *Louisville & N. R. Co. v. Sherrod*, 84 Ala. 178; *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397.

A bill of lading is the written contract of the parties, and by its terms their rights and liabilities must be measured (*Fry v. Louisville N. A. & C. R. Co.* 1 West. Rep. 290, 103 Ind. 265), and one accepting it without examining its contents will be bound thereby. *Snow v. Indiana, B. & W. R. Co.* 7 West. Rep. 264, 109 Ind. 422.

The effect of acceptance by the shipper of a bill of lading is regulated by the Civil Code of Dakota. See *Hartwell v. Northern Pac. Exp. Co.* 3 L. R. A. 342, 5 Dak. 463.

The rule that a shipper must examine a bill of lading, or if he does not he is bound by its terms, does not apply where, before delivery of the bill, the goods have been shipped so far that he could not have reclaimed them had he objected to the bill; nor does it apply where the parties have acted upon a previous parol agreement. *Guillaume v. General Transatlantic Co.* 1 Cent. Rep. 723, 100 N. Y. 491; *Snow v. Indiana, B. & W. R. Co.* 7 West. Rep. 264, 109 Ind. 422; *Hamilton v. Western M. C. R. Co.* 96 N. C. 398.

If for the purpose of getting reduced rates the

shipper should put a value on the articles, he cannot recover beyond that value. *Rosenfeld v. Peoria, D. & E. R. Co.* 1 West. Rep. 150, 103 Ind. 121.

A stipulation, in a bill of lading, that the carrier's responsibility as a common carrier shall terminate when the goods are transported and safely stored in the depot of the carrier, is not opposed to public policy, and operates to limit the liability thereafter to that of a warehouseman. *Western R. Co. v. Little*, 86 Ala. 159.

In case of connecting carriers.

The rights of a connecting carrier receiving goods from another carrier are not affected by any limitations put upon the latter's authority by the shipper, of which the connecting carrier has no notice. *Price v. Denver & G. R. Co.* 12 Colo. 402.

When several carriers unite to complete a line of transportation, and receive goods for one freight, they are each liable for damages during transportation, subject to reclamation against the party by whose act the damage occurred. *Richardson v. The Charles P. Chouteau*, 37 Fed. Rep. 532.

A carrier receiving freight from another carrier under an agreement between the latter and the shipper is entitled to the benefit of any valid limitation of the first carrier's liability, just as it is liable for any failure to perform its part of the contract. *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397.

A railroad company whose line is one of several connecting roads, in the absence of a special contract or of an association or copartnership by which each connecting line is liable for the contracts of the others, is not responsible for damages for negligence occurring beyond its terminus. In such case its liability is confined to that of a forwarding agent. *Knott v. Raleigh & G. R. Co.* 98 N. C. 73.

a corporation, and it was therefore not necessary to specifically aver that it was a corporation. *Adams Exp. Co. v. Hill*, 43 Ind. 157; *Indianapolis Sun Co. v. Horrell*, 53 Ind. 527; *Sayers v. Orawfordsville First Nat. Bank*, 89 Ind. 280.

The defendant's denial of the possession of the goods at Mooresville excused the plaintiffs from making a tender of the carrier's charges. A common carrier waives his right to detain goods for the freight if he puts his refusal to deliver them to the owner upon the ground that they are not in his possession at the place where a demand is duly made. *Vinton v. Baldwin*, 95 Ind. 433, and cases cited; *Mathis v. Thomas*, 101 Ind. 119; *Platter v. Elkhart County*, 103 Ind. 360, 1 West. Rep. 235; *House v. Alexander*, 105 Ind. 109, 3 West. Rep. 816.

Where a corporation invests an agent with general authority to adjust claims against it, the declarations of that agent, made while endeavoring to secure an adjustment of the claim, are competent evidence against his principal. This general rule has often been applied in insurance cases, and must necessarily apply in such cases as this, for, otherwise, the corporation would be entirely without a representative.

In deciding, as we have, that the provisions of the contract with the United States Express Company cannot be taken advantage of by the appellant, we have disposed of the point that the damages are limited to \$50; but if we were wrong in this, still, the limitation will not control, since there is evidence of negligence and no evidence that a lower rate of freight was given on account of the limitation placed upon the value of the property. *Rosenfeld v. Peoria, D. & E. R. Co.* 108 Ind. 121, 1 West. Rep. 150; *Bartlett v. Pittsburgh, C. & St. L. R. Co.* 94 Ind. 281; *United States Exp. Co. v. Buckman*, 28 Ohio St. 144.

As there was evidence of negligence, and no evidence that there was any special consideration inducing the owners to place a less value on their property than its actual worth, the limitation, even conceding it to be available to the appellant as a part of the contract, is nullified.

The instructions of the court are quite as favorable to the appellant as the law warrants, and the evidence fully supports the verdict.

Judgment affirmed.

Petition for rehearing denied September 25, 1889.

TEXAS SUPREME COURT.

EQUITABLE LIFE ASSURANCE SOCIETY of the United States, *Appl.*,

v.

Robert R. HAZLEWOOD.

(....Tex.....)

1. A warranty by an applicant for a life insurance that his answers to the society's medical examiner are true, does not make

him responsible for the truth of such answers as reported to the company; and if by being incorrectly written down by such examiner without the applicant's knowledge they are untrue as reported to the company, the policy will not be avoided thereby.

2. The signature of an applicant for life insurance, written at the beginning of the paper containing his medical examination, is for purposes of identification rather

NOTE.—*Life policy; construction of.*

A policy of insurance is a single entire contract and continues during the life of the insured subject to discontinuance by nonpayment of the premiums. *Fearn v. Ward*, 80 Ala. 555.

The provisions of a policy are construed and applied like other contracts, and may render it void *ab initio*, by its terms and failure of warranty. *Connecticut Mut. L. Ins. Co. v. Pyle*, 2 West. Rep. 330, 44 Ohio St. 19.

Questions and answers will be reasonably construed although the policy is conditioned on the truth of the answers. *Home Mut. L. Assn. v. Gillespie*, 1 Cent. Rep. 134, 110 Pa. 84.

Mistakes in policies may be disregarded or corrected. *Connecticut Mut. L. Ins. Co. v. Pyle*, *supra*.

Application for insurance on life.

Where the application was signed before being filled out, the fact that the answers were incorrectly written in by the agent may be established by parol evidence; otherwise if the applicant had signed afterwards. *Brown v. Metropolitan L. Ins. Co.* 8 West. Rep. 775, 45 Mich. 303.

Where an agent of a life insurance company assumed the whole preparation of an application, and asked or told the applicant to sign it, without her reading it or hearing it read, the company cannot defend on the ground of false statements in the application. *Temmink v. Metropolitan L. Ins. Co.* 72 Mich. —, 40 N. W. Rep. 400.

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Where a physician, acting as agent for the company, in examining an applicant for life insurance, assumes to write out the answers to the questions upon his own knowledge of the facts, rather than from the answers given by the applicant, the answers as given by him are conclusive on the company. *Pudritzky v. Supreme Lodge K. of H.* 76 Mich. 423.

A copy of an application attached to an insurance policy, which does not have the name of the applicant appended thereto, is not a copy of such application within the Statute of Wisconsin, requiring a copy to be attached to the policy in order to permit the insurance company to prove the falsity of any statement therein. *Dunbar v. Phenix Ins. Co.* 72 Wis. 492.

Whether the signature to an application for insurance, which was by mark only, is genuine or not is immaterial, where the policy has been accepted, the premiums paid for several years, and received and retained by the company, with no offer to return them. *Home Mut. L. Assn. v. Biel* (Pa.), 17 Atl. Rep. 33.

Where an insurance contract is ambiguous, the doubt should be resolved against the company. See *note to Kratzenstein v. Western Assur. Co.* (N. Y.), 5 L. R. A. 799.

Company responsible for acts of its agents.

The insurance company, and not the insured, is responsible for the falsity of answers inserted in the

than for the purpose of binding him for the truth of the contents of the paper.

3. Where payment of a policy of life insurance is contested because of the falsity of certain answers made by the applicant to questions propounded to him, and which he warranted to be true, the charge to the jury upon the question of falsity must be confined to such questions and answers as were put in issue by the pleadings and evidence, and not extended to all the answers made by the applicant.
4. While an applicant for life insurance is not bound to exercise supervision over the writing down of his answers by the medical examiner, yet, if he knows that his answers have been incorrectly written down, it becomes his duty to see that proper corrections are made, and if he fails to do so he will be estopped from disputing them as written even although recovery upon the policy is thereby defeated.
5. Where a life insurance company contests payment of a policy upon the ground that it was taken out by the beneficiary as a wagering policy, and proves that the beneficiary loaned the insured the money with which he paid the premium, testimony of the agent of the corporation is admissible as to negotiations preceding the application, tending to show that both the beneficiary and the insured were urged by the agent to apply for the insurance; that the premium was paid by insured; and that he thought of taking the policy for the benefit of the minor children of the beneficiary, but did not do so because the beneficiaries could not then be so easily changed in case such change became desirable.
6. Where the applicant stated that no application by him for insurance was ever rejected, and it is shown that his application for membership in a mutual benefit society was rejected, plaintiff may show that the company's agent informed the insured that such societies were not regarded as life insurance companies and need not be considered as such by him.
7. The designation of a person as beneficiary in a life insurance policy, who has no insurable interest in the life of the person taking

out the policy, does not render it void; but such person may be treated as an assignee, appointee or trustee to receive the proceeds for whoever may be lawfully entitled to enjoy them.

8. One has an insurable interest in the life of his brother.
9. There is no special reason for limiting the amount for which a policy may be taken out when the insurance is obtained by a person on his own life and made payable originally or by assignment to another having no, or only a limited, insurable interest in his life.

(December 6, 1889.)

APPEAL by defendant from a judgment of the District Court for Delta County in favor of plaintiff in an action upon a policy of life insurance. *Affirmed.*

The facts are sufficiently stated in the opinion.

Messrs. Maxey, Lightfoot & Denton and *Hodges & Lane*, for appellant:

Where a policy of life insurance was taken out for speculation—at the instance of the beneficiary, who furnished the money to pay the premium—upon the life of a brother, twenty-eight years of age, the beneficiary being a man in no way dependent upon the assured, even though there might have been a small indebtedness greatly disproportionate to the policy, such policy cannot be sustained, but is a wagering contract and void, as against public policy.

Price v. Knights of Honor, 68 Tex. 866, and authorities there cited; *Levy v. Taylor*, 66 Tex. 652; *Warnock v. Davis*, 104 U. S. 782 (26 L. ed. 927); *Cammack v. Lewis*, 82 U. S. 15 Wall. 648 (21 L. ed. 214); *Lewis v. Phoenix Mut. L. Ins. Co.* 39 Conn. 100; *Singleton v. St. Louis Mut. Ins. Co.* 66 Mo. 63, 27 Am. Rep. 321; *Guardian Mut. L. Ins. Co. v. Hogan*, 80 Ill. 85, 22 Am. Rep. 180; *Keystone Mut. Ben. Asso. v. Norris*, 7 Cent. Rep. 204, 115 Pa. 446; *Bacon, Ben. Societies*, § 250, pp. 868, 370, 595, 868, § 249; *Bliss, Ins.* pp. 27, 40, 42, 43; *Stevens v. Warren*, 101 Mass. 564.

Where both the application and the policy

application by an authorized agent of the company, where the insured had given true answers. *O'Brien v. Home Ben. Society*, 27 N. Y. S. R. 326.

Where the law of a State provides that a person who solicits or procures an application for insurance shall be held to be the agent of the insurance company, and such agent fills up the application, his act in doing so is the act of the company. *Continental L. Ins. Co. v. Chamberlain*, 132 U. S. 304 (33 L. ed. 341).

If the applicant for insurance fully states the facts to the agent, and the agent writes the answers to the questions contrary to the facts stated by the applicant, the insurance company is estopped from making a defense in an action on the policy, by reason of the falsity of such answers. *Continental L. Ins. Co. v. Chamberlain*, 132 U. S. 304 (33 L. ed. 341).

Where the agent writes in the application that the applicant has no other insurance, although the applicant told him that he had certificates of membership in co-operative companies, which the agent said were not considered insurance by him, the company is bound by the agent's interpretation, and estopped from asserting the contrary. *Ibid.*

The act of an agent authorized to solicit and take applications for insurance, in inserting false answers to interrogatories, without the knowledge or fault of the applicant, is binding upon the company. *Phoenix Ins. Co. v. Stark*, 120 Ind. 444.

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An insurance company cannot repudiate the fraud of its agent in inserting untrue answers in the application, and thus escape the obligations of its contract, merely because the assured accepted in good faith the act of the agent, without examination. *Kister v. Lebanon Mut. Ins. Co.* 5 L. R. A. 646, 128 Pa. 553.

Insurable interest in life.

To create an insurable interest in the life of another, there must be a reasonable ground, founded in the relations of the parties,—either pecuniary, or of blood, or affinity,—to expect some benefit or advantage from the continuance of his life. *United Brethren Mut. Aid Society v. McDonald*, 1 L. R. A. 238, 122 Pa. 324.

A stepson has no insurable interest in the life of his stepfather. *Ibid.*

In the absence of any insurable interest of the beneficiary, the law will presume that a policy was taken out for the purpose of a wager or speculation. *Ibid.*

A son-in-law has no insurable interest in the life of his mother-in-law, who has no visible means of support and whom he keeps and maintains. *Stambaugh v. Blake* (Pa.) 22 W. N. C. 407.

A wife and children have an insurable interest in the life of the husband and father. *Washington Cent. Nat. Bank v. Hume*, 128 U. S. 195 (32 L. ed. 370). The foundation of the doctrine is that no one

refer to each other, and warrant that all the statements made in the application as well as those made by the assured to the medical examiner are true, and stipulate that if any of such statements are in any respect untrue the policy shall be void, any misstatement by the assured in such application or examination, whereby the insurer is misled as to his true condition, will avoid the policy.

Galveston Ins. Co. v. Long, 51 Tex. 91; *Aetna L. Ins. Co. v. France*, 91 U. S. 510 (23 L. ed. 401); *Jeffries v. Economical Mut. L. Ins. Co.* 89 U. S. 22 Wall. 47 (22 L. ed. 833); *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519 (29 L. ed. 934); *Yose v. Eagle Life & H. Ins. Co.* 6 Cush. 42; *Metropolitan L. Ins. Co. v. McLaigue*, 8 Cent. Rep. 611, 49 N. J. L. 587, 60 Am. Rep. 665; *Bliss, Life Ins.* pp. 46, 48, §§ 24, 36, §§ 37, 38, 50, p. 72; § 54, p. 79; § 53, p. 85; §§ 59, 60, 64, 77, p. 109; § 52, p. 122; *Bacon, Ben. Societies*, § 233, p. 328; § 427, p. 637; *May, Ins.* § 298, p. 326; §§ 186, 187, p. 195; *Powers v. Northeastern Mut. L. Asso.* 50 Vt. 630.

Where the contract between the parties for assurance is one of warranty, and the facts in evidence show, or tend to show, that the affirmative warranty of the assured, upon which the policy is based, is untrue, the court should so charge the jury as to leave them to find the truth or falsity of such warranted facts; and it is error to allow them to consider outside contemporaneous conversations, or other matters concerning the materiality of the questions, which were not carried into the written contract.

Texas Mut. L. Ins. Co. v. Davidge, 51 Tex. 244; *Galveston Ins. Co. v. Long*, 51 Tex. 89; *New York L. Ins. Co. v. Fletcher*, *supra*; *Thompson v. Knickerbocker L. Ins. Co.* 104 U. S. 252 (26 L. ed. 765); *Union Mut. L. Ins. Co. v. Mowry*, 96 U. S. 544 (24 L. ed. 674); *Bacon, Ben. Societies*, § 155, note 1, and authorities cited; *McCoy v. Metropolitan L. Ins. Co.* 133 Mass. 85; *Miles v. Connecticut Mut. L. Ins. Co.* 3 Gray, 580; *Draper v. Charter Oak F. Ins. Co.* 2 Allen, 569; *Kibbe v. Hamilton Mut. Ins. Co.* 11 Gray, 163.

shall have a benefit of any kind in a life policy, who is not presumed to be interested in the preservation of the life insured. *Gilbert v. Moose*, 104 Pa. 78.

A party having no insurable interest in the life of another cannot receive an assignment of a policy of insurance upon the life of the latter, on an agreement merely to pay the premiums or assessments. Such an assignment will not vitiate the policy, but will leave the insurance money payable, on the death of the assured, to the party originally designated in the certificate. *Price v. Supreme Lodge K. of H.* 68 Tex. 361.

Insurable interest in life of another. See note to *Rittler v. Smith* (Md.) 2 L. R. A. 844.

That a company is estopped by the fraud of its agent, see note to *Kiester v. Lebanon Mut. Ins. Co.* (Pa.) 5 L. R. A. 646.

Wager policies.

It is the absence of this insurable interest which gives to the policy the character of a wager contract; there can arise in such case no question of motive or good faith. *Downey v. Hoffer*, 110 Pa. 109.

The rule, applicable alike to life and fire insurance, rests in public policy for the protection of human life and property. *Stoner v. Line*, 16 W. N. C. 187; *Keystone Mut. Ben. Asso. v. Norris*, 7 Cent. Rep. 304, 115 Pa. 446. 7 L. R. A.

Where all the stipulations of a contract of assurance are set out in writing and by its terms the statements therein are warranted to be true, they cannot be varied upon a material point by contemporaneous verbal statements and conversations between the assured and the soliciting agent of the company.

Union Mut. L. Ins. Co. v. Mowry, *New York L. Ins. Co. v. Fletcher*, *McCoy v. Metropolitan L. Ins. Co.* *Miles v. Connecticut Mut. L. Ins. Co.* and *Draper v. Charter Oak F. Ins. Co.* *supra*; *Bliss, Life Ins.* § 82, pp. 122, 123.

Messrs. J. A. Templeton, E. B. Perkins and E. H. Bennett, for appellee:

Henry Clay Hazlewood had an insurable interest in his own life, and if he himself in good faith applied for and obtained the policy sued on, and paid to defendant all premiums due thereon, and if he in good faith had the same made payable to appellee, said policy would not be a speculative or wagering policy, but a valid and binding obligation on defendant.

Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457 (24 L. ed. 251); *Aetna L. Ins. Co. v. France*, 94 U. S. 561 (24 L. ed. 287); *Langdon v. Union Mut. L. Ins. Co.* 14 Fed. Rep. 272, and authorities there cited; *Bacon, Ben. Societies*, §§ 248, 249, 397; *Bliss, Life Ins.* § 26; *Leomis v. Eagle Life & H. Ins. Co.* 6 Gray, 399; *Elkhart Mut. Aid B. & R. Asso. v. Houghton*, 1 West. Rep. 284, 103 Ind. 286, and authorities therein cited; *Campbell v. New England Mut. L. Ins. Co.* 98 Mass. 381; *Provident L. Ins. & Inv. Co. v. Baum*, 29 Ind. 236; *Morrell v. Trenton Mut. L. & F. Ins. Co.* 10 Cush. 282, 57 Am. Dec. 92 *et seq.*

Henry Clay Hazlewood had an insurable interest in his own life, and could effect such insurance, and appoint anyone to receive the money in case of his death during the existence of such policy.

Langdon v. Union Mut. L. Ins. Co. *Elkhart Mut. Aid B. & R. Asso. v. Houghton* and *Provident L. Ins. & Inv. Co. v. Baum*, *supra*.

One brother has an insurable interest in the life of another where there is superadded to that relationship that of debtor and creditor;

An insurance contract is void, unless the insured has an interest in the subject matter of the policy. *Adams v. Pennsylvania Ins. Co.* 1 Rawle, 106; *Gilbert v. Moose*, 104 Pa. 80; *Stoner v. Line*, and *Keystone Mut. Ben. Asso. v. Norris*, *supra*; *Downey v. Hoffer*, 110 Pa. 109, 16 W. N. C. 184; *Seigrist v. Schmaltz*, 5 Cent. Rep. 230, 113 Pa. 326; *Grant v. Kline*, 7 Cent. Rep. 623, 115 Pa. 618; *Cooper v. Shaeffer* (Pa.) 9 Cent. Rep. 601; *Cammack v. Lewis*, 82 U. S. 15 Wall. 643 (21 L. ed. 244); *Warnock v. Davis*, 104 U. S. 775 (26 L. ed. 924); *Stevens v. Warren*, 101 Mass. 564; *Franklin F. Ins. Co. v. Hazzard*, 41 Ind. 116, 13 Am. Rep. 313; *Mo. Valley L. Ins. Co. v. Sturges*, 18 Kan. 93, 26 Am. Rep. 761; *Franklin L. Ins. Co. v. Sefton*, 53 Ind. 380; *Singleton v. St. Louis Mut. Ins. Co.* 66 Mo. 63, 27 Am. Rep. 321; *Moore v. Small*, 19 Pa. 468; *DeFrance v. DeFrance*, 34 Pa. 360.

When the life of a debtor who owes but \$100 is insured by his creditor for \$3,000, the transaction is within the prohibition against wagering policies. In such a case the court should declare, as a matter of law, that no more can be recovered by a creditor than is sufficient to reimburse him his debt, the premium he has paid and interest. *Cooper v. Shaeffer* (Pa.) 9 Cent. Rep. 601.

An assignment does not help a wagering policy. *Stambaugh v. Blake* (Pa.) 22 W. N. C. 407.

and in such a case the extent of the recovery will not be limited to the amount of the indebtedness due, and the beneficiary may recover the amount of the entire policy.

Goodwin v. Massachusetts Mut. L. Ins. Co. 78 N. Y. 480, 18 Alb. L. J. 217; *Grant v. Kline*, 7 Cent. Rep. 626, 115 Pa. 618.

The clearest and most unequivocal language is necessary to create a warranty, and all statements and expressions of a doubtful character will be construed as representations merely.

Goddard v. East Texas F. Ins. Co. 67 Tex. 69; *Moulor v. Am. L. Ins. Co.* 111 U. S. 335 (28 L. ed. 447); *First Nat. Bank v. Hartford F. Ins. Co.* 95 U. S. 673 (24 L. ed. 563); *Phœnix L. Ins. Co. v. Raddin*, 120 U. S. 163 (30 L. ed. 644); *Alabama Gold L. Ins. Co. v. Johnston*, 80 Ala. 467, and authorities cited; *Continental L. Ins. Co. v. Rogers*, 8 West. Rep. 88, 119 Ill. 474; *Clapp v. Massachusetts Ben. Asso.* 6 New Eng. Rep. 103, 146 Mass. 519; *Dilleber v. Home L. Ins. Co.* 69 N. Y. 256 *et seq.*; *Stout v. Commercial Union Assur. Co.* 12 Fed. Rep. 534; *May*, Ins. 160-165, 174-178; *Bliss*, Life Ins. § 404; *Bacon*, Ben. Societies, § 468.

No statement in the application made by the assured, and which he at that time honestly and in good faith believed to be true, would vitiate the policy, even though it should ultimately appear that such statement was not in all respects literally true.

Moulor v. Am. L. Ins. Co. *Alabama Gold L. Ins. Co. v. Johnston*, *Continental L. Ins. Co. v. Rogers*, and *Clapp v. Massachusetts Ben. Asso. supra*; *Southern L. Ins. Co. v. Booker*, 9 Helsk. 606, 24 Am. Rep. 344, 354; *May*, Ins. §§ 169, 170; *Bacon*, Ben. Societies, § 214.

Henry, J., delivered the opinion of the court:

Upon the application of Henry C. Hazlewood, appellant, in August, 1887, issued its policy upon his life, payable to Robert R. Hazlewood, if living, if not, then to his brother, Henry C. Hazlewood, for the sum of \$15,000, payable at the death of the said Henry C. H. C. Hazlewood was a younger brother of R. R. Hazlewood. He died in March, 1888, aged then about twenty-eight years. Appellee, beginning with the year 1881, and between that time and the date of the application for the insurance, had advanced to the said Henry C. various sums of money, amounting to about \$1,200, for which the said Henry acknowledged an indebtedness. On the back of the application for the insurance, and just above the signatures of both of said Hazlewoods, is a printed agreement in the following words: "It is hereby agreed that all the foregoing statements and answers, as well as those made, or to be made, to the Society's medical examiner, are warranted to be true, and are offered to the Society as a consideration of the contract." In the body of, and on the back of, the application, and above said signatures, there are a number of questions and answers relating to the risk. Attached to the application is another paper, styled "Medical Examiner's Report," at the beginning of which appears the signature of Henry Clay Hazlewood, and at the end of it the name of the medical examiner. Between the two signatures there appear a great

number and variety of questions and answers, relating to the history of the said Henry, and of his ancestors and collateral kindred, and to his physique, system, general health record, habits and environment. The answers are usually "Yes" or "No," and, from the space allowed for them in the form used, it is evident that they are required to be monosyllabic. Some of the answers are evidently made by the medical examiner, and some by the subject of the examination. There is nothing but the nature of the answers to distinguish those of the medical examiner from those of the subject of the examination; and it is not easy to distinguish, in some instances, by which one the answer was really made. While many of the questions answered by the witness relate to facts necessarily within his knowledge, and to which he evidently ought to have been able to give categorical and truthful answers, there are others seemingly required to be and in fact answered by him, about which he could not, in the nature of things, have had exact and positive knowledge, and about which it is not probable that he could have expressed himself satisfactorily by simply answering "Yes" or "No." All answers were written down by the medical examiner.

The policy sets out on its face that it is issued "in consideration of the application, and of each statement made therein." Among the provisions of the policy is one reading: "If any statement made in the application for this policy be in any respect untrue, this policy shall be void." The application set out on its face: "I certify that I am temperate in my habits, and am, to the best of my knowledge and belief, in sound physical condition, and a satisfactory subject for life assurance." This was signed by the insured, and indorsed by the beneficiary. Under the general health record, the question was asked in the written and printed medical examination which was sent forward to the company in New York: "(13) Any history of serious illness, injury or infirmity, etc.?" to which the insured answered, "No." "(16b) When, and for what, has medical advice been sought within the last three years?" to which the insured answered "Nothing." The medical examiner of defendant testified that he asked both of the above questions, and the assured answered them as recorded, and made no other statements under those heads. He says: "I wrote the answers. Mr. H. C. Hazlewood was sitting at my left elbow. I asked him each question, and wrote the answer as he gave it. First, had him sign at the top. Asked him questions 1 to 18, inclusive, and then wrote the answers. After the examination, he asked me what sort of a risk he was. I told him he could see for himself, and gave him the report; and he read it over himself. I asked him each question separately, and wrote his answers. He told me he had not sought medical advice in three years. That question is considered material. All are so regarded, as all go to make up the report. . . . Henry Clay Hazlewood gave no history of mental disorder or derangement. Applicant ought to have informed me of any mental derangement. Absent-mindedness, or hallucinations of fear, and the like,—general belief that someone was after

applicant, to kill him, or imagining something to exist that did not,—would be a serious question."

In the written examination the question was asked: "(6) Any history of mental derangement?" to which the applicant answered, "No." In the medical examination is the printed question to the applicant: "(8a) Ever spat blood, or any history of chronic hoarseness or cough, or of asthma, or shortness of breath?" To which the insured answered, "No."

The controverted questions as to breaches of warranty raised by the pleadings, referred to in the evidence and discussed in the brief of appellant's counsel, are thus stated in the brief: "The applicant covenants in writing, and warrants, that to the best of his knowledge and belief he is in sound physical condition. He warrants that he has not sought medical advice for anything within the last three years. He warrants that there has been no mental derangement. He warrants that there is no application pending for other insurance. He warrants that there has been no severe illness, coughs or other ailments," etc.

It is contended that the court erred in refusing to give the following charge at the request of defendant:

"If the jury believe from the evidence that Henry Clay Hazlewood, in the application for the policy of assurance, warranted that all the statements in such application, and all the statements and answers made to the Society's medical examiner, were true, and that such application was made a part of the policy, and it was therein provided that if any statement in such application was in any respect untrue, the said policy should be void, then I charge you that all three of such instruments, taken together, constitute the contract between the parties, and a warranty on the part of the assured that all the statements and answers to the medical examiner were true; and, if you further believe from the evidence that the said Henry Clay Hazlewood, in his medical examination, in answer to the printed questions propounded by the Society, had his answers to said questions put down in writing by the medical examiner opposite said questions, after said Hazlewood had signed said medical examination, and that after said answers were put down he read over and examined the same, and assented thereto, and the same was sent forward with the application, as the basis of the policy, and the same was issued by defendant upon the reliance of the truth of such answers, then, if you find from the evidence that said written answers in said medical examination were in any respect untrue, you will find for the defendant;" and also: "In refusing to grant the defendant's motion for a new trial in this, that it was clearly proved that the contract was embraced in the application, the answers of the assured to the medical examiner, and the policy, taken together, and they constitute a warranty that the statements therein made were true, when the facts fully show that they were not true, that at the time of the application the assured was not in sound physical condition, but was in bad health, and misled defendant and its officers by his statements regarding his condition."

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The doctrine contended for by appellant, that a warranty must be strictly complied with, is fully maintained by the authorities quoted in his brief.

Mr. Bliss, in his work on Insurance, says: "By introducing them, they stipulate, in effect, that they are so material that if not strictly complied with the whole contract is rendered void. A misstatement in a warranty is therefore fatal to the contract, although arising from the most innocent mistake, or from false information afforded by others, or from mere inadvertence, and as much so as if made with the most willfully fraudulent intent." Section 36.

In the case of *Jeffries v. Economical Mut. L. Ins. Co.* 89 U. S. 22 Wall. 53 [22 L. ed. 885], the court says: "The proposition at the foundation of this point is this: that the statements and declarations made in the policy shall be true. This stipulation is not expressed to be made as to important or material statements only, or to those supposed to be material, but as to all statements. The statements need not come up to the degree of warranties. They need not be representations, even, if this term conveys an idea of an affirmation having any technical character. 'Statements and declarations' is the expression; what the applicant states, and what the applicant declares. Nothing can be more simple. If he makes any statement in the application, it must be true. If he makes any declaration in the application, it must be true. A faithful performance of this agreement is made an express condition to the existence of a liability on the part of the company." Again, on page 56 [886]: "Many cases may be found which hold that where false answers are made to inquiries which do not relate to the risk the policy is not necessarily avoided, unless they influenced the mind of the company, and that whether they are material is for the determination of the jury. But we know of no respectable authority which so holds, where it is expressly covenanted, as a condition of liability, that the statements and declarations made in the application are true, and when the truth of such statements forms the basis of the contract."

In the case of *Etna L. Ins. Co. v. France*, 91 U. S. 512 [23 L. ed. 402], the court adopts the reasoning in the above case, and adds: "It is only necessary to reiterate that all the statements contained in the proposal must be true; that the materiality of such statements is removed from the consideration of the court or jury by the agreement of the parties that such statements are absolutely true, and, if untrue in any respect, the policy shall be void."

In the case of *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519 [20 L. ed. 984], referred to in the brief of appellant, the insured made certain statements and representations respecting himself, his life and his past and present health, to which he appended a declaration warranting their truthfulness, and agreeing that they should be the basis of any contract between him and the company, and that if they, or any of them, were in any respect untrue the policy which might be issued thereon should be void; and further agreeing that, inasmuch as only the officers of the home office had authority to determine whether or not a policy should issue on any application, and as

Paxon, Ch. J., delivered the opinion of the court:

This was an appeal from the order of the court below refusing to open a judgment entered by the *Real Estate Investment Co. v. Oliver Roop and Fanny C. Roop*, appellants, in the sum of \$680. The said Fanny was the wife of the said Oliver Roop, but this does not appear on the face of the note upon which the judgment was entered. The petition which was filed in the court below is not printed in the paper book, hence we have no certain knowledge of the specific grounds upon which the judgment was asked to be opened, and we might well dismiss the case for this reason alone. We learn from the docket entries, however, that the application was on behalf of both defendants, and from the agreements of counsel, (a) that the note was usurious; and (b) that the defendant, Fanny C. Roop, was a married woman, and as such, had no power to bind herself by a judgment note.

As to the first proposition, the depositions show that only \$500 was loaned to the defendants; but as the plaintiff concedes this, and also alleges that it was a loan with the judgment note as collateral, and that no more than the \$500 with interest is claimed, there would seem no good reason why the court below should open the judgment and order an issue to try a fact which is not disputed.

The second ground of relief is more serious. On behalf of Fanny C. Roop, it was contended "that, as the record of the judgment reveals no contract within the power of a married woman to make, it is irregular as to Fanny Roop and cannot stand." The judgment is entirely regular upon its face, as the record does not show that Fanny C. Roop is a married woman. The depositions do show it, however, and the fact is not denied.

The plaintiff contends that under the Act of June 8, 1837 (Pub. Laws, 832), known as the "Married Person's Property Act," a married woman has the power generally of confessing judgments, and refers us to the third section of said Act as confirming it. Said section is as follows: "A married woman may make, execute and deliver leases of her property, real and personal, and assignments, transfers and sales of her separate personal property, and notes, bills, drafts, bonds or obligations of any kind, and appoint attorneys to act for her, and it shall not be necessary for her husband to be made a party thereto or joined therein."

This language is certainly very broad, and is a part of the legislation, commencing in 1848, the object of which evidently is to emancipate married women from the restraints of the common law to a certain extent, and to enable them to act as a *feme sole* in respect of their property. It is not necessary for us to express an opinion of the wisdom of this legislation. We have followed the Legislature cautiously, and have, as was our duty, given effect to these Acts to the extent of their plainly expressed meaning; but it is so radical in its character, and so wide a departure from the common law, that we have been careful not to extend the force of any of these Acts by judicial construction.

The Act of 1837 certainly does go very far in 7 L. R. A.

enlarging the powers of married women. The first section gives them the power of a *feme sole* as to the acquisition, ownership, possession, control, use or disposition of property of any kind in any trade or business in which they may engage, or for necessities, and for the use, enjoyment and improvement of their separate estate, and to "make contracts of any kind, and to give obligations binding herself therefor." The only restriction upon the powers thus conferred is found in the proviso at the end of the section. It is as follows: "Provided, however, that a married woman shall have no power to mortgage or convey her real estate, unless her husband join in such mortgage or conveyance."

The second section declares that a married woman may bind herself by contracts relating to any trade or business in which she may engage, or for necessities, and for the use and enjoyment of her separate estate, and may sue and be sued, etc., in all respects as if she were a *feme sole*; "provided, however, that nothing in this or the preceding section shall enable a married woman to become indorser, guarantor or security for another."

Then follows the third section, which I have already quoted. It was contended that this section gives her the general power to contract, which would of course include the power to confess a judgment. If, however, it was intended to confer this broad power, and place a married woman on the same plane with a *feme sole* it could have been done in a few lines, declaring that hereafter a *feme covert* should have the same power to contract debts as a *feme sole*. For such a purpose it was unnecessary to frame an Act with seven sections. We do not think it was intended to confer a power to contract generally. Of what use would be the restriction, contained in the first section, that she shall have no power to mortgage or convey her real estate without her husband joining in such mortgage or conveyance, if she may bind her real estate by confessing a judgment for general purposes? The third section must be read in connection with the other sections and the Act considered as a whole. Viewed in this light, it unfetters a married woman, subject to the restrictions before mentioned, for three purposes, viz., (1) where she engages in trade or business; (2) in the management of her separate estate; and (3) for necessities. For any of these purposes she may bind herself and her estate or business by her contract, and I have no doubt may lawfully confess a judgment. But beyond this we do not think the Act confers any power. It is entirely proper that the law should clothe her with sufficient power to properly manage her separate estate. And when it authorizes her to embark in business it is right that she should be held to her contracts, which can only be done by authorizing her to make such contracts. So in regard to necessities. If she may purchase them she should be authorized to bind herself and her estate for them in the usual manner and by the usual forms by which contracts are made by persons *sui juris*. But we are not disposed to say that for every purpose she may make contracts and bind her estate generally, as may a *feme sole*. The Legislature must say so in

language too clear to be misunderstood before we will subject the estates of married women to such a peril as this.

It was conceded that this judgment was given by a married woman. It was not pretended that it was done in the management of, or for the benefit of, her separate estate; or in the prosecution of any business in which she was engaged, or for necessities. On the contrary, if not given as surety for her husband, it was given upon his importunity, and to aid him in his business, one of the very perils from which the law ought to protect a married woman.

The judgment, having been confirmed without authority, is void as to Fanny C. Roop.

The order of the court below is reversed as to Fanny C. Roop, and the judgment against her is stricken from the record.

Levi S. UPDEGROVE, *Appt.*,

v.

PENNSYLVANIA SCHUYLKILL
VALLEY R. CO.

(....Pa.....)

A release to a railroad company of a right of way across certain land, with a further release of the company from all claims for damages by reason of the taking and using of the land for said railroad, or by reason of the construction and maintenance of the said railroad on and over said land, will bar the owner of the land from subsequently recovering damages for the overflowing of his land by water by reason of the construction of a ditch and culvert by the railroad company in the particular manner for drainage purposes long after the original construction of the road.

(February 24, 1890.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas of Chester County entered upon a verdict directed for defendant in proceedings arising upon an appeal by plaintiff from the report of a jury of view refusing to assess damages against defendant for the alleged taking and occupying of certain of plaintiff's land. *Affirmed.*

Plaintiff was and still is the owner of a farm in Chester County, Pa. In 1882 the defendant Company constructed its line of railroad across his farm so cutting the same as to leave about fifteen acres of land between the railroad and the Schuylkill Canal. The natural slope of the land was toward the canal. In 1888, nearly six years after the original construction of the railroad, the Company dug a ditch on the upper side of its road-bed by which the natural drainage of the land was diverted from the places where it had formerly been into other and different places. The ditch was commenced at the point nearly a half mile distant from a point upon the land which the Company had obtained from plaintiff at which a culvert was constructed under the railroad and from which a ditch was run through plaintiff's land to the canal. By reason of this ditch large quantities of water were made to run over plaintiff's land which would not otherwise have

done so, and at certain seasons of the year the quantity became so great that it overspread the banks of the ditch and deposited earth and stone upon plaintiff's land and left the same boggy, wet and unfit for cultivation a large part of the year. Plaintiff presented his petition to the Court of Common Pleas of Chester County for a jury of view to assess the damages which he claimed by reason of this alleged appropriation of his land and the essential damages to his farm which resulted from this action of the Railroad Company. Viewers were appointed who reported adversely to his claim and he then appealed to the Court of Common Pleas. Defendant admitted the injury, but claimed that no action would lie for the recovery of damages therefor by reason of a release which it had received from plaintiff at the time that it purchased from him its right of way. The court charged the jury in substance that this release would bar a recovery in that action and directed them to return a verdict for defendant. Plaintiff thereupon took this appeal.

The material portions of the release appear in the opinion.

Messrs. J. Howard Jacobs, William M. Hayes and R. Jones Monaghan, for appellant:

If the release in this case had been an absolute deed of the land to the Railroad Company, to be used by it for the construction of a railroad, it is entirely clear that the action of the Railroad Company in diverting the surface water which accumulated on the appellant's farm from its ordinary course, where, by the natural declivity of the land, it was accustomed to flow, through artificial ditches constructed for that purpose, would render it liable to respond in damages for their injury to the appellant's lands.

Ang. Watercourses, § 108 J; *Kauffman v. Griesemer*, 26 Pa. 407; *Miller v. Laubach*, 47 Pa. 154; *Pennsylvania Coal Co. v. Sanderson*, 4 Cent. Rep. 475, 113 Pa. 146; *Huddleston v. West Bellevue*, 1 Cent. Rep. 861, 111 Pa. 110.

With much greater force must this be true in the case in hand where their only right is that of a right of way for the construction and maintenance of a railroad.

Pennsylvania S. V. R. Co. v. Walsh, 124 Pa. 544; *Pennsylvania S. V. R. Co. v. Ziemer*, Id. 571.

No such contract as the one in question is ever understood or could lawfully be made to release one of the contracting parties from its acts of negligence or its wrongful injuries to the rights or property of the other. An express release to a carrier does not include acts of negligence.

8 Wood, Railway Law, § 425; *Am. Exp. Co. v. Sands*, 55 Pa. 140; *Pennsylvania R. Co. v. Butler*, 57 Pa. 337; *Grogan v. Adams Exp. Co.* 5 Cent. Rep. 298, 114 Pa. 528; *Pennsylvania R. Co. v. Raiardon*, 12 Cent. Rep. 177, 119 Pa. 581.

There have been an injury and destruction, as well as a taking of the appellant's land, by this action of the Railroad Company, which renders it a trespasser subject to ouster, but appellant may waive the trespass and proceed under the Statute.

McClinton v. Pittsburg, Ft. W. & O. R. Co. 66 Pa. 409; *Delaware, L. & W. R. Co. v. Burson*, 61 Pa. 369.

Mr. John J. Pinkerton, for appellee:
The direction of a verdict for defendant was proper.

North & West Branch R. Co. v. Swank, 105 Pa. 555; *Hoffeditz v. Southern Pa. R. & Min. Co.* 4 Pa. Sup. Ct. Dig. 593.

Plaintiff could not dictate to the Railroad Company how the road should be constructed.

New York & E. R. Co. v. Young, 83 Pa. 182.
With its discretion, exercised within the limits of its Act of Incorporation, no court has any control or right to interfere.

Parke's App. 64 Pa. 140; *Struthers v. Dunkirk, W. & P. R. Co.* 87 Pa. 282; *Cleveland & P. R. Co. v. Speer*, 56 Pa. 384.

Per Curiam:

It was decided in *North & West Branch R. Co. v. Swank*, 105 Pa. 555, that "an agreement between a land owner and a railroad company to sell the latter a right of way across the premises of the former covers all damages, of whatever sort, suffered by the land owner, all for which he is legally entitled to compensation." The same principle was recognized in the later case of *Hoffeditz v. Southern Pennsylvania R. & Min. Co.* 4 Pa. Sup. Ct. Dig. 593, not yet reported.

In the latter case the plaintiff had, for the consideration of \$1,000, released the company from all suits, claims, demands and damages whatever, for, upon or by reason of their entry upon and taking and occupying the land on which the railroad was built, and the location and construction of said railroad and works connected therewith. The plaintiff brought suit to recover damages for the flooding of his land. His allegation was that the culvert built by the company to carry off the water was too small for that purpose in times of freshets, and that the construction of the road caused a larger

body of water to accumulate at that particular spot than had been the case before such construction. Upon the trial of that case the court below reserved the question whether the release was a bar to a recovery by the plaintiff, and subsequently entered judgment thereon for the defendant, which was affirmed by this court. It was said in the opinion: "We are unable to see any ground upon which the plaintiff could rest a claim for damages." The cases cited rule the one in hand. The defendant Company obtained from the plaintiff a release for the right of way of eighty feet in width across said farm. The agreement further released the said Company from all claims for damages by reason of the taking and using of the land for said railroad, or by reason of the construction and maintenance of the said railroad on and over said tract of land. The plaintiff contended that about six acres of his land was repeatedly overflowed and rendered unfit for cultivation, by reason of the construction of a ditch and culvert by the Railroad Company, which he alleged threw water upon his land which would not have otherwise flowed there. The learned judge below instructed the jury that "these ditches and culvert, and this discharge of water is the result, the necessary result, of the construction of that road." We see no error in this. It is in direct line with the rulings of this court in the cases above cited. A release of the right of way to a railroad company would be a vain thing if the company is to be subsequently subjected to litigation for every injury or damage resulting to the property by reason of the construction of the road. All these matters are supposed to be in the contemplation of the parties when the company pays its money for the right of way and obtains a release therefor.

Judgment affirmed.

INDIANA SUPREME COURT.

ADAMS EXPRESS CO., Appt.,

John B. HARRIS et al.

(....Ind....)

1. An intermediate carrier can derive no benefit from a contract between the

first carrier and the shipper, limiting the carrier's liability, where such contract neither provides that its stipulations shall inure to the benefit of any other than the first carrier nor designates any other carrier along the line as an intermediate carrier.

2. Where the title of the cause gives the full names of the plaintiffs, they need not be repeated in alleging that plaintiffs are partners.

NOTE.—Common carriers; liability for loss of goods.

A common carrier has two distinct liabilities, one for losses by accident or mistake where his liability is that of insurer; the other for losses by default or negligence, where his liability is that of an ordinary bailee. *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 363 (21 L. ed. 635); *Dorr v. New Jersey Steam Nav. Co.* 11 N. Y. 435, 4 Sandf. 186.

Liability may be restricted by contract.

It is a well-established rule of law that a carrier may restrict his common-law liability as insurer. *Fibel v. Livingstone*, 64 Barb. 179; *Christenson v. Am. Exp. Co.* 15 Minn. 270; *Pennsylvania R. Co. v. Henderson*, 51 Pa. 315; *Farnham v. Camden & A. R. Co.* 55 Pa. 53; *Davidson v. Graham*, 2 Ohio St. 131; *Graham v. Davis*, 4 Ohio St. 362; *Illinois Cent. R. Co. v. Adams*, 42 Ill. 474.

7 L. R. A.

The right of the carrier to limit its responsibility has been recognized by the Supreme Court of the United States since its decision in the case of *New Jersey Steam Nav. Co. v. Merchants Bank*, 47 U. S. 6 How. 344 (12 L. ed. 465); but to be valid the limitation must in all cases be reasonable (*The Colon*, 9 Benedict, 354; *Rintoul v. New York Cent. & H. R. R. Co.* 17 Fed. Rep. 906; *May v. The Powhatan*, 5 Fed. Rep. 375), and to be reasonable it must not stipulate for exemptions from liability for the consequences of its negligence, or that of its servants or agents. *Inman v. South Carolina R. Co.* 129 U. S. 128 (32 L. ed. 612); *Merchants D. Transp. Co. v. Bloch*, 86 Tenn. 397; *Coward v. East Tenn. V. & G. R. Co.* 16 Lea. 226; *Dillard v. Louisville & N. R. R. Co.* 2 Lea. 238; *Southern Exp. Co. v. Caldwell*, 88 U. S. 21 Wall. 284 (22 L. ed. 556). See note to *Richmond & D. R. Co. v. Payne* (Va.) 6 L. R. A. 849.

It is not just and reasonable in the eyes of the

3. A complaint against "Adams Express Company" need not specifically allege that it is a corporation. That fact is imported by its name.
4. A common carrier waives his right to detain goods for the freight if he puts his refusal to deliver them to the owner upon the ground that they are not in his possession at the place where a demand is duly made.
5. Where a corporation invests an agent with general authority to adjust claims against it, the declarations of that agent, made while endeavoring to secure an adjustment of the claim, are competent evidence against his principal.
6. A limitation of liability in the bill of lading will not control where the damage is an effect of the carrier's negligence, and where it does not appear that the limitation was in consideration of a lower rate of freight.

(May 9, 1889.)

APPEAL by defendant from a judgment of the Circuit Court for Morgan County in favor of plaintiffs in an action to recover damages for injuries to plaintiffs' property while in defendant's possession for purposes of transportation, alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Jordan & Matthews, for appellant:

The stipulations and conditions in the bill of lading inure to the benefit of the intermediate carrier the same as to the initial carrier.

U. S. Exp. Co. v. Harris, 51 Ind. 127; *Maghee v. Camden & A. R. Transp. Co.* 45 N.Y. 514, and cases cited; 2 Greenl. Ev. § 210.

The declarations of an agent cannot bind his principal unless they are part of the *res gesta*.

Pittsburgh, C. & St. L. R. Co. v. Theobald, 51 Ind. 249, and cases cited; *La Rose v. Logansport Nat. Bank*, 102 Ind. 346; *Williamson v. Cambridge R. Co.* 3 New Eng. Rep. 750, 144 Mass. 148.

Messrs. Adams & Newby for appellees.

Elliott, Ch. J., delivered the opinion of the court:

The material facts pleaded by the appellees as their cause of action are these: On and prior to the 17th day of January, 1885, they were partners engaged in business as nurserymen; on that day a lot of fruit trees was delivered to the United States Express Company

at Champaign, Illinois; the trees were owned by the plaintiffs and were directed to them at Mooresville, Indiana. The United States Express Company undertook to carry the trees to Indianapolis, and there deliver them to some other carrier, to be transported to their destination. A written contract was made between the United States Express Company and the plaintiffs, which contained, among other things, these provisions: that the person or corporation to whom the trees shall be delivered for transportation from the end of that company's line to their destination shall not be deemed the agent of the company, but shall be deemed the agent of the plaintiffs; that the company shall not be liable for injury to the goods unless it "be proved to have occurred from the fraud or gross negligence of the company or its servants; nor shall any demand be made upon the company for more than \$50, at which sum said property is hereby valued." There is no provision in the contract for the benefit of any carrier except the United States Express Company, nor is any other carrier named.

The trees were delivered to the defendant in good condition at Indianapolis, and it carried them to Mooresville. After they had reached there, the plaintiffs went to the office of the defendant, prepared to pay the charges and receive the trees, and although they were then in the possession of the defendant's agent, he denied that they had been received. On a subsequent day the plaintiffs went again to the defendant's office, received the trees and paid the freight on them. The trees were so injured through the negligence of the defendant as to be utterly valueless. The plaintiffs had sold the trees to divers persons, and had agreed to deliver them on the 19th day of October, 1885. The refusal of the defendant to deliver the trees when first demanded caused the plaintiffs to lose the profits of the sales made by them, for the reason that the delay prevented them from delivering the trees to the purchasers in accordance with their contract.

The contention of the appellant is that the contract between the United States Express Company and the plaintiffs bound both them and the appellant; that the latter, when it accepted the goods for transportation, became bound to comply with the provisions of the contract and secured a right to all its stipulations in favor of the first carrier, and that the

law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants; nor can it arbitrarily, or without the consent of the shipper, place a value upon articles received for carriage and in this manner limit the amount of recovery against it in case of loss. *Rosenfeld v. Peoria, D. & E. R. Co.* 1 West. Rep. 151, 103 Ind. 121. See note to *Missouri Pac. R. Co. v. Ivey (Tex.)* 1 L. R. A. 500; *North America Ins. Co. v. Easton (Tex.)* 3 L. R. A. 425.

Limit to Liability.

The same reasons do not exist against contracts limiting the amount of recovery as exist against contracts for total exemption from liability; hence the rule as expressed in *Southern Exp. Co. v. Moon*, 39 Miss. 622; *The City of Norwich, d. Benedict*, 271; *United States Exp. Co. v. Backman*, 28 Ohio St. 144; *Black v. Goodrich Transp. Co.* 55 Wis. 319; *Chicago*, 7 L. R. A.

St. L. & N. O. R. Co. v. Abels, 60 Miss. 1017; *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 30 Kan. 645.

The agreement limiting the carrier's liability may be either written or printed. *Feige v. Michigan Cent. R. Co.* 62 Mich. 1.

A shipper who signs a contract limiting the carrier's liability cannot evade its effect on the ground that he did not know its contents, where he had opportunity to read it or hear it read. *St. Louis, I. M. & S. R. Co. v. Weekly*, 50 Ark. 397; *Hutchinson v. Chicago, St. P. M. & O. R. Co.* 37 Minn. 524; *Myers v. Wabash, St. L. & P. R. Co.* 6 West. Rep. 685, 90 Mo. 98.

Where a contract signed by the shipper is fairly made, agreeing on a valuation of the property shipped, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the

contract continued in force for the benefit of all the parties until the goods were delivered at their destination.

The opposing contention is, that the contract between the United States Express Company and the plaintiffs did not inure to the benefit of the appellant, and that, when it accepted the goods for transportation, it received them under the law and became bound by the ordinary rules which prevail in cases where there is no special contract.

If the appellant had been designated in the contract with the first carrier as one of the intermediate carriers, or if the contract had provided that its stipulations should inure to the benefit of all the carriers, then the contention of the appellant would find strong support from the authorities. *U. S. Exp. Co. v. Harris*, 51 Ind. 127; *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397; *Halliday v. St. Louis, K. C. & N. R. Co.* 74 Mo. 159, 41 Am. Rep. 309; *Evansville & C. R. Co. v. Androschoggin Mills*, 89 U. S. 22 Wall. 594 [22 L. ed. 724]; *Maghee v. Camden & A. R. Transp. Co.* 45 N. Y. 514; *Manhattan Oil Co. v. Camden & A. R. & Transp. Co.* 54 N. Y. 197.

But the contract does not provide that its stipulations shall inure to the benefit of any other carrier than the one with whom it was made, nor does it designate any other carrier along the line. Its provisions apply only to the carrier with whom the contract was directly made, and they leave it to that carrier to select the carrier from the termination of its line to the end of the route. The authorities are sub-

stantially agreed that in such a case the intermediate carrier cannot successfully claim the benefit of the provisions of the original contract. *Martin v. Am. Exp. Co.* 19 Wis. 336; *Bancroft v. Merchants Despatch Transp. Co.* 47 Iowa, 262, 29 Am. Rep. 482; *Merchants Despatch Transp. Co. v. Bolles*, 80 Ill. 473; *Camden & A. R. Co. v. Forsythe*, 61 Pa. 81; *Etna Ins. Co. v. Wheeler*, 49 N. Y. 616.

The rule declared by the decisions we have referred to is the only one that can be defended on principle; for, where the contract designates only one carrier, there is no privity between the owners and the designated carriers; but, where the contract is a through one, by designated carriers there is a privity of contract, for it is justly inferable that the contract was intended for the benefit of all who perform services under it. So, too, where the contract declares that it is for the benefit of intermediate carriers it may be enforced, since it is a contract for the benefit of a third person, and, as it is beneficial to him, it is natural to presume that its terms were assented to and formed the contract under which the goods were transported. Where, however, the contract is solely for the benefit of the original parties it is not possible to apply this rule to it.

Where, as here, the names of the plaintiffs are given in full in the title of the cause, it is unnecessary to repeat them in alleging that the plaintiffs were partners. It is sufficient to allege that the plaintiffs were partners, without again giving their names.

The name of the defendant imports that it is

contract will be upheld; the valuation and limitation of liability in the bill of lading, being just and reasonable, is binding on the shipper. *Newburger v. Howard & Co's Express*, 6 Phila. 174; *Squire v. New York Cent. R. Co.* 98 Mass. 236; *Hopkins v. Westcott*, 6 Blatchf. 64; *Belger v. Dinsmore*, 51 N. Y. 166; *Oppenheimer v. U. S. Exp. Co.* 99 Ill. 62; *Magnin v. Dinsmore*, 56 N. Y. 163, 62 N. Y. 35, 70 N. Y. 410; *Earnest v. Southern Exp. Co.* 1 Woods, 573; *Elkins v. Empire Transp. Co.* 81* Pa. 315; *South and North Ala. R. Co. v. Henlein*, 52 Ala. 603, 56 Ala. 368; *Muser v. Holland*, 17 Blatchf. 412; *Harvey v. Terre Haute & I. R. Co.* 74 Mo. 533; *Graves v. Lake Shore & M. S. R. Co.* 137 Mass. 33, approved in *H. rtv. Pennsylvania R. Co.* 112 U. S. 333 (28 L. ed. 719; *Louisville & N. R. Co. v. Sherrod*, 84 Ala. 178; *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397.

A bill of lading is the written contract of the parties, and by its terms their rights and liabilities must be measured (*Fry v. Louisville N. A. & C. R. Co.* 1 West. Rep. 280, 103 Ind. 265), and one accepting it without examining its contents will be bound thereby. *Snow v. Indiana, B. & W. R. Co.* 7 West. Rep. 264, 109 Ind. 422.

The effect of acceptance by the shipper of a bill of lading is regulated by the Civil Code of Dakota. See *Hartwell v. Northern Pac. Exp. Co.* 3 L. R. A. 342, 5 Dak. 463.

The rule that a shipper must examine a bill of lading, or if he does not he is bound by its terms, does not apply where, before delivery of the bill, the goods have been shipped so far that he could not have reclaimed them had he objected to the bill; nor does it apply where the parties have acted upon a previous parol agreement. *Guillaume v. General Transatlantic Co.* 1 Cent. Rep. 723, 100 N. Y. 491; *Snow v. Indiana, B. & W. R. Co.* 7 West. Rep. 264, 109 Ind. 422; *Hamilton v. Western N. C. R. Co.* 96 N. C. 368.

If for the purpose of getting reduced rates the

shipper should put a value on the articles, he cannot recover beyond that value. *Rosenfeld v. Peoria, D. & E. R. Co.* 1 West. Rep. 150, 108 Ind. 121.

A stipulation, in a bill of lading, that the carrier's responsibility as a common carrier shall terminate when the goods are transported and safely stored in the depot of the carrier, is not opposed to public policy, and operates to limit the liability thereafter to that of a warehouseman. *Western R. Co. v. Little*, 86 Ala. 159.

In case of connecting carriers.

The rights of a connecting carrier receiving goods from another carrier are not affected by any limitations put upon the latter's authority by the shipper, of which the connecting carrier has no notice. *Price v. Denver & R. G. R. Co.* 12 Colo. 402.

When several carriers unite to complete a line of transportation, and receive goods for one freight, they are each liable for damages during transportation, subject to reclamation against the party by whose act the damage occurred. *Richardson v. The Charles P. Chouteau*, 37 Fed. Rep. 532.

A carrier receiving freight from another carrier under an agreement between the latter and the shipper is entitled to the benefit of any valid limitation of the first carrier's liability, just as it is liable for any failure to perform its part of the contract. *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397.

A railroad company whose line is one of several connecting roads, in the absence of a special contract or of an association or copartnership by which each connecting line is liable for the contracts of the others, is not responsible for damages for negligence occurring beyond its terminus. In such case its liability is confined to that of a forwarding agent. *Knott v. Raleigh & G. R. Co.* 96 N. C. 73.

a corporation, and it was therefore not necessary to specifically aver that it was a corporation. *Adams Exp. Co. v. Hill*, 43 Ind. 157; *Indianapolis Sun Co. v. Horrell*, 53 Ind. 527; *Sayers v. Crawfordsville First Nat. Bank*, 89 Ind. 280.

The defendant's denial of the possession of the goods at Mooresville excused the plaintiffs from making a tender of the carrier's charges. A common carrier waives his right to detain goods for the freight if he puts his refusal to deliver them to the owner upon the ground that they are not in his possession at the place where a demand is duly made. *Vinton v. Baldwin*, 95 Ind. 433, and cases cited; *Mathis v. Thomas*, 101 Ind. 119; *Platter v. Elkhart County*, 103 Ind. 360, 1 West. Rep. 235; *House v. Alexander*, 105 Ind. 109, 3 West. Rep. 316.

Where a corporation invests an agent with general authority to adjust claims against it, the declarations of that agent, made while endeavoring to secure an adjustment of the claim, are competent evidence against his principal. This general rule has often been applied in insurance cases, and must necessarily apply in such cases as this, for, otherwise, the corporation would be entirely without a representative.

In deciding, as we have, that the provisions of the contract with the United States Express Company cannot be taken advantage of by the appellant, we have disposed of the point that the damages are limited to \$50; but if we were wrong in this, still, the limitation will not control, since there is evidence of negligence and no evidence that a lower rate of freight was given on account of the limitation placed upon the value of the property. *Rosenfeld v. Peoria, D. & E. R. Co.* 108 Ind. 121, 1 West. Rep. 150; *Bartlett v. Pittsburgh, C. & St. L. R. Co.* 94 Ind. 281; *United States Exp. Co. v. Beckman*, 28 Ohio St. 144.

As there was evidence of negligence, and no evidence that there was any special consideration inducing the owners to place a less value on their property than its actual worth, the limitation, even conceding it to be available to the appellant as a part of the contract, is nullified.

The instructions of the court are quite as favorable to the appellant as the law warrants, and the evidence fully supports the verdict.

Judgment affirmed.

Petition for rehearing denied September 25, 1889.

TEXAS SUPREME COURT.

EQUITABLE LIFE ASSURANCE SOCIETY of the United States, *Appl.*, v.

Robert R. HAZLEWOOD.

(....Tex.....)

1. A warranty by an applicant for a life insurance that his answers to the society's medical examiner are true, does not make

him responsible for the truth of such answers as reported to the company; and if by being incorrectly written down by such examiner without the applicant's knowledge they are untrue as reported to the company, the policy will not be avoided thereby.

2. The signature of an applicant for life insurance, written at the beginning of the paper containing his medical examination, is for purposes of identification rather

NOTE.—*Life policy; construction of.*

A policy of insurance is a single entire contract and continues during the life of the insured subject to discontinuance by nonpayment of the premiums. *Fearn v. Ward*, 80 Ala. 555.

The provisions of a policy are construed and applied like other contracts, and may render it void *ab initio*, by its terms and failure of warranty. *Connecticut Mut. L. Ins. Co. v. Pyle*, 2 West. Rep. 330, 44 Ohio St. 19.

Questions and answers will be reasonably construed although the policy is conditioned on the truth of the answers. *Home Mut. L. Asso. v. Gillespie*, 1 Cent. Rep. 134, 110 Pa. 84.

Mistakes in policies may be disregarded or corrected. *Connecticut Mut. L. Ins. Co. v. Pyle*, *supra*.

Application for insurance on life.

Where the application was signed before being filled out, the fact that the answers were incorrectly written in by the agent may be established by parol evidence; otherwise if the applicant had signed afterwards. *Brown v. Metropolitan L. Ins. Co.* 3 West. Rep. 775, 45 Mich. 303.

Where an agent of a life insurance company assumed the whole preparation of an application, and asked or told the applicant to sign it, without her reading it or hearing it read, the company cannot defend on the ground of false statements in the application. *Temmink v. Metropolitan L. Ins. Co.* 72 Mich. —, 40 N. W. Rep. 403.

7 L. R. A.

Where a physician, acting as agent for the company, in examining an applicant for life insurance, assumes to write out the answers to the questions upon his own knowledge of the facts, rather than from the answers given by the applicant, the answers as given by him are conclusive on the company. *Pudritzky v. Supreme Lodge K. of H.* 76 Mich. 423.

A copy of an application attached to an insurance policy, which does not have the name of the applicant appended thereto, is not a copy of such application within the Statute of Wisconsin, requiring a copy to be attached to the policy in order to permit the insurance company to prove the falsity of any statement therein. *Dunbar v. Phenix Ins. Co.* 72 Wis. 432.

Whether the signature to an application for insurance, which was by mark only, is genuine or not is immaterial, where the policy has been accepted, the premiums paid for several years, and received and retained by the company, with no offer to return them. *Home Mut. L. Asso. v. Riel* (Pa.) 17 Atl. Rep. 36.

Where an insurance contract is ambiguous, the doubt should be resolved against the company. See *note to Kratzenstein v. Western Assur. Co.* (N. Y.) 5 L. R. A. 799.

Company responsible for acts of its agents.

The insurance company, and not the insured, is responsible for the falsity of answers inserted in the

tiff's use, and not the reservation to the owner of the use of his land. Every use by the owner was abandoned, except such as might be made in a mode entirely consistent with the full and undisturbed enjoyment by the grantee of the easement. The idea of a joint use of the land by both parties, in the sense that a use by the grantee should at any time give way to a use by the grantor, is contrary to the plain meaning and intent of the grant. It cannot be supposed that the grantor, when conveying a right of way over an impassable tract of land, intended to restrict his grantee from changing its surface so as to make it passable and available for the purpose of a road, or that, after the road had been so constructed, he had the right to enter upon the land and impair its usefulness, or impose upon the grantee the duty of keeping such impaired road in repair for the benefit of the grantor. The full extent of the rights of the grantor in the soil of the road was to enter thereon, and do such acts only as should not injure or impair the enjoyment of the easement by the grantee, and when he went beyond such use he transcended the rights pertaining to his character as the owner of the soil. The general character of these rights is familiar to all owners of land, because they are common to all whose lands abut upon public roads, and they are varied only by the character of the easements enjoyed, and the terms of the grants under which they are possessed. Unless, therefore, something can be found in the terms of the grant which modifies the easement created, that must be held to be the measure of the rights of the parties. No inference can be drawn from the present grant that it was intended that the grantor should enjoy the unrestricted use of the road, with the privilege of so wearing and using it as to subject the grantee to the labor and expense of keeping it in repair. It is apparent from the character of the property affected, and the use to be made thereof, that the plaintiff expected to construct a carriage road for access to and communication with his residence as a gentleman's country seat. It could not have been contemplated by the parties that such a road was to be used for farming purposes, to draw heavy loads over, and cut it up by the use of the various appliances needed for such purposes. The land over which the road was laid out had never before been so used, and the owner of the soil had theretofore obtained access to his land from the public road by entering upon and traveling over it in other places. The land itself was of small compass, and little value, as it was hilly, rocky, sterile and unadapted to agricultural uses; and it could not, under the circumstances, have been intended that the road was to be built and used to any considerable extent for farming purposes by either the grantor or grantee. The building of fences on both sides of the road showed an intention to preserve it from indiscriminate use, and, while the construction of a bar-way on either side of

the road manifested a design that the defendant might thereby have access to his land and cross the road, it was not intended, we think, to give him liberty to so use the road as to impair or destroy its usefulness or character as a carriage road for private use. The right of way granted was to be forty feet wide, and the grantee had a right thereunder, not only to a free passage over the traveled part, but also to a free passage over such portion of the land, inclosed as a way, as he thought proper or necessary to use. *Herrick v. Stover*, 5 Wend. 580; *Drake v. Rogers*, 8 Hill, 604; *Wood, Nuis.* § 260.

The deposit of stone or other obstructions on such inclosed space, in such a way as to interrupt the enjoyment of the easement, constituted an obstruction which was inconsistent with the rights possessed by the grantee, and could be properly prevented by injunction. The use of such land for agricultural purposes, the raising of crops or the deposit of materials thereon, except perhaps for temporary purposes,—was clearly inconsistent with the rights conveyed by the grant. It is difficult, if not impossible, to lay down a clear and definite line of use which shall enable the parties always to determine what may be considered a proper and reasonable use, as distinguished from an unreasonable and improper one; and such questions must, of necessity, be usually left to the determination of a jury or the trial court, as questions of fact. *Baleman v. Talbot*, 81 N. Y. 866; *Huson v. Young*, 4 Lana. 64; *Prentice v. Geiger*, 74 N. Y. 342.

It is not supposed that it was the intention of the court below to wholly preclude the defendant from the use of the roadway by passing over or across it in such manner as should not materially obstruct passage or injure the road-bed; but it was only intended to prevent an unreasonable use thereof which should sensibly impair its condition, or render its use offensive and impracticable to the plaintiff and others having lawful occasion to pass over it. We think the findings of the trial court are conclusive upon us as to the improper use of the road by the defendant, and that an injunction was properly awarded against him. Some of the members of this court are, however, apprehensive that the order made by the court below is not sufficiently explicit, and may be subject to misunderstanding and misconstruction. We have therefore thought best to change its form so as to express more clearly the rights and duties of the respective parties. The words "willfully or unreasonably" should be inserted after the word "interfering," in the sixth line of the order, in the place of the words "in any way," and also after the word "as," in the ninth line of said order.

With these modifications, the judgment should be affirmed, with costs.

All concur (*Andrews, J.*, in result), except *Finch, J.*, dissenting.

NEW YORK COURT OF APPEALS (2d Div.).

Grace E. KURSHIEDT *et al.*, *Respts.*,

v.

UNION DIME SAVINGS INSTITUTION,
Appt.

(....N. Y....)

The inchoate dower right of the wife of defendant in a suit to foreclose a mortgage given by his grantor, where neither she nor the grantor is served or appears as defendant, the grantor being simply named in the summons, is not cut off by the judgment of foreclosure under Code Proc., § 182, barring parties who claim under unrecorded deeds from a defendant in foreclosure, although the conveyance was not recorded, or known to the plaintiff. Her right is not derived from her husband, but from the grantor.

(January 21, 1890.)

APPPEAL by defendant from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the New York Special Term in favor of plaintiffs in an action to recover back the purchase money paid for certain real estate. *Affirmed.*

The facts sufficiently appear in the opinion. **Mr. William H. Arnoux**, for appellant: Mrs. Sandford is a subsequent incumbrancer, and is barred by the proceedings subsequent to the filing of the *lis pendens*.

Old Code, § 182; *Ostrom v. McCann*, 21 How. Pr. 431; *Fuller v. Scribner*, 76 N. Y. 190, 16 Hun, 180.

It is objected that Clark was never served, but that makes no difference. A foreclosure is in its nature a proceeding *in rem* (*Cleveland v. Boerum*, 24 N. Y. 622); and hence, when it is begun as to one it is begun as to all, including Clark.

The title of the defendant to the premises in question was free from any and all defects, and was a good, valid and marketable title.

Moser v. Cochrane, 9 Cent. Rep. 427, 107 N. Y. 35; *Schermerhorn v. Niblo*, 2 Bosw 161; *M. E. Church Home v. Thompson*, 10 Cent. Rep. 508, 108 N. Y. 618.

Mr. M. A. Kurshiedt, for respondents:

Mrs. Sandford was not made a party to the action, and, as she holds an inchoate right of dower, can now redeem from the mortgage.

Wheeler v. Morris, 2 Bosw. 524; *Mills v. Van Voorhies*, 20 N. Y. 412.

This right is a real and existing interest, and as much entitled to protection as the vested right of a widow, and neither can be impaired by any judicial proceeding to which the wife or widow is not made a party. A wife as much as a widow is an absolutely necessary party to an action in order to produce such a title as a purchaser will be compelled to accept.

Wiltie, Mortg. Foreclosure, 100, § 44; *Mer-*

chants Bank v. Thomson, 55 N. Y. 7; *Mills v. Van Voorhies*, *supra*; *Bell v. New York*, 10 Paige, 49; *Denton v. Nanny*, 8 Barb. 618; *Wheeler v. Morris*, *supra*; *Hitchcock v. Harrington*, 6 Johns. 290; *Collins v. Torrey*, 7 Johns. 278.

In *Kittle v. Van Dyck*, 1 Sandf. Ch. 76-78, the vice-chancellor, citing *Hobart v. Abbot*, 2 P. Wms. 648, and *Norrish v. Marshall*, 5 Madd. 475, held that a wife, who had not joined in a purchase money mortgage, takes her dower in the premises subject to the mortgage, and is an interested and consequently a necessary party to the foreclosure suit. See also *Taggart v. Rogers*, 49 Hun, 265; *Walton v. Meeks*, 41 Hun, 311.

Previous to the amendment of the Code of Procedure in 1858, it had been settled in this State, by numerous decisions, that a subsequent purchaser was not bound by a *lis pendens*, until the action was properly commenced against his grantor, by the service of process, either personally or by publication.

Hayden v. Bucklin, 9 Paige, 513; *Butler v. Tomlinson*, 38 Barb. 641.

Since then no case can be found where a notice of *lis pendens* has been held to affect a purchaser from a party named as a defendant in the summons, but never served with process.

See *Fuller v. Scribner*, 76 N. Y. 190; *Lamont v. Cheshire*, 65 N. Y. 30.

The entry of a judgment against a defendant not served with process, and who has not appeared, is a void act, so far as he is concerned.

Powell v. Finch, 5 Duer, 666.

A void judgment is, in legal effect, no judgment, and all claims flowing out of it are void. *Freeman, Judgments*, § 117.

Bradley, J., delivered the opinion of the court:

The purpose of this action was to recover back the purchase money paid by the plaintiffs to the defendant upon a contract, whereby the latter agreed to sell and convey to them certain land situated in the City of New York; and the alleged ground of the claim is that the defendant was unable to convey to the plaintiffs such title as they were entitled to under the contract. They recovered. The title which the defendant claims to have come through that taken by one Rowe from Catharine A. Ferris, who had the title on the 1st day of December, 1870, when she made a conveyance to Rowe. That conveyance also covered land which the defendant by contract undertook to sell and convey to one Todd, who also brought an action against this defendant to recover back purchase money. The proposition, urged on the part of the plaintiffs in this action, that the title taken by the defendant was defective on the alleged ground that the deed from Ferris to Rowe was not

NOTE.—Dower; inchoate right.

The right of dower, unlike an estate given by statute to the widow, confers no seisin until it is assigned to her, although actually in possession by acquiescence of the heirs and devisees. *McMahon v. Gray* (Mass.) 5 L. R. A. 748.

The inchoate right of the wife is as much entitled to protection as the vested rights of the widow. See note to *Mandel v. McClave* (Ohio) 5 L. R. A. 519.

It is not defeated by a tax sale where the lien for taxes attaches after the dower right becomes fixed. *Shell v. Duncan* (S. C.) 5 L. R. A. 821. See also note to *Everson v. McMullen* (N. Y.) 4 L. R. A. 118.

sealed, has, at the present term of this court, been determined in *Todd v. Union Dime Sav. Inst.* 23 N. Y. S. R. 697, upon the same evidence as that presented by the record here, adversely to the plaintiffs, and therefore will have no further consideration on this review.

There is, however, a further question in the present case, which requires consideration. In May, 1874, one Clark, claiming to be the owner of the premises, made to one Clapp a mortgage upon them to secure the payment of \$22,000 according to the condition of a bond made by the mortgagor to the mortgagee, which bond and mortgage were duly assigned by Clapp to the defendant, and afterwards, and in July, 1874, the defendant brought an action to foreclose the mortgage, and filed with the proper clerk the summons and complaint, with a notice of the pendency of the action. The mortgagor, Clark, and one Thomas L. Sandford, were named as defendants in the foreclosure action. The summons was in no manner served upon Clark, nor did he appear in the action. Sandford appeared and defended, and, among other matters, alleged a conveyance of the premises by Clark to him. The fact was that he had a deed to that effect in his possession at the time of the commencement of that action. It was not then recorded, nor was the defendant then advised that such a deed had been made. But at the time of the commencement of that action Sandford had a wife, Delia A. Sandford, who was not made a party defendant therein. The question arises whether, in view of the fact that Clark was not served, the omission to make Mrs. Sandford a party defendant in the foreclosure action rendered the judgment in that action ineffectual to bar her inchoate right of dower. Such would have been the effect if Clark had been served with the summons or had appeared in the action. Old Code, § 132; *Fuller v. Scribner*, 76 N. Y. 190.

This is on the permitted assumption (without considering the effect if otherwise) that the Savings Institution was in no manner charged with notice of the conveyance to Sandford at the time of the commencement of that action.

Assuming that Clark had conveyed his interest in the property, he was not a necessary party to the action of foreclosure; but, if the action had been brought and prosecuted upon that assumption, it was necessary to make those deriving any title or interest in it from his conveyance parties defendant. Prior to the Code the failure to record a conveyance made subsequently to a mortgage, and prior to the commencement of an action for its foreclosure or filing *lis pendens*, did not obviate the necessity of making such subsequent grantee a party defendant to bar his right of redemption. Those not made parties, and thus affected by the judgment, were purchasers and incumbrancers who became such *pendente lite*. *Haines v. Beach*, 3 Johns. Ch. 459; *Hayden v. Bucklin*, 9 Paige, 512; *Butler v. Tomlinson*, 38 Barb. 641.

The provisions of the Code so modified the rule as to make the action and its result ineffectual, as against subsequent purchasers and incumbrancers whose conveyances are not recorded at the time of filing the notice of pendency of the action. This may not be the rule when a plaintiff in such an action has actual notice of the unrecorded incumbrance at the

time of its commencement. *Lamont v. Cheshire*, 65 N. Y. 80.

There is no occasion here to consider that question. It was contemplated by the provisions referred to of the Code that those whose conveyances or incumbrances appear by the record should be made parties in order to charge with the result of the action those holding under them not made parties, whose interests do not so appear of record at the time of filing such notice; that is to say, that the latter should be barred by charging the former as defendants in the action. The fact, therefore, that Clark had conveyed the property, did not, for that purpose, obviate the necessity of serving him with the summons, and charging him by the decree, and thus through him by that means to bind any person, not made a party, who had by his unrecorded conveyance taken any right relating to the title to the premises. It may be assumed that the notice was duly filed, representing Clark as a party defendant; but that, of itself, was ineffectual to bar Mrs. Sandford's right of redemption, if she took any such right through or by means of the conveyance. Such result was dependent upon effectuating the proceedings in the action against him as a party defendant. Without accomplishing such a result, he was, in practical effect, no more a party than he would have been if his name, as such, had not appeared in the summons. The grantee, Sandford, in the conveyance made by Clark, was served, and so far as he was concerned the failure to serve Clark had no importance, and its only consequence has relation to Mrs. Sandford, and the effect of the foreclosure action, the decree, and its execution, if executed, upon her alleged inchoate right of dower in the premises. Assuming, as we may for the purposes of this review, that such right existed when the foreclosure action was commenced, it was the subject of her protection by means of defense or any other adequate remedy until lawfully barred. *Mills v. Van Voorhies*, 20 N. Y. 412; *Simar v. Canaday*, 58 N. Y. 298; *Denton v. Nanny*, 8 Barb. 618.

The right of dower is not derived from the husband. It is a right at common law, and arises by reason of the marriage and by operation of law. It is a right which attaches on the land when the seisin and the marriage relation are concurrent, and such is the effect of the Statute. 1 Rev. Stat. p. 740, § 1. When it was essential, under an early statute of this State, to determine the relation of the wife to the grant made of land to her husband, it was held that the wife's inchoate right of dower vested at the moment of the grant to the husband; and that she took such right constructively, as purchaser from the grantor. *Sutliff v. Forgey*, 1 Cow. 89; *Forgey v. Sutliff*, 5 Cow. 713; *Priest v. Cummings*, 20 Wend. 350; *Conolly v. Smith*, 21 Wend. 61; *Lawrence v. Miller*, 2 N. Y. 251.

And, inasmuch as Mrs. Sandford did not derive her inchoate right of dower from her husband, the fact that he was a party defendant to the foreclosure action did not operate to bar or defeat her right of redemption. In view of the apparent situation arising from the failure to bar this alleged right of Mrs. Sandford, the title which the defendant was able to convey to the plaintiffs was not free from reasonable

doubt, and was not the marketable title which, in the contemplation of the parties, was to be conveyed in performance of the contract.

The judgment should be affirmed.
All concur, except Potter and Haight, JJ., not sitting.

INDIANA SUPREME COURT.

Benjamin F. KOONS, Admr., *Appl.*
v.

Joshua H. MELLETT *et al.*

(....Ind.....)

1. Notice of appeal to co-parties need not be given under Ind. Rev. Stat. 1881, § 635, where no judgment is rendered against them and they have no interest in the appeal.
2. An appeal in a suit by the creditor of a legatee against him and the administrator to reach money in the latter's hands is not subject to the provisions of Ind. Rev. Stat. 1881, §§ 2454, 2455, respecting appeals in proceedings for settlement of decedent's estates.
3. The general lien of a judgment creditor of a legatee upon lands charged with the legacy or upon the proceeds of a sale thereof is subject to any equities that may exist in favor of the estate against the legatee.
4. The indebtedness of a legatee to the estate, including that arising from payment by the administrator of obligations of the intestate

as surety for the legatee, may be set off against his claim to the legacy.

(*Berkshire and Olds, JJ., dissent.*)

(December 19, 1899.)

APPEAL from a judgment of the Wayne Circuit Court in favor of the appellees in an action to compel application by the appellant as administrator of money in his hands to satisfaction of a judgment in plaintiffs' favor against a legatee. *Reversed.*

The case is stated in the opinion.

Messrs. Kibbey & Kibbey for appellant.
Messrs. Burchenal & Rupe for appellees.

Coffey, J., delivered the opinion of the court:

Daniel Ulrich died testate in Wayne County, Indiana, on the 1st day of March, 1884, the owner in fee of real estate in that county of the value of \$15,000, leaving eight children then living as his heirs-at-law. The will of the said Daniel Ulrich contains the following clause:

NOTE.—Appeal by less than all interested.

The word "co-parties," as used in section 635 of the Revised Statutes, means parties to the judgment appealed from, not co-plaintiffs or co-defendants to the action. *Hogan v. Robinson*, 94 Ind. 140; *Easter v. Severin*, 78 Ind. 540; *Hadley v. Hill*, 78 Ind. 448; *Hammon v. Sexton*, 69 Ind. 37.

All parties to and affected by the judgment must be made parties to the appeal, else the appeal may be dismissed for want of jurisdiction. *Hunderlock v. Dundee, M. & T. Inv. Co.* 88 Ind. 139.

The rule of the section is somewhat technical. A party waives the benefit of it where no motion is made to dismiss until after submission or call by agreement, and there has been joinder in error. *Martin v. Orr*, 96 Ind. 492; *Hendricks v. Frank*, 86 Ind. 278; *Easter v. Acklemire*, 81 Ind. 164; *Easter v. Sevin*, 78 Ind. 542; *Field v. Burton*, 71 Ind. 380; *State v. Hattabough*, 66 Ind. 223; *People's Sav. Bank v. Finney*, 63 Ind. 460.

Submission by agreement waives all defects as to parties to the appeal. *Lebanon First Nat. Bank v. Emex*, 84 Ind. 144.

Where a part of several co-parties appeal, this section requires only that a co-party to the judgment appealed from shall join or be notified. *Logan v. Logan*, 77 Ind. 560.

Parties to an action need not be notified of an appeal unless they are parties to the judgment, from which the appeal is taken. *Kennedy v. Divine*, 77 Ind. 492.

Two defendants appealed, served notice upon their co-defendants and filed proof of such notice with the clerk of the supreme court. Defendants not appearing and declining to join are regarded as having joined in the appeal. *Roy v. Rowe*, 90 Ind. 55.

After notice of appeal served on co-defendants, one party to the judgment may assign error in his own name alone, and, after joinder in error, and cause submitted on a written agreement, the errors are well enough signed in the name of appellant. *Cain v. Goda*, 94 Ind. 558.

7 L. R. A.

Where no question is made on appeal as to a defect of parties, the court will not, *sponte sua*, dismiss. *Travelers Ins. Co. v. Yount*, 98 Ind. 458. See *Hunderlock v. Dundee, M. & T. Inv. Co.* 88 Ind. 139.

On appeal by A from a judgment refusing to quash an execution against A and B, on motion of A, B is not a necessary party. *McAllister v. State*, 81 Ind. 257.

In an action against A, B and C, in a judgment against A and in favor of B and C, B and C are not necessary or proper parties to A's appeal. *Berg-hoff v. McDonald*, 87 Ind. 551.

When time is given to file appeal bond, which is filed within the time prescribed, and transcript filed less than sixty days after the filing of the appeal bond, notice is unnecessary, and parties who were plaintiffs below may be joined in the appeal, by naming them in the assignment of errors. *Conaway v. Ascherman*, 94 Ind. 188.

Distribution of estate where legatee is debtor to the estate.

When a legatee is a debtor to the estate, he is entitled to only the excess, if any, of the legacy over the debt. *Armour v. Kendall*, 15 R. I. 193; *Re Bogart*, 28 Hun. 466, 468; *Willes v. Greenhill*, 29 Beav. 378, 382; *Smith v. Smith*, 8 Giff. 268.

The mere gift of a legacy is not a manifestation of the testator's intent to remit a debt due from the legatee. An executor is justified in refusing payment to a legatee indebted to testator in a sum greater than the legacy, and applying the same in part satisfaction of the debt. *Smith v. Murray*, 1 Dem. 36; *Clarke v. Bogardus*, 12 Wend. 67; *Ranking v. Barnard*, 5 Madd. 32; *Wright v. Austin*, 56 Barb. 17; *Close v. Van Husen*, 19 Barb. 509; *Rickets v. Livingston*, 3 Johns. Cas. 100; *Coates v. Coates*, 38 Beav. 249.

The executor may retain so much of the legacy as is sufficient to satisfy a debt due to the testator. *Courtenay v. Williams*, 3 Hare, 539; 1 Roper, Leg. 608.

An administrator with the will annexed may re-

"Secondly: It is my will that all of my property, both real and personal, shall be sold and the funds accruing therefrom shall be distributed as follows, to wit: David, my son, five hundred dollars for his work after he was twenty-one years of age; and Samuel, my son, three hundred dollars for a like service, and Daniel Heaston, one hundred dollars as a gift out of natural love and affection; and the balance to be equally divided amongst all my children," etc.

On the 28d day of May, 1884, the appellee, Joshua H. Mellett, recovered a judgment in the Henry County Circuit Court against the appellee, David C. Ulrich, legatee under said will, for the sum of \$1,174.82 and costs, and on the 14th day of July, 1884, said Mellett filed a transcript of said judgment in the clerk's office of the Wayne Circuit Court, and caused the same to be duly recorded and docketed for the purpose of acquiring a lien on the interest of the said David C. Ulrich in the lands of which the said Daniel Ulrich died seised, the said David being a resident of Wayne County, and being insolvent, except for his interest in the estate of the said Daniel, deceased, an execution on said judgment having been returned wholly unsatisfied.

After the filing of said transcript in the clerk's office of the Wayne Circuit Court, the appellant, Benjamin F. Koons, was duly appointed administrator of the estate of the said

Daniel Ulrich with the will annexed, and on the 1st day of March, 1885, sold the real estate, of which the said Daniel died seised, to Benjamin B. Beeson for the sum of \$15,482.89, which sale was duly approved by the Wayne Circuit Court.

This action was brought by the appellee, Mellett, for the purpose of compelling the appellant, Koons, as administrator, to apply the money in his hands belonging to the said David C. Ulrich to the satisfaction of his judgment, the complaint averring the facts above set forth.

At the death of the said Daniel Ulrich he was surety for the said David C. Ulrich upon promissory notes aggregating a large sum, which said administrator has since been compelled to pay. This, with other debts due from David to his father, exceeded his legacy. The administrator sought to set off against the interest of the said David C. Ulrich in said estate the amount he had thus been compelled to pay, together with the debts due from him to the estate, but the circuit court refused to allow such set-off, and he excepted.

The assignment of errors calls in question the correctness of this ruling.

The record contains a special finding of the facts in the cause, together with the court's conclusions of law thereon, from which it appears that the court held that the appellee, Mellett, by filing a transcript of the judgment of

tain a pecuniary legacy in part payment of the debt due to the testator by the legatee. *Blackler v. Boott*, 114 Mass. 24; *Green v. Nelson*, 12 Met. 507.

A legatee having become bankrupt since the death of testator, his assignees are not entitled to any part of the personal estate bequeathed to the legatee. *Richards v. Richards*, 9 Price, 219.

The representatives of the widow after her death have no lawful claims against the estate except to the excess, if any there be, of the value of her entire interest therein above the amount of her indebtedness. *Young v. Purdy*, 4 Dem. 461; *Springer's App.* 29 Pa. 208; *Allen v. Smitherman*, 6 Ired. Eq. 841.

Debts due to estate to be first collected.

The executors had no right either to pay themselves, or any other legatees, any portion of the income upon their legacies until they had first collected the amount of their respective debts to the estate. *Leggett v. Leggett*, 24 Hun. 335; *Adair v. Brimmer*, 74 N. Y. 558; *Campbell v. Graham*, 1 Russ. & M. 463.

The right of an executor or administrator to retain the whole, or a part, of the legacy or distributive share, in discharge or satisfaction of a debt due from a legatee or distributee to the estate, is not only consistent with the soundest principles of equity, but is perfectly well settled. *Rogers v. Murdock*, 45 Hun. 32.

The administrator of the estate had the right to apply so much of the distributive share of the estate coming to the defendant as would pay and discharge the note against the estate. *Wright v. Austin*, 56 Barb. 17.

The executors have a right to set off the debt due against a claim by the legatee for payment of the legacy. *Re Bogart*, 28 Hun. 468; *Stagg v. Beekman*, 2 Edw. Ch. 89; *Smith v. Kearney*, 2 Barb. Ch. 533.

If the executor's answer denies the validity and legality of the claim, and alleges facts which support the denial, the surrogate cannot grant a legacy. *L. R. A.*

tee's petition for payment. *Charlick's Estate*, 11 Abb. N. C. 57.

It is against conscience that the legatee should receive anything out of the fund without deducting therefrom the amount of that fund which is already in her hands as a debtor to the estate. *Merritt v. Jenkins*, 17 Fla. 538.

Lien of judgment confined to interest of debtor.

A court of equity will confine the lien of a judgment to the actual interest of the judgment debtor in the property. *White v. Carpenter*, 2 Paige, 217; *Kelsted v. Avery*, 4 Paige, 9; *Thomas v. Kennedy*, 24 Iowa, 397; *Monticello Hydraulic Co. v. Loughry*, 72 Ind. 562.

The interest which the judgment lien affects is the actual interest which the debtor has in the property, and a court of equity will always permit the real owner to show, there being no intervening fraud, that the apparent ownership of another is or was not real; and when the judgment debtor has none other than the legal title the lien of the judgment does not attack. *Hays v. Reger*, 8 West. Rep. 308, 102 Ind. 527; *Wheeler v. Wheeldon*, 9 How. Pr. 303; *Thomas v. Kennedy*, 24 Iowa, 397; *Brown v. Pierce*, 74 U. S. 7 Wall. 205 (19 L. ed. 134).

The lien constitutes no property or right in the land itself, as it is merely a general lien securing a preference over subsequently-acquired interests in the property. *Baker v. Morton*, 79 U. S. 12 Wall. 158 (20 L. ed. 235); *Conard v. Atlantic Ins. Co.* 26 U. S. 1 Pet. 443 (7 L. ed. 213); *Massingill v. Downs*, 48 U. S. 7 How. 797 (12 L. ed. 906); *Buchan v. Sumner*, 2 Barb. Ch. 165; *Ellis v. Tousley*, 1 Paige, 280.

Such a lien is subject to all equities existing in favor of third persons at the time of the recovery of the judgment. *Armstrong v. Fearnaw*, 67 Ind. 429; *Wharton v. Wilson*, 60 Ind. 591; *Huffman v. Copeland*, 86 Ind. 224; *Jones v. Rhoads*, 74 Ind. 510; *Boyd v. Anderson*, 102 Ind. 217; *Heck v. Fink*, 85 Ind. 6; *Sharpe v. Davis*, 76 Ind. 17; *Troost v. Davis*, 81 Ind. 37; *Glidewell v. Spaugh*, 26 Ind. 319; *Way v. Lyon*, 8 Blackf. 78; *Heberd v. Wines*, 2 West. Rep. 715, 106 Ind. 242.

the Henry Circuit Court in the clerk's office of the Wayne Circuit Court acquired a lien on the interest of the said David C. Ulrich in the estate of the testator, which lien, upon a sale of the land, was transferred to the funds derived from such sale against which the set-off could not be allowed.

The contention of the appellant, Koons, as we understand it, is: (1) that by the terms of the will of the said Daniel Ulrich the said David had no interest in the land, but simply an interest in the proceeds of the sale of such land, which was personal property, and that by reason thereof the appellee acquired no lien by the filing of his transcript; and (2) admitting that the appellee did acquire a lien by filing a transcript of the judgment of the Henry Circuit Court in the clerk's office of Wayne County, that such lien was subject to the equities in favor of the estate, and that he was entitled to no more than the balance after the payment of the indebtedness of David to the estate.

Before passing upon or considering the questions involving the merits of the controversy between the parties, it becomes necessary to inquire whether the case is in a condition to authorize this court to enter upon such consideration.

The appellee has filed in this court a motion to dismiss the appeal, for the alleged reasons: (1) that the appellant has failed to comply with the provision of § 635, Rev. Stat. 1881, upon the subject of appeals; (2) for the reason that the case falls within the provisions of §§ 2454 and 2455 of Rev. Stat. 1881, and it is claimed that, as the transcript in the cause was not filed in this court within the time limited by these sections, the appeal should be dismissed.

Section 635, *supra*, provides that "a part of several co-parties may appeal, but in such case they must serve notice of the appeal upon all the other co-parties and file proof thereof with the clerk of the supreme court."

It has been held by this court that where a part only of several co-parties appeal from a joint judgment without notice of such appeal to their co-parties, the appeal will be dismissed. *Herzog v. Chambers*, 61 Ind. 333; *People's Sav. Bank v. Finney*, 63 Ind. 460; *Cranmore v. Bodine*, 65 Ind. 25; *Hunter v. Chrisman*, 70 Ind. 439; *Couch v. Thomas*, 71 Ind. 286.

But this rule is confined to parties against whom judgment has been rendered, and it is not necessary to serve notice upon parties to the record and against whom the court has failed to render any judgment in the cause, and who have no interest in the result of the appeal. *Wilson v. Stewart*, 63 Ind. 294; *Logan v. Logan*, 77 Ind. 558; *Easter v. Seterin*, 78 Ind. 540; *Hogan v. Robinson*, 94 Ind. 138.

The decree rendered in this case is against appellant and David C. Ulrich alone. There is no finding, judgment or decree of any kind against any of the other parties to the suit. Notice of this appeal was served by appellant upon David C. Ulrich and he declined to join in the appeal. Notice was issued for the other parties to the suit and service acknowledged by Kibby & Kibby, attorneys; but as they are not necessary parties to this appeal, we deem it unnecessary to inquire whether such attorneys had authority to bind them by such acknowl-

edgment of service or not, as such notice is not necessary to the validity of this appeal.

Section 2454, *supra*, provides that "any person considering himself aggrieved by any decision of a circuit court, or judge thereof in vacation, growing out of any matter connected with a decedent's estate, may prosecute an appeal to the supreme court, upon filing with the clerk of such circuit court a bond— . . . with sufficient sureties— . . . conditioned for the diligent prosecution of such appeal," etc.

Section 2455 provides that such appeal bond shall be filed within ten days after the decision complained of is made, etc.

Any person who is aggrieved, desiring such appeal, may take the same in his own name, without joining with any other person. The transcript shall be filed in the supreme court within ten days after filing the bond.

These statutes have been so often construed by this court that there is now no room for doubt as to their meaning. The rule to be deduced from the decisions upon the subject is that in all proceedings under the law providing for the settlement of a decedent's estate, where the exercise of the probate jurisdiction of the court is invoked, the appeal is governed by §§ 2454 and 2455, Rev. Stat. 1881; but in all actions authorized by the Code, and not involving the exercise of the probate jurisdiction of the court, the appeal is governed by the Code, and these sections have no application. *Browning v. McCracken*, 97 Ind. 279; *Bennett v. Bennett*, 102 Ind. 86; *Miller v. Carmichael*, 98 Ind. 236; *Yearley v. Sharp*, 96 Ind. 469; *Seward v. Clark*, 67 Ind. 289; *Rusk v. Gray*, 74 Ind. 231; *Willson v. Bunford*, 74 Ind. 424; *Hillenberg v. Bennett*, 88 Ind. 540; *Heller v. Clark*, 103 Ind. 591, 1 West. Rep. 881.

This is a proceeding by a creditor of a legatee against such legatee and the administrator with the will annexed, to reach money in the hands of such administrator for the payment of a debt, not due from the estate represented, but due from such legatee. It cannot be successfully maintained that it is in any sense a proceeding authorized by the Act providing for the settlement of a decedent's estate, and hence the law regulating appeals from such proceedings has no application.

The motion to dismiss the appeal should be overruled.

The transcript of the judgment rendered in the Henry County Circuit Court, when filed in the office of the clerk of the Wayne Circuit Court, constituted a lien upon the interest of David C. Ulrich in the lands of which his father died seised. Upon a sale of the land by the appellant, such lien followed the proceeds of such sale into his hand and bound it to the same extent it bound the land. *Campbell v. Martin*, 87 Ind. 577; *Bell v. Green*, 90 Ind. 75; *Ballenger v. Drook*, 101 Ind. 172; *Simonds v. Harris*, 92 Ind. 505; *Wilson v. Rudd*, 19 Ind. 101.

Such lien, however, was a general lien, and was subject to all the equities existing in favor of the estate represented by the appellant, and conferred on the appellee, Mellett, no greater rights as against said estate than those possessed by David C. Ulrich. The general lien of a judgment creditor upon the land of his debtor is subject to all equities which existed against

such land in favor of third persons at the time of the recovery of the judgment. *Wright v. Jones*, 105 Ind. 17, 2 West. Rep. 850; *Foltz v. Wert*, 108 Ind. 404, 1 West. Rep. 852; *Hayes v. Reger*, 102 Ind. 524, 8 West. Rep. 308; *Herberd v. Wines*, 105 Ind. 287, 2 West. Rep. 754.

The title to the land owned by the testator at the time of his death vested in the persons named in his will, subject to be divested by sale of the land as provided for in the will. The question then arises as to what rights the appellant had as regarded the set-off claimed by him as against David C. Ulrich, for it is certain that whatever rights he had against David C. Ulrich, he has also as against the appellee, Mellett. Mellett has the right, by reason of his lien, to pursue the funds derived from the sale of the land into the hands of the administrator, and, to the extent of his judgment, compel the payment of such fund to him to the same extent and upon the same conditions and no other, that David C. Ulrich might compel payment to him if the judgment did not exist. In other words, the appellee, Mellett, in respect to the amount due him from David C. Ulrich, is a substituted creditor, with all the right, and no more than that possessed by the legatee for whom he has become substituted. The question arises, therefore, as to whether appellant was entitled to the set-off claimed as against David C. Ulrich.

In *Manifold's Estate*, 5 Watts & S. 340, the father, being surety for the son, died intestate, leaving real estate which was sold by his administrator to pay debts. Upon the question of the distribution of the balance after the payment of the debt, it was held that a judgment creditor of the son was not entitled to any part of the fund by reason of his lien on the land, the liability of the intestate for his son being greater than the son's distributive share. The court said: "But the appellant can be in no better condition than his debtor, for a creditor, although he pursues his debtor to judgment, cannot, as against other distributees, better his condition. He succeeds to the rights of the debtor and nothing more. It matters not that the debt was paid since the death of the intestate, as it was a contingent liability of his, and upon the payment of the debt by the administrator an equity arises which relates back to the time of the death of the intestate, and this equity cannot be disturbed by any act of the distributees, nor can it be displaced by a subsequent judgment obtained by his creditors."

In the case of *Springer's App.* 29 Pa. 208, it was held that if one of the heirs of the estate is indebted to it, he may be treated, in its distribution, as having an advancement to the amount of his debt.

In the case of *Strong v. Bass*, 85 Pa. 883, it was held that the executor was entitled to set off a debt due from the legatee to the estate represented by him against a legacy given by the will of the deceased when it was sought by a creditor to reach the legacy by an attachment proceeding. The court in that case said: "If, therefore, the executor had the right to set-off against the legatee, he retains it against the substituted creditor. If, for any reason, the legatee could not enforce payment of the legacy without first performing some other duty to the estate, his attacking creditor can reach the

legacy only on the same conditions." See also *Nickerson v. Chase*, 122 Mass. 296; *Askeo v. Douglass* (N. J.) 2 Cent. Rep. 210; *Snyder v. Warbasse*, 11 N. J. Eq. 463; *Smith v. Smith*, 13 N. J. Eq. 164; *Brooks v. Brooks*, 12 S. C. 422; *Smith v. Kearney*, 2 Barb. Ch. 533.

In the American Law of Administration by Woerner, vol. 2, § 560, the learned author says: "The indebtedness of a legatee or distributee constitutes assets of the estate which it is the executor's or administrator's duty to collect for the benefit of creditors, legatees and distributees. Hence such indebtedness may be deducted from any legacy or distributive share of the debtor. . . . The right of set-off exists whether the legatee or distributee was indebted to the deceased before his death or contracted a liability to the estate, or even to the administrator personally, thereafter. So it is held that a son is not entitled to recover his distributive share of his father's estate where the father was surety for him in an amount greater than the value of such share, although the executor did not pay the surety debt until after the action was brought by the son."

This was a suit in the court below, as we understand it, by which the appellee, Mellett, sought to reach the funds in the hands of the appellant by virtue of the judgment-lien held by him on the interest of David C. Ulrich in the lands owned by the testator at the time of his death. At the time appellee, Mellett, acquired his judgment lien on the land, he was bound to know that such land would, by the terms of the will, be converted into money. As we have seen, he took his lien subject to all the equities existing in favor of the estate, and he now stands in no better condition as to the legacy bequeathed to David C. Ulrich than the legatee himself would occupy were he seeking to recover the legacy.

This case is governed by a different rule, and is to be distinguished from the cases where a party has acquired a specific lien for value without notice of the existence of equities at the time such lien is acquired. In our opinion, the appellant had the right to set off against the legacy bequeathed to David C. Ulrich any indebtedness of the said David to the estate represented by him. This right, we think, includes any sum due the estate on account of surety debts existing at the death of the testator, without regard to the time when such debts were paid. Having reached this conclusion it follows that the court below erred in its conclusions of law upon the facts set forth in the special finding. It is disclosed by the special finding of facts that David C. Ulrich is insolvent, and that he is indebted to the estate represented by the appellant in a sum greatly in excess of his distributive share of the estate. This indebtedness should be set off against the amount due him under the will of the testator.

Judgment reversed, with directions to the Circuit Court to restate its conclusions of law in accordance with this opinion and to render judgment accordingly.

Berkshire, J., dissents from the limitation as to the right of a specific lien holder for value, as expressed in this opinion.

Olds, J., also dissents, except as to the matter of practice.

Petition for rehearing overruled April 2, 1890.

James FISCUS, Admr., *Appt.*,
v.
William A. MOORE.

(....Ind....)

1. A debt due to the estate from an heir may be deducted from his distributive share of the proceeds of real estate which has been sold in process of administration.
2. One who takes a mortgage on real estate from an heir pending settlement of the estate, and with knowledge of the heir's indebtedness to the estate, can acquire no greater interest than that of the heir himself; and where the real property is sold for assets under the Indiana statutes, his claim to the proceeds is subject to a deduction or set-off of the heir's indebtedness.

(*Olds and Berkshtre, JJ., dissent.*)

(January 29, 1890.)

A PPEAL from a judgment of the Decatur Circuit Court ordering an administrator to pay a mortgage given by an heir out of the proceeds of real estate. *Reversed.*

The case is stated in the opinion.

Mr. John S. Scobey for appellant.

Mr. William A. Moore for appellee.

Mitchell, J., delivered the opinion of the court:

William Fiscus, late of Decatur County, died intestate in February, 1885, leaving a widow and seven children, to whom his real estate descended, as tenants in common. After the death of the intestate, Marion Fiscus, one of the heirs, who was indebted to the estate in a large amount, executed a mortgage on his undivided interest in certain real estate which he inherited from his father, to secure an individual debt due from him to William A. Moore, the latter having at the time full and complete notice of the debt due from the mortgagor to his father's estate. Subsequently the administrator, by due proceedings for that purpose, obtained an order of the probate court, and sold all the real estate for the purpose of making assets for the payment of debts owing by the intestate.

After paying the debts, there remained \$2,500 of the proceeds of the sale of real estate in the administrator's hands for distribution, but the distributive share of Marion Fiscus was much less than the amount of his debt due the estate. Moore, as mortgagee, applied to the court for an order upon the administrator, requiring him to pay the amount of the mortgage debt out of the proceeds of the sale of the land upon which he had taken a mortgage from Marion Fiscus. The order was made accordingly.

The question for decision is whether a debt due from an heir can be retained out of his distributive share of the surplus proceeds of real estate, which has been regularly sold in order to make assets to pay debts, as against one who took a mortgage on the undivided interest of the heir in the land sold, the mortgage having been taken pending the settlement of the

estate, with knowledge of the indebtedness of the heir.

That the indebtedness of an heir or distributee constitutes part of the assets of the estate, which it is the duty of the administrator to collect for the benefit of the creditors and other distributees, and that such indebtedness may be deducted from the distributive share of the debtor, are well-settled propositions. The right of the administrator to deduct the indebtedness due from a distributee is usually denominated a right of set-off; but, as *Lord Cottenham* remarked in *Cherry v. Boultbee*, 4 Mylne & Cr. 442: "The term 'set-off' is very inaccurately used in cases of this kind. In its proper use it is applicable only to mutual demands, debts and credits. The right of an executor of a creditor to retain a sufficient part of a legacy given by the creditor to the debtor to pay a debt due from him to the creditor's estate is rather a right to pay out of a fund in hand than a right of set-off. Such a right of payment, therefore, can only arise where there is a right to receive the debt so to be paid, and the legacy or fund so to be applied in payment of the debt must be payable by the person entitled to receive the debt." *LaFoy v. LaFoy*, 43 N. J. Eq. 206, 9 Cent. Rep. 84.

The ground upon which an administrator is entitled to retain so much of the distributive share of a distributee as will satisfy a debt due from the latter to the estate is, that the heir or distributee makes a demand upon the administrator in respect to assets in his hands as administrator, and the just and equitable answer in such a case is that the person making the demand has already in his hands assets belonging to the estate in excess of the amount of the distributive share which he is demanding. *Jeffs v. Wood*, 2 P. Wms. 128; *Courtenay v. Williams*, 3 Hare, 539-552; *Ramsour v. Thompson*, 65 N. C. 628; *Woerner*, Law of Administration, § 564.

Thus in *Waterman on Set-Off*, § 210, it is said: "The right of the executor or administrator to retain in such cases depends upon the principle that the legatee or distributee is not entitled to his legacy or distributive share while he retains in his own hands a part of the fund out of which that and other legacies or distributive shares ought to be paid."

And in *Ranking v. Barnard*, 5 Madd. 32, the court said, in substance, that it was clear that the executor had the right to satisfy the legacy by applying the funds in his hands, and that this right existed against an assignee of the legatee as well as against the legatee himself.

It is contended, however, that the right to retain the amount of a debt due from a distributee to the estate out of his distributive share only obtains in case the fund to be distributed arises out of the personal estate, and that it does not apply when real estate has been sold and the fund for distribution is derived from that source. We can perceive no reason for such a distinction. Of course where the administrator of an estate holds a claim, as such, against one of the heirs or distributees, he is entitled to avail himself of all the rights and remedies ordinarily available to any other person under like circumstances, no greater and no less. If the administrator is driven to pursue the ordinary remedy to collect a debt due the estate

NOTE.—See *Koons v. Mellett*, ante, 231, and note, 7 L. R. A.

from an heir, he stands like any other creditor and is put to a race of diligence with others; but if, in the proper course of administration, funds which constitute assets of the estate come into his hands by operation of law, which he holds as administrator, in the distribution of which an heir or legatee asserts a right to participate, it is always a sufficient answer that the claimant has already in his hands more than his share of the assets of the estate.

A proceeding by an administrator to acquire priority in respect to real estate which has descended to the heir, so as to charge upon it a debt due the estate, is one thing, while a proceeding by an heir or his grantee to compel the administrator to pay money which he holds in the capacity of administrator is quite another, in case the heir has already received all he is entitled to out of the estate. The distinction is clearly drawn in *LaFoy v. LaFoy*, *supra*. In that case a bill was filed for partition of real estate among certain devisees. An attempt was made to charge the share of one of the devisees with the amount of a debt due from him to the estate of the testator. In an opinion holding that this could not be done the court says: "The devisee of lands occupies no such relation to the executor as that which exists between legatee and executor. No act is necessary, on the part of the executor, to put the devisee in full enjoyment of the estate devised. The opportunity, therefore, could not arise for the executor to retain the debt of the devisee to the testator out of any demand which the devisee might seek to enforce against the executor." It was very properly held that, inasmuch as the executor could only acquire a lien upon the land devised by becoming an actor and instituting proceedings appropriate to that end, the debt could not be so charged in a partition proceeding.

Campbell v. Martin, 87 Ind. 577, is distinguished from the present case upon the same principle.

In *Smith v. Kearney*, 2 Barb. Ch. 533, it was held that the fund which the executor sought to retain did not come to his hands in the character of executor, but merely as an accident, and that the right of set-off did not obtain for that reason. There is nothing in that case opposed to our conclusion in the present case. Any reasoning which fails to appreciate the distinction between an attempt to enforce a lien or charge upon the real estate which has descended to an heir by an independent proceeding, and an attempt by an heir who is indebted to the estate, or by his assignee or mortgagee, to compel the payment to him of a distributive share which has come into the hands of the administrator by operation of law, must necessarily lead to a conclusion that is wide of the mark.

As has been seen, the present is a case where real estate has been sold in the regular process of administration, for the purpose of making assets with which to pay claims against the estate. Now, if the heir or his assignee, or a purchaser from him, were here claiming a distributive share of the personal assets of an estate, and at the same time retaining by an indebtedness a much larger part of the assets than the amount of his claim, there could be

no question of the administrator's right to withhold the distributive share and apply it on the debt due the estate. Can it make any difference that the assets arose from the sale of real estate, especially in a case where it appears that the assignee or mortgagee knew of the indebtedness when he acquired his lien upon or interest in the land?

In the recent case of *Koons v. Mellett*, *ante*, 231, present term, it was held, after full and careful consideration, that one who had obtained a judgment against a devisee of real estate, which was afterwards sold, in pursuance of the terms of the will, acquired no better right to participate in the proceeds than the devisee himself had, and that the administrator with the will annexed had the same right to set off a debt due from the devisee to the estate as if the latter himself were claiming to participate in the fund. *Manifold's Estate*, 5 Watts & S. 340; *Springer's App.* 29 Pa. 208; *Strong v. Bass*, 35 Pa. 333; *Nickerson v. Chase*, 122 Mass. 296; *Askeo v. Douglass* (N. J.) 2 Cent. Rep. 210; *Snyder v. Warbasse*, 11 N. J. Eq. 463; *Smith v. Smith*, 13 N. J. Eq. 164.

The principle which ruled the case cited is decisive of our judgment in the present case.

While it is quite true, as is contended, that upon the death of the ancestor the title to real estate descends to and vests in the heir, the fact must be kept in mind that, unlike the rule at common law, the heir, according to the terms and policy of the statutes in this State, does not take an absolute title. Pending the settlement of the estate of his ancestor, the descent is subject to be intercepted and the title divested whenever the personal representative makes it appear that the sale of the land is necessary to make assets for the payment of the ancestor's debts. The Statute not only gives the administrator the right, but makes it his duty, when the personal property is not sufficient, to convert the real estate into assets for the payment of debts. Where this right is asserted and the lands are sold and conveyed, the title to the land which descended to the heir is completely divested; and although the heir may have sold and conveyed the land, the conveyance made by an administrator under the order of the court is not in any wise affected or impaired by the previous incumbrance or conveyance by the heir. This conclusion logically results from the fact that under the statutes of our State the real and personal property of an intestate descends to the same persons and in the same proportions, and both are equally chargeable with the payment of his debts, with the exception that the personal estate must be exhausted first. *Nelson v. Murfee*, 69 Ala. 598.

At the common law the title to real estate vested absolutely in the heir upon the death of the ancestor, and was not subject to be made assets for the payment of debts. Under the Statute in force here, it is as completely subject to the debts of the intestate as is the personal estate; and even though the administrator waste the personal estate, a purchaser of the real estate from an heir is not protected. *Nettleton v. Dixon*, 2 Ind. 446.

It is not in the power of a third person to impair or embarrass the personal representative in the settlement of an estate by dealing with

the heirs upon the supposition that their interest is of a certain or fixed character, nor can the other heirs be deprived of some portion of their estate by the intervention or intermeddling of a stranger, so as to destroy the equality of descent and distribution. The right of heirs to participate equally in the estate of their ancestor is superior to that of a lienholder with notice. *Folta v. Wert*, 108 Ind. 404-411, 1 West. Rep. 852; *McCandless' App.* 98 Pa. 489.

It frequently happens that the assets of an estate consist largely of debts due from the heirs to the ancestor. If it were possible for an heir, immediately upon the death of his ancestor, to convey or incumber his interest in the real estate, so that, after paying the debts of the ancestor, his grantee or mortgagee might participate in the surplus equally with other heirs who had received, or who owed the ancestor nothing, the most manifest injustice and inequality would result. The law always presumes that an ancestor meant that his heirs should share equally in his estate. *Ruch v. Biery*, 110 Ind. 444-449, 9 West. Rep. 215.

As was pertinently said, in effect, in *Weakley v. Conradt*, 56 Ind. 430, a purchaser acquires precisely the right and interest which the heir has from whom he takes a conveyance, nothing more nor less. *Duwall v. Speed*, 1 Md. Ch. 229; *Baker v. Griffith*, 83 Ind. 411.

Until the estate is finally settled, he is bound to know that the sale of real estate may become necessary in order to make assets for the payment of debts, and he is bound to know that when the land is converted into money, by operation of law it becomes money, assets in the hands of the administrator, and that it is subject to all the incidents of other assets, regardless of the source from which they arise. For certain purposes of administration and distribution, money thus acquired may be treated as having the qualities, and as the representative of the real estate, but it is nevertheless money which has come into the hands of the administrator by operation of law in the course of administering the estate. Any procedure which the heir or his grantee or assignee may institute to get it out of the administrator's hands brings into operation and makes available to the latter any right of set-off, or to retain it as against any legitimate debt owing by the heir to the estate, through whom he claims as assignee. *Johnson v. Hoyle*, 3 Head, 58.

The claim of the assignee is not a claim to an interest in the land, but it is a claim to an interest in the assets of the estate; whatever interest he has is an interest in the estate, and he takes that interest precisely as his assignor held it.

The doctrine of *Ball v. Green*, 90 Ind. 75, is opposed in some respects to the conclusions reached in *Koons v. Mellett*, ante, 281, and in the foregoing opinion, and to that extent must be deemed modified.

The judgment is reversed, with costs, with directions to the court below to proceed in consonance with this opinion.

Olds, J., dissenting:

I cannot concur in the majority opinion of the court in this case.

William Fiscus died intestate, owning real estate situate in the Counties of Decatur and 7 L. R. A.

Ripley. Marion Fiscus, son of William, was indebted to his father at the time of his death in the sum of \$1,610.17. The administrator of the father's estate brought suit and recovered a judgment against the son in the Decatur Circuit Court. Before the filing of a transcript in the clerk's office of Ripley County and obtaining a lien on the real estate in that county, Marion Fiscus, the son, executed to the appellee, Moore, a mortgage on the real estate which descended to the son in Ripley County, to secure a valid debt to Moore for \$75, and the mortgage lien attached to such real estate and became a prior lien to the judgment lien in favor of the estate. After the execution of the mortgage the administrator filed a transcript of the judgment in the clerk's office in Ripley County and obtained a lien upon the land. After the liens had attached the administrator sold all of the real estate under an order of court for the sale of the real estate of the decedent for the payment of debts. After the payment of the debts, there remained a surplus in the hands of the administrator for distribution between the heirs, and of such surplus Marion, the son, was entitled to \$357.

The contest in this case is as to whether Moore shall have so much of said sum applied to the liquidation of his debt as will satisfy it, or whether the administrator, as against Moore, has the right to apply all of said distributive share in satisfaction of the judgment in favor of said estate. It is held by the majority of the court that the administrator has the right to offset the judgment held against the son to the amount due him derived from the sale of the real estate on which Moore held a mortgage, or, in other words, to apply the surplus in his hands derived from such sale to the payment of the judgment. This I deny, and assert that such holding is contrary to the weight of authority. It is a recognized doctrine that so far as the distributive share due to the heir is derived from personal property, it may be set off or applied in payment, or, rather, retained by the administrator in payment of a debt due from the heir; but an entirely different rule applies as to the surplus which may come into the hands of the administrator by reason of the sale of real estate for the payment of debts; and well there should be a different rule applied. The personal property is assets in the hands of the administrator. It is made his duty by law to convert the personal property into money and to collect the debts due the estate, as well those due from heirs as those due from other persons. The administrator is the lawful custodian of the personal property, and he may maintain an action for its recovery. The heir has no claim to the personal property. No lien could attach to it and the heir could in no way legally incumber any interest in it. All the interest the heir has in a claim to the personal property is to his distributive share in the surplus remaining after the payment of the debts of the ancestor and the costs of administration. But it is different in regard to the real estate. As to that the title vests in the heir at the date of the death of the ancestor, subject to be devested only upon one contingency, viz., for the payment of the debts of the ancestor; and the administrator is entitled to an order to sell only so much of the real estate of

the decedent as may be necessary to pay the debts and liabilities of the estate. Rev. Stat. 1881, § 2846.

The law does not contemplate any distribution of the proceeds of real estate, and it is only in case the real estate cannot be separated so as to sell only a sufficient amount to pay the debts and leave the portion belonging to the heirs unsold, making it a necessity that the whole must be sold, that any funds arising from the sale of real estate in excess of the amount necessary to pay the debts comes into the hands of the administrator. If there is sufficient personal property to pay the debts and costs of administration, then the administrator cannot sell the real estate, and the only way he can collect a debt against the heir is by the same process by which he collects debts due from other persons, and his only remedy against the land in that event is by judgment, execution and sale, and the lien would attach at the date of the rendition of the judgment, as would the lien of any other creditor, and the land would be applied to the payment of the liens in the order in which they attached.

It is so well settled that I need not cite authorities to support the propositions, that the title vests in the heir at the date of the death of the ancestor; and that the lien of a judgment against the heir attaches to such interest which descends to the heir, and that the same is true when an interest is devised instead of passing by inheritance; and that the land so taken by descent or devise is subject to sale on execution; also that, in case of a sale of such real estate for the payment of the debts of the ancestor or testator, any surplus remaining is subject to the lien, and the judgment or mortgage creditor can recover it as against the heir or devisee. That is to say, in equity the converted estate retains its original character.

Let these propositions be controverted, I cite a few of the decisions of this court in support of the propositions I have stated. *Milligan v. Poole*, 85 Ind. 64; *Spray v. Rodman*, 43 Ind. 225; *Wilson v. Rudd*, 19 Ind. 101; *Gimbel v. Stoltz*, 59 Ind. 446; *Ballenger v. Drock*, 101 Ind. 172; *Simonds v. Harris*, 92 Ind. 505.

If the debt due the ancestor was on account of an advancement to the heir, or if the heir was simply entitled to a legacy to be paid to him by the executor, then equity might interpose and compel an application of the legacy to the payment of the debt; but where the debt due from the heir is an ordinary debt, the administrator or executor has no more right or claim or lien upon the land which descends to the heir or is devised to the devisee than has any other creditor of the heir or devisee. If the ancestor or testator desired the real estate to be charged with the payment of the debt, a testator can charge the land devised with the payment of the debt and make it a prior lien to that of any of the other creditors of the devisee. If the testator has not done so, or the real estate descends to the heir, then the real estate is subject alike to the payment of the debt of the ancestor and the other creditors of the heir.

In the case of *La Foy v. La Foy*, 43 N. J. Eq. 206, 9 Cent. Rep. 84, it is held that the debt of a devisee to the testator is not a charge on lands devised to him by the testator, in the absence of language in the will making such debt a

charge. The court in [that case, after stating the doctrine which permits the executor to withhold the payment of a legacy until the satisfaction of the debt due the testator, says: "The devisee of lands occupies no such relation to the executor as that which exists between legatee and executor. No act is necessary, upon the part of the executor, to put the devisee in full enjoyment of the estate devised. The opportunity, therefore, could not arise for the executor to retain the debt of the devisee to the testator out of any demand which the devisee might seek to enforce against the executor. If such a charge attaches against the land devised it would be necessary for the executor to establish it by proceedings in which he is the actor. After diligent search I have been unable to find a case in which an attempt has been made to charge a devisee of lands with a debt due from the devisee to the testator, in the absence of language in the will manifesting the purpose of the testator to do so." The court, in conclusion, says: "In the absence of language in the testator's will to that effect, there is no authority for charging the devisee's debt upon land devised to him."

If any right exists to have the proceeds of the land which descends to the heir or is devised to the devisee, applied to the payment of a debt due the ancestor or testator in preference to other creditors, then the administrator has the right to have the estate charged with it and a lien declared paramount to any other lien in favor of other creditors, whether the land be sold for the payment of debts of the ancestor or testator or not. The right to set off a legacy or a distributive share of the assets arising from personal estate against the debt due from the heir or legatee is denominated the doctrine of equitable retainer.

In the case of *Smith v. Kearney*, 2 Barb. Ch. 533, the court holds that the principle of equitable retainer does not apply to a fund arising from the sale of real estate which descended to the debtor as one of the heirs-at-law of the testator, and which real estate has been converted into personalty by accident or because the valid portions of the will could not be carried into effect in any other way than by a sale of the land, and that the proceeds of real estate thus converted into personalty are still to be considered as real estate and as in no way connected with the funds which come to the hands of the executor for the purposes of the will.

And I contend that the same is true in case of an administration. The administrator has no business with any portion of the real estate which descends to the heir. It comes to him by reason of the fact that he cannot sell but a sufficient amount to pay debts, and is compelled, in order to execute his trust, to sell more, and when thus sold, the portion or the surplus above what is required to pay the debts retains its character as real estate, and if applied by order of the court to pay debts, it must be applied to the payment of the same in the order which it would be if it were real estate, the prior incumbrances being first ordered satisfied. It must necessarily retain its character as real estate. It is not distributed in like manner as personal assets. The administrator cannot mix the two and distribute them. If he did, the widow would take one third, but

she has no interest in such surplus. It goes back to the person in whom the title was vested before the sale.

In the case of *Sartor v. Beaty*, 25 S. C. 298, it was held that the doctrine of equitable retainer did not apply to the interest of the distributee in the real estate of an intestate or to the proceeds of the sale thereof.

In *Procter v. Newhall*, 17 Mass. 81, in considering this same question, the court says: "The other objection would be fatal to the title of the tenant if it were true that Joseph Hulthorn had but a defeasible estate, as has been suggested; for the tenant has no greater or better estate than Joseph Hulthorn had at the time of the attachment. But we are of the opinion that his estate was no more subject to the debt formerly due to the intestate than it was to any other debt. In the division of real estate among heirs no deduction can be made from the share of any one of them on account of any debt due from him to the estate. This can only be done in cases of advancement."

In the case of *Mann v. Mann*, 12 Heisk. (Tenn.) 245, it was held that the son's indebtedness to the father's estate is not a lien on the son's share of his father's realty, and that such share in the realty is subject to a race of diligence between the personal representatives of the father and other creditors of the son.

In the American Law of Administration, by Woerner, vol. 2, § 564, in speaking of the equitable doctrine of retainer, it is said: "If the lands have been sold and there is a residue of the proceeds for distribution, it has been held both that the administrator may retain to the extent of the debt due by the distributee, and, on the other hand, that, since in equity the converted estate retains its original character, the equitable doctrine of retainer does not extend to the proceeds of real estate."

In support of the doctrine that it may be retained the author cites but one case, and that is *Nelson v. Murfee*, 69 Ala. 598, in which it was held that, as against the heir the executor could retain the amount, but in that case the court says: "Whether, when the heir is insolvent and owes the estate of the ancestor, as in this case, the administrator has any prior right to demand payment out of lands descended, or whether it becomes a mere race of diligence between him and other creditors of the heir, is a question not raised by this record"; and by a diligent search for authorities this is the only case that I have been able to find where the question has been considered, that any court has even intimated that the doctrine applies in such a case as we have under consideration. See *Hancock v. Hubbard*, 19 Pick. 167; *Towles v. Towles*, 1 Head, 601.

In Pennsylvania it was held that the indebtedness was an advancement and could be retained. *Springer's App.* 29 Pa. 203.

In *Strong v. Raas*, 35 Pa. 333, it was held, as we have hereinbefore stated, that the doctrine applied in case of legacies, and I do not question that the doctrine does apply in case of legacies or advancement, and the authorities cited in support of the decision of the case in *Koons v. Mellett*, this term, ante, 231, go no farther than to hold that the doctrine applies in cases of distributive shares of personal property, legacies and where the debt is an advancement.

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In exact accord with the unanimous holding of the courts of other States, this court has twice decided this question adversely to the majority opinion and in accordance with what I believe to be the settled law.

In the case of *Campbell v. Martin*, 87 Ind. 577, Campbell, the appellant, recovered a judgment against Alexander C. Martin in the Washington Circuit Court on January 14, 1876. On June 1, 1876, Mason L. Martin, father of Alexander C. Martin, died testate, owning land in said Washington County which he devised to his said son, Alexander C. James A. Martin was appointed administrator of the father's estate with the will annexed. Alexander C. was indebted to the father, and at the August Term, 1878, of the Washington Circuit Court the administrator recovered a judgment on said indebtedness to the estate. At the April Term, 1879, the court ordered the administrator to retain and hold the real estate so devised to Alexander, giving him credit for its appraised value on the judgment against him in favor of the administrator. The proceedings in the court below were undoubtedly irregular, but this court in deciding the case expresses its views in regard to these judgment-liens, and says: "There is some reason for the application of this doctrine to the payment of legacies by the executor, and especially so when the indebtedness of the legatee to the estate might be regarded as a total or partial ademption of the legacy. But we know of no reason whatever for the extension of this doctrine and making it applicable to devisees of real estate. As a general rule, legacies are payable by the executor out of the testator's personal estate which may come to his hands to be administered; but, ordinarily, the executor has absolutely nothing to do with the real estate devised by his testator unless it may be needed for the payment of the testator's debts. Otherwise the devise of the real estate will take effect at once upon the death of the testator, without any intervening act of the executor. Upon the facts stated in the complaint in the case at bar, we are of opinion that the lien of the appellant's judgment upon the real estate devised to Alexander C. Martin was not and could not be divested nor postponed to the lien of the junior judgment against him in favor of the administrator."

The case of *Ball v. Green*, 90 Ind. 75, is a case involving exactly the same principle as the one under consideration, and it was held by a unanimous court that the mortgagee was entitled to the surplus. In that case the court well says: "No authority is cited to support this position, and we know of none, nor do we believe it can be maintained on principle. The administrator had authority to sell this land to pay the decedent's debts, but no power to sell in order to collect a claim from the owner. After the payment of the decedent's debts, the residue of the money, if any, will belong to Jesse Adams, and its retention by the administrator will not make the estate the debtor of Adams, nor will it make the administrator such debtor except at the option of Adams. In addition to this, the appellee has a lien upon the money that is superior to any claim of the administrator, if, indeed, he has any, and which was not impaired or affected by the accidental.

circumstances that he had the custody of the money and that Adams was indebted to him and to the estate. As against the appellee, in our opinion, he could not retain the money for the purpose of collecting from Adams claims due the estate. As to these he occupied no better position than any other creditor, and as the appellee had acquired a specific lien his claim must prevail."

These two decisions have long since settled the doctrine in this State in accordance with the weight of authority, and they ought, in my opinion, to be adhered to.

Berkshire, J., concurs with **Olds, J.**

STATE OF INDIANA, *ex rel.* Joseph H. CLARK *et al.*, *Appts.*,
v.

Clarkson HAWORTH, Trustee of Monroe School Township.

(....Ind....)

1. **The regulation of the public schools is a state matter** exclusively within the dominion of the Legislature; hence an Act prescribing the text books to be used therein and regulating the method of procuring them does not impinge in the slightest degree upon the right of local self government.
2. **The legislative power over schools is not exhausted by exercise**, and the fact that the Legislature has always intrusted the management of school affairs to local organizations will not preclude it from at any time changing the system so as to remove them from local control.
3. **As incident to its constitutional power** to make the public-school system uniform, the Legislature may provide that the books shall be obtained through the medium of a contract awarded to the best or lowest bidder.
4. **The Legislature may impose upon all officers** whose tenure is legislative such duties respecting school affairs as it deems proper.
5. **An Act providing for the procurement of books** for the public schools, which attains the result for which it was passed,—that of benefiting the public,—cannot be declared invalid because it requires public officers to perform duties which confer an incidental benefit upon individual book dealers.
6. **An Act providing for the procurement of books for the public schools** is not within the constitutional provisions against monopolies because it designates certain books as a standard and requires books furnished to be equal in merit to those named and the books adopted uniform, and permits the selection of copyrighted works, and requires the exclusive contract for furnishing them to be awarded to the lowest bidder where there is no exclusion of

persons from bidding but competition is open to all who are prepared to supply books of the required standard.

7. **The Legislature may give one person the exclusive privilege** for a certain period of time of furnishing books for the public schools of the State and compel the officers whose duty is to procure such books to obtain them exclusively from such person, as well as require patrons of the schools to use the books prescribed.
8. **The Act of March 2, 1889**, providing for the procurement of books for the public schools, is constitutional in all its essential features.
9. **The duty imposed upon school trustees** by section 7 of the Act of March 2, 1889, "to immediately procure and take charge of the books" provided under the terms of that Act for use in the public schools, and "to furnish them on demand to the school patrons" at the price fixed therefor, is imperative and may be enforced by mandamus.

(*Berkshire, J., dissents.*)

(March 13, 1890.)

APPEAL by relators from a judgment of the Circuit Court for Howard County in favor of respondent in a proceeding by mandamus to compel him to procure certain books for use in the public school as required by the Act of March 2, 1889. *Reversed.*

The facts are fully stated in the opinions.

Messrs. Louis T. Michener, Atty-Gen., Morris & Barrett and Duncan & Smith for appellants.

Mr. Addison C. Harris, with Messrs. James O'Brien and C. C. Shirley, for appellee:

All grants of privileges are to be liberally construed in favor of the public, and, as against the grantees of the monopoly, franchise or charter, to be strictly interpreted.

Sedgwick, Stat. and Const. L. pp. 328, 339; Cooley, Const. Lim. 3d ed. p. 393.

The sole trade of any mechanical artifice, or any other monopoly, is not only a damage and prejudice to those who exercise the same trade, but also to all subjects; for the end of all these monopolies is for the private gain of the patentees.

Darcy v. Allein, 11 Coke, 84 (b). See *Citizens Gas & M. Co. v. Elwood*, 14 West. Rep. 92, 114 Ind. 532.

The Act of March 2, 1889, not only seeks to grant exclusive privileges to a favored few for the manufacture and sale of the books, but also seeks to abridge the right of the people to buy and use whatever books they may elect to use. The right to buy and sell and use whatever property we may elect to use is a natural right in each individual which the Legislature has no power to abridge, in any individual, so

NOTE.—School law; adoption of text books.

Under the Indiana laws relating to the adoption of school books by county boards, changes of such books may be made at any time by the unanimous consent of the board. *Iverson v. Indianapolis School Comrs.* 39 Fed. Rep. 735.

The requirement of Ind. Rev. Stat., § 4436, that no text book adopted by the county board shall be changed within six years from the date of adoption, has no application to cities. *Ibid.*

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A board cannot, by adopting books for a given time, preclude itself from adopting other books within that time. *Ibid.*

Section 4444, authorizing a township trustee to purchase suitable apparatus and appliances for schools, does not authorize the purchase of text books to be used by the individual pupils. *Honey Creek School Twp. v. Barnes*, 119 Ind. 212.

long as he does not, by its exercise, interfere with the rights of others.

Arrowsmith v. Burlingim, 4 McLean, 497; *Evansville v. State*, 4 L. R. A. 93, 118 Ind. 426.

A law that attempts to take away any privilege essential to the inherent right of local self government is void.

See *State v. Denny*, 4 L. R. A. 79, 118 Ind. 382; *State v. Denny*, 4 L. R. A. 65, 118 Ind. 449; *Evansville v. State*, *supra*; *People v. Albertson*, 55 N. Y. 50; *People v. Hurlbut*, 24 Mich. 44; *People v. Detroit*, 28 Mich. 228.

Section 9 of the School-Book Act gives the contractors privileges not conferred on any other publisher of or dealer in the "Indiana Educational Series" or other books to use the trustees, at public expense, to sell its books and appropriate their bonds for its security. This deprives book makers and book sellers of "liberty" and "property," within the Fourteenth Amendment.

See *Jacobs*, 98 N. Y. 98; *People v. Marz*, 99 N. Y. 377; *Butchers Union S. H. & L. L. Co. v. Crescent City L. L. & S. H. Co.* 111 U. S. 746 (28 L. ed. 585); *Santa Clara Co. v. Southern Pac. R. Co.* 118 U. S. 394 (30 L. ed. 118); *Pembina Consol. S. Min. & Milling Co. v. Pennsylvania*, 125 U. S. 181 (31 L. ed. 650); *Pom. Const. Law*, § 256 E.

That clause does undoubtedly prohibit discriminating and partial legislation by any State, in favor of particular persons, or against others in like condition.

Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 128 (32 L. ed. 586).

The discriminations which are open to objection are those where persons are engaged in the same business, are subjected to different restrictions or are held entitled to different privileges under the same conditions.

Soon Hing v. Crowley, 113 U. S. 709 (28 L. ed. 1145), quoted in *Minneapolis & St. L. R. Co. v. Beckwith*, *supra*.

It is undoubtedly the right of any citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons, of like age, sex and conditions.

Dent v. West Virginia, 129 U. S. 121 (32 L. ed. 625).

Elliott, J., delivered the opinion of the court:

The questions presented and argued in this case do not require us to do more than outline the pleadings, for the questions are general ones, involving the validity and the construction of a statute. It is sufficient, to bring the question clearly enough before the mind for investigation and consideration, to say that the relator petitioned for a writ of mandate to compel the appellee, as school trustee of Monroe Township, in the County of Howard, to certify to the county superintendent of schools the number of text books required by the children of the township for use in the public schools, and to procure and furnish such books as the law requires, and that the return of the appellee to the alternative writ is so framed as to present the question of the constitutionality of the Act of March 2, 1889, and also the question as to the duties of the school trustee under that Act. *Elliott's Supp.* § 1289; *Acts 1889*, p.—.

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The Act assailed does not impinge in the slightest degree upon the right of local self-government. The right of local self-government is an inherent, and not a derivative, one. Individualized, it is the right which a man possesses in virtue of his character as a freeman. It is not bestowed by Legislatures, nor derived from statutes. But the courts which have carried to its utmost extent the doctrine of local self-government have never so much as intimated that it exists as to a matter over which the Constitution has given the law-making power supreme control; nor have they gone beyond the line which separates matters of purely local concern from those of state control. Essentially and intrinsically, the schools in which are educated and trained the children who are to become the rulers of the Commonwealth are matters of state, and not of local, jurisdiction. In such matters the State is a unit and the Legislature the source of power. The authority over schools and school affairs is not necessarily a distributive one to be exercised by local instrumentalities, but, on the contrary, it is a central power residing in the Legislature of the State. It is for the law-making power to determine whether the authority shall be exercised by a state board of education, or distributed to county, township or city organizations throughout the State. With that determination the judiciary can no more rightfully interfere than can the Legislature with a decree or judgment pronounced by a judicial tribunal. The decision is as conclusive and inviolable in the one case as in the other, and an interference with the legislative judgment would be a breach of the Constitution which no principle would justify nor any precedent excuse.

But we need not rest our conclusion that the control of school and school affairs is vested in the law-making power of the State upon the proposition that schools are intrinsically matters of state concern, and not of a local nature—although it may there be securely rested; for our Constitution, in language that cannot be mistaken, declares that it is a matter of the State and not of the locality. The language of the Constitution is this: "Knowledge and learning, generally diffused throughout the community, being essential to the preservation of a free government, it shall be the duty of the General Assembly to encourage by all suitable means moral, intellectual, scientific and agricultural improvement, and to provide by law for a general and uniform system of common schools, wherein tuition shall be without charge and equally open to all." Art. 8, § 1.

The Constitution enjoins a duty and confers a power. The duty and the power are coextensive, but the effect they are designed to accomplish is unified, because the duty is to "provide a uniform system of common schools," and the power is granted to enable the General Assembly to effectively perform the duty. Both by the Constitution and by the intrinsic nature of the duty and the power, the authority is exclusively legislative, and the matter over which it is to be exercised solely of state concern.

That this conclusion is sound is so clear that authorities are not required to fortify or support it; but authorities are not wanting, for the

current of judicial decision is unbroken. *State v. Springfield School Directors*, 74 Mo. 21; *State v. Columbus Board of Education*, 35 Ohio St. 368; *Baltimore School Comrs. v. State Board of Education*, 26 Md. 505; *Robinson v. Howard*, 84 N. C. 151; *Stuart v. Kalamazoo School Dist.*, 80 Mich. 69; *Ford v. Kindal School Dist.*, 1 L. R. A. 607, 121 Pa. 548; *People v. Quincy Board of Education*, 101 Ill. 308; *Richards v. Raymond*, 92 Ill. 612, 84 Am. Rep. 151; *Powell v. Board of Education*, 97 Ill. 375; *Briggs v. Johnson Co.*, 4 Dill. 148; *Rawson v. Spencer*, 118 Mass. 40; *Com. v. Hartman*, 17 Pa. 118.

Judge Cooley has examined the question with care, and discussed it with ability, and he declares that the Legislature has plenary power over the subject of the public schools. He says, in the course of his discussion: "To what extent the Legislature shall provide for the education of the people at the cost of the State or of its municipalities is a question which, except as regulated by the Constitution, addresses itself to the legislative judgment exclusively." Again, he says: "The governing school boards derive all their authority from the Statute, and can exercise no powers except those expressly granted and those which result by necessary implication from the grant." Const. Lim. 5th ed. 225, note 1.

No case has been cited by counsel, and none has been discovered by us, although we have searched the reports with care, which denies the doctrine that the regulation of the public schools is a state matter, exclusively within the dominion of the Legislature.

If it be true that the power is a legislative one, then it is indisputably true that the courts cannot control the legislative discretion. This principle is elementary in constitutional law, and it needs no support from precedents or decisions, but the principle has been so well expressed by *Mr. Justice Bradley* that we quote his language. Replying to an argument that the mode in which the power was exercised was improper, this great judge said: "The answer is, the legislative department, being the nation itself, speaking by its representatives, has a choice of methods, and is master of its own discretion." *Legal Tender Cases*, 79 U. S. 12 Wall. 547-561 [20 L. ed. 311, 315].

We have adopted and applied this rule, and, indeed, we could not depart from it without a disregard of principle that no decision or precedent would excuse. *Hancock v. Yaden* (Ind.) 6 L. R. A. 576.

As the power over schools is a legislative one, it is not exhausted by exercise. The Legislature, having tried one plan, is not precluded from trying another. It has a choice of methods and may change its plans as often as it deems necessary or expedient, and for mistakes or abuses it is answerable to the people, but not to the courts. It is clear, therefore, that even if it were true that the Legislature had uniformly intrusted the management of school affairs to local organizations, it would not authorize the conclusion that it might not change the system. To deny the power to change is to affirm that progress is impossible, and that we must move forever "in the dim foot-steps of antiquity." But the legislative power moves in a constant stream and is not exhausted by its exercise in any number of in-

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stances, however great. It is not true, however, that the authority over schools was originally regarded as a local one; on the contrary, the earlier cases asserted that the Legislature could not delegate the power to levy taxes for school purposes to local organizations, but must itself directly exercise the power, thus denying in the strongest possible form the theory of local control. This ruling was for many years regarded as the law of the State, but in the case of *Robinson v. Schenk*, 102 Ind. 307, it was held that the Legislature might either exercise the power itself or delegate it to local governmental instrumentalities. It has, indeed, been the uniform course since the organization of the State to regulate and control school affairs by legislation. All the public schools have been established under legislative enactments, and all rules and regulations have been made pursuant to statutory authority. Every school that has been established owes its existence to legislation, and every school officer owes his authority to the statute.

It is impossible to conceive of the existence of a uniform system of common schools without power lodged somewhere to make it uniform, and, even in the absence of express constitutional provisions, that power must necessarily reside in the Legislature. If it does reside there, then that body must have, as an incident of the principal power, the authority to prescribe the course of study and the system of instruction that shall be pursued and adopted, as well as the books which shall be used. This general doctrine is well entrenched by authority. *Horey v. State*, 119 Ind. 395; *Horey v. State*, 119 Ind. 386; *State v. Hawkins*, 44 Ohio St. 98, 8 West. Rep. 125; *State v. Harmon*, 81 Ohio St. 250.

Having this authority, the Legislature may not only prescribe regulations for using such books, but it may also declare how the books shall be obtained and distributed. If it may do this, then it may provide that they shall be obtained through the medium of a contract awarded to the best or lowest bidder, since, if it be true, as it unquestionably is, that the power is legislative, it must also be true that the Legislature has an unrestricted discretion and an unfettered choice of methods. It cannot be possible that the courts can interfere with this legislative power and adjudge that the Legislature shall not adopt this method or that method; for, if the question is at all legislative, it is so in its whole length and breadth. Under our form of government there is no such thing as a power partly judicial and partly legislative; the one power excludes the other, for each is distinct and independent. *State v. Noble*, 4 L. R. A. 101, 118 Ind. 350; *Greenough v. Greenough*, 11 Pa. 489.

If the Legislature exercises its right to make a choice of methods by enacting that the books for the schools shall be furnished by the person making the most acceptable bid, the courts cannot interfere, because the power exercised is a purely legislative one, and within the legislative domain courts are forbidden to enter. There is no escape from this conclusion save by a denial of legislative independence, and an assertion of the right of judicial surveillance and control.

If the power over the school system is legis-

lative and exclusive, then the Legislature has authority to impose upon all officers whose tenure is legislative such duties respecting school affairs as it deems proper. All such officers take their offices *cum onere*, and must do what the Legislature commands, or else resign.

It is a mistake to suppose that the Statute under consideration imposes duties upon the school officers for the benefit of the book dealers. Not a word in it indicates such an intention. The purpose of the law makers, clearly manifested and expressed, is to secure a benefit to the public. The effect of the Statute is not to make officers perform duties for the benefit of private individuals, but to make them render services for the benefit of the public, and that benefit results to private persons is an unavoidable incident, not a designed or express provision of the Statute. At the time the Act was passed it was not known, nor could it be known, what persons would secure the contract for furnishing the books required by law; for it was provided that competition should be invited and the contract awarded to the lowest bidder. It may be true that the book dealers are incidentally benefited by the services of the officers, but if that be a sufficient reason for condemning the Act, then all statutes providing for the award of contracts by public officers, the certification of accounts or the making of reports where individuals are interested, must be condemned, since, in every instance, there is an incidental benefit to the dealer or contractor. The truth is that in no event can a public officer award a contract or certify estimates, accounts or the like, without at the same time rendering a beneficial service to the person with whom he deals on behalf of the State. If the services of the officers benefit the public and are imposed for the good of the public, the Statute is rescued from successful attack although the services of the officers may also benefit a private person. Either this is true, or else it is true that no public officer can be required to award contracts, verify accounts, audit claims or certify estimates to an individual who has a claim against the State or any of its municipalities.

The Statute is not within the constitutional provisions directed against monopolies. It designates as the standard for the guidance of the state board of education certain books; requires that the books furnished for the use of the schools shall be equal in merit to those named; requires the board to advertise for proposals to furnish the books in a newspaper published in each of the five large cities of the nation, and requires the board to award the contract to the lowest bidder. In the section directing the award of the contract it is enjoined upon the board to "ascertain under which of said proposals or propositions the school books" can be furnished to the people of the State for use in the common schools. In another section it is provided that the books shall be distributed by the township trustees, and that the books shall be sold to the pupils and patrons of the schools. It appears, therefore, that the object of the Act is to secure books for the public schools by means of open competition after full notice.

There is no exclusion of bidders, no limitation of the right to furnish school books to the
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people of the State to any class; on the contrary, all who are prepared to supply such books as the Statute makes the standard are invited to compete for the contract. No special privilege is granted to anyone, no right denied to anyone, for all are invited to enter the field as competitors.

It is true that the Statute declares that the books shall conform to a designated standard, but this standard no one will deny the power of the Legislature to establish. The right to fix the standard is, indeed, a condition essential to the existence of the power; deny the condition, and it must follow that each father or guardian that controls a pupil may dictate what studies he shall pursue and what books he shall use. Such a result would be most deplorable, for it would produce such chaotic confusion that the usefulness and efficiency of the school system would be completely and forever destroyed; but the provisions of the Constitution prevent such a result, for they make it the duty of the Legislature to establish a uniform system. A standard must be fixed in order that there may be fair and open competition, since there could be no intelligent bidding if bidders were not informed what they would be required to furnish. If only a limited class own or control property that the public good demands, then that class is in the best situation to bid; but there is no reason why the public shall not have the best that their representatives can secure. The utmost that can be done is to establish a standard and invite competing bids. If school books can be bought by local boards or by a state organization, some one publisher must of necessity be favored in every instance where a uniform system is adopted. This result can by no possibility be avoided. If, for illustration, McGuffey's series of readers should be selected as the standard, then the owners of the copy-right of that series would be favored, to the exclusion of all others. It comes at last to this, either the Legislature may authorize the state board to select the books, even though the selection may give peculiar advantage to one publisher, or it can neither buy nor authorize anyone to buy books protected by copyright. Everyone knows that the best books are thus protected, and so they should be, for an author is entitled to the benefit of his work, and it would be sinning against justice to pirate his books.

If no copyrighted books can be bought, then new discoveries and new methods, however important, may be denied the children of our common schools, and this without sufficient reason, for no rule of law prohibits the purchase for public use of articles protected by letters-patent or by copyright. A familiar and forceable illustration is supplied by cases of the improvements of streets with patented pavements at the expense of the property owners.

We conclude our discussion of this phase of the subject by affirming that the Statute cannot be considered as creating a monopoly because it does require that a certain class of books shall be used, and in doing this does favor some publishers to the exclusion of others.

We accept as correct the assumption of appellant's counsel that the Statute does require the people of the State to buy the particular

books designated by the proper officer in obedience to the command of the law, and that, so far as concerns the officers of the State, they must be bought from the firm to whom the state board of education awards the contract. We agree fully with appellant's counsel upon this point, for we think that everywhere throughout the Statute is manifested the intention to create a uniform system, and to make a body of rules which all school officers are bound to obey. Nor do we doubt that it was the intention of the Legislature to secure to the person who proved the best bidder in the open competition so carefully provided for, the exclusive privilege of furnishing the books selected by the state board of education, so far as the acts of school officers are involved. Whether it goes farther is not a question in this case, for the Statute operates upon and through the officers of the State. It is, indeed, not possible to so construe the Statute as to deny the exclusive right of the successful competitor, since the language employed by the Legislature clearly and unmistakably indicates the intention to exercise its power by creating a uniform system, and quite as clearly evinces a purpose to secure the practical enforcement and operation of that system by vesting in the person to whom the contract may be awarded the exclusive privilege of supplying books to all the children who enter the schools of the State, so far as the books are supplied through the school officers.

Two things are very clear: one, that the Legislature meant to provide an exclusive privilege in order to secure books at the best prices; the other, that the Legislature meant to prevent the possibility of any break in the uniformity of the system framed by the Statute.

We can find neither reason nor authority that suggests a doubt as to the power of the Legislature to require a designated series of books to be used in the schools, and to require that the books selected shall be obtained from the person to whom the contract for supplying them may be awarded. It is to be remembered that the Statute does not command that every person shall buy the books; it confines the requirement to those who receive the benefit of the public schools. These schools are owned and maintained by the State, and the State may prescribe the terms and conditions upon which pupils may enter them, except that it cannot disregard the constitutional injunction that "tuition shall be without charge and equally open to all." It may, as we have seen, prescribe the course of study that shall be pursued and the system of instruction that shall be adopted, and to perfect and complete its control it must have the power to prescribe the books that shall be used and the mode in which they shall be obtained. In prescribing the mode in which books shall be obtained the Legislature simply commands that those who enjoy the benefit of the schools which it maintains shall secure such books as it deems best, and in the mode it regards as expedient. Power thus asserted is exercised in a matter which is not of common right, but which concerns institutions founded and fostered by the State. The regulation, in its entire scope, relates exclusively to the enjoyment of the privilege afforded by a system of education created and maintained by the State for the general good,

and it must follow that the State does have power to make the regulation effective by prescribing the method which shall be pursued by those who seek to enjoy the privilege it has created. Certainly, no one will deny the existence of such a right, and if it does exist it must reside in the law-making power of the State.

The regulation of the mode of receiving books by the pupils of the common schools is not analogous to a regulation of general property rights, for books are peculiar to schools and schools are the property of the State. It is no answer to this argument to affirm that the State may not give one person the exclusive privilege of selling fuel, clothing or the like to a community, for school books are unlike such property in their chief characteristics, and the Legislature does not assume to declare that any person may not sell books to a community; it simply assumes the power of declaring that the person whom the state board of education decides is the lowest bidder shall have the exclusive privilege of supplying its schools with books. In doing this it does no more respecting schools than a private citizen does who contracts with another to furnish him goods for a designated period, nor does it do more regarding schools than it does with respect to all the public institutions whose officers are authorized to give the exclusive privilege of furnishing groceries, medicines or other articles to the person to whom a contract covering a designated period is awarded, for the State owns and maintains its schools just as much as it does its public institutions of every kind.

Either the State has power to regulate and control the schools it owns or it has not. That it does not have the power we venture to say no one will affirm; if it does have the power it must reside in the law-making department, for it is impossible for it to exist elsewhere. If the power does reside in the law-making department, then that department must exercise its discretion and adopt such measures as it deems best, and if the measures adopted lead to the exclusion of some book owners it is an incident that no ingenuity can escape nor any system avoid. The denial of the right to select the books is the denial of the right of regulation and control, and we cannot conceive it possible to deny this right. If the right of regulation and control exists, then the fact that the exercise of the right does exclude some publisher is an inseparable and unavoidable condition of the exercise of the right. Without it the right is annihilated. If a clear and manifest legislative right cannot be exercised without conferring privileges in the nature of a monopoly, then, as the authorities all agree, a monopoly may be created, for a denial of the right will not be suffered. This doctrine is discussed by Judge Cooley in his work on Torts, and by Mr. Tiedeman in his work on the Police Power, to which we refer without comment. Cooley, Torts, 277; Tiedeman, Pol. Power, 815 *et seq.*

But we need not enter the field traveled by those authors, for here there is no denial of a right to sell books to a community. All that is here done is to provide that the person who receives, after fair and open competition, the contract for supplying books to the school

children shall enjoy an exclusive privilege for the period prescribed by the Statute.

Judge Cooley says that "it is held competent for the State to contract with a purchaser to supply all the schools of the State with text books of a uniform character and price." Const. Lim. 5th ed. 225, note 1.

In *Curryer v. Merrill*, 25 Minn. 1, 38 Am. Rep. 450, it was held that the State might purchase books and compel the patrons of the school to buy the books from its officers. The question was presented in *Bancroft v. Thayer*, 5 Sawv. 502, in substantially the same general form that it is here, and it was held that a State may provide by legislation that a designated person shall have the exclusive privilege of furnishing all the text books needed for the use of the public schools. This decision was made upon the Constitution of Oregon, which is very similar to ours, and the right to make such a contract is referred to the police power, the court saying: "To authorize and provide that by means of contract or legislative grant a particular person or persons shall have the exclusive right to do or furnish a particular thing, upon certain conditions, for the use and convenience of the public schools, has always been a common mode of exercising the police power of the State."

In the case of *State v. State Board of Education*, 18 Nev. 173, the power of the Legislature to require the adoption and use of the books of a designated publisher was assumed to exist by court and counsel, and this is true of the case of *People v. Oakland Board of Education*, 55 Cal. 831. The court held in *People v. State Board of Education*, 49 Cal. 684, that the decision of the state board of education as to the text books that should be used was final and must be obeyed by all of the local boards and officers. These authorities and those to which we have heretofore referred seem to us to so conclusively settle the question as to leave no room for debate.

If it be true, as the decided cases all affirm, that the State may itself contract for the books and require the patrons of the schools to buy from its officers at a designated price, it must be true that the State can contract with an individual to supply the books, for the underlying principle is precisely the same. It can make no difference whether the State buys the books and then requires the patrons of the schools to purchase from its officers, or whether it vests the exclusive privilege in an individual by contract, for the decision of the question does not depend upon the parties, but upon the character of the act or transaction. Whether the right to sell is asserted by the State itself or conferred upon an individual can make no difference, since in either case the privilege is exclusive. If the State can itself exercise such a privilege it can certainly authorize its exercise by an individual.

Our conclusion upon the constitutional questions is in harmony with the judgment of the eminent judge who heard and decided the case of *State v. Blue*, 23 N. E. Rep. 963, as well as that of the learned judge who decided this case; for we agree with them that the Statute is constitutional in all its essential features. Whether there are, or are not, isolated and detached clauses that may be invalid we have not

inquired, for the reason that the case, as it is presented by the record and in the very able argument of counsel, requires no such investigation.

The remaining question requires a construction of the Statute. The contention of the one party is that it imposes no imperative duty upon the trustee that can be enforced by mandamus; and that of the other is, that such a duty is imperative and that mandamus is the appropriate remedy.

It is not necessary that a statute should in direct terms declare the duty of an officer in order to make it an imperative one. The duty may be deduced from the general provisions and scope of the statute, regard being had to the evil intended to be remedied and the object sought to be accomplished. A familiar illustration of this general doctrine is supplied by the cases which hold that highway officers may be compelled by mandate issued upon the petition of a citizen who has sustained a special injury, to repair a highway or remove an obstruction. The cases of *Wren v. Indianapolis*, 96 Ind. 206, and *Greenfield v. State*, 12 West. Rep. 713, 118 Ind. 597, are apposite examples, for there the duty to issue estimates and proceed with the collection of assessments for the improvement of a street was deduced from the general provisions of the Act for the Incorporation of Cities. But, without prolonging our opinion by an examination of the decided cases in detail, we adopt, as a fair expression of the conclusion to be deduced from them, this statement of a careful and accurate author, who, in speaking of the difference between a duty and a privilege, says: "It has, indeed, been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction, involving no invalidating consequences in its disregard, or as imperative duty, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment." Endlich, Interpretation of Statutes, § 443.

This fundamental principle runs parallel with the cardinal rule which affirms that the courts must ascertain and give effect to the intention of the Legislature. It is, indeed, substantially the same rule expressed in different words to emphasize its application. *Kellogg v. Page*, 44 Vt. 856; *Corbett v. Bradley*, 7 Nev. 106.

Our own decisions are collected and well discussed in *Middleton v. Greeson*, 3 West. Rep. 905, 106 Ind. 18. The question which here emerges is, Do the provisions of the Statute concerning school trustees impose a duty or confer a privilege; or, to particularize, do those provisions require all township trustees to adopt the books, and thus give practical effect to the statutory scheme as a complete and symmetrical system, or, do they put it in the power of each trustee to break the uniformity by refusing to procure the books? If it be true that township trustees may, at their pleasure, procure or refuse to procure the books for which the state board contracts, then the Statute is nullified in so far as it assumes to confer a right upon the contractor to supply the people of the State with school books. Grant the right of each of the school trustees to determine for himself

whether he will or will not procure the books, and it may result that the contract will operate in very few only of the townships of the State, and this, as we shall presently show, was a result the Legislature intended to prevent.

It is, as we have suggested, always proper to ascertain the object intended to be accomplished, and for this purpose it is proper to look to the history of the times, to the cause which induced the enactment of the Statute, and to consider, also, the evil intended to be remedied. Again and again has this doctrine been asserted by this court, and in asserting it the court did no more than enforce a rule much older than the State. *Krug v. Davis*, 87 Ind. 590, and cases cited; *Bell v. Davis*, 75 Ind. 315; *Clare v. State*, 68 Ind. 17; *State v. Canton*, 43 Mo. 48; *People v. Lacombe*, 99 N. Y. 43.

One who would give a just interpretation to the language of a statute must always give due consideration to the history of the enactment. Speaking of the duty of one who undertakes to interpret a statute, the author quoted says: "He must refer to the history of the times to ascertain the reasons for and the meaning of the provisions of a statute, and to the general state of opinion, public, judicial and legislative, at the time of the enactment." *Endlich, Interpretation of Statutes*, § 29.

Illustrations of this well-known rule are supplied by the cases of *Aldridge v. Williams*, 44 U. S. 8 How. 9 [11 L. ed. 469]; *United States v. Union Pac. R. Co.* 91 U. S. 72 [23 L. ed. 224]; *District of Columbia v. Washington Mar- ket Co.* 108 U. S. 243 [27 L. ed. 714]; *State v. Nicholls*, 30 La. Ann. 980; *Keyport & M. P. S. Co. v. Farmers Transp. Co.* 18 N. J. Eq. 13; *Delaplane v. Orenshaw*, 15 Gratt. 457.

The information imparted by the inaugural address of the Governor of the State, by the debates in the General Assembly, and by the reports of the legislative committees makes clear the object sought to be accomplished, and reveals the evil it was the legislative purpose to remedy.

It is manifest that to so construe the Statute as to enable township trustees to refuse to make reports, to prepare certificates or to procure books would defeat the leading purpose of the Legislature.

No one who attends to the history of the times can doubt that it was the legislative intention to require all school officers to procure the books for the pupils from the person to whom the state board of education should award the contract. It was, too, the intention of the Legislature to equalize prices, to prevent one locality from being compelled to pay a much greater price for books than another, to put it beyond the power of the local officers to mar the uniformity of the system, to prevent favoritism and to open the field to competition. To this end the Legislature constructed a system which required competitive bidding, and, to make sure that the best prices might be obtained, provided that whoever secured the contract should have the exclusive privilege of furnishing to the school officers all the books designated and required by the state board. To permit the local school officers to treat the provisions of the Statute as the grant of a privilege would prevent the attainment of this end. To give effect to the intent of the 7 L. R. A.

Legislature and to secure the accomplishment of the principal object of the Statute, it must be held that its provisions create a legal duty which the trustees cannot put on or off at pleasure. To hold otherwise would effectually destroy the symmetry of the Statute and so cripple its machinery as to render it useless; and this we cannot do in the face of the historical facts which were laid before the General Assembly by the governor, considered in the reports of the committees of that body and debated by its members. We know, as matter of history, imparted to us by the most authentic records, and in the most public method, that, with little diversity of opinion, it was agreed that there were great evils to be remedied. The diversity of opinion was not so much as to the existence of the evil and the necessity of a remedy, as it was respecting the nature of the remedy that should be resorted to for the cure of the evil.

Before turning to the language of the Statute it is proper to refer to an ancient and well-known rule of law which is not without influence here. An English writer says: "It has, indeed, been said to have become an axiom 'that in public statutes words only directory, permissive or enabling may have a compulsory force where the thing to be done is for the public benefit, or in advancement of public justice.'" *Heard's Short's Extraordinary Remedy*, 255.

An American court has thus stated the rule: "The grant by the Legislature of an official power involves a corresponding public duty, and where the power is not expressly discretionary, its exercise is a peremptory public duty." The same court also said: "Public official powers must be supposed to be granted from public motives and for the public good, and their exercise is not a matter of discretion unless expressly made so." *People v. New York Co.* 11 Abb. Pr. 114.

The rule was thus expressed by our own court: "Where the words of the statute are permissive merely, in cases where public rights are concerned, and where the public or third persons have a claim *de jure* that the powers should be exercised, they will be construed as obligatory." *Gray v. State*, 72 Ind. 576.

Other cases declare the same doctrine. *Bansmer v. Mace*, 18 Ind. 27; *State v. Buckles*, 89 Ind. 272; *Indianapolis v. McAvoy*, 86 Ind. 587.

That the Statute here under examination contains provisions concerning public rights and rights in which individual patrons of the schools have an interest is too clear for denial, and therefore this rule forcibly applies.

An analysis of the provisions of the Statute, submitted to the light of the principles we have stated will make clear its meaning and object.

Section 1 constitutes the state board of education commissioners for the purpose of making selections of text books for use in the common schools, and designates the standard which shall guide the board in the selection of books.

Section 2 commands the board to advertise for proposals in two daily newspapers in this State, and one in the Cities of New York, Philadelphia, Cincinnati, Chicago and St. Louis, and directs what the action of the board shall be.

Section 3 requires the board to examine all proposals for furnishing "school books to the

people of the State, for use in the common schools."

Section 4 provides that if books can be furnished to "the patrons for use in the common schools of this State" from manuscript, the board shall invite proposals for manuscript, and not for books.

Section 6 provides that as soon as the board shall have entered into a contract it shall be the duty of the governor to issue his proclamation "announcing such fact to the people of the State."

Section 7 provides that when the governor shall have issued his proclamation, it "shall be the duty of each and every school corporation within this State, within thirty days thereafter, and at such other times as books may be needed for use in their respective school corporations, to certify to the school superintendent of their respective counties the number of school text-books provided for in such contract required by the children for use in their respective school corporations."

In this section it is made the duty of the school superintendent to make a requisition for such books upon the contractor, and it is further made the duty of the superintendent, upon the receipt of the books, to immediately notify all of the township trustees of the receipt of such books.

This section also declares that "it shall be the duty of such trustees to immediately procure and take charge of such books," and "that upon the receipt of such books by said school trustees they shall furnish them on demand to the school patrons or school children of their corporation at the price fixed therefor by the contract entered into between said board of commissioners and the contractor."

It is also provided in the same section that books may be purchased from the superintendent.

Section 8 makes it the duty of each trustee to make a report of the books received, the number sold and the number on hand, and section 9 provides a penalty for a breach of duty.

From this synopsis these important things are made manifest: The books are to be secured for all the schools of the State. Everywhere throughout the Statute the terms employed refer to the entire State, never to localities. Every provision indicates an intention to establish a uniform system, and not a provision indicates an intention to put it in the power of any officer to break the uniformity.

The duty is enjoined upon all of the trustees of the State; none are excepted.

The books are all to be furnished under the contract, and furnished without exception for all the schools of the State. The only method for securing the books is through the contract.

The conclusion that the law is obligatory upon every school trustee within the State is therefore irresistible.

From beginning to end there is no hint or suggestion that some of the trustees may, and some may not, obey the law and procure or decline to procure the books under the contract made by the state board. There is not the remotest suggestion from which it can be inferred that the system constructed shall be treated otherwise than as a unit. Nor is there a word from which it can be inferred that the Legisla-

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ture intended that inferior school officers might exercise discretionary power and thus break and deform the uniformity and symmetry of the system.

All we know of the history of the enactment, all we can discover as to the object of the Statute, and all that we have learned of the evil sought to be remedied, combine with the words of the Statute (words clear in themselves, but clearer still in the light shed upon them by extrinsic facts which it is our duty to know, and which we do know) in support of the conclusion that the Statute creates a uniform system, requires that all books be procured under the contract, and that school trustees may not exercise discretionary powers but shall perform the duty enjoined upon them by procuring and distributing the books selected by the state board of education as the law commands.

Upon the petition of a citizen courts have enforced a duty less clear and imperative than that which rests upon the appellee, but the length of this opinion (excusable, if excusable at all, because of the magnitude and importance of the questions involved) forbids that we do more than refer to the cases. *State v. Springfield School Directors*, 74 Mo. 21; *Baltimore School Comrs. v. State Board of Education*, 28 Md. 505; *Maddox v. Neal*, 45 Ark. 121, 55 Am. Rep. 540.

For the error in holding that the duty imposed upon school trustees is not imperative, the judgment must be reversed.

Judgment reversed, with instructions to proceed in accordance with this opinion.

Olds, J., concurring:

I concur in the conclusion reached in the principal opinion, but not in all the statements and arguments contained in it.

I do not think the Statute in question in conflict with any express provision of, or the spirit of, the State Constitution; nor do I think it an encroachment on the rights of the citizens of the State, not delegated to the legislative department of the state government by the Constitution. In reaching this conclusion I do not concur in the broad statement of counsel for the appellant that before the law can be declared unconstitutional and void some express provision of the Constitution must be pointed out which prohibits such legislation; but I adhere to the doctrine recently enunciated by this court, that the grant of power to the legislative department is a grant only of all legislative power, and that there are some rights of the people which cannot be taken away by legislative enactment notwithstanding there is no provision in the Constitution expressly prohibiting such legislation.

The common schools of the State are in the main supported by the State, and the tuition is free. The Constitution expressly enjoins on the General Assembly the duty "to encourage by all suitable means moral, intellectual, scientific and agricultural improvement, and to provide, by law, for a general and uniform system of common schools, wherein tuition shall be without charge and equally open to all."

By the Constitution, the common schools of the State are expressly placed under the control and supervision of the General Assembly. It is made the duty of that department of the

state government to provide for a uniform system. This must relate to books, as it is manifestly essential that there must be a uniformity in books to secure proper efficiency in the schools, and such uniformity can only be brought about and maintained by legislation providing for the adoption and use of certain books. Whether there should be a uniformity in the books of but a single school, or whether one system and the same class of books should extend to all schools in the township or county, or in the schools of the whole State, is a matter of policy to be considered by the General Assembly in the passage of laws to govern the common schools in this respect. This uniformity in books has always been controlled by legislation, and I think properly so, and I think also that it is committed to the General Assembly by the provisions of the Constitution.

When once admitted that it is subject to legislative control at all, as it seems to me it must be, then it is exclusively within the province of the General Assembly to determine whether there shall be a uniformity of books in a single school or the schools of a township, county or State, and the manner by which the books shall be adopted; and courts can in no way interfere.

I do not believe the General Assembly has power to create a monopoly, nor do I believe they have done so in the passage of this Statute. School books are usually copyrighted, and when adopted under the system provided for in the law under consideration, or under any other law, or in any manner so that the parent or child is required to procure the particular kind of a book or books used in the school the child attends, they of necessity have to purchase of the person or persons publishing and controlling the copyright of the particular book or books used in the school, or, if not copyrighted, of the person or persons publishing the particular books; so that if, under the old system of adopting books, which it is not contended is objectionable to the provisions of the Constitution, when books were adopted for use in a township or county, the patrons of the schools had of necessity to purchase directly or indirectly of the person or persons who controlled and published the books adopted. If the present law creates a monopoly, the old law likewise created one, differing only in extent, the present system not having so many of the features of a monopoly, as it provides for a competition before the adoption, and the old did not. The necessity of uniformity in books exists, and the Constitution expressly enjoins the duty on the General Assembly to provide for it; and to have uniformity requires that the books be purchased of the person or persons publishing and controlling the particular books used.

While the contract entered into between the state board of education and the School-Book Company does not possess the usual elements of mutuality, and may be of doubtful validity as a contract, yet I think the action of the state board of education under the law amounts to an adoption of the particular books to be used in the common schools.

It has been suggested by counsel that if this Act be valid, then the Legislature may pass laws of the same character relating to any merchantable article which citizens purchase one from the other, or even related to the clothing

of school children, or some matter about which there is no necessity for uniformity. But as between the law under consideration and the laws of the character suggested there is a decided difference. If the law related to ordinary merchantable articles, purchased in the common and ordinary dealings between citizens, or to clothing of school children, or to some matter about which there was no necessity for any uniformity, then I would concede at once that such legislation was beyond the power of the General Assembly and not contemplated by the Constitution. But the question under consideration is entirely different. It is legislation concerning a matter for which there is a necessity for system and uniformity, and the duty of providing for a uniform system is expressly enjoined upon the General Assembly by the Constitution.

The services to be performed by the township trustees, who are school officers, are to be done for the public. The paramount object of the services to be rendered is to put in force the law and execute it by requiring the school officers of the township to keep the particular books where all patrons of the schools may easily obtain them, and to require that such books be used in the schools, and while the services of the trustees may incidentally benefit the persons furnishing and selling the books, yet I do not regard that this fact renders the law invalid.

As to whether the law repeals the old law and whether it is mandatory or not, it seems to me that from the wording of the whole Act there can be no question as to what was the legislative intent, and that such intent was to establish a uniformity in school books throughout the State, and that it was intended to supersede and take the place of all other laws on the same subject.

As to whether the law is a salutary one or not, and as to whether it will prove beneficial or detrimental to the common-school interest of the State, are matters about which the court has nothing to do. These questions were with the General Assembly, and determined by them in the passage of the law.

Berkshire, J., dissenting:

I cannot agree to the conclusion reached in the opinion of the court, and feel called upon, therefore, to state in as few words as possible my reasons for the position which I assume; and that the conclusions which I draw as to the provisions and requirements of the Act of March 2, 1889, may be the better understood, I herein set out most of the sections of the Act in full.

The first section provides that the state board of education shall constitute a board of commissioners for the purpose of making a selection or procuring the compilation for use in the common schools of the State of Indiana of a series of text books in certain branches named, and fixes a standard as to the matter and quality of the books.

Section 2 is as follows: "The said board of commissioners shall, immediately upon the taking effect of this Act, advertise for twenty-one consecutive days in two daily papers published in this State having the largest circulation, and in one newspaper of general circulation in the Cities of New York, Philadelphia, Cincinnati,

Chicago and St. Louis, that at a time and place fixed by said notice, and not later than six months after the first publication thereof, said board will receive sealed proposals on the following:

"1. From publishers of school text books for furnishing books to the school trustees of the State of Indiana for use in common schools of this State, as provided in this Act, for a term of five years, stating specifically in such bid the price at which each book will be furnished, and accompanying such bid with specimen copies of each and all books proposed to be furnished in such bid.

"2. From authors of school text-books who have manuscripts of books not published for prices at which they will sell their manuscript, together with the copyright of such books for use in the public schools of the State of Indiana.

"3. From persons who are willing to undertake the compilation of a book or books or a series of books, as provided in section one (1) of this Act, the price at which they are willing to undertake such compilation of any or all of such books, to the acceptance and satisfaction of the said board of commissioners.

"Provided that any and all bids by publishers herein provided for must be accompanied by a bond in the penal sum of \$50,000, with resident freehold security to the acceptance and satisfaction of the governor of the State, conditioned that if any contract be awarded to any bidder hereunder, such bidder will enter into a contract to perform the conditions of his bid to the acceptance and satisfaction of said board.

"And provided further, that no bid shall be considered unless the same be accompanied by the affidavit of the bidder that he is in no wise directly or indirectly connected with any other publisher or firm who is now bidding for books submitted to such board, nor has any pecuniary interest in any other publisher or firm bidding at the same time, and that he is not a party to any compact, syndicate or other scheme whereby the benefits of competition are denied to the people of the State.

"And be it further provided, that if any competent author or authors shall compile any one or more books of the first order of excellence, and shall offer the same as a free gift to the people of this State, together with the copyright of the same, and the right to manufacture and sell such books in the State of Indiana for use in the public schools, it shall be the duty of such board of commissioners to pay no money for any manuscript or copyright for such book or books on the subject treated of in the manuscript so donated; and such board shall have the right to reject any and all bids, and at their option such board shall have the right to reject any bid as to a part of such books and to accept the same as to the residue thereof."

Section 3 is as follows: "It shall be the duty of such board to meet at the time and place mentioned in such notice, and open and examine all sealed proposals received pursuant to the notice provided for in section two (2) of this Act; and it shall be the further duty of such board to make a full, complete and thorough investigation of all such bids or proposals, and to ascertain under which of said proposals or

propositions the school books could be furnished to the people of the State for use in the common schools at the lowest price, taking into consideration the size and quality, as to matter, material, style of binding and mechanical execution of such books.

"Provided always, that such board shall not in any case contract with any author, publisher or publishers for the furnishing of any book, manuscript, copyright or books which shall be sold to patrons for use in the public schools of this State at a price above or in excess of the following, which prices shall include all cost and charges for transportation and delivery to the several county superintendents in this State, namely:

"For spelling books, ten (10) cents;

"For a First Reader, ten (10) cents;

"For a Second Reader, fifteen (15) cents;

"For a Third Reader, twenty-five (25) cents;

"For a Fourth Reader, thirty (30) cents;

"For a Fifth Reader, forty (40) cents;

"For an Arithmetic, intermediate, thirty-five (35) cents;

"For an Arithmetic, complete, forty-five (45) cents;

"For a Geography, elementary, thirty (30) cents;

"For a Geography, complete, seventy-five (75) cents;

"For an English Grammar, elementary, twenty-five (25) cents;

"For an English Grammar, complete, forty (40) cents;

"For a Physiology, thirty-five (35) cents;

"For a History of the United States, fifty (50) cents;

"For copy books, each, five (5) cents."

Section 4 is as follows: "If, upon the examination of such proposals, it shall be the opinion of such board of commissioners that such books can be furnished cheaper to the patrons for use in the common schools by procuring and causing to be published the manuscript of any or all of such books, it shall be their duty to procure such manuscript and to advertise for sealed proposals for publishing the same in like manner as hereinbefore provided, and under the same conditions and restrictions. And such contract may be let for publication of all of such books or for any one or more of such books separately; and it shall be the further duty of such board of commissioners to provide in the contract for the publication of any such manuscript for the payment by the publisher of the compensation agreed upon between such board and the author or owner of any such transcript, for such manuscript, together with the cost or expense of copyrighting the same."

Section 5 is as follows: "It shall be a part of the terms and conditions of every contract made in pursuance of this Act that the State of Indiana shall not be liable to any contractor hereunder for any sum whatever, but that all such contractors shall receive their pay and compensation solely and exclusively from the proceeds of the sale of books, as provided for in this Act."

Section 6 is as follows: "As soon as such board shall have entered into any contract for the publishing of books for use in the public schools of this State pursuant to the provisions

of this Act, it shall be the duty of the governor to issue his proclamation announcing such fact to the people of this State."

Section 7 is as follows: "When such proclamation shall have been duly issued, it shall be the duty of the school trustees of each and every school corporation in this State, within thirty days thereafter, and at such other times as books may be needed for use in the public schools of their respective corporations, to certify to the county superintendent of their respective counties the number of school text-books provided for in such contract required by the children for use in the schools of their several school corporations. Such county superintendent shall forthwith make such requisition for books as the schools in said several counties may require upon the state superintendent of public instruction, and the said state superintendent of public instruction shall immediately thereafter make a requisition for said books upon the contractor, who shall within ninety days ship the books so ordered directly to the county school superintendents of the several counties of this State. Upon the receipt of such books it shall be the duty of such county school superintendents to immediately notify all the school trustees of the school corporations as shown by the last school enumeration of their counties, of the receipt of such books.

"It shall then be the duty of such school trustees to immediately procure and take charge and custody of all the books assigned to their several corporations, receipting therefor to the said county school superintendent, and upon the receipt of such books by said school trustees, they shall furnish them on demand to the school patrons or school children of their respective corporations at the price fixed therefor by the contract entered into between said board of commissioners and said contractor; and it shall be the duty of the school officers to sell such books for cash only, and if they shall sell or dispose of any books other than for the cash price thereof, they shall be held personally liable and liable upon their official bond for the price of such book or books.

"Provided, that any patron or pupil of any school or schools other than the public schools, and also any child between the ages of six and twenty-one years of age, or the parent, guardian or teacher of such child, shall have the right to purchase and receive the books, and at the prices named, by payment of the cash price thereof to the school superintendent of any county in this State; and it is made his duty to make requisition upon the contractor for any and all books so ordered and paid for by any such person or persons.

"And provided further, that nothing in this Act shall operate to prevent the state board of education, boards of school trustees or boards of school commissioners from devising means and making arrangements for the sale, exchange or other disposition of such books as may be owned by the pupils of the schools under their charge at the time of the adoption of books under the provisions of this Act."

Section 8 reads as follows: "At the expiration of three months after the receipt of such books by the county superintendent, and every three months thereafter, it shall be the duty of each school trustee receiving and chargeable

with books under the provisions of this Act to make a full and complete report to the county superintendent of the number of books sold and the amount of money received therefor, and the number of books on hand; and at the time of making such report he shall pay over to the county superintendent all moneys received by him, or with which he is chargeable from the sales of books in his hands, which report shall be duly verified by the oath of the party making it."

Section 9 is as follows: "If, at the expiration of ten days from the time required by this Act for the making of such report of any school superintendent chargeable with books under this Act, any such officer shall have failed, neglected or refused to make such report or turn over any moneys with which he is chargeable, it shall be the duty of the county school superintendents within fifteen days to enter suit upon his official bond for an accounting and recovering of any moneys due from him on account of such books with which he is chargeable, and all judgments recovered upon such bond shall include a reasonable attorney's fee for the attorney prosecuting such suit, and such judgment shall be without relief from valuation or appraisal laws, and shall be without stay of execution."

Section 10 reads as follows: "It shall be the duty of the several county superintendents of this State, within thirty days from the issuing of the proclamation by the governor as hereinbefore provided for, and every county school superintendent hereafter elected, before he enters upon the discharge of his official duties, to enter into a special bond, with at least two freehold sureties of such county, payable to the State of Indiana, conditioned that they will faithfully and honestly perform all the duties required of them by this Act, and account for and pay over all moneys that may come into their hands pursuant to the provisions of this Act, in a penal sum which shall be equal in amount to \$100 for every one thousand inhabitants of their respective counties as shown by the last census immediately preceding the giving of such bond, to be approved by the board of commissioners of their respective counties; and upon the failure of any county school superintendent to give such bond, his office shall become immediately vacant, and the board of commissioners of his county shall immediately appoint some competent and suitable person to fill such vacancy for the unexpired term of his office."

Section 11 is as follows: "It shall be the duty of each county superintendent in this State, within ten days after the quarterly reports of the school trustees as hereinbefore provided for, to make a full, true, complete and detailed report to the contractor of all books sold by the several school trustees of his county, and the number of books in the hands of the trustees of each school corporation, which report shall be accompanied by all cash received by him from the school officers from sales of books by them sold, and which report shall be duly verified by him, and a duplicate thereof shall be filed in the office of the auditor of his county. Upon the failure of any county superintendent to make the report and to transmit the cash as required by this section, a right of

action shall immediately accrue to the contractor against the said school superintendent and his sureties upon the bond provided for in this Act, for an accounting and for the recovery of any moneys received and not transmitted by him and for any damages which may have resulted from his neglect or failure to comply with the provisions of this Act, and any judgment upon any such bond shall include a reasonable fee for the attorney prosecuting such suit, and such judgment shall be without relief from valuation and appraisement laws, and shall be without stay of execution."

Section 12 makes it a misdemeanor for a school trustee to charge or receive more than the price fixed by the contract with the State for the books.

Section 13 makes it embezzlement in any trustee or county superintendent if he fraudulently fail to account for and pay over to the proper person or persons moneys in his hands, or to account for school books received by him and unsold, under the provisions of the said Act.

In my opinion, the whole Act is in violation of the Constitution of the United States, and in violation of § 23, art. 1, of the Constitution of the State of Indiana, and therefore void. Said last named section reads as follows:

"The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens."

In my judgment, under and by virtue of said Act, the Indiana School-Book Company is granted privileges and immunities which upon the same terms do not belong to other citizens, natural or artificial. It is true that the Act provides that the board of commissioners named therein shall advertise for sealed proposals from publishers, authors and persons willing to undertake the compilation of books to be used in our public schools, and authorizes the said board to accept the bid which seems to be the most advantageous under all the circumstances, and to enter into a contract with such bidder.

But it is expressly provided in said section 5 that under no consideration is the State to become liable to any contractor in any sum whatever. The books to be furnished, therefore, are not sold to the State, nor are they sold to the patrons of the schools by virtue of the arrangement which the State and the contractor makes. It requires another transaction, complete and perfect in itself, between the contractor and the patrons of the school to divest the ownership of the contractor in the books which he is to furnish, and to vest the ownership thereof in the patrons of the school, and just the same character of transaction as though there had been no arrangement or contract between the State and the contractor. It seems to me that the most that can be said or claimed for the contractor is that the contract or arrangement extends to him the privilege, to the exclusion of other persons, of supplying the public schools with text books. But it is made the duty of the trustees of the several school townships in the State to certify, within thirty days after the governor has issued his proclamation as required by the Act, and thereafter as books are needed for use in the schools, to the county superintendents of their respective counties, and the

duty of the several county superintendents upon receiving the certificates of the trustees to make a requisition upon the superintendent of public instruction for the books required for their several counties, who makes a requisition upon the contractor, who, within thirty days, ships the books required for each county to its county superintendent. When the books are received by the county superintendent, it is made his duty to notify the trustees, and it then becomes their duty to take charge of the books going to their respective townships, first receipting therefor to the county superintendents. And after receipting for and taking into his possession the books for his township, it is made the duty of the trustee to put them on sale, and, on demand, for cash, at the price fixed upon by the State and the contractor, to furnish them to the patrons of the schools of his township, and to the patrons of other schools than public schools: and to any child over six and under twenty-one years of age, it is made the duty of the several county superintendents to make requisition for and furnish books for cash, and at the price fixed upon by the State and the contractor.

And it is made the further duty of the trustee to report to the county superintendent quarterly the state of the book trade, giving the number of books sold, the amount of money received therefor and the number of books unsold and on hand, and at the same time to pay over to the county superintendent all moneys received by him or with which he is chargeable; and if he fails to make the report or to pay over the moneys, it is made and becomes the duty of the county superintendent within fifteen days thereafter to institute suit upon the bond of the trustee so in default; and it is provided that in addition to the amount found due the judgment shall include a reasonable fee for the plaintiff's attorney, and the trustee and his sureties are deprived of the benefit of valuation and appraisement laws, and of the benefit of all laws for the stay of execution.

The several county superintendents are required to give a separate bond for the benefit of the contractor, and if any superintendent fails to give this bond his office is declared vacant.

Each county superintendent, within ten days after he receives the quarterly reports of the trustees, is required to make a full and complete report, not to his superior officer, the superintendent of public instruction, but to the contractor, of all books sold and of those still unsold in the hands of the trustees, and, along with his report, to bear the money in his hands—the proceeds of the sales made by the trustees.

To what extent the county superintendent must travel or the point to which he must go to make this report the law does not provide. It must be, therefore, to the headquarters or place of business of the contractor, wherever that may be (if he reports in person), as the rule is that whenever an inferior officer is required to report to a superior he is required to go to the headquarters or place of business of his superior. It may be that the county superintendents can make their reports to the contractor by mail or express, and thus transmit the moneys in their hands at their own risk; as to that I am not prepared to say.

If a county superintendent fails to make the report required of him, or to pay over the money in his hands, a right of action at once accrues to the contractor upon his said bond, and the judgment rendered is increased over and above the amount found due to the extent of a reasonable fee for the contractor's attorney, and is rendered without relief from valuation and appraisal laws, and without the benefit of all laws for the stay of execution. And if any county superintendent or school trustee fails to pay over the money in his hands when called upon by the proper person, or to turn over unsold books received by him, the law declares him guilty of the crime of embezzlement.

To me this seems to be one of the most remarkable laws ever enacted by any legislative body, to say the least of it. It not only creates a monopoly, but, in my judgment, as hard and offensive one as could well be created by a legislative body.

Blackstone's definition of a monopoly is as follows: "A monopoly is an institution or allowance from the sovereign power of the State, by grant, commission or otherwise, to any person or corporation for the sole buying, selling, making or using of anything whereby any person or persons, bodies politic or corporate are sought to be restrained of any liberty they had before, or hindered in their lawful trade."

This definition is accepted and adopted by *Justice Field in Butchers Union, S. H. & L. Co. v. Crescent City, L. L. & S. H. Co.* 111 U. S. 746 [28 L. ed. 585], and is recognized everywhere as authoritative.

The exclusive privileges granted to the Indiana School-Book Company under the Legislative Act in question fall exactly within Blackstone's definition, and clearly and unmistakably within the inhibition of the State Constitution. Not only is the School-Book Company granted the exclusive right for the period of five years to supply the common schools with certain text-books, but local public officers at great expense to the people of the State, and, if needs be, to the neglect of their public duties, are made the agents of the contractor to dispose of its books, and placed under most severe penalties, criminal as well as civil, in case they fail to perform the duties which, under the law, they owe to the contractor.

Under the severe and strict requirements of this Act, any school trustee is required involuntarily to open up a branch establishment for the Indiana School-Book Company.

It is claimed by the appellant that the law is mandatory upon all the public servants of the State upon whom it imposes duties, and with this contention I agree. It is not only mandatory, but it is so to that extent that, though text-books from the same plates from which are issued the books to be furnished by the Indiana School-Book Company were placed in the hands of the trustees, they would not be authorized to put them on sale to be used in the schools, for the law and the contract entered into between the School-Book Company and the State grants to the company the privilege of furnishing the books, and this means all the books, and places the duty upon the trustees of carrying out the promises of the State: and should the trustees sell books be-

longing to other persons, and allow them to be used in the schools, the promises of the State would be broken.

I purposely omit the word "obligation" but use the word "promise" because, under the arrangement, I do not think the State has obligated itself. But, to pass on, the State having promised the School-Book Company that it should have the privilege of furnishing all the books, in my judgment the promise of the State is broken if the school trustees allow books purchased anywhere to be used in the schools, except through them as the agents of the School-Book Company.

The law requires the trustee to certify the number of books the schools of his township need, for which a requisition is made, and these books are placed in the hands of the trustees; and out of the books so furnished the contractor is entitled to have all the children supplied, and, if more are needed, that a further requisition be made.

It was evidently the intention of the General Assembly that the books required for the schools should be furnished by the contractor as provided for in the Act. Otherwise some provision would have been made giving to the patrons an opportunity to get books elsewhere of the same series. The law grants such privileges and immunities to the Indiana School-Book Company as were evidently, in my judgment, intended to be inhibited by the Constitution, and cannot be upheld (if that would remove the objections to it) on the ground that it falls within the police power of the State as a law to improve the sanitary condition of the public or to protect it against immorality. Indeed, this is not seriously contended.

The Act in question must stand upon § 1, art. 8, of the State Constitution, which reads as follows: "Knowledge and learning generally diffused throughout a community being essential to the preservation of free government, it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific and agricultural improvement, and to provide by law for a general and uniform system of common schools, wherein tuition shall be without charge and equally open to all."

But this constitutional provision must be construed with other constitutional provisions, and in the light of the Federal Constitution; and I claim when it is so construed, exclusive privileges and immunities cannot be granted by the Legislature to one citizen, or to a class of citizens, under the pretense of building up or providing for a general school system. It is wholly unnecessary to the maintenance of a general and uniform system of common schools that exclusive privileges and immunities be granted to any citizen or class of citizens, and nothing of the kind was ever contemplated by the framers of the Constitution.

But it is contended that the exclusive right to supply the common schools with text-books was sold to the lowest bidder, and as an opportunity was then offered to all persons who desired to bid and compete for the privilege, that the right which the School-Book Company claims to have acquired is free from all the elements of a monopoly. The argument is fallacious and unsound.

The *modus operandi* by which the General Assembly grants to a citizen or class of citizens privileges and immunities which on the same terms are not open to all citizens is wholly immaterial. It is the thing done and not the manner of doing it that taints the act or transaction. Exclusive privileges or immunities granted to one or more citizens are none the less objectionable, and none the less within the constitutional inhibition, because sold to the lowest bidder, than if granted without an opportunity for competitive bids.

I do not controvert the proposition which was suggested in argument by way of illustration, that if the State desired to purchase any number of school books to be delivered at once or in the future, or to build a state house or to let a contract for supplies for its benevolent institutions, that to let the contract to the lowest bidder and best bidder would be a very proper thing to do, although I apprehend if there was no fraud the State might go into the market and contract with whom it pleased, and its contracts would be valid and binding. In either case there would be no monopoly, but a simple case of bargain and sale as between two natural persons. But that is not this case. The State has no interest in the contracts nor in the subject matter of the contracts. After the requisition for the books upon the School-Book Company (which is a mere notice to it) by the superintendent of public instruction, the books are shipped to the county superintendents, and by them delivered to the trustees, by them sold and the money paid over to the county superintendents, and by them paid over to the School-Book Company. Neither the State nor its officers has any control over the books at any time or place, nor anything to do with the proceeds arising from sales, nor have the local officers any relations in any way with the State or its officers. If the local officers fail to do their duty, all rights of action for the failure accrue to the contractor. Until the books are sold they remain the property of the School-Book Company. If loss should occur by fire or otherwise, it would fall on the School-Book Company, unless, probably, if the trustee or county superintendent, from want of care, were to permit any of the books to be damaged or destroyed, in view of the extreme solicitude which the law has for the interests of the contractor, the loss would fall upon such officer, notwithstanding he is an involuntary agent of the School-Book Company.

But further in this connection, until the books are sold to the patrons of the school they have not been furnished to anyone. The School-Book Company has delivered them to the trustee for sale the same as the manufacturer delivers his wares to the middleman to dispose of to the customer. Under this law the trustee occupies the position of middleman between the School-Book Company and the patrons of the school. What is it, then, which the School-Book Company acquired by its so-called contract with the State? The privilege pure and simple, of supplying the common schools of the State with text-books, to the exclusion of every other person, natural or artificial. All other school-book publishers and dealers are cut off from furnishing books to be used in the schools. The patrons, as we have

said, must purchase in the manner and from the dealer which under the law has been designated. *The Slaughter House Cases*, found in 88 U. S. 16 Wall. beginning with page 33 [21 L. ed. 894], sustained the Act of the Louisiana Legislature upon the one ground that the subject matter which the Act covered came within the police power of the State; and in these cases four out of the nine judges dissented on the ground that, in their judgment, the law was unconstitutional.

In the case of *Butchers Union, S. H. & L. L. Co. v. Crescent City, L. L. & S. H. Co.* 111 U. S. 746 [28 L. ed. 585], the character of the law that had been sustained in the former cases was again before the supreme court, and it was held that the power of a State Legislature to make a contract which cannot be abrogated or modified does not extend to subjects affecting the public health and public morals, and that, although the law then in question had given exclusive rights and privileges to the Butchers' Union, Slaughter House & Livestock Landing Company for a period of twenty-five years, that the Legislature of Louisiana had power to abrogate or modify the rights and privileges thus granted.

In that case all of the judges concurred in the conclusion reached, but four out of nine adhered to their former views that the law was unconstitutional because it granted exclusive privileges.

It will hardly be conceded by the appellant or the Indiana School Book Company that the law here in question may be repealed or modified by the Legislature so as to abrogate or modify the School-Book Company's privileges acquired under the law. Upon the other hand, the claim of the School-Book Company must be, and is, that its contract with the State is a valid and binding contract under which it has acquired valuable privileges which the Legislature cannot abrogate or modify, and that it has acquired the exclusive right to furnish the common schools with text-books for the period of five years; and if the contract extended over a period of fifty years the claim would be the same and would rest upon an equally solid foundation.

This position may well be assumed if the law in question is constitutional, and the contract or arrangement which has been entered into binding.

Authorities to support this claim or position are abundant, and among others is the case of *New Orleans Gas Light Co. v. Louisiana Light & H. Co.* 115 U. S. 650 [29 L. ed. 516], and the other cases in the same volume which immediately follow the case named. But those cases rest upon the ground that the party who obtains the privilege is acting in the capacity of an agent for the State, or has undertaken to perform a public duty or public service for the State, none of which has the Indiana School-Book Company undertaken or assumed. The State was not proposing, and has at no time proposed, to furnish the patrons of the common schools with text books, nor did it owe any duty in that direction; at least if it did, it has been a long neglected duty.

I do not say that the State might not, with great propriety, furnish school books to the patrons of the public schools, but what I do say is that it owes them no such duty.

The position, therefore, of the School-Book Company under its contract with the State is that of a private corporation engaged in a private business for private gain.

In *Com. v. Bacon*, 13 Bush, 210, 26 Am. Rep. 189, the court lays down the law upon this subject as I understand it to be. "It is the duty of the government to establish and maintain highways. Ferries are parts of highways, and the government may perform its duty in establishing and maintaining them through the agency of private individuals or corporations, and such agencies are representatives of the government and perform for it a part of its functions. And in consideration of the service thus performed for the public the government may prohibit altogether persons from keeping ferries and competing with those it has licensed. The establishment of public highways being a function of government, no person has a right to establish such a highway without the consent of the government, and hence, in prohibiting unlicensed persons from keeping a ferry, the government does not invade the right of even those who own the soil on both sides of the stream. The owner of the soil may, unless his land be regularly condemned for the purpose, prohibit any other person from using it as a landing for a ferry; this he may do because he is the owner of the soil. So the government, being charged with the duty of establishing and maintaining ferries, has the exclusive right to establish them, and may prohibit anyone it chooses from doing so, because the establishment of a ferry without the consent of the government is an invasion of its right, just as the use of the soil for a ferry landing without the consent of the owner would be an invasion of his right of property.

"The Burnham County Agricultural Society is a strictly private corporation; it owes no legal duty to the public; it may hold fairs or not as its managers may decide, and is as free from the influence or control of the government as a private individual, and cannot, therefore, enjoy any privileges which may not be enjoyed by an individual.

"The effect of the Act, then, is to restrict the right of one person to use and enjoy his property in a particular manner, that another may use his in that manner to greater profit than he could if each was left free to use his own as he pleased.

"In this country, where the right of the citizen to acquire, hold and enjoy property is guaranteed by the fundamental law, it would seem that the statement of the proposition is enough to refute it."

It was not and is not necessary for any publisher or dealer in school books to obtain a grant or license from the State to do business within the State. Any school-book publisher or dealer in school books may carry on his business in Indiana the same as may the manufacturer of furniture, cotton or woolen goods, paper or any other article or commodity. The exclusive privilege granted to the Indiana School-Book Company restricts other school-book publishers and dealers in the use and enjoyment of their property in a particular manner; that is to say, they are deprived of the privilege of dealing with the patrons of the schools and furnishing them school books for

the use of their children in the schools; hence the School-Book Company is enabled to enjoy its property to a greater profit than it could except for the monopoly which has been granted to it.

But I claim that it is plain to be understood from the opinion of the learned judge in *New Orleans Gaslight Co. v. Louisiana Light & H. Co.*, supra, that, had there been at the time the grant was made such a constitutional provision as we have in our Constitution, in the Louisiana Constitution, the law creating the grant would have been held unconstitutional, and refer to what is said in the opinion, beginning on page 672 [524] of the volume; and I make the same claim for the case of *Louisville Gas Co. v. Citizens Gaslight Co.* 115 U. S. 683 [29 L. ed. 510]. In that case the grant was upheld because the Kentucky Bill of Rights prohibited the granting of exclusive privileges except in consideration of public services, and the court held that the services to be performed in consideration of the grant were public services.

But our Constitution makes no exception. The provision is a sweeping one: "The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens." It is impossible for any other citizen, under the law in question, for five years, upon any terms, and especially upon the same terms, to furnish text-books to the patrons of the schools for use therein, even if he had for sale the same series of publications.

Suppose that any citizen or class of citizens were to offer to enter into a contract with the State upon the same terms as provided in the contract with the Indiana School-Book Company, and that his or their books be placed in the hands of the county superintendents or trustees for sale, could the State enter into any such contract or grant the same privileges under this law? Certainly not. See *Citizens Gas & Min. Co. v. Elwood*, 114 Ind. 882, 14 West. Rep. 92; *Soon Hing v. Crowley*, 113 U. S. 709 [28 L. ed. 1147]; *Dent v. West Virginia*, 129 U. S. 121 [32 L. ed. 625]; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26 [32 L. ed. 585].

But to return to the contract once more. I insist that if the law were unobjectionable on constitutional grounds, under its provisions no valid and binding contract could be made, and hence none has been made.

It is common law that without mutuality between the parties there can be no contract. There must be obligations on both sides or there is no enforceable contract. This is so well understood that I do not feel called upon to cite authorities.

Now, the contract in question is one to furnish school books, not to the State, but to the patrons of the schools. The contract, as we have already said, and which will not be controverted, is with the State and not with the patrons. The patrons are under no legal obligation to buy the books; they may be compelled to do so or keep their children out of the public schools; but this is a question of parental duty, and not a legal obligation.

The law expressly stipulates for the State that it assumes no legal liability. Then we inquire, Where is the legal obligation on the side of the State? In what does the mutuality of the con-

tract consist? There is no legal obligation to the School-Book Company from anyone. But it may be said that the School-Book Company obtains the privilege of putting its books on sale to the patrons of its schools to the exclusion of any other person, and the services of the county superintendents and trustees to sell if anyone wishes to buy; but it is left, after all, discretionary with the State whether it will comply with its part of the engagement, and if it does not, it is expressly provided that it is not liable for such failure.

In the first place, under the law, the School-Book Company was required to enter into bond that if awarded the contract it would enter into a satisfactory contract; but the law does not provide that a bond shall be given for the performance of the contract. An action for its default in performing the conditions of the contract must be brought on the contract, against the School-Book Company. We inquire, Who is damaged by the default, and what the measure of damages? The State is not damaged, for it purchased no books from the company, and expressly stipulated against liability to the company. The patrons of the schools are not damaged, for the School-Book Company had no contract with them and they are under no obligations to purchase its books. And if it were possible to find one to whom the book company is bound to respond in case of its default in the performance of the contract I imagine that it would be a little troublesome to ascertain the measure of damages.

I am aware that there is a class of contracts where a valid contract may be entered into by one of the parties for the benefit of a third person, but the contract under consideration does not belong to that class. Here no obligation is entered into to perform any particular act or duty for the benefit of any third person.

But I further claim that if it is conceded that the contract is valid and enforceable, the rule *cum oners* does not apply to the county superintendents and trustees in performing the duties required of them by the law in question. Why do I make this assertion? For the reason that the duties which the law throws upon the county superintendents and trustees are not public duties. The law makes them merely the agents of the School-Book Company to dispose of its wares. As we have already said, the books are shipped to these officers direct from the contractor, and when sold the money is returned directly to it. The property belongs to the contractor until disposed of to the patrons of the schools. With the books and the business transaction which places them on the market and finally returns the proceeds to the owner the State nor the public have anything to do.

It is an anomaly to say that, while engaged in transacting the business of a private corporation solely for its private gain, the trustees and county superintendents are serving the people. They are the simple agents of the private corporation, and it is begging the question to assume that they are performing the duties of public officers.

This brings me to a consideration of the question of the right of the people in the several subdivisions of the State to manage the local
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details of their schools as they have a right to do in other local affairs.

Most certainly the public schools in which a majority of the children and youth of the State must begin and finish their education is not, of all local affairs, the one of least importance. When the territory now comprising our State was given a territorial government, and from that time down to the present, township and county subdivisions have existed. And from the year 1824 until the year 1852, the congressional townships had a corporate existence for school purposes; and from the year 1852 to the present, the civil townships of the State have been incorporated as school townships.

And during all this time the people of the school townships, whether congressional or civil townships, have controlled the local details of their common schools, and this included the books which should be used in the schools, as well as other matters, and never, until the law now under consideration, has the Legislature assumed to interfere with these local privileges.

The Act of 1877 organized a county board of education, with power to select and adopt the text-books which should be used in the schools of the county. This board was composed of the county superintendent, the trustees of the different townships, and the chairman of the board of trustees of each town and city in the county. In this board the people of every township, through their trustee, had a voice, and after the books were adopted any person or persons had a perfect right to go into the county and sell to the patrons of the schools any of the books adopted, and the patrons of the schools might purchase the books from whomsoever they could, for cash, on time or in any other manner.

In my judgment the Act in question deprives the people of the school townships of the State of an important local privilege or right, and on that ground ought not to be upheld. But as this question has so recently and thoroughly been gone over by this court, I do not desire to do more than call attention to what has been decided.

In *State v. Denny*, 118 Ind. 898, 4 L. R. A. 79, this court, by Coffey, J., said: "It is therefore perfectly apparent from the Constitution itself that it was framed with reference to then existing local governments of counties, towns, townships and cities. Did the people, then, in the adoption of the Constitution, surrender the right of local self-government which they at that time possessed? *Judge Cooley*, in the case above cited, said: 'The State may mould local institutions according to its views of policy or expediency; but local government is a matter of absolute right and the State cannot take it away.'"

It is true that § 1, art. 8, of the State Constitution, *supra*, made it the duty of the Legislature to create a general and uniform system of common schools, but it never was contemplated by the framers of the Constitution, and no such construction can reasonably be placed upon the said section, that the Legislature could or would assume to control the local affairs and details of the schools. The creation of a general system is one thing, and the control of such matters as pertain to that general system, and which are

purely local to the people of the school townships is another and very different thing. Applying the principle as enunciated by Judge Cooley in the quotation above, the Legislature may mould the system, but the local government of the schools exists as an absolute right. The State may declare how the schools shall be governed, teachers elected and the branches to be taught therein, but the local control and management of the schools must be left with the people of the districts and townships, or their local representatives.

What would be thought of a law enacted by the Legislature appointing a state board of commissioners to take charge of the schools in all their details?

See the individual opinion in the case last above cited. *State v. Denny*, 118 Ind. 449, 4 L. R. A. 65, and *Evansville v. State*, 118 Ind. 426, 4 L. R. A. 93.

In *Robinson v. Schenck*, 103 Ind. 818, the court said: "It is possible, and only possible, to build up an efficient system by leaving local school matters under proper general laws to the people of the different localities. The Legislature very clearly realized the fact, and the law challenged is an expression of their judgment and that of the people, for it has stood unquestioned for more than eighteen years. We do not affirm that this long acquiescence in the law establishes its constitutionality, but we do affirm that it supplies a strong reason in support of our proposition *that the only way in which a great and efficient common-school system can be successfully maintained is to intrust to the people of the localities, by general laws, the government of local school affairs.* (The italics are my own.) The provision that the Legislature shall provide by law for a general and uniform system of common schools does not mean that the Legislature must, directly, and by statute, levy all taxes for each locality, nor that they shall prescribe rules for every school district in the State. Where the *right of local government is conferred upon all school subdivisions* upon the same terms, there is nothing special, nor is there any break in the line of uniformity. . . . It would be utterly impossible for the Legislature to do more than provide by law for a general and uniform system of common schools, for they could not prescribe the details for the government of each school district, for this would require them to determine the size of the school-houses, the character of the appliances and furniture, the quantity of fuel that should be consumed, the number that should be employed, and, indeed, to make provision for the purchase of the smallest things needed for use in the schools, down to the chalk used in the black-board exercises.

"The people never meant that the Legislature should undertake to do such an impracticable thing; all they meant was that the system should be general and uniform in the sense that its privileges and benefits should be extended upon the same terms and conditions to all the school districts of the State, and their meaning is well explained in their Constitution. When the Legislature, by a general law, left the local school government upon the same terms and conditions to all the school districts of the State of like character and conditions,

they did provide by law for a general and uniform system, and have so obeyed the people."

This case clearly recognizes the right of local self-government in the control and management of the public schools, and agrees with what I have said already as to what is to be understood as a general school system under the Constitution, and is in line with the unbroken practical construction of the people of the State from the organization of the state government.

But, I inquire, if the present law can be upheld, why may not the Legislature provide by law that all school-houses which the districts may be called upon to build for the following period of five years or more should be let, through the state board of education, to the lowest and best bidder, and in the same way all chalk for blackboard exercises furnished to the patrons of the schools in the same way, and the school trustees required to superintend the building of the school-houses and the distribution of the chalk among the patrons for the benefit of the contractors? This would have the effect to make the school system more general and uniform.

In *Evansville v. State*, *supra*, I said, speaking for myself and not for the court, that practical construction was of very little consequence when what had been done was in violation of a plain constitutional provision, and I am of that opinion still.

But local control of the common schools by the people of the townships is in violation of no provision of the Constitution, but in harmony with the spirit and letter of that instrument.

From the year 1824 to the passage of the Act of 1889, the people of the districts and school townships have had unbroken control of their local school affairs, including the adoption and purchase of text books, without any claim by the Legislature that it had the power to deprive them of any of these privileges.

In the individual opinion to which we have referred it is said: "Continued and uniform exposition broken by this Act for the first time in the whole history of our State supports the views of a majority of the court upon the question of the right of the citizens of a political corporation, such as a county, township or city, to choose their own local officers. The essential and abiding principle of local self-government supports it. The rule that the people whose property is liable for municipal debts should choose those to whom they will intrust the management of their local affairs yields it support.

"The rule that the Constitution recognizes the principle that the people of a locality can govern themselves honestly and intelligently without the direct guardianship of the persons representing the State at large gives it support of no uncertain character."

With what force the foregoing language comes to the law in question, whereby the Legislature has assumed to appoint a board of commissioners, with power, not only to say to the people the particular series of text-books which their children shall carry to school, but from whom they shall purchase them, the price to be paid and the manner of payment!

The case of *Hovey v. State*, 119 Ind. 886, by

a majority of the court was affirmed solely on the ground of practical construction in the appointment of trustees for the benevolent institutions, and yet there had been no such uniformity nor so long continued as has been the case with the people of the local school subdivisions in the local government of their schools, including the adoption and purchase of their text books.

My judgment is that the law is in violation of the Constitution, and that it is invalid for other reasons which I have stated.

For the reasons given, I dissent from the conclusion reached by a majority of the court.

Ellen WHITE, *Appt.*,

v.

CHICAGO, ST. LOUIS & PITTSBURGH
R. CO.

(....Ind....)

1. The building by a railroad company of a side track in a street along and upon which it has a right of way and has a single track in operation constitutes no additional burden upon property abutting upon the street for which damages may be recovered by its owner, where the statutes enabled the company to locate its tracks upon the street and to appropriate a right of way six rods wide, and it gave notice that its appropriation would be made "in as full and ample and perfect a manner as may be required" for railroad purposes, and it paid the assessed damages, which were duly accepted.

3. A judgment will not be reversed for error in a conclusion of law stated by the lower court if a proper judgment is rendered upon the facts found by it.

(February 6, 1890.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Cass County in favor of defendant in an action to recover damages for the construction by defendant of a railroad track upon a public street in front of plaintiff's property. *Affirmed.*

The case sufficiently appears in the opinion.

Messrs. Fansler & Shaffrey and Nelson & Myers for appellant.

Messrs. N. O. Ross and George E. Ross for appellee.

Olds, J., delivered the opinion of the court:

The appellee is the owner of a railroad running on and over Canal Street in the City of Logansport. Said street is sixty feet wide and the main track of said railroad as originally built and ever since maintained is located along the center of said street. Appellant is the owner of a lot abutting and fronting on the south side of said street upon which is situated a dwelling-house in which she resides, and her only means of ingress and egress to and from said lot is from said street.

After the construction of the main track of said railroad the defendant Company, without any permission of the owner of said lot, and without any proceedings to condemn the street for the use of said Company, except the orig-

inal proceedings when the road was constructed, built a second track or side track along said street, along and upon the south half of said street, south of the main track, in front of the said plaintiff's lot and residence, and has for several years maintained and used the same.

The appellant brings this action for damages sustained by reason of the building and using of said extra or side track upon the south half of said street in front of her lot. She alleges the facts in her complaint and asks for damages sustained.

Issues were joined and a trial had by the court without the intervention of a jury, resulting in finding and judgment in favor of the defendant below, the appellee. Upon proper request the court found the facts specially and stated its conclusions of law. The appellant excepts to the conclusions of law as stated by the court; also moves for judgment in her favor on the facts found, which motion is overruled and the ruling assigned as error. The findings of facts and conclusions of law as stated by the court are as follows:

Findings of facts—The court having been requested by the parties to find the facts, with the conclusions of law thereon, with the view of excepting to the decision of the court upon the questions of law involved in the trial, finds the following facts, to wit:

First. The court finds that the plaintiff is the owner in fee simple of lot 4, of James A. Taylor's Addition to the City of Logansport, Cass County, Indiana; that she acquired title thereto on the 4th day of January, 1870, remotely through said Taylor, and has had possession thereof ever since, and up to the present time, and that said lot is a part of two lots, on the south side of Canal Street, and opposite lots 18 and 19, and was owned by said Taylor in fee simple during the months of June and July, 1859, and until after January, 1863.

Second. That on the 9th day of June, 1859, the Toledo, Logansport & Burlington Railroad Company filed in the office of the clerk of the Cass Circuit Court the instrument of appropriation, to wit:

To All Whom it May Concern, Take Notice:

The Toledo, Logansport & Burlington Railroad Company, a corporation duly organized in pursuance of the General Railroad Law of the State of Indiana, approved May 11, 1852, for the purpose of constructing, maintaining and operating a railroad within the State of Indiana, agreeable to its articles of association, has located the line and route of its said railroad over and across the lands and premises hereinafter mentioned and described, and that said Company intends to and does hereby, under and pursuant to the provisions of law, appropriate the rights, interests, lands and premises hereinafter described for the purpose of constructing, operating and maintaining its said railroad. Said Company not having agreed with the owners of the lands touching the damages which may be sustained by them, by reason of the construction of the same, or for the lands, interests and real estate thereby appropriated as aforesaid, to the end that appraisers may be appointed to assess said damages, if any may be by them sustained, does hereby file

these articles of appropriation describing the interests and rights to be appropriated, to wit: (describing certain lands). Also in and through Canal Street in the City of Logansport, Cass County, Indiana, so far as said Company may be legally liable for damages to the owners of lots and parts of lots on either side of said street, who are as follows, to wit: James A. Taylor, as the owner of two lots on the south side of Canal Street, opposite lots 18 and 19, such appropriation to include the right of said Company to take materials for the construction and repair of said railroad at any point within fifty feet of the center of said railroad, except along said street, with the right of way over said tracts of land sufficient to enable said Company to construct and repair said road, and the right to conduct water by aqueducts, and the right to make drains and to have and to hold said rights, interests and privileges to the use of said Company so long as the same shall be required for the uses and purposes of said road, in as full and ample and perfect a manner as may be required for that purpose, —reference being had to the map and surveys of the engineers of said Company showing the line, route and location of said railroad, and to the certificate of location attached thereto, and being part thereof, filed in the office of the clerk of the Cass Circuit Court, for a more particular description of the said tracks and parcels of land so taken and rights and interests so appropriated by said Company for the purposes aforesaid.

In witness whereof, the said Company has caused these presents to be signed by their president, this 21st day of June, 1859.

D. M. Dunn, President.

A copy of the map and survey of the line and route of the location of said railroad is attached hereto as a part of said instrument of appropriation, and marked "A."

That on the 29th day of June, 1859, the foregoing instrument of appropriation was served on James A. Taylor, by the delivery to him of a copy thereof, and on the first day of July, 1859, the judge of the court of common pleas in vacation appointed three disinterested freeholders of said county appraisers, to assess the damages that said Taylor might sustain by reason of said appropriation. That afterwards, on the 4th day of July, 1859, said appraisers made their appraisal and filed it in the office of the clerk of said county, in which they gave and assessed in favor of said Taylor, as the damage he would sustain as the owner of said lots by such appropriation, the sum of \$100, which sum was afterward, on the 10th day of October, 1859, paid to and accepted by him as and for his said damage.

Third. That during the years 1859 and 1860 said Toledo, Logansport & Burlington Railroad Company completed said railroad by building a single track along Canal Street, near the center of the street, so that cars could run over the same, and that it has been used and operated as a railroad ever since, and is now so used, and that the defendant is and has been since April 2, 1863, the owner of and operating the same as the remote vendee of said Toledo, Logansport & Burlington Railroad Company.

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Fourth. That the plat hereto attached, marked "B," is a correct representation of said railroad tracks of the defendant as used and operated on the 2d day of April, 1883, when it first commenced operating said road, and as it has remained ever since, through Canal Street in front of the plaintiff's property. That the lot marked "4" on the south side of Canal Street represents the plaintiff's lot, and so much of it as is marked with diagonal lines represents her dwelling thereon. That the north red line represents the original main track of said railroad, the south rail of which is twenty-nine feet north of the north line of the plaintiff's lot, and said Canal Street is sixty-six feet wide.

That the south red line represents a side track that was put in and constructed where it now is in the year 1871, by the remote grantors of the defendant, without other or further condemnation or appropriation proceedings than hereinbefore mentioned, and without the consent of the plaintiff, and she, at the time, made objections to the men engaged in the work, and it was extended from Third Street to a point nearly opposite the east line of lot number 21 as marked on said plat, the east end being designated by a small black mark or line at right angles with the red line. That in the year 1882, and before this defendant owned or had possession of said road, said south track was extended to the shops connected with said road, a distance of about one mile, and since that time has been used as a track for trains going east, and the north track for trains going west.

That the ends of the ties are fourteen feet and the south rail of the south track fifteen feet and two inches north of the north line of the plaintiff's lot, and that the distance between the center lines of the north and south tracks above mentioned is twelve feet and two inches.

Fifth. That at the time said side track was constructed in the year 1871, the Columbus, Chicago & Indiana Central Railway Company was the owner of said railroad.

That under an order and decree of foreclosure of the Circuit Court of the United States for the District of Indiana said railroad, with all things thereto appertaining, was sold, and on the 21st day of February, 1883, was conveyed to William L. Scott, Charles J. Osborn and John S. Kennedy, who, on the 17th day of March of the same year, conveyed the same to the defendant; and that on the 2d day of April, 1883, the defendant took possession of said railroad and has operated it ever since, and has maintained, kept up and used said side track ever since.

Sixth. That the rails and ties of said side track are and have been ever since the 2d day of April, 1883, from six to seven inches above the grade and surface of said Canal Street in the front of plaintiff's property; and that by reason of the construction and maintenance of said side track the plaintiff has been interrupted in the use of said street, and access to her property through and across said street with any kind of wheeled vehicles has been made much more difficult and dangerous.

That ever since the construction of said railroad, or soon thereafter, telegraph poles were placed by the Western Union Telegraph Company and maintained along the outer edge of the sidewalk that passes in front of and adjoin-

ing the plaintiff's property and south of said second track on that side of the street, but none of the poles were placed in front of the plaintiff's premises on which the wires were held that were used in the operation of said railroad by the several companies operating said road ever since its completion in the year 1880.

Seventh. That the rental value of plaintiff's property, by reason of the foregoing facts, has been reduced in value since the 2d day of April, 1888, up to the 17th day of August, 1887, in the sum of \$315, and she has sustained damages in the said sum of \$315.

The court being sufficiently advised, does now conclude the law to be on the facts found in this cause as follows:

First. The plaintiff is not entitled to maintain an action for damages for a trespass. Her remedy, if any she has, is in an action for compensation by way of damages for the real estate occupied and used by the defendant for railroad purposes, or by having the damages assessed under the statutes relating to the assessment of damages for property taken under the right of eminent domain. She cannot maintain an action either for trespass or in ejectment or for an injunction.

Second. I find for the defendant that it is entitled to recover its costs.

The map referred to as "Exhibit A" in the findings is a map of the road as it was located for a distance beyond the city limits on either side, having a line designating the center of the right of way or road which ran along Canal Street on the outside of the platted lots of the city; two lines one on each side of the center, showing the width of said right of way, also showing the grades at various points. The map contains no statement of fact as to whether there was to be one track or a number of tracks, except that there was but the one track platted. The map marked "B" indicates the location of the lot, the railroad and shows the main track and side track and their relation and proximity to the lot owned by the appellant.

The findings of facts show that there were proceedings instituted to condemn the land to be used for the construction and building of the railroad, and that damages were assessed for the injury of the lot in question, then owned by one Taylor and afterwards purchased and now owned by the appellant. The primary and material question to be determined is as to whether the appellant has any right of action for damages accruing to her on account of the location and maintenance of the extra track or switch.

The Statute in regard to acquiring the right of way for the construction of railroads was in force as it now is at the time the railroad operated by the appellee was constructed. We quote a part of section 3903, defining the powers, rights and privileges of railroad companies. It provides: "Every such corporation shall possess the general power, and be subject to the liabilities and restrictions expressed in the special powers" following. The third specification grants the right "to purchase and by voluntary grants and donation receive and take and by its officers, engineers, surveyors and agents enter upon, and take possession of, hold and use all such lands and real estate and other

property as may be necessary for the construction and maintenance of its railroad, stations, depots and other accommodations necessary to accomplish the object for which the corporation is created, but not until the compensation be made therefor," etc.

The fourth specification grants the right "to lay out its road not exceeding six rods wide, and to construct the same; and for the purpose of cutting embankments and procuring stone and gravel, it may take as much more land, within the limits of its charter, in the manner provided hereinafter, as may be necessary for the proper construction and security of the road.

Fifth. To construct its road upon or across any stream or watercourse, road, highway, railroad or canal so as not to interfere with the free use of the same, which the route of its road shall intersect in such manner as to afford security for life and property; but the corporation shall restore the stream or watercourse, road or highway thus intersected to its former state, or in a sufficient manner not to unnecessarily impair the usefulness or injure its franchise.

Section 3907 provides for the appropriation of land for the use of the Company.

It is well settled that a street is a highway, and that the fee to the street is in the adjacent land owner, subject to an easement in the public (*Cox v. Louisville, N. A. & O. R. Co.* 48 Ind. 178; *Indianapolis v. Croas*, 7 Ind. 9); and that damages may be properly assessed in favor of the lot owner for the use of a street by a railroad company, and there can be no doubt but that the company may by proper proceedings have the damages assessed to an adjacent lot owner when the street is appropriated for the purpose of constructing a railroad along and over the street adjacent to the lot. The lot owner has an interest in land to be appropriated or used, and the company may have the damages assessed the same as if the appropriation was of a portion of the lot, and this proposition is not controverted by counsel in this case. The findings of facts show that an application was made in pursuance with the Statute to appropriate the property and due notice given, and the damages to the lot in question assessed and paid by the Company and accepted by the owner. The question is presented as to what rights the Railroad Company making such appropriation acquired in the street. The Statute authorizes the location of a railroad upon a street. It likewise authorizes the appropriation of a right of way for the construction of a railroad six rods in width and as much land in addition thereto as may be necessary for the construction and proper use and operation of the railroad. The application for appropriation in this case states that "such appropriation to include the right of said Company to take materials for such construction and repair of said railroad at any point within fifty feet of the center of said railroad except along said street, with the right of way over said tracts of land sufficient to enable said Company to construct and repair said road, and the right to conduct water by aqueducts, and the right to make drains and to have and to hold said rights, interests and privileges to the use of said Company so long as the same shall

be required for the use and purposes of said road, in as full and ample and perfect a manner as may be required for that purpose;" and under this application damages resulting therefrom to the lot in question were assessed in favor of the owner and were by him accepted. By this appropriation the Railroad Company obtained the right to lay its track upon and use the street in question for the purpose of constructing and operating its railroad in as full and perfect manner as might be required for the purpose of operating the road.

In treating of the assessment of damages in Wood's Railway Law, vol. 2, pp. 897, 898, § 256, it is said: "The presumption is that every injury which, in judgment of law, would result to the other adjacent property of the owner from taking a part of his land for the construction of the road and from the use of it in a proper manner when constructed, was foreseen by the appraisers and included in their first estimate. The award made by the statutory tribunal is exhaustive, and the land owner cannot maintain an action for damages which should have been, but were not, assessed and allowed in that proceeding, even though he claimed them then and they were erroneously disallowed. His remedy for such error is by steps to review the award. When the appraisal of land damages was reduced below what it otherwise would have been, by the representations of the agents of the company that the road would be constructed in a particular manner, made at the time of the appraisal to the commissioners, and such representations were not fulfilled in the actual construction of the road, whereby the plaintiff sustained serious loss and injury, it was held that the adjudication of the commissioners was a merger of all previous negotiations upon the subject, and that no action could be maintained for the construction of the railway contrary to such representations, provided it was in a prudent and proper manner."

In the case of *Chicago, R. I. & P. R. Co. v. Smith*, 111 Ill. 363, it was held that "where a person conveys a right of way on his land it will be conclusively presumed that all the damages to the balance of the land, past, present and future, were included in the consideration paid him for his conveyance, the same as an assessment of damages on a consideration would be presumed to embrace," and that a grant of a right of way "for all uses and purposes of the company, or in any way connected with the construction, preservation, occupation and enjoyment of said road," is broad enough to embrace all uses for railroad purposes, however much increased, and by any other companies authorized by law. It is further held that when a right of way is condemned for public use over a tract of land, the owner will be entitled to compensation not only for the value of the land taken, but also for all damages to the residue of the tract, past, present and future, which the public use may thereafter reasonably produce.

In *Babcock v. Western R. Corp.* 9 Met. 553, 43 Am. Dec. 411, it is held that a grant of power to accomplish any particular enterprise, especially one of a public nature, carries with it authority to do all that is necessary to effect the principal object.

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In *Pierce on Railroads*, p. 177, it is said: "The final award is a bar to an action for any injury which the appraisers could have legally estimated, irrespective of their action upon the claims for injury, or even their knowledge or ignorance of its existence. They are conclusively presumed to have performed their duty, except in a direct proceeding to set aside the award or on appeal."

The doctrine is well settled by the decisions of our own court that a claim for damages cannot be reviewed, and when damages are assessed for an injury to property resulting from a permanent improvement, or taken for public use, it bars all actions for future damages. See *La Fayette v. Nagle*, 12 West. Rep. 637, 113 Ind. 425, and authorities cited in that case.

In appropriation of a right of way or the location of a railroad along, upon and over a street or highway, the location and appropriation are made with a view of future use and occupancy by the railroad company to the full extent and purpose as the future operation and business of the company may demand. It gives to the company, as against the property owners affected thereby, the right to use such right of way or street or highway upon which the road is located, a full and complete right to use the same for railroad purposes in as full and ample a manner as the necessity of the company may demand. It is manifest when the road is located that it cannot be successfully operated with but one line of track, without any turn-outs or switches. It is likewise evident that with the future development and improvement of the country along the line of the road the business of the road will increase, and with such increase of business a necessity will arise for additional tracks and switches. When proceedings to appropriate a right of way and for the assessment of damages sustained by property owners along the right of way or abutting upon a street upon which the proposed road is to be located are resorted to, future necessity as well as the present needs of the company are conclusively presumed to be taken into consideration, and when damages are assessed it includes all damages resulting from the construction and from all necessary and proper use of the right of way, road, street or highway by the railroad company for railroad purposes. This would not include damages resulting from the negligent use of a street or highway by the company or for an unnecessary change of an established grade of a street or negligent or unnecessary obstruction of the same, but it does include all damages resulting to the property owner from the legitimate and necessary use of the same for railroad purposes, including the right to lay necessary additional tracks or side tracks. That this is the true rule to apply in such cases we think there can be no doubt, and such rule is, as we believe, supported by the weight of authority. It was certainly not contemplated that after a company had condemned a right of way for railroad purposes, in no way limiting the use to which the same should be put in the future, but stipulating in the instrument of appropriation that it was to be in as full and ample and perfect a manner as may be required for railroad purposes, that it is necessary as often as the future business and necessity of

the company demands an additional switch or even an additional track from one station to another, for the company to file an additional instrument of appropriation and have the additional damages assessed resulting to the property abutting the right of way or street along where such additional track or switch is to be located by reason of its construction; and we think there can be no difference between the rights of a land owner abutting on the right of way and abutting on the street in cases where damages have been assessed. In such case damages have been assessed for the necessary use of the same for railroad purposes.

We have not set out the complaint in full in this case. We do not deem it necessary. The complaint is upon the theory that the appellant is entitled to damages by reason of the location of the side-track or switch along and upon said street, on the ground that it is an additional burden not included in the original appropriation, and, taking the theory we do of the law, there can be no recovery on such ground. The facts found show the location of the road, instruments of appropriation filed and damages assessed for the injury to the lot in question and paid and accepted by the then owner; that the appellee has succeeded to all the rights of the original owners of the road.

The court rendered a proper judgment on the facts found, and a judgment will not be reversed for error in a conclusion of law stated if a proper judgment is rendered on the facts found, as such error is harmless.

Counsel have discussed at length the remedy in case the side track constituted an additional burden for which the owner ought to recover damage; but, as we held it constitutes no additional burden for which damages may be recovered, we are not called upon to decide as to what is the proper remedy. There being no wrong, there is no remedy.

If the complaint alleged the unlawful construction and maintenance of the side track in an improper manner, unnecessarily obstructing the street, it would present a different question.

The court having rendered a proper judgment on the facts found, there is no error for which the judgment should be reversed.

Judgment affirmed, with costs.

A petition for rehearing was subsequently filed and, after consideration, on February 26, 1890, *Olds, J.*, delivered the opinion of the court:

Counsel for appellant insist that the court misconstrued the theory of the complaint. In this we think they are mistaken. The complaint charges that "upon the 2d day of April, 1883, and ever since, the defendant has wrongfully, unlawfully and without right, kept up and maintained a second additional track in the center of the south half of said Canal Street," etc. Then it alleges that a portion of the ties, and all of the rails, are above ground, which second railroad track has been so kept up and maintained, etc. Then it alleges the use of the track for running trains of cars, and standing engines upon it, obstructing the street, making it impossible to cross the street for many hours without crawling under the

cars so wrongfully kept upon the track; that by reason of the running of engines and trains of cars wrongfully, as aforesaid, upon said second track, so wrongfully maintained, as aforesaid, by the defendant, the plaintiff's said house is rendered grimy and dirty by the dust raised by the defendant's engines and cars, and the smoke which exhales from said engines penetrates into her said house, to her great damage, etc. There is no allegation in the complaint that the running of engines and cars upon said second track, and allowing them to stand upon the same, are not within the ordinary and necessary use of the road. There is no allegation that the second track was improperly constructed. Taking the complaint as a whole, there is but one construction which can reasonably be placed upon it, and that is the one we placed upon it in the original opinion; that it proceeds upon the theory that the plaintiff is entitled to damages by reason of the location of the second track along and upon said street, on the grounds that it is an additional burden, not included within the original appropriation, and that the second track is unlawfully placed upon the street; and it does not proceed upon the theory that the second track is lawfully upon the street, but improperly constructed, and an unlawful use made of the track. Besides, the case was argued upon the same theory on which it was decided. Counsel for appellant, in their original brief, stating the theory of the case, say, "that the appellee had for a number of years rightfully maintained a single track of its road through the center of said street; that ever since the year 1883 the appellee has unlawfully, and without right, kept and maintained an additional track in the center of the south half of said street, in front of and adjacent to the plaintiff's lot and dwelling-house."

It is further stated in the brief that the first question presented is, "Can the plaintiff maintain this action for damages caused by the defendant in using the entire south side of the street in front of plaintiff's lot, with a second or additional railroad track, without further proceedings to have her damages assessed?" "Does the fact that the appellee or its grantors caused damages to be assessed for the right to lay and maintain a single track along the center of the street give it the right to lay additional tracks?" These statements from the original brief of counsel show conclusively that counsel took the same theory of the question presented in the case as did the court in rendering its decision; and it comes in bad grace now for counsel to change base, and insist upon another theory on petition for rehearing, after a suggestion in the decision that the complaint might have been so formed as to present a different question.

It is suggested that we ought to decide upon the question of limitation. Having decided that the plaintiff cannot maintain this action at all, there is no question of limitation to be passed upon. Counsel, in effect, ask the court to pass upon the question as to when some other form of an action would be barred by the Statute of Limitations. This we cannot do.

The petition for rehearing is overruled.

ILLINOIS SUPREME COURT.

LAFLIN & RAND POWDER CO.,

Appt.,

v.

Mary TEARNEY.

(.....Ill.....)

1. Instruction to find for the plaintiff if the jury find from the evidence that plaintiff has made out her case as laid in her declaration is not erroneous where the declaration states a good cause of action.
2. A powder magazine so situated that it is liable to inflict serious injury upon the person or property of a person residing near by in case of an explosion is a private nuisance, and liability for such injury is not avoided by care or lack of negligence in keeping the powder.
3. It is not necessary to use the word "nuisance" in a declaration for damages for the maintenance thereof if the facts alleged constitute a nuisance.
4. The fact that an explosion of a magazine of gunpowder destroyed buildings of another shows that keeping the gunpowder, considered with reference to "the locality, the quantity and the surrounding circumstances," constituted a nuisance *per se*.
5. Damage caused by the explosion of a powder magazine which was located upon a lot smaller than that required by an ordinance is caused by violation of the ordinance.
6. The risk of injury by an explosion of a powder magazine is not assumed by the owner of premises by reason of the fact that other powder magazines were in the neighborhood when the lot was purchased and the buildings erected, and that in one of the other powder companies the owner's husband was a stockholder, and that she had leased land to other companies for storing powder, where neither she nor her husband had ever been employed by, or had relations of any kind with, the owner of the magazine which exploded.
7. Nuisances should be removed, as a city extends, to vacant grounds beyond the immediate neighborhood of the residences of the citizens.

(January 21, 1890.)*

APPEAL by defendant from a judgment of the Appellate Court, First District, affirming a judgment of the Superior Court for Cook County in favor of plaintiff in an action to recover damages resulting to plaintiff's property from the explosion of defendant's powder magazine. *Affirmed*.

The case sufficiently appears in the opinion. *Messrs. Mills & Ingham and E. F. Ryan*, for appellant:

Where it is sought to fix a liability for damage based upon the violation of an ordinance, it must appear that the violation of the ordinance was the cause of the damage.

*A decision was originally reached in this case reversing the judgment of the appellate court, the opinion being handed down May 16, 1889. On October 4, 1889, a rehearing was granted and after argument the opposite decision was reached and the opinion given herewith delivered. The former opinion is therefore of no importance and is consequently omitted. [Rep.]

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Wabash, St. L. & P. R. Co. v. Thompson, 15 Ill. App. 118; *Chicago & R. I. R. Co. v. McKean*, 40 Ill. 218; *Quincy, A. & St. L. R. Co. v. Welthoener*, 73 Ill. 60; *Terre Haute & I. R. Co. v. Tuterweiler*, 16 Ill. App. 197; *Terre Haute & I. R. Co. v. Jenuine*, Id. 218; *Wabash, St. L. & P. R. Co. v. Wallace*, 110 Ill. 117; *St. Louis, A. & T. H. R. Co. v. Manly*, 58 Ill. 300; *Kepperly v. Ramsden*, 83 Ill. 358; *Sutton v. Wanuatosa*, 29 Wis. 21.

A party is not to be held responsible for injuries which could not reasonably have been foreseen or expected as the result of his misconduct.

Phillips v. Dickerson, 85 Ill. 11; *Sharp v. Powell*, L. R. 7 C. P. 253, 2 Moak, Eng. Rep. 567.

No man can maintain an action for a wrong where he has consented to the act which occasions his loss.

Broom, Legal Max. 265; *Toledo, W. & W. R. Co. v. Larmon*, 87 Ill. 68; *Chicago & A. R. Co. v. Pennell*, 94 Ill. 454.

One purchasing land takes it subject to all drawbacks existing at the time of the purchase.

Elgin v. Welch, 16 Ill. App. 487; *Toledo, W. & W. R. Co. v. Hunter*, 50 Ill. 325; 2 *Thomp. Neg.* 1009.

Mr. William H. Barnum, for appellee: The defendant was charged with wrongfully maintaining a dangerous private nuisance which injured and damaged the plaintiff by destroying her building; and this being so, no charge of negligence in maintaining such nuisance was necessary, since no amount of care exercised in and about maintaining it could save the defendant from liability.

Heeg v. Licht, 80 N. Y. 580; *Weir's App.* 74 Pa. 280; *Wood, Nuis.* §§ 115, 130, 133; *Hay v. Cohoes Co.* 2 N. Y. 159; *Tremain v. Cohoes Co.* 2 N. Y. 163; *Cahill v. Eastman*, 18 Minn. 394.

Every person who for his own profit or advantage brings upon his premises, and collects and keeps there, anything which, if it escapes, will do damage to another, is liable for all the consequences of his acts, and is bound at his peril to confine it and keep it upon his own premises.

Fletcher v. Rylands, L. R. 1 Exch. 265.

No degree of care or skill will save him from liability; and this, even though the promoting cause of injury be the action of the elements.

Plintz v. Augusta, 47 Ga. 263; *Montgomery v. Fleming*, 2 Stuart, 519.

The averment of the violated ordinance makes the second-count charge a public as well as a private nuisance.

Kepperly v. Ramsden, 83 Ill. 358.

Magruder, J., delivered the opinion of the court:

This is an action on the case, brought in the Superior Court of Cook County by the appellee against the appellant Company; to recover damages to the dwelling, barn and other out-houses upon the premises of appellee, resulting from the explosion of a powder magazine upon the premises of appellant. The buildings of the plaintiff and the powder magazine in question were located upon a street called "Archer

Avenue," in the Town of Lake, in the outskirts of the City of Chicago, in Cook County. Verdict and judgment in the trial court were in favor of the plaintiff, and such judgment, having been affirmed by the appellate court, is brought here from the latter court by appeal.

The first instruction given for the plaintiff is as follows: "If the jury find from the evidence that the plaintiff has made out her case as laid in her declaration, then the jury must find for the plaintiff." Defendant took exception to the giving of this instruction. We have held that such an instruction does not make the jury the judges of the effect of the averments of the declaration, but merely empowers them to determine whether the proof introduced sustains the issues made by the pleadings in the case. *Ohio & M. R. Co. v. Porter*, 92 Ill. 437; *Pennsylvania Co. v. Marshall*, 119 Ill. 399, 7 West. Rep. 445.

The declaration was not demurred to. After the plaintiff had closed her testimony, the defendant moved that the jury be directed to return a verdict in favor of the defendant, which motion was overruled, and exception was taken. After the motion for new trial was overruled, defendant also moved in arrest of judgment, which latter motion being overruled, exception was entered.

It is claimed by the appellant that the declaration does not set out a cause of action. The first objection made to the declaration is that it does not charge the defendant with negligence. The objection is not well taken. The powder magazine kept by the defendant upon its premises was so situated with reference to the dwelling-house of the plaintiff that it was liable to inflict serious injury upon her person or her property in case of an explosion. It was a private nuisance, and therefore the defendant was liable, whether the powder was carefully kept or not. As a general rule the question of care or want of care is not involved in an action for injuries resulting from a nuisance. If actual injury results from the keeping of gunpowder, the person keeping it will be liable therefor, even though the explosion is not chargeable to his personal negligence. 1 Wood, Nuis. §§ 73, 115, 130, 142; *Heeg v. Licht*, 80 N. Y. 579; *Cheatham v. Shearon*, 1 Swan, 213; *Stout v. McAdams*, 8 Ill. 67; *Ottawa Gas Light & Coke Co. v. Thompson*, 89 Ill. 600; *Nevins v. Peoria*, 41 Ill. 502; *Cooper v. Randall*, 53 Ill. 24; *Myers v. Malcom*, 6 Ill. 292; *Hay v. Cohoes Co.* 2 N. Y. 159; *Phinney v. Augusta*, 47 Ga. 263; *Burton v. McClellan*, 8 Ill. 434; *Wier's App.* 74 Pa. 230.

The second objection to the declaration is that it does not specifically aver the powder magazine to be a nuisance. It was not necessary to use the word "nuisance," if the facts alleged constituted a nuisance. The declaration avers that it was the duty of the defendant to so use its premises as not to jeopardize the buildings of the plaintiff, and not to store upon its premises any dangerous substance whereby plaintiff's property might be destroyed in case of an explosion; that the defendant did keep upon its premises a magazine of gunpowder, dynamite, etc., and stored therein a large amount of gunpowder, dynamite, etc.; that the gunpowder, dynamite, etc., so kept upon said

premises, exploded; and that by means of such explosion "the material of which such magazine was constructed was then and there driven with great force and violence upon and against the property of the plaintiff, hereinbefore described," and that "the following property of the plaintiff was by means of such explosion, struck by flying missiles, rocks and stones, and was wrecked and torn by means of the concussion of the air, then and there caused by said explosion, and was totally destroyed and lost, and was of great value, to wit: one two-story frame dwelling," etc.

A private nuisance is defined to be "anything done to the hurt or annoyance of the lands, tenements or hereditaments of another." 8 Bl. Com. 216.

Any unwarrantable, unreasonable or unlawful use by a person of his own property, real or personal, to the injury of another, comes within the definition stated, and renders the owner or possessor liable for all damages arising from such use. *Heeg v. Licht*, *supra*.

The averments of the declaration bring the present case within the definition thus quoted. The fact that the magazine exploded shows that it was dangerous. The fact that the explosion destroyed plaintiff's buildings shows that the keeping of gunpowder in the magazine, considered with reference to "the locality, the quantity and the surrounding circumstances," constituted a nuisance *per se*. *Heeg v. Licht*, *supra*; Wood, Nuis. § 142.

The declaration contains two counts. The second count, in addition to the averments of the first, as above set forth, further avers that there was an ordinance in the Town of Lake ordaining that "no powder magazine or place for storing or keeping gunpowder or other explosive material shall be kept or maintained within the town: provided, however, the provisions of this section shall not be held or construed to apply," etc., to any magazine located upon a lot of a certain size and area; and that the defendant's magazine was located upon a lot of a smaller size than that required by the ordinance. It is claimed by the defendant that the injury to the plaintiff's property was not caused by the violation of this ordinance, and therefore that such violation imposes no liability upon the defendant. We do not concur in this view. If the magazine had not been where it was, the explosion would not have taken place, and the injury to plaintiff's property would not have resulted. The ordinance absolutely prohibited any powder magazine from being kept within the town, unless the lot upon which it was located should be of a certain size. The defendant kept its magazine within the town upon a smaller lot than the law required. Its magazine was in the town in violation of the law. The keeping of gunpowder in the town was an illegal act. "If an illegal act be done, the party doing or causing the act to be done is responsible for all consequences resulting from the act." *Burton v. McClellan*, *supra*.

The cases referred to by counsel as holding a contrary doctrine have no application here. In those cases it is held that, where the plaintiff's right of recovery depends upon his own exercise of due care, as well as upon the defendant's negligence, the failure of the defend-

ant to comply with some statutory requirement, such as ringing a bell, or blowing a whistle, or erecting a sign-board, will not of itself authorize a recovery, in the absence of such care on the part of the plaintiff. There the injury is attributable to the plaintiff's want of ordinary care, and the defendant's neglect of a statutory requirement cannot be set up as an excuse. Here there is no question of the exercise of care by the plaintiff, nor is it a mere matter of non-feasance on the part of the defendant. In keeping a powder magazine in the town without complying with the condition named in the ordinance, the defendant was guilty of malfeasance. Its offense is similar to that of bringing diseased cattle into the State in violation of the Act of the Legislature on that subject, as discussed in *Somerville v. Marks*, 53 Ill. 371, and *Sangamon Distilling Co. v. Young*, 77 Ill. 197.

The appellant complains of the refusal of the court to instruct the jury that there could be no recovery if they should find from the evidence that there were other powder magazines in the neighborhood where plaintiff lived; that such magazines were there when plaintiff bought her lot and erected her buildings; that her husband had been employed in the powder business; that she bought her property in order that her husband might be near the magazines; that she bought said property after the location and erection of defendant's magazine; that her husband had been a stockholder in one of the powder companies; and that she had leased some of her own land to powder companies for the purpose of storing powder thereon. It is claimed that, if the foregoing facts were found to be true, the plaintiff assumed the risk of being injured by the explosion of defendant's magazine. If a servant enters the employment of his master knowing it to be dangerous and unsafe, he assumes the risks attendant upon such employment, and waives all claim for

damages against his employer in case of injury. In such cases the risks are a part of the contract of service. 2 Thomp. Neg. 1008.

But in the present case it is not pretended that either the plaintiff or her husband had ever been employed by the defendant, or had ever had any interest in defendant's powder magazine or business, or that there had ever been any relations of any kind between her husband and the defendant.

In *Cooper v. Randall*, 53 Ill. 24, which was an action to recover damages for the erection, on a lot adjacent to plaintiff's dwelling-house, of a flouring-mill, which threw chaff, dust, smut and dirt into plaintiff's house, the defendants sought to prove that another house in the same neighborhood, owned and rented by the plaintiff, was a disreputable house. The evidence was held to be inadmissible, because wholly foreign to the issue. "The issue was whether the mill was an injury to this property, and no light could be shed upon that question by evidence in regard to the occupancy of another house in the neighborhood."

In *Wier's App.*, 74 Pa. 220, *supra*, it was said: "Carrying on an offensive trade for any number of years in a place remote from buildings and public roads does not entitle the owner to continue it in the same place after houses have been built and roads laid out in the neighborhood, to the occupants of which, and travelers upon which, it is a nuisance. As the city extends, such nuisances should be removed to the vacant grounds beyond the immediate neighborhood of the residences of the citizens. This public policy, as well as the health and comfort of the population of the city, demand."

We do not think that there was any error in the refusal of the instruction last referred to.

The judgment of the Appellate Court is affirmed.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF ILLINOIS.

S. F. SMITHERS

v.

A. JUNKER.

(41 Fed. Rep. 101.)

A note for value received promising to pay a certain sum at the maker's convenience and upon this express condition, that" he is "to be the sole judge of such convenience and time of payment," may be enforced by an action after the expiration of a reasonable time on demand and refusal of payment. It does not give the maker the sole right to say when it would suit his convenience to pay it.

(December, 1889.)

ACTION upon a promissory note. On demurrer to the declaration. Overruled.

The case sufficiently appears in the opinion. *Mr. Harvey H. Anderson* for defendant in support of the demurrer.

Mr. B. W. Wilson for plaintiff, *contra*.

Gresham, J., delivered the opinion of the court:

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The first, second and third counts are upon a written instrument, which is set out as follows:

Chicago, November 1, 1883.

For value received I promise to pay to S. F. Smithers two thousand and forty-eight and 25-100 dollars, payable at my convenience, and upon this express condition, that I am to be the sole judge of such convenience and time of payment.

A. Junker.

It is averred that, after a reasonable time had elapsed, the plaintiff demanded payment, which was refused by the defendant. The defendant's promise was to pay the money in consideration of something of value received from the plaintiff. If what the defendant received was a mere gift, and it was not contemplated by the parties that the instrument was to be a binding obligation, why was it executed? Its execution is evidence that the plaintiff expected an equivalent for what the defendant received, and that the latter understood he was bound to pay the sum of money specified, not immediately or on any certain day, but within a reasonable time, to be determined by himself.

It was not contemplated, however, that the money should become due only at the pleasure of the defendant, without regard to lapse of time or the rights of the plaintiff. The beginning of the instrument imports an obligation to pay a specific sum of money, and the succeeding language should not be construed to destroy that obligation. If the defendant was given the sole right to say when it would suit his convenience to pay the debt, he might decide that he would never pay it, which would

not be a reasonable or honest exercise of his judgment as to time of payment. The instrument was executed on November 1, 1883, and after the lapse of more than five years payment was demanded and the debt became due. Such contracts should be construed liberally, in favor of payees. *Lewis v. Tipton*, 10 Ohio St. 88; *Works v. Hershey*, 85 Iowa, 340; *Ramot v. Schotenfels*, 15 Iowa, 457; *Kincaid v. Higgins*, 1 Bibb, 896.

Demurrer overruled.

LOUISIANA SUPREME COURT.

SUCCESSION OF Joseph LORENZ.

(....La. Ann....)

- *1. In a proceeding taken to put heirs in possession of an estate an issue must be joined, as in other civil matters, with the administrator in possession, and proof must be taken and judgment rendered contradictorily, recognizing their capacity.
2. Judgments of foreign countries must be clothed with all the forms required to prove their authenticity in the country in which they are pronounced. Otherwise, copies of the same will not be considered authentic, and cannot be admitted in evidence in the tribunals of this State.
3. What purports to be the exemplification of a record in the Imperial Royal District Court of Findland, in the Province of Bohemia, in the Empire of Austria, which does not contain intrinsic evidence of a judgment or decree of that court, and which is not shown by extrinsic evidence to have been in the form of a judgment or decree of such court, cannot be admitted in evidence in our court as that of such a judgment or decree.

(December 16, 1889.)

APPEAL by E. von Meysenburg, petitioner, from a judgment of the Civil District Court, Parish of Orleans, in favor of the administrator in a proceeding instituted by petitioner to have certain nonresident persons recognized as heirs of Joseph Lorenz, deceased, and put in possession of his estate. *Affirmed.*

The case sufficiently appears in the opinion.

Mr. Augustus Bernau, for appellant:

The evidence was admissible and conclusive. *Glover v. Doty*, 1 Rob. (La.) 130.

Mr. Gas. A. Breaux, for appellee:

A judgment recognizing heirs and sending them in possession is one that must be rendered on issue joined and competent evidence, as any other judgment.

Code Prac. art. 1000 *et seq.*; Civil Code, art. 1193; *Caldwell v. Glenn*, 6 Rob. (La.) 10.

When a deposition is taken in another State or foreign country to be used in a court of this State, the proceedings are those of that court, and must conform to our statutes.

Commandeur v. Russell, 5 Mart. N. S. 460.

A judgment of a foreign court must be rendered upon citation or voluntary appearance, or it is without effect.

Hennen's Dig. Judgment, 13, 2, p. 748.

Watkins, J., delivered the opinion of the court:

The deceased, Joseph Lorenz, formerly a

*Head notes by **WATKINS, J.**

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citizen of Findland, Bohemia, a province of the Austrian Empire, died in New Orleans on the 17th of November, 1887, intestate, leaving a succession which consisted exclusively of cash and movables. It was placed under an administration by the public administrator, there being no known heirs of the deceased present or represented; and when his gestion closed there was a balance of \$2,722.18 shown to be on hand by the final account of December 19, 1887.

The present proceeding was instituted by E. von Meysenburg, consul-general of Austria, resident of said city, as the agent of certain persons residing in Findland, Bohemia, to have them recognized, and put in possession, as the heirs of said estate. It was originally begun by rule, but it was dismissed by the court as of nonsuit, and this one was commenced, by citation to the public administrator, in lieu thereof. The answer is a general denial, coupled with an averment that the parties named are not the heirs of Joseph Lorenz, deceased. On the trial, counsel for the petitioner offered to file in evidence the procuration of the consul-general, along with what are alleged to be exemplifications from the records of a certain court in Bohemia, Austria, whereby the petitioning principals were duly recognized as the collateral kindred of the deceased, and as such entitled to inherit his estate. These documents are written in the German language, and are brought up in the original annexed to the record, and it also contains a translation into English. All of these were objected to as evidence, on the grounds, "that the proceedings offered cannot stand as evidence for the decree which is asked for herein, to recognize certain heirs; that said judgment of court has not by any proceeding whatever been recognized as the judgment of a foreign court; that the proceeding is an *ex parte* proceeding, which is not binding upon the public administrator, in a proceeding against him." These objections were sustained by the judge *a quo*, and the testimony rejected; and it was brought up, annexed to a bill of exceptions, so that, in the event of an adverse ruling in this court on the question of its admissibility, we could examine it as applicable to the merits, and decide the issues involved.

The contention of the counsel for the public administrator is that in a proceeding taken to send heirs into possession of an estate an issue must be joined, as in other civil matters, before judgment can be rendered; that such proceeding must be conducted contradictorily; and that no testimony can be admitted on the

trial, over objection, which has been taken *ex parte*. To put the defendant's view more tersely, we quote from his brief, at page 2, viz.: "If the decedent had died in Austria, and an administrator or officer . . . had been appointed under its laws, and the claimants herein had then proceeded contradictorily, to have themselves adjudged heirs, upon such a record the court of probate here, in ancillary proceedings, would have admitted the proceedings, and held itself bound by the judgment; but such is not the instant case. There was no succession in Austria, but in independent proceedings, *ex parte* merely, the petitioners obtained an order, not a judgment, which they say is binding."

This objection raises a question as to what effect is to be given to the proceedings of the Austrian court; as to whether it presents, in effect, any judgment or decree on the question of the heirship of the claimants. It is a requirement of our law that "when the heirs, . . . having a right to a succession, present themselves, or send their powers of attorney to claim it, they are bound to cause themselves to be recognized as such, and shall be put in possession by the judge of the place where the succession is opened, after having cited the curator who has been appointed for the succession." Rev. Civil Code, art. 1198.

Code Prac., art. 1000, is couched in like terms. It is elementary that the form and effect of actions are governed by the law of the place where they are brought. Id. art. 18.

It has been held, invariably, that in such matters heirs must proceed by suit (*Caldwell v. Glenn*, 6 Rob. (La.) 9), and that *ex parte* proceedings for the recognition of heirs bind neither creditors nor third persons. *Dalton v. Wickliffe*, 85 La. Ann. 355; *Succession of Lampson*, Id. 418; *Succession of Charnbury*, 84 La. Ann. 21.

Our law further provides that the applicants "shall file along with their petition all such proofs as may go in support of it, to the end that the curator . . . may be made acquainted with them." Code Prac. art. 1001.

It further provides that "if, from the examination of the testimony produced in support of the prayer, the judge discovers that the petitioners are entitled to the succession, he shall put them in possession of it." Art. 1003.

It is plain that the question of the competency of the evidence is one for the court *a quo*, and that it is authorized to judge of the sufficiency of the proofs offered in support of the pretensions set up by persons alleging themselves to be heirs to an estate under its jurisdiction; and it was the duty of the administra-

tor to require strict legal proof of same. It is true that our law provides that "when the judgments have been rendered in foreign countries the copies presented shall be considered authentic, and admitted in evidence in the tribunals of this State, if they are clothed with all the forms required to prove their authenticity in the countries where they are pronounced." Code Prac. art. 758. (Italics are ours.)

Foreign judgments have frequently been given effect by the decrees of our courts (*Brosnaham v. Turner*, 16 La. 434; *Jones v. Jamison*, 15 La. Ann. 85; *Rowand v. Jarvis*, 5 La. Ann. 43; *West Feliciana R. Co. v. Thornton*, 12 La. Ann. 786; *State v. Orleans R. Co.* 38 La. Ann. 818); but, in our conception, what is presented to us as a judgment of the Imperial Royal District Court of Findland, in the Province of Bohemia, in the Empire of Austria, is not clothed with all the forms requisite to prove its authenticity as such in that country. It contains no intrinsic evidence of a decree or judgment of that court; and no extrinsic evidence was offered in the court below that the forms of law required in that country had been pursued, and that such decree—if, indeed, it be one—legally fixed the status of the claimants there. While it is perfectly true that the claimants are Austrian subjects, and are therefore amenable to the laws of that empire, and within the jurisdiction of the courts of that country *ratione personarum*, it is quite apparent that the *res, i. e.*, the succession of Joseph Lorenz, was not, and hence there was nothing within its control which could make its decrees effective, *ratione materiae*.

A careful examination of the record offered in evidence has satisfied us that, at most, the proceeding was *ex parte*, and the hearing was an extrajudicial one, and had for its object the taking of the testimony of certain witnesses, who voluntarily appeared before the judge and gave in their evidence, in order that it might be attached to a power of attorney to be executed in favor of, and forwarded to, the Austrian consul at New Orleans. In effect, this was merely a commission to take testimony, before an Austrian judge, of certain persons residing in that empire, and which has no force and effect whatever as a judgment of a court in that country.

It was the duty of plaintiffs to have obtained a commission from the court in which the suit for the recognition of the heirs was pending to take the testimony of witnesses in Findland, Bohemia, on which they relied. The evidence offered was correctly rejected.

Judgment affirmed.

ALABAMA SUPREME COURT.

Benjamin J. BALDWIN, *App't.*,

v.

LOUISVILLE & NASHVILLE R. CO.

(....Ala....)

The State under its police power may require railroad employees to be examined by a competent board constituted by state authority, as to their fitness for their service.
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ice, and impose upon the railroad companies the reasonable expense of such examination, and such imposition will not deprive the companies of property without due process of law; but the expense imposed on any company must be restricted to the examination of persons who are about to be, or are at any time, actually employed by it, and as to whom examinations are compulsory.

(*Stone, Ch. J., and Somerville, J., dissent.*)

(December 10, 1890.)

APPEAL by plaintiff from a judgment of the City Court of Montgomery, in favor of defendant in an action to recover a statutory fee alleged to be due plaintiff as a duly authorized medical examiner for services rendered in examining defendant's employes for color blindness. *Reversed.*

The action was brought to recover the sum of \$1,800 for services rendered by plaintiff for defendant in the examination of defendant's employes for color blindness, and was commenced October 8, 1887. Plaintiff was one of the medical examiners appointed under the provisions of the Act of February 28, 1887, entitled "An Act for the Protection of the Traveling Public against Accidents Caused by Color Blindness and Defective Vision" (Sess. Acts 1886-87, p. 87). He sued to recover the fees prescribed and allowed by section 8 of that Act. The complaint contained a special count only alleging plaintiff's appointment as one of the medical examiners, the performance of services by him in the examination of the defendant's employes, and the defendant's refusal to pay the specified fees on demand. Defendant demurred to the complaint on the ground that the statutory provision was unconstitutional and void. The demurrer was overruled and it filed a special plea denying its liability for the fees claimed by the plaintiff on the same ground. Plaintiff demurred to this plea, the court sustained the demurrer, the defendant declined to plead over, and judgment was entered in favor of plaintiff, and defendant brought the case to this court for review. After argument a decision was reached on February 6, 1889, in which the judgment below was reversed, Stone, *Ch. J.*, and Somerville, *J.*, holding the Act unconstitutional, and Clopton, *J.*, dissenting from that decision, but concurring in the reversal on other grounds. The case was remanded to the lower court where it was tried a second time and the demurrer to the complaint was sustained on account of the unconstitutionality of the Act. Thereupon plaintiff appealed to this court. In the mean time another judge had been added to the supreme bench, and the new judge concurred in the opinion of Clopton, *J.*, the law being that on a second appeal the court must decide the case according to what in its opinion is then the law without reference to the former decision in the same case. The Act increasing the number of judges to four provided that whenever the four judges shall be equally divided in a case they should certify the fact to the governor, who should then appoint a member of the bar of the supreme court to sit with them and determine the case. The judges in the case being equally divided, the court certified its division to the governor, and he appointed William O. Ward as fifth judge in the case. Mr. Ward announced his concurrence in the opinion of Clopton, *J.*, which was rendered on the former appeal, and that opinion therefore became the law of the case.

The other material facts appear in the opinions.

Messrs. Tompkins, London & Troy, for appellant:

The law in question is not contrary to either the letter or spirit of our Constitution; it is an exercise of a power given to enable the State to

discharge its highest duty, and tends to prevent crime and suffering.

Cooley, Const. Lim. 5th ed. 201, 202; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140. See *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205 (33 L. ed. 107); *Peters v. St. Louis & I. M. R. Co.* 23 Mo. 107; *Brant v. Conn. & P. R. R. Co.* 31 Vt. 214; *Boston, C. & M. R. Co. v. State*, 32 N. H. 215.

The courts have universally sustained legislation requiring railroad companies to fence in their tracks when other land owners are not required to do so, and making them liable for damages resulting from a failure to fence.

Blair v. Milwaukee & P. R. Co. 20 Wis. 267; *New Albany & S. R. Co. v. Tilton*, 12 Ind. 8; *Jones v. Galena & C. R. Co.* 16 Iowa, 6; *Ohio & M. R. Co. v. McClelland*, 25 Ill. 140; *Waldron v. Rensselaer & S. R. Co.* 8 Barb. 390; *Kansas Pac. R. Co. v. Mower*, 16 Kan. 578; *Gorman v. Pacific R. Co.* 26 Mo. 441. See also *Pennsylvania R. Co. v. Riblet*, 66 Pa. 164.

If the Legislature in the exercise of its police powers has the authority to pass such a law as the one under consideration applicable to all persons and corporations, a statute applicable only to railroad companies cannot be held void.

Bannon v. State, 49 Ark. 167, 31 Am. & Eng. R. R. Cas. 533; *Griswell v. Housatonic R. Co.* 4 New Eng. Rep. 85, 54 Conn. 447, 32 Am. & Eng. R. R. Cas. 849.

The powers of the State extend to its supervision of the roads to insure that these safeguards against injury to the public are maintained.

Thorpe v. Rutland & B. R. Co. 27 Vt. 140.

The law under discussion is nothing but a law requiring the railroad companies at their expense to erect a most important safeguard against accident so as to render their business ordinarily safe to others.

Tiedeman, Pol. Powers, § 194. See *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455 (30 L. ed. 237).

It is the duty of the company to employ men of the character this law provides for, and it must at its own expense see that the men they do employ are of such character. The cost of having this determined is not and cannot be a tax, which is a contribution levied by the State for the support of the government, and not the compensation required to be paid to an agent of the State appointed to enable a public carrier to discharge a duty he is required by the common law to discharge at his own expense.

Smith v. Alabama, 124 U. S. 480 (31 L. ed. 508); *Cooley*, Taxn. 1; *Burroughs*, Taxn. § 9.

The constitutionality of a similar law has been sustained by other courts.

Charlotte, C. & A. R. Co. v. Gibbs, 27 S. C. 385, 31 Am. & Eng. R. R. Cas. 464; *Abrecht v. State*, 8 Tex. App. 216, 84 Am. Rep. 737; *Boston & M. R. Co. v. County Comrs.* 4 New Eng. Rep. 657, 79 Me. 386; *People v. Squire*, 10 Cent. Rep. 437, 107 N. Y. 598, 1 Am. St. Rep. 893; *Weber v. Reinhard*, 73 Pa. 370, 18 Am. Rep. 747; *Chicago & N. W. R. Co. v. People*, 9 West. Rep. 151, 120 Ill. 104, 31 Am. & Eng. R. R. Cas. 437; *Lent v. Tillson*, 72 Cal. 404, 19 Am. & Eng. Corp. Cas. 640.

Meurs. Thomas G. Jones and J. M. Falkner, for appellee:

Without a certificate one cannot engage in or be employed in the railroad business, and the certificate is the license to engage in such business.

Baldwin v. Kouns, 81 Ala. 278.

The employé is the direct beneficiary of the license. The State cannot provide that a railroad company shall not do business unless it takes out a license or pays a license fee as a condition precedent.

Leloup v. Port of Mobile, 127 U. S. 640 (82 L. ed. 811).

Whether or not a fee may be lawfully exacted under the police power is always a question for the courts, and they are the ultimate judges of the rightfulness and the legality of the exaction.

Joseph v. Randolph, 71 Ala. 499; *Tiedeman, Pol. Powers*, pp. 197, 198.

The Act does not impose any legal duty on railroad companies to have their employés examined; it simply requires them not to have men in their service without certificates. The duty of procuring the examination is put on the employé, and the duty not to hire a man without a certificate put on the railroad company.

An agreement to serve after August 1 without a certificate could not constitute a contract; it would be an act forbidden to both sides under a penalty, and absolutely void.

Woods v. Armatrong, 54 Ala. 150.

What is here attempted is not authorized by the taxing power; and is a thinly veiled attempt under guise of exercise of police power to put the entire expense of a public state burden upon a few taxpayers.

Where the motive of a law is general welfare, the fact that it remotely or incidentally confers more benefit on one class than another cannot justify the imposition of the entire expenses on a class of taxpayers.

Such a law is authorized neither by the taxing nor by the police powers.

Cooley, *Taxn.* 2d ed. 141, 142; *Burroughs*, *Taxn.* 68, 392; *Joseph v. Randolph*, 71 Ala. 499; *Illinois Cent. R. Co. v. Bloomington*, 76 Ill. 447; *Ohio & M. R. Co. v. Lackey*, 78 Ill. 55.

The police power is not omnipotent; it cannot run counter to the Constitution or prohibit things which it permits. It can only regulate such right, and the regulation must be reasonable.

Joseph v. Randolph, *supra*; *People v. Marx*, 99 N. Y. 377.

The owner of a railroad has a legal and vested right to use his property in that business and the Legislature cannot prohibit or prevent it; it can only reasonably regulate it.

Atchison, T. & S. F. R. Co. v. Howe, 32 Kan. 737; *Cooley*, *Const. Lim.* 5th ed. p. 618; *Pensacola Teleg. Co. v. W. U. Teleg. Co.* 96 U. S. 1 (24 L. ed. 708).

Clopton, J., delivered the following opinion:

Appellee was appointed an examiner under the provisions of "An Act for the Protection of the Traveling Public against Accidents Caused by Color Blindness and Defective Vision." The Act disqualifies all persons affected

with color blindness and loss of visual power, one or both, to the extent defined therein, from serving on railroad lines in the capacity of locomotive engineer, fireman, train conductor, brakeman, gate tender or signal-man, or in any other position which requires the use of discrimination of form or color signals; and makes it a misdemeanor for any person to serve in any of the capacities mentioned without first having obtained a certificate of fitness in accordance with the provisions of the Act. It requires the governor to appoint as examiners a suitable number of properly qualified medical men distributed throughout the State; authorizes any one of them to make the examination, and issue the certificate; and provides for prescribing the methods in which the examination shall be made. The examiner is entitled to a fee of \$3.

The third section provides "that on and after the 1st day of June, 1887, examinations and re-examinations, at the expense of the railroad companies, shall be required under this law; and any railroad company, officer or agent of the same, employing after said date a person in any of the capacities specified in section 1 of this Act, who does not possess a certificate of fitness therefor, in so far as color blindness and visual powers are concerned, duly issued in accordance with the requirements of this Act, shall be guilty of a misdemeanor, and for each and every offense shall be punished by a fine of not less than \$50, nor more than \$500; provided, that those persons already in employment in said capacities on the 1st day of June, 1887, shall be allowed until the 1st day of August, 1887, in which to procure the necessary certificates." Acts 1886-87, p. 87.

Appellee brings the action to recover of defendant the fees for examinations of persons serving in the specified capacities on a railroad in this State. The main contention between the parties relates to the power of the Legislature to impose upon the railroad companies the expense of the examinations and re-examinations required by the Act.

The police power, which has always been regarded of the utmost importance, and as essential to good order, extends to the protection of the lives, health, comfort, safety and quiet of all persons, and to the protection of all property. In respect to railroads, it has been said by a learned judge: "It may be extended to the supervision of the track, tending switches, running upon the time of other trains, running a road with a single track, using improper rails, not using proper precaution by way of safety beams in case of the breaking of axle-trees, the number of brakemen upon a train with reference to the number of cars, employing intemperate or incompetent engineers and servants, running beyond a given rate of speed, and a thousand similar things, most of which have been made the subject of legislation or judicial determination, and all of which may be." As to their employés, it may be extended to the police, which the corporations themselves exercise in the absence of legislative regulations. *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625.

In *McDonald v. State*, 81 Ala. 279, the Act "to Require Locomotive Engineers in This

State to be Examined and Licensed by a Board to be Appointed by the Governor for That Purpose" was brought before this court. The enactment declares unlawful, and makes a misdemeanor, for the engineer of any railroad train in this State to drive or operate any train of cars or engine upon the main line or road-bed of any railroad in this State, which is used for the transportation of persons, passengers or freight, without first undergoing an examination and obtaining a license as therein provided. The Act requires the governor to appoint a board of examiners, who are authorized to make the examinations, and to issue the licenses; and the examining member of the board is entitled to a fee of \$5, to be paid by the applicant. It was contended that the Act is a regulation of commerce between the States, and contravenes the Constitution of the United States. Somerville, J., speaking for the court, says: "In our opinion, it is a mere internal police regulation, which was competent to be provided for by the State, as a proper mode of preserving the safety of the traveling public, and other persons whose lives may well be imperiled by the negligence of ignorant and incompetent engineers."

The same Statute was brought before the Supreme Court of the United States in *Smith v. Alabama*, 124 U. S. 465 [81 L. ed. 508], on error to this court, when the same constitutional objection was made. The validity of the Act was maintained as a valid exercise of the police power. Matthews, J., says: "It is properly an Act of legislation, within the scope of the admitted power reserved to the State to regulate the relative rights and duties of persons being and acting within its territorial jurisdiction, intended to operate so as to secure for the public safety of person and property."

The Statute now under consideration came before the same court in *Nashville, O. & St. L. R. Co. v. Alabama*, 128 U. S. 96 [32 L. ed. 352], also on error to this court. After referring to the decision in *Smith v. Alabama*, and the provisions of the Statute adjudged to be valid in that case, Field, J., says: "The Act now under consideration only requires an examination and license of parties to be employed on railroads in certain specified capacities, with reference to one particular qualification,—that relating to his visual organs; but this limitation does not affect the application of the decision. If the State could lawfully require an examination as to the general fitness of a person to be employed on a railway, it could, of course, lawfully require an examination as to his fitness in some one particular. The Statute was held to constitute a part of that body of the local laws which governs the relation between carriers of passengers and freight and the public who employ them. It relates to the duties of railroad companies, and the rights of the traveling public, defining and declaring that certain specified things shall be done and observed to insure the safe carriage of passengers. In view of the foregoing adjudications, that the provisions of the Act fall within the class of police regulations we cannot regard an open question."

The Legislature, having the power to supervise and regulate the business of railway companies, so far as may be needful to the safety

of passengers, had implied authority to provide suitable and efficient means of enforcing the regulations, and impose the expense on the companies. On this principle rest the provisions of many such statutes. Dealers in many classes of merchandise are required to submit them to inspection, and dealers using weights and measures to have them officially approved, and pay the fees of the officers. Steam vessels are required to submit to inspection, and pay the expense thereof. The duties have often been imposed on railroad companies to fence their roads, station flag-men at public crossings, and provide safeguards at places of danger at their own expense. The statutes of the several States afford many other illustrations of the application of the same principle, the constitutionality of which has not been doubted. *Boston & M. R. Co. v. County Comrs.* 79 Me. 386, 4 New Eng. Rep. 657; *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455 [30 L. ed. 237]; *Thorpe v. Rutland & B. R. Co. supra*; *Kansas Pac. R. Co. v. Mower*, 16 Kan. 573.

The supervision is not because of benefit to the parties whose business is supervised, but in the interest of the public good, health and safety. If the State has the authority to impose upon railroad companies the expense of inspecting their tracks and machinery, of stationing flag-men at public crossings, and providing safeguards when necessary, on no sound principle can the right be denied to have their employes examined by a competent board constituted by state authority and to require the companies to pay the reasonable expense of ascertaining that their employes possess the qualifications required by law,—the expense in ascertaining that the agencies used by them in operating their roads, the fitness of which is essential to the protection and safety of life and property, are suitable and efficient. This, as I understand it, is the view of the Statute taken in *Nashville, O. & St. L. R. Co. v. Alabama, supra*, where in answer to the objection that the Act deprived the companies of property without due process of law, Field, J., says: "Requiring railroad companies to pay the fees allowed for the examination of parties who are to serve on their railroad in one of the capacities mentioned is not depriving them of property without due process of law. It is merely imposing upon them the expenses necessary to ascertain whether their employes possess the physical qualifications required by law."

But, conceding the right to require payment of the expense of enforcing proper police regulations, counsel contend that the Statute operates to create a state board of examiners before whom every person desiring to be employed in the specified capacities, whether or not in actual employment when the Statute went into effect, shall appear and be examined, to the end that the State, in exercising its licensing power, may be informed what persons can be trusted to engage in certain occupations; and that the requirement that the railroad companies shall pay the expense is the imposition of a tax, under color of establishing police regulations, unauthorized by the taxing power. Taxation is not the purpose, nor ordinarily a legitimate exercise, of the police power. Its province is to supervise and regulate, in doing which a

license fee may be exacted to assist in the regulation, but should not exceed the necessary or probable expense of inspecting and regulating the business to which the power is extended, including the expense of issuing the license, and compensation to the officer required, and such incidental and additional expense as may be necessary to enforce the regulations. *Van Hook v. Selma*, 70 Ala. 861; *Cooley, Taxn.* 598.

In establishing police regulations, a license fee may be exacted for the purpose of raising revenue; but when done the tax is not imposed under the police power, but under the separate and distinct power of taxation, and comes within the provisions of the Constitution limiting the exercise of the latter power. The requirement that the railroad companies pay the expense of the examinations is not the imposition of a tax, in the constitutional sense. No part of the fee allowed the examiner, which is the only expense required to be paid, goes into the state treasury, or assists in raising the public revenue, and it cannot be applied to any purpose other than payment of the expense of the examination. By the express terms of the Statute, it is allowed for each and every examination, whether or not a certificate of fitness is granted, and was intended to cover, from time to time, the expense of enforcing the statutory regulations.

If the operation of the Act be, as counsel insist, to impose on the companies the fee for examining and licensing persons who are not in their employment, and who sustain no relation to them in the department of their business supervised, it goes beyond the scope and province of the police power, and falls within the provision of the Constitution which prohibits private property being taken for private use, or depriving a person of property without due process of law. It is an essential constituent of a valid law, imposing upon the companies the expense, that it be restricted to the examination of persons who are to be employed or are in the service of the companies in some one of the specified capacities,—agencies employed by them to carry on their business.

As is apparent from the decisions referred to above, the requirement that the examinations shall be at the expense of the companies is sustainable only as an authorized part of the system of supervision. By the Statute all persons, whether or not in employment at the time the Act took effect, are required to obtain the requisite certificate, and of consequence to undergo an examination before serving in any of the specified capacities. The fifth section, which allows the fee, does not prescribe in terms by whom it shall be paid. The third section specially extends the supervision to the business of the railroad companies, and fixes the time on and after which it shall be enforced. The provision is not that all examinations required by the Act shall be at their expense, but that "examinations and re-examinations at the expense of the railroad companies shall be required under this law." The intention is to establish the manner of supervision, and the mode of enforcement, by examinations and re-examinations, and by imposing penalties for employing persons who do not possess the requisite certificate of fitness. The penalty is not

incurred by mere contractual employment, without actual service.

But it must be conceded that the Statute, fairly construed, operates to impose upon the companies the expense of examining those persons who were in their employment on and after the 1st day of June, without reference to their continuation in the service after the 1st day of the succeeding August, which time was allowed such employes to procure the requisite certificates. It was so construed in *Baldwin v. Kouns*, 81 Ala. 272. As has been said, its constitutionality can be maintained only so far as it is a legitimate exercise of the police power. Neither the persons then actually employed, nor the companies, incur the penalties prescribed by statute until after the expiration of the time allowed such employes to obtain the certificates. Until then the supervision, as to those who were in the employment of the companies, does not commence; until then compulsory examinations of such persons cannot be made. Under the police power, the expense of no examination can be imposed upon the companies, except of the agencies used in carrying on their business when it becomes their duty to submit to supervision, and examinations may be compelled. So far as the Statute requires examinations to be made prior to the 1st of August, 1887, at the forced expense of the companies, of persons in their employ on the 1st day of June preceding, without reference to their continuation in service after the 1st of August, it goes beyond a legitimate and constitutional exercise of the police power. My brothers differ from this conclusion, holding the provision of the Statute under consideration unconstitutional, as not being a legitimate exercise of the police power. They express their own views. I concur in the reversal of the judgment, on the ground that the complaint does not aver facts sufficient to show the liability of defendant for examinations had between the 1st day of June and August.

Reversed and remanded.

Stone, Ch. J., dissenting:

The certificate exacted of certain employes of railroad companies, in reference to their power to distinguish colors, is certainly a legitimate exercise of the police power of the government. Its tendency is to increase the chances of safety in railroad travel, at best more or less hazardous. And it is certainly within the pale of legislative power to punish by fine or penalty any railroad company which intrusts the running of a train to the control of an agent or agents who are without the requisite evidence of qualification. This would be dealing with the conduct of the corporation,—its operation, by which it earns its income,—and it is right and proper that it should be made to pay the expense of such violation of its duty.

The question presented by this record is different. It is not whether the road is properly appointed, properly constructed and properly equipped, but whether persons serving it, or seeking employment at its hands, are duly qualified for the service they propose to render. This is made by the law one of the conditions upon which the particular line of duties can be undertaken by the applicant. It is a qualifica-

tion he must possess before he can accept employment, and hence it is for his benefit that the examination is had, and a certificate given.

The certificate when given is good for five years, and authorizes the holder of it to take employment, not alone from the one railroad company, but from any company that will employ him. On the other hand, it imposes on him no duty to continue in the service of the road on which the Statute proposes to assess the expense of the examination. Can a distinction be drawn between the present case and that of any other professional man, skilled laborer or artisan, who is required to possess certain qualifications before entering upon certain lines of employment or service? And if the expense of establishing the fact that the applicant possesses the necessary qualifications can be imposed on the employer without his consent in the one case, why not in every like case, which requires tests of qualification?

The Statute under consideration attempts to impose on the railroad corporations, without its consent, and whether it will or not, the expense of the examination of certain classes of its employes, for the purpose of determining their fitness for the service. Is this not a mere legislative edict that one person (artificial) shall, without his consent, pay for services rendered to another? This is not "due process of law." Private property shall not be taken for private use. These are constitutional guaranties, and corporations are as much under their protection as natural persons are.

The case of *Morgan Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455 [80 L. ed. 287], rightly interpreted, is not opposed to the views expressed above, and furnishes no warrant for the Statute we are interpreting. The question in that case arose under the Quarantine Laws of Louisiana, enacted for the purpose of keeping out contagious diseases. To allow vessels to land in New Orleans, not having a bill of health free of contagious or infectious diseases, would be to greatly imperil the inhabitants of the city. The quarantine inspection or examination was required primarily for the safety of the city, but secondarily and largely for the benefit of the vessel. If found free from disease, she could at once proceed, complete her voyage, and come into port. The benefit of the inspection was thus largely the vessel's, and furnished a sufficient consideration to uphold the charge made against her.

In the case of *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96 [32 L. ed. 352], the question we have been considering was not, and could not be, raised. Hence the remark of the eminent jurist who prepared the opinion in that case is not an authoritative adjudication.

The majority of the court hold that so much of the Statute as imposes on the railroads the expense of the examination and certification of the qualification of its employes is unconstitutional and void.

Somerville, J., dissenting:

I concur in the opinion of the chief justice in this case. The law under consideration, in 7 L. R. A.

my judgment, passes beyond the legitimate domain of the police power, and reaches ground forbidden by the prohibitions of the Constitution. It is not denied that the Legislature has the power to regulate the business of common carriers engaged in running railroads in this State by a reasonable exercise of its police power, having in view the preservation of the public safety. *Smith v. State*, 85 Ala. 841; *Smith v. Alabama*, 124 U. S. 465 [81 L. ed. 508]; *McDonald v. State*, 81 Ala. 279.

It may also, in the lawful exercise of this power, require the examination of railroad employes for color blindness, or other defects of vision, as done in this case, and may require a certificate of personal qualification for the service in question. *Baldwin v. Kouns*, 81 Ala. 272.

As to these propositions there is no difference of opinion among the members of the court.

Such a certificate, however, is in the nature of a personal license to the employé. It is mainly and primarily for his benefit; as much so as the personal license or diploma of a lawyer, physician, druggist or any other person engaged in any other employment would be. It follows and adheres to his person, unless otherwise restricted, anywhere in the territory of the sovereignty granting it, and in whose-soever employment the licensee may be engaged. It is only incidentally beneficial to the employer, so long as the employment may subsist. It is not the property of the employer, but of the employé. The debt incurred for the service rendered in making the examination is therefore the debt of the latter, not of the former. The law-making power can enact no edict by which a legal liability for the debt of one person can be fastened on another without due process of legal proceedings,—according to the rules and forms established for the protection of private rights. It cannot take the property or money of one person, and give it to another, by naked transfer, nor impose a liability on one person for the private benefit of another, in the absence of some relation between the parties which brings the case within the sphere of the police power. There is a line where taxation may become spoliation. So laws, under the guise of police regulations, may reach the constitutional dead-line of property confiscation. It is impossible to forecast the logical results which may practically flow from the opposite conclusion. Farmers might as well under color of the police power be compelled to pay the licenses of commission merchants employed in sampling their cotton; druggists, for the diplomas of their clerks; the patrons of schools, for certificates of qualification required for teachers; patients, for the diplomas of doctors; or clients, for those of lawyers. No precedent known to us among the adjudged cases goes to this extent, or lays down any principle which, in our opinion, would support the constitutionality of the law under consideration, so far as it seeks to make the railroad companies liable for the expenses incurred in the examination of employes under the provisions of the Act.

MARYLAND COURT OF APPEALS.

STATE of Maryland, Use of Mary BASHE
at al., Appts.,
v.

James BOYCE.

(...Md....)

The mere pendency of a suit against the lessee of a wharf to recover damages for injuries caused by its defective condition will not abate a subsequent suit for the same purpose against the owner of the wharf.

(March 18, 1860.)

APPPEAL by plaintiffs from a judgment of the Baltimore City Court overruling a demurrer to a plea in abatement of the declaration, in an action to recover damages for personal injuries resulting in death and alleged to have resulted from defendant's negligence. *Reversed.*

The facts are fully stated in the opinion.

Argued before Alvey, Ch. J., and Robinson, Irving and McSherry, JJ.

Messrs. J. Alexander Preston and Harry Welles Rusk, for appellants:

If the appellee is liable, he is liable whether there is an action pending against another defendant or not.

See *Seever v. Clement*, 28 Md. 436; *Livingston v. Bishop*, 1 Johns. 290.

For a joint trespass the plaintiff may sue all the trespassers jointly or each of them separately.

Thomas v. Rumsey, 6 Johns. 26; *Osterhout v. Roberts*, 8 Cow. 43.

A plea in abatement, to be effective, should set forth "that at the time of the issuing of the summons another action was pending in the same court, or in some other court within the State, between the same parties, on the same cause of action."

1 Poe, Pl. p. 502; *U. S. Bank v. Baltimore Bank*, 7 Gill, 426; *Brown v. Somerville*, 8 Md. 444; *Seever v. Clement*, 28 Md. 434; *Marshall v. Cooper*, 43 Md. 63; *Watson v. Jones*, 80 U. S. 13 Wall. 679 (20 L. ed. 666); *Cook v. Burnley*, 78 U. S. 11 Wall. 659 (20 L. ed. 29); *Albert v. State*, 6 Cent. Rep. 447, 66 Md. 825.

A plea of prior action pending, in order to suspend or abate the action to which it is pleaded, must show that the action pending is between the same parties, and for the same cause as that involved in the case which is sought to be abated.

Bryan v. Scholl, 7 West. Rep. 560, 109 Ind. 387, and cases cited; 6 Wait, Act. and Def. p. 397; *Adams v. Gardiner*, 13 B. Mon. 197; *Harris v. Johnson*, 65 N. C. 478; *Ratzer v. Ratzer*, 2 Abb. N. C. 466; *Gamsby v. Ray*, 52 N. H. 513; *Walsworth v. Johnson*, 41 Cal. 61; *Compton v. Green*, 9 How. Pr. 228; Gould, Pl. chap. 5, §§ 122-125.

Messrs. William A. Fisher, W. Cabell Bruce and D. K. E. Fisher, for appellee:

If said wharf or pier was out of repair at the time of the accident, and the decedent was without fault, the Consolidation Coal Company and the appellee are co-tortfeasors.

1 Thomp. Neg. 319; *Bears v. Ambler*, 9 Pa. 193, 194.

7 L. R. A.

If such is the relation between the Consolidation Coal Company and the appellee, then the appellee had the right to plead the pendency of the prior suit brought by the equitable appellants against the company in abatement of this suit.

1 Chitty, Pl. 100; *Boyce v. Bayliffe*, 1 Campb. 60, 61.

The effect of the plea is to put an end to this suit, and the equitable appellants cannot avoid its effect by discontinuing the action against the Consolidated Coal Company.

Stephen, Pl. 49; 1 Chitty, Pl. p. 470; *Leavitt v. Mowe*, 54 Md. 617.

McSherry, J., delivered the opinion of the court:

There is but a single question involved in this appeal. It arises upon the following facts: The appellee owned a wharf which was under lease to the Consolidated Coal Company. By reason of the wharf being, as alleged, out of repair, Joseph Bashe was injured, and shortly afterwards died from the effects of that injury. The widow, children and mother of the deceased brought suit against the coal company, the lessee of the wharf; and whilst that suit was still pending and undisposed of, they brought another action, for the same cause, against the appellee, the owner of the wharf. Both suits were instituted in Baltimore City. To the declaration filed in the second action the appellee pleaded in abatement the pendency of the prior suit against the coal company; the appellants demurred to the plea, and the Baltimore City Court entered judgment on the demurrer for the appellee. From that judgment this appeal has been taken.

In support of the plea reference was made by the appellee to 1 Chitty, Pl. 100; *Boyce v. Bayliffe*, 1 Campb. 60, and *Ravlinson v. Orielt*, Carth. 96. The text of Mr. Chitty relies only on the case in 1 Campb. which was decided by Lord Ellenborough at *Nisi Prius*. The case in Carthew states that Holt, Ch. J. *dubitabat*, but the other three judges inclined that the plea was good.

Much as we respect the opinion of Mr. Chitty, we think that the great weight of authority is against the sufficiency of the plea.

The general rule is this: where the two suits are for the same cause of action and between the same parties, the pendency of the first may be pleaded in abatement of the second. The identity of the subject matter and of the parties must be alleged (Poe, Pl. 502; *Cook v. Burnley*, 78 U. S. 11 Wall. 659 [20 L. ed. 29]; *Bryan v. Scholl*, 109 Ind. 387, 7 West. Rep. 560); and the two suits must be pending in the courts of the same State. *Seever v. Clement*, 28 Md. 426.

Now, whilst the cause of action is alleged to be the same in both suits, the defendants are admitted by the plea to be different, and therefore the plea is undoubtedly bad unless an exception to the general rule obtains in the case of joint tortfeasors. No reason is perceived for the existence of such an exception, and no authorities have been cited to support it other than those already alluded to. It may be regarded as very generally accepted law in this country that where two or more persons jointly

commit an actionable tort the injured party may join them all in one action or he may bring a separate action against each, though he can have but one satisfaction. He has his election *de melioribus damnis*. Nothing short of the satisfaction of a judgment obtained against one, or his release, will operate to defeat a recovery by the same plaintiff against another joint trespasser in a subsequent action founded on the same tort. *Lovejoy v. Murray*, 70 U. S. 3 Wall. 1 [18 L. ed. 129]; *Sheldon v. Kibbe*, 8 Conn. 214; *Morgan v. Chester*, 4 Conn. 387; *Sanderson v. Caldwell*, 2 Aik. (Vt.) 195; *Blann v. Orocheron*, 20 Ala. 320; *Du Bose v. Marr*, 52 Ala. 506; *Knott v. Cunningham*, 2 Sneed, 204; *Page v. Freeman*, 19 Mo. 421; *Elliott v. Hayden*, 104 Mass. 180; *Woods v. Pangburn*, 75 N. Y. 498.

Why then should the mere pendency of another suit which has not yet even ripened into a judgment, and which may never do so, abate all subsequent suit against a different joint tortfeasor for the same trespass? No satisfactory reason can be given to support any such distinction. The principle governing the question involved here is clearly stated in *Livingston v. Bishop*, 1 Johns. 290, in the opinion delivered by Kent, *Chief Justice*. That case was sanctioned and approved in *Lovejoy v. Murray*, and referred to by this court in *Gunther v. Lee*, 45 Md. 66.

It was suggested at the argument that art. 47, § 2, of the Code allows but one action to be

brought for the same injury in cases of this character. This Statute, which gives a right of action in the name of the State for the use of the wife, husband, parent and child of a person whose death has been caused by negligence, provides "that not more than one action shall lie for and in respect of the same subject matter of complaint." It permits but one suit to be instituted against the same defendant for an injury resulting in death; and therefore all who have a right to unite as plaintiffs, but who omit to become parties, are excluded from bringing a subsequent action. *Deford v. State*, 30 Md. 208.

Its object was to protect a defendant from being vexed by several suits instituted by or in behalf of different equitable plaintiffs for the same injury when all the parties could, with perfect convenience, be joined in one proceeding. It never contemplated depriving a plaintiff of the right to sue separately different joint tortfeasors, though, of course, there can be but one satisfaction, no matter how many judgments may be recovered.

For the reasons we have given we are of opinion that the court below erred in overruling the demurrer and in entering judgment for the appellee. The plea was bad and the judgment must therefore be reversed and a new trial will be awarded.

Judgment reversed, and new trial awarded.

OREGON SUPREME COURT.

H. COOK, Admr., etc., of A. C. McDonald, Deceased, *Appt.*,
v.

Martin L. COOPER, Admr., etc., of George Cooper, Deceased, *et al.*, *Respts.*

(....Or.....)

*1. Where at a void foreclosure sale the mortgagee becomes the purchaser of

*Head notes by STRAHAN, J.

NOTE.—*Mortgage of real property; common-law doctrine.*

At the common law the ordinary mortgage was to all intents and purposes a conveyance of the legal estate, subject to be defeated by performance by the mortgagor of the condition by payment of the debt upon the prescribed day; and in case of default the estate of the mortgagee, which was before conditional, became absolute, "leaving to the mortgagor only an equity of redemption, which chancery will lay hold of and give effect to by compelling a reconveyance on equitable terms." *Shields v. Lozeur*, 34 N. J. L. 486; *Davis v. Teays*, 3 Gratt. 283; 1 Jones, Mort. § 9; *Coote*, Mort. 4th ed. 15.

This equitable right of the mortgagor was termed his "equity of redemption" which was eventually recognized as an estate in land capable of being devised, granted or entailed with remainders: an estate in which there may be *seisin*, while the mortgage in fee is considered as personal assets. *Casborne v. Scarfe*, 1 Atk. 608.

The equitable theory.

The mortgage is regarded primarily as a security for the debt, which is the principal fact, the interest L. R. A.

the mortgaged premises, and enters into the possession thereof, and then sells and attempts to convey such premises by deed, such deed operates as an assignment of the mortgage debt, as well as the mortgage securing the same, to the grantee in such deed, and each successive deed to said premises by persons holding under such mortgage must have the same effect.

2. If for any cause in the foreclosure suit, the proceeding is ineffectual to foreclose the mortgage, and the mortgagee purchases at a sale under such void proceedings, and

est of the mortgagee being merely a lien on the land,—a thing in action which may be assigned and transferred without conveyance of the land itself, and a personal asset which on the death of the mortgagee passes to his legal representatives, and not to his heirs. 1 Washb. Real Prop. chap. 16.

Under this system, after a redemption a deed from the mortgagee to the mortgagor is necessary to invest the latter with the full legal title, and a decree in the redemption suit directs such conveyance. 3 Pom. Eq. Jur. 151.

The estate and title of subsequent mortgagees are therefore regarded as purely equitable and a mortgage of the equity of redemption is necessarily an equitable mortgage; and this is the foundation of the English doctrine of "tacking," whereby a junior mortgagee without notice may buy in or procure a transfer of the first mortgage and thereby obtain precedence over the holder of an intermediate mortgage in the satisfaction of liens out of the mortgaged premises. *Marsh v. Lee*, 2 Vent. 337, 1 Cas. in Ch. 162; *Brace v. Duchess of Marlborough*, 2 P. Wms. 491; *Young v. Young*, L. R. 3 Eq. 801; *Péase v. Jackson*, L. R. 8 Ch. 576; *Prosser*

enters into the possession under such sale, his relation to the mortgaged premises is that of a mortgagee in possession.

3. Under § 326, Hill's Code, a mortgagee is precluded from recovering possession of the mortgaged premises after forfeiture by action; but if he can obtain possession of such premises in any lawful or peaceable mode, that is, without force, he may retain possession of such premises, as against the mortgagor or any person claiming under him subsequent to the mortgage, until his mortgage debt is paid.

4. A mortgagee in possession is not to be treated as a mere stranger would be who went upon the land of another and placed improvements thereon without the owner's consent. But, on the contrary, he may lawfully take down or carry away buildings erected by him on the land mortgaged, the materials of which were his own, and not so connected with the soil that they cannot be removed without prejudice to it.

5. Where the right to remove a chattel from another's land exists, and the party entitled to remove is in possession of the premises, he may exercise the right of removal while so in possession, and a resort to equity is unnecessary.

(November 13, 1899.)

APPEAL by plaintiff from a judgment of the Circuit Court for Multnomah County in favor of defendants in an action to recover damages for the removal of alleged fixtures from certain land. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Nicholas & Deady and Gearin & Gilbert for appellant.

See v. Rice, 28 Beav. 68; *Bates v. Johnson*, Johns. (Eng.) 304.

But this rule of "tacking" has been rejected by the courts of this country as being impossible under our registry system. 3 Pom. Eq. Jur. 221.

The American doctrine; modification of the English doctrine, legal and equitable combined.

Even in those States which regard the mortgage as in any sense conveying a legal estate many incidents of such title are abandoned. The mortgagee has the legal title, as between himself and the mortgagor, only so far as necessary to preserve the mortgage as a valid security, and the mortgagor as against all other persons is regarded as retaining the legal estate. *Kannady v. McCarron*, 18 Ark. 166; *Terry v. Rosell*, 32 Ark. 478; *Delahay v. Clement*, 4 Ill. 201; *Vansant v. Allmon*, 23 Ill. 80; *Carroll v. Ballance*, 26 Ill. 9; *Nelson v. Pinegar*, 30 Ill. 473; *Jackson v. Warren*, 32 Ill. 381; *Pollock v. Madison*, 41 Ill. 516; *Harper v. Ely*, 70 Ill. 581; *Clark v. Reyburn*, 1 Kan. 231; *Redman v. Sanders*, 2 Dana, 68; *Stewart v. Barrow*, 7 Bush, 368; *Woolley v. Holt*, 14 Bush, 788; *Blaney v. Bearce*, 2 Me. 132; *Wilkins v. French*, 20 Me. 111; *Stratton v. Cole*, 3 New Eng. Rep. 383, 75 Me. 553; *Jones v. Smith*, 4 New Eng. Rep. 689, 79 Me. 446; *Brown v. Stewart*, 1 Md. Ch. 87; *McKim v. Mason*, 3 Md. Ch. 186; *Leighton v. Preston*, 9 Gill, 201; *Evans v. Merriken*, 8 Gill & J. 47; *Jamieson v. Bruce*, 6 Gill & J. 73; *Sumwalt v. Tucker*, 34 Md. 89; *Timms v. Shannon*, 19 Md. 236; *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115; *Barnard v. Eaton*, 2 Cush. 304; *Brookover v. Hurst*, 1 Met. (Ky.) 695; *Ewer v. Hobbs*, 5 Met. 3; *Howard v. Robinson*, 5 Cush. 128; *Brown v. Cram*, 1 N. H. 169; *McMurphy v. Minot*, 4 N. H. 251; *Southerlin v. Mendum*, 5 N. H. 420; *Glass v. Ellison*, 9 N. H. 60; *Hobart v. Sanborn*, 13 N. H. 226; *Tripe v. Maroy*, 39 N. H. 439; 7 L. R. A.

Messrs. Moreland & Masters, for respondents:

Defendants had a right to remove the house. *Taylor v. Townsend*, 8 Mass. 411; *Waters v. Reuber*, 16 Neb. 99, 49 Am. Rep. 710; *Kibbe v. Campbell*, 34 La. Ann. 1163; *Little v. Willford*, 81 Minn. 173; *McKelway v. Armour*, 10 N. J. Eq. 115, 64 Am. Dec. 445; *Tyler v. Decker*, 10 Cal. 435; 1 Hillard, Real Prop. p. 8; *Wickliffe v. Clay*, 1 Dana, 591.

Defendants could recover in equity the value of the improvements under the circumstances of this case.

See Bright v. Boyd, 1 Story, 478, 2 Story, 607; *Taylor v. Cozart*, 4 Humph. 433, 40 Am. Dec. 655; *Scott v. Dunn*, 1 Dev. & B. Eq. 425, 80 Am. Dec. 177, note; *French v. Grevet*, 57 Tex. 278; *Hawkins v. Brown*, 80 Ky. 186; *Thomas v. Malcom*, 89 Ga. 328, 99 Am. Dec. 459; *McKelway v. Armour*, 10 N. J. Eq. 118; *Union Hall Assn. v. Morrison*, 39 Md. 281; *Hatcher v. Briggs*, 6 Or. 50.

Having a good and complete defense in equity to plaintiff's claim, defendants may avail themselves of the same in this action.

Onson v. Cown, 22 Wis. 329; *Estrada v. Murphy*, 19 Cal. 250; *Lestrade v. Barth*, 19 Cal. 673; *Pitcher v. Hennesey*, 48 N. Y. 428; *New York Ice Co. v. Northwestern Ins. Co.* 21 How. Pr. 296; *Phillips v. Gorham*, 17 N. Y. 270; *Bartlett v. Judd*, 21 N. Y. 200; *Lattin v. McCarty*, 41 N. Y. 107; *Hoppough v. Struble*, 60 N. Y. 430.

Strahan, J., delivered the opinion of the court:

This cause was tried by the court below with-

Hemphill v. Ross, 66 N. C. 477; *Ellis v. Humsey*, 66 N. C. 501; *State v. Ragland*, 75 N. C. 12; *Harkrader v. Lefly*, 4 Ohio St. 602; *Allen v. Everly*, 24 Ohio St. 97; *Randa v. Kendall*, 15 Ohio, 671; *Youngman v. Elmira & W. R. Co.* 65 Pa. 278; *Brobst v. Brook*, 77 U. S. 10 Wall. 519 (19 L. ed. 1002); *Tryon v. Munson*, 77 Pa. 250; *Conard v. Atlantic Ins. Co.* 26 U. S. 1 Pet. 441 (7 L. ed. 213); *Carpenter v. Carpenter*, 6 R. I. 542; *Waterman v. Matteson*, 4 R. I. 539; *Henshaw v. Wells*, 9 Humph. 568; *Vance v. Johnson*, 10 Humph. 214; *Faulkner v. Brockenbrough*, 4 Rand. 245.

Mortgagee entitled to possession.

As against the mortgagor, the mortgagee is entitled to possession at once, unless the mortgage itself shows a different intent. *Knox v. Easton*, 68 Ala. 345; *Welsh v. Phillips*, 54 Ala. 309; *Doe v. Moleskey*, 1 Ala. 708; *Grandin v. Hurt*, 80 Ala. 118; *Blaney v. Bearce*, 2 Me. 132.

The same rule applies in Illinois, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, Tennessee and Virginia.

That mortgagee is entitled to possession after default, see *Harmon v. Short*, 8 Smedes & M. 438; *Hill v. Robertson*, 24 Miss. 368; *Walcoo v. McKinney*, 10 Mo. 229; *Kennett v. Plummer*, 23 Mo. 142; *Cockrill v. Bane*, 13 West. Rep. 656, 94 Mo. 444; *Sutton v. Mason*, 38 Mo. 120; *Woods v. Hilderbrand*, 46 Mo. 284; *Johnson v. Houston*, 47 Mo. 227; *Reddick v. Gressman*, 49 Mo. 389; *Sanderson v. Price*, 21 N. J. L. 646, note; *Shields v. Lozeau*, 34 N. J. L. 493.

In Vermont, upon default, the mortgagee is entitled to possession, and may enter, or may immediately bring ejectment. *Lull v. Matthews*, 19 Vt. 322; *Hagar v. Brainerd*, 44 Vt. 294.

After default the mortgagee's legal estate is absolute, and the mortgagor's only interest is equi-

out the intervention of a jury, and the only questions of law we are required to consider arise upon the findings, which are as follows:

"(1) That A. C. McDonald, named in the complaint, died intestate on the 21st day of September, 1878, seised and possessed at the time of his death of the real property mentioned in the complaint, and described as lots one (1) and two (2) in block 120, Stephen's Addition to East Portland, Multnomah County, Or.

"(2) That said A. C. McDonald and his wife, on the 23d day of March, 1878, to secure the payment of part of the purchase price of the aforesaid real property for which said A. C. McDonald had given his promissory note, executed and delivered to B. Boesch, their vendor, a mortgage on said real property, which debt and mortgage were not paid at the date of the death of said A. C. McDonald.

"(3) That on the 25th day of August, 1879, said B. Boesch commenced a suit in this court, in the equity department thereof, against the widow and heirs of said A. C. McDonald, deceased, to foreclose said mortgage, though no administration of the estate of said deceased had been had, nor any administrator appointed for said estate, and said mortgage had not been nor has it yet been recorded; that a supposed service of summons in said suit was made on the defendants therein, by publication, as against nonresidents, and a decree of foreclosure regular in form was made and rendered by this court in said suit on the 15th day of October, 1879.

"(4) That pursuant to the decree of fore-

closure in said suit the lands in said mortgage described, being the same lots one and two, in block 120, in Stephen's Addition to East Portland, in this county, which are mentioned in the complaint herein, were sold at sheriff's sale on the 22d day of November, 1879, and were bid off by said B. Boesch; and, said sale having been duly approved by this court, a deed for said lots was in due form made by the sheriff to said Boesch, which purported to convey to said Boesch all the right, title, estate and interest which said A. C. McDonald had in said lots at the time of his death, which deed was duly recorded in the records of deeds for this county.

"(5) That said lots passed by a regular chain of conveyances, as alleged in the answer, from said B. Boesch to the defendant, Martin L. Cooper's intestate, the said George Cooper, deceased; the several purchasers under said Boesch down to George Cooper entering into possession of said lots, and exercising acts of ownership over the same.

"(6) That said George Cooper's immediate vendors were in actual possession of said lots, and said George Cooper took the advice of counsel concerning the title to said lots, and procured an abstract of the title thereof to be made, and the certificate of reputable attorneys of this court, declaring the title of the Forbes, the immediate vendors of said George Cooper, in and to said lots to be good and in fee simple; and said George Cooper thereupon purchased said lots, and paid the full value thereof in cash, and took a deed therefor; and went into the actual possession of the same on or about

table. *Paulling v. Barrow*, 32 Ala. 9; *Barker v. Bell*, 37 Ala. 354; *Edwards v. Farmers F. Ins. Co.* 21 Wend. 467; *Jackson v. Pierce*, 10 Johns. 414; *Smith v. Shuler*, 12 Serg. & R. 240; *Simpson v. Ammons*, 1 Binn. 175.

In Massachusetts his legal estate is ordinarily made absolute by a strict foreclosure rather than by a decree for a judicial sale. *Bradley v. Fuller*, 23 Pick. 1; *Hapgood v. Blood*, 11 Gray, 400; *Sparhawk v. Bagg*, 16 Gray, 588; *Steel v. Steel*, 4 Allen, 417; *Silloway v. Brown*, 12 Allen, 80; *Norcross v. Norcross*, 105 Mass. 255.

A strict foreclosure proceeds upon the theory that the mortgagee or purchaser has acquired the legal title and obtained possession of the estate, but that the right and equity of redemption have not been cut off or barred. *Jefferson v. Coleman*, 9 West. Rep. 73, 110 Ind. 515.

In such case, the legal title of the mortgagor having been acquired, the remedy by strict foreclosure is proper to cut off the right and equity of junior incumbrancers to redeem. *Ibid.*

Title of mortgage.

Until the mortgagee takes possession or files a bill to foreclose and for a receiver, the mortgagor is owner as to all the world, and is entitled to the rents and profits. *American Bridge Co. v. Heidelberg*, 94 U. S. 800 (24 L. ed. 144).

As against the mortgagee and those holding under him, the estate of the mortgagor is purely equitable; but as against all others, it is to all intents and purposes the true and legal ownership with all its incidents and qualities. *Middletown Sav. Bank v. Bates*, 11 Conn. 519; *Cooch v. Gerry*, 3 Harr. (Del.) 280; *Harper v. Ely*, 70 Ill. 581; *Georges Creek C. & I. Co. v. Detmold*, 1 Md. 225.

So he may recover possession of the land by an 7 L. R. A.

action at law. *Ellison v. Daniels*, 11 N. H. 274; *Parish v. Gilmanton*, 11 N. H. 298; *Great Falls Co. v. Worster*, 15 N. H. 412; *Whittemore v. Gibbs*, 24 N. H. 484.

Or he may maintain a legal action for injuries done to the estate by a third person. *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115; *Wilson v. Hooper*, 13 Vt. 653; *Hooper v. Wilson*, 12 Vt. 695; *Walker v. King*, 44 Vt. 601.

After default the mortgagee may pursue any or all remedies, legal or equitable, which he may have at the same time. *Fitzgerald v. Beebe*, 7 Ark. 310; *Gilchrist v. Patterson*, 18 Ark. 575; *Reynolds v. New Orleans Canal & Bkg. Co.* 30 Ark. 530.

He may obtain possession by ejectment. *Rockwell v. Bradley*, 2 Conn. 1; *Beach v. Clark*, 6 Conn. 354; *Chamberlain v. Thompson*, 10 Conn. 243; *Middletown Sav. Bank v. Bates*, 11 Conn. 519; *Newbold v. Newbold*, 1 Del. Ch. 310; *Karnes v. Lloyd*, 52 Ill. 118; *Erickson v. Rafferty*, 79 Ill. 209; *Brown v. Stewart*, 1 Md. Ch. 87; *Wilhelm v. Lee*, 2 Md. Ch. 322; *Buckley v. Daley*, 45 Miss. 538; *Carpenter v. Bowen*, 42 Miss. 28; *Buck v. Payne*, 52 Miss. 271.

Abandonment of the legal theory.

In some States, partly through the operation of statutes, and partly through the adoption of equitable doctrines by the law courts, the equitable theory that a mortgage is a mere security for the debt, and conveys no title to or estate in the mortgaged premises, is adopted. *McMillan v. Richards*, 9 Cal. 365; *Nagle v. Macy*, 9 Cal. 426; *Haffley v. Maier*, 13 Cal. 18; *Goodenow v. Ewer*, 16 Cal. 451; *Boggs v. Fowler*, 16 Cal. 559; *Fogarty v. Sawyer*, 17 Cal. 589; *Lord v. Morris*, 18 Cal. 487; *Dutton v. Warchauer*, 21 Cal. 609; *Kid v. Teeple*, 22 Cal. 255; *Skinner v. Buck*, 29 Cal. 253; *Bloodworth v. Lake*, 33 Cal. 255; *Jackson v. Lodge*, 36 Cal. 28; *Maak v. Wetzlaer*, 36 Cal. 247;

the 17th day of March, 1885, in good faith, and fully believing that he had a good title thereto, and wholly ignorant of any adverse title thereto.

"(7) That while said George Cooper was in possession of said lots, to wit, in the year 1886, he built upon said lots the dwelling-house described in the complaint, with material and funds wholly his own, and in good faith, without notice of any adverse title, and verily believing that he was the owner in fee of said lots, and of the whole thereof.

"(8) That on June 25, 1887, an action was begun in the Circuit Court of the United States for the District of Oregon, against said George Cooper by Angus McDonald, heir-at-law of said A. C. McDonald, in which said action said plaintiff, Angus McDonald, claimed to be the owner in fee of said lots hereinbefore mentioned, and demanded possession of the same; and said United States Circuit Court having jurisdiction did in said action, on the 28th day of November, 1887, adjudge that said Angus McDonald was owner in fee of said lots, and in possession thereof, and did in substance and effect adjudge that said George Cooper had no title to said lots, and that the decree of this court in the hereinbefore described suit of *Boeschen v. McDonald*, and the sheriff's deed aforesaid to said Boeschen, were invalid and of no effect.

"(9) That while said action in said United States circuit court was pending, and two days before said judgment therein had been rendered, to wit, on the 26th day of November, 1887, the said George Cooper, the defendant,

Martin L. Cooper's intestate, being still in possession of said lots, caused said dwelling erected by him as aforesaid on said lots to be removed therefrom, and had the same on the said 26th day of November, 1887, on the street near said lots, and afterwards removed the same, and placed it upon another lot belonging to said George Cooper, in the same block, and that in and by said removal of said house from said lots no injury was done to the soil of said lots, nor was there any injury to the inheritance, and said George Cooper removed nothing from said lots except what he had himself and with his own means placed thereon.

"(10) That the value of said houses at the time of removal was \$700.

"(11) That said defendant W. O. Allen did not remove, nor aid or assist or advise or encourage any other person to remove, said house; that said Martin L. Cooper, defendant, did employ men to remove said house, and did direct them in regard to the same; but that said Martin L. Cooper, in all that he did in and about the removal of said house, was only the agent for, and acted only for and in behalf of, said George Cooper, his intestate."

As conclusions of law the court finds, from the foregoing facts:

"(1) That the plaintiff is not entitled to recover from any of the defendants any sum whatever for said house, or the removal of the same.

"(2) That the defendants are entitled to judgment that they go without day, and recover their costs and disbursements from the plaintiff. E. D. Shattuck, Judge."

Carpentier v. Brenham, 40 Cal. 221; *Harp v. Calahan*, 46 Cal. 222; *Frink v. Leroy*, 49 Cal. 314; *Drake v. Root*, 2 Colo. 685.

Under the equitable theory, which has been very generally adopted by statute, the mortgage is merely a lien on the premises, and the mortgagee has no right to possession except by means of a foreclosure of the mortgage, the mortgagor having the right to possession until removed after a decree of foreclosure and a sale thereunder. *Davis v. Anderson*, 1 Ga. 176; *Seals v. Cashion*, 2 Ga. Dec. 76; *Ragland v. Justices*, 10 Ga. 65; *Elfe v. Cole*, 26 Ga. 197; *Jackson v. Carswell*, 34 Ga. 279; *United States v. Athens Armory*, 35 Ga. 344; *Burnside v. Terry*, 45 Ga. 621; *Vason v. Ball*, 56 Ga. 268; *Reasoner v. Edmundson*, 5 Ind. 393; *Francis v. Porter*, 7 Ind. 213; *Morton v. Noble*, 22 Ind. 160; *Grable v. McCulloch*, 27 Ind. 472; *Fletcher v. Holmes*, 32 Ind. 497; *Hall v. Savill*, 3 Greene (Iowa) 37; *Courtney v. Carr*, 6 Iowa, 238; *White v. Rittenmeyer*, 30 Iowa, 268; *Life Assn. of America v. Cook*, 20 Kan. 19; *Chick v. Willetts*, 2 Kan. 384; *Duclaud v. Rousseau*, 2 La. Ann. 168; *Gorham v. Arnold*, 22 Mich. 247; *Caruthers v. Humphrey*, 12 Mich. 270; *Wagar v. Stone*, 36 Mich. 364; *Adams v. Corriston*, 7 Minn. 456; *Donnelly v. Simonton*, 7 Minn. 167; *Berthold v. Holman*, 12 Minn. 335; *Berthold v. Fox*, 13 Minn. 501; *Parsons v. Noggle*, 23 Minn. 328; *Rice v. St. Paul & P. R. Co.* 24 Minn. 464; *Kyger v. Ryley*, 2 Neb. 20; *Hurley v. Estes*, 6 Neb. 339; *Davidson v. Cox*, 11 Neb. 260; *Hyman v. Kelly*, 1 Nev. 179; *Whitmore v. Shilverick*, 3 Nev. 238; *Waring v. Smyth*, 2 Barb. Ch. 119, 5 N. Y. Ch. L. ed. 680; *Besser v. Hawthorn*, 3 Or. 129; *Thayer v. Cramer*, 1 McCord, Ch. 896; *Nixon v. Bynum*, 1 Bailey, L. 148; *Annelly v. De Saussure*, 12 S. C. 489; *Wright v. Henderson*, 12 Tex. 48; *Mann v. Falcon*, 25 Tex. 271; *Walker v. Johnson*, 37 Tex. 127; *Wood v. Trask*, 7 Wis. 568.

Under this theory, a deed of trust to secure pay-
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ment of a debt is regarded as a mortgage, the legal title remaining in the grantor. *Kyger v. Ryley*, 2 Neb. 20; *Webb v. Hoselton*, 4 Neb. 306; *Walker v. Johnson*, 37 Tex. 127.

It is held otherwise under the Statute of Florida. *Soutter v. Miller*, 15 Fla. 625.

Rights of mortgagee in possession.

A mortgagee who obtains possession peaceably under the equitable theory will not be dispossessed until the debt is paid. *Eyster v. Garf*, 2 Colo. 223; *Packer v. Rochester & S. R. Co.* 17 N. Y. 28; *Hubbard v. Moulson*, 53 N. Y. 225; *Mickles v. Townsend*, 18 N. Y. 575; *White v. Rittenmeyer*, 30 Iowa, 268; *Roberts v. Sutherland*, 4 Or. 219; *Gillett v. Eaton*, 6 Wis. 30; *Tallman v. Fly*, 6 Wis. 244; *Fladland v. Delaplaine*, 19 Wis. 459; *Hennessey v. Farrell*, 20 Wis. 43; *Avery v. Judd*, 21 Wis. 263; *Brinkman v. Jones*, 44 Wis. 498; *Chase v. Peck*, 21 N. Y. 581; *Sahler v. Signer*, 44 Barb. 606; *Munro v. Merchant*, 26 Barb. 383; *Casey v. Buttolph*, 12 Barb. 637; *Jackson v. Delancy*, 13 Johns. 537, 7 Am. Dec. 403; *Moore v. Cable*, 1 Johns. Ch. 385; *Watson v. Spence*, 20 Wend. 280; *Phyfe v. Riley*, 15 Wend. 248; *Van Duyn v. Thayer*, 14 Wend. 234; *Bussey v. Page*, 14 Me. 132; *Pace v. Chadderdon*, 4 Minn. 499; *Pettengill v. Evans*, 5 N. H. 54; *Henry v. Confidence G. & S. Min. Co.* 1 Nev. 619; *Deu v. Wright*, 7 N. J. L. 175, 11 Am. Dec. 546; *Harris v. Haynes*, 34 Vt. 220.

A mortgagee in possession, selling part of the land, is chargeable with its value at the date of sale. *Turner v. Johnson*, 12 West. Rep. 701, 95 Mo. 431.

The right of a mortgagee in possession, or his assignee, to prevail against the grantee of the mortgagor, must have proceeded from the mortgagor prior to his conveyance to his grantee. *Berlaack v. Halle*, 22 Fla. 223.

"Supplemental Findings.

"That said mortgage mentioned in finding of fact No. 2 was not produced at the trial of this action, although due notice was served upon defendant and his attorneys to produce the same, nor was its absence accounted for other than by the statement by witness (Moreland) that he had it when foreclosure suit was pending, and had looked for it since this action was begun, but that it could not be found, and that said mortgage was never recorded in the office of the county clerk of Multnomah County, Or.

E. D. Shattuck, Judge."

1. It does not affirmatively appear from the findings of the court below for what reason the United States Circuit Court for the District of Oregon adjudged the title to the premises described to be in the heir of A. C. McDonald, but no doubt it was on the ground that the circuit court in which the foreclosure proceedings were had failed to acquire jurisdiction over the heir-at-law of A. C. McDonald, deceased. Nor is it material in the form in which this record is presented. The findings, in effect, show that there was an attempted foreclosure, followed by a sale of the property; that such sale was approved by the court, and a proper deed executed to Boesch, the plaintiff and mortgagee, who became the purchaser at the sale and entered into the possession by virtue of said deed. He subsequently sold his interest in said premises, which passed with the possession thereof by mesne conveyances to George Cooper, who erected the house thereon. These conveyances, if they failed to pass title to the lots described, operated as an as-

signment of Boesch's mortgage to the successive grantees named in said several deeds. *Robinson v. Ryan*, 25 N. Y. 320; *Winslow v. Clark*, 47 N. Y. 261; *Miner v. Beekman*, 50 N. Y. 337; *Murdock v. Chapman*, 9 Gray, 159; *Hinds v. Ballou*, 44 N. H. 619; *Smith v. Smith*, 15 N. H. 55; *Lamprey v. Nudd*, 29 N. H. 299.

If the Boesch mortgage was not foreclosed, it remained in full force and unsatisfied, and by the conveyances set out in the findings was owned by George Cooper at the time he placed the erections on the lots, and in such case his relation to the lots was that of a mortgagee in possession.

I am aware that it was said by this court in *Roberts v. Sutherland*, 4 Or. 219, that a mortgagee who obtains possession of the mortgaged premises with the assent of the mortgagor, after default of the latter, may retain such possession until payment of the mortgage debt. Such possession is a good defense against an action of ejectment brought by the mortgagor, so long as the mortgage debt remains unpaid. This is a correct statement of the law as far as it goes, but it does not go far enough. It is true Hill's Code, § 326, provides: "A mortgage of real property shall not be deemed a conveyance, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law." This provision of the Statute is copied from the Revised Statutes of the State of New York (2 Rev. Stat. p. 312, § 57); but after the enactment of this Statute it was held in that State that "if the mortgagee, after for-

Under this theory of the mortgage the mortgagor's interest is for all purposes, and under all circumstances, and between all parties, the legal estate in the premises with all the incidents and qualities of legal ownership; and the application of the term "equity of redemption" to this legal estate and its employment in the legislation of States adopting this theory of the mortgage is the occasion of constant misapprehension and confusion of thought. *Trim v. Marsh*, 54 N. Y. 608; *Chick v. Willetts*, 2 Kan. 364.

Mortgagee in possession.

A mortgagee in possession is entitled to rents and profits until his claim is wholly paid, as against one who became the wife of the mortgagor after the execution of the mortgage. *Wait v. Savage* (N. J.) 13 Cent. Rep. 348.

He will be subject to the duty of applying the rents and profits in discharge of the debt, and rendering an account of their receipt and application. *Chamberlain v. Connecticut Cent. R. Co.* 4 New Eng. Rep. 477, 54 Conn. 472; *Caldwell v. Hall*, 49 Ark. 508.

He is only amenable for rents received, unless guilty of negligence or fraud, but is not entitled to compensation for trouble in care of the property. *Turner v. Johnson*, 13 West. Rep. 701, 95 Mo. 431; *Stevenson v. Edwards*, 98 Mo. 622; *Lambertville Nat. Bank v. Boes* (N. J.) 11 Cent. Rep. 238.

He is only required to account for actual receipts less such sums as he may have paid out for taxes and necessary repairs, unless it is shown that more could have been realized by reasonable diligence. *Pinneo v. Goodspeed*, 9 West. Rep. 479, 120 Ill. 524.

Where possession was not only wrongfully taken by the mortgagee, but accompanied by force and fraud, on a suit to redeem he cannot be charged with less than the whole rental value during his possession. *Meigs v. McFarlan* (Mich.) 40 N. W. 7 L. R. A.

Rep. 246; *Brown v. South Boston Sav. Bank*, 148 Mass. 300.

Where mortgagee was in possession of a portion of the mortgaged land, under a parol agreement with the mortgagor, and rented a portion of land in his possession to a tenant on a rental of half of the crop, and the portion of the mortgage was set aside and delivered to him and was in his possession, replevin will not lie at the suit of the mortgagor against the mortgagee. *Byers v. Byers*, 9 West. Rep. 316, 65 Mich. 568.

A mortgagee in possession may make such repairs as are reasonably necessary for the preservation of the property, but cannot make permanent improvements or repairs which conduce merely to his comfort or convenience. *Raynor v. Drew*, 73 Cal. 307.

He is bound to keep the property without unreasonable deterioration, and is therefore credited with necessary repairs; but he has no right to enhance the value of the estate, and thus render it more difficult for the mortgagor to redeem. See *Quinn v. Brittain*, Hoff. Ch. 353; *Moore v. Cable*, 1 Johns. Ch. 385; *Bell v. New York*, 10 Paige, 49; 3 Pom. Eq. Jur. 205.

On redemption of the mortgage, he is entitled to be reimbursed for necessary repairs made on the premises. *Johnson v. Hosford*, 10 West. Rep. 254, 110 Ind. 578; *Stevenson v. Edwards*, 98 Mo. 622.

There is, however, no principle of law permitting the owner or mortgagor or their grantees, or a subsequent purchaser with notice of prior equities of the first purchaser, to make improvements on the premises, and have a prior lien therefor; but such improvements will pass upon sale of the premises. *Cable v. Ellis*, 8 West. Rep. 431, 120 Ill. 126.

Mortgagee obtaining possession may retain it till his debt is paid.

Prior mortgagee is entitled to retain possession

feiture, entered into possession, either by the consent of the mortgagor or by means of legal proceedings, he may defend himself there, at least till his debt is paid." *Van Dwyne v. Thayer*, 14 Wend. 234.

So it was said in *Phyfe v. Riley*, 15 Wend. 248: "Now, by the Revised Statutes, the mortgagee must complete his title by other proceedings before he brings his suit; but if the mortgagee, after forfeiture, obtains possession in some legal mode other than by an action, why should the mortgagor, or those claiming under him, recover the possession from the mortgagee without paying the money secured by it?"

Miner v. Beekman, *supra*, was a case where the mortgagee bid off the mortgaged premises at a void foreclosure sale, and entered into the possession of the premises; and the court held, if the defendants had acquired the rights of the mortgagee, they could defend their possession by virtue of the mortgage.

So *Shriver v. Shriver*, 86 N. Y. 575, was also a void foreclosure by reason of the owner of

the property not having been made a party to the suit, and at the attempted sale under the decree a stranger, and not the mortgagee, became the purchaser and entered into the possession, and the court by Folger, *Ch. J.*, said, distinguishing the case from *Miner v. Beekman*, *supra*: "The case is supposed to be like that of *Miner v. Beekman*, 50 N. Y. 337. It is different in an important particular. There the entry was by the mortgagee, who was also the purchaser at the sale. He thus became a mortgagee in possession, and could defend against the owner of the equity of redemption or his representative any action, except one for an accounting of the rents and profits and to redeem." And this seems to be the settled rule in New York. *Casey v. Buttolph*, 13 Barb. 637; *St. John v. Bumpstead*, 17 Barb. 100; *Munro v. Merchant*, 26 Barb. 383; *Winslow v. McCall*, 32 Barb. 241; *Randall v. Raab*, 2 Abb. Pr. 307; *Jackson v. Bowen*, 7 Cow. 18; *Watson v. Spence*, 20 Wend. 260; *Madison Ave. Baptist Church v. Baptist Church in Oliver St.* 78 N. Y. 82; *Trimm v. Marsh*, 54 N. Y. 599;

until his claim is fully paid. *Callanan v. Shaw*, 19 Iowa, 133.

As against a prior mortgagee in possession of the property, a receiver will not be allowed in favor of a subsequent mortgagee, as long as any part of the debt remains unpaid to the prior mortgagee. *Patton v. Accessory Transit Co.* 4 Abb. Pr. 235, 13 How. Pr. 502; *Quinn v. Brittain*, 3 Edw. Ch. 314; *Bolles v. Duff*, 35 How. Pr. 481; *Rapier v. Gulf City Paper Co.* 64 Ala. 390; *Callanan v. Shaw*, 19 Iowa, 133; *Trenton Bkg. Co. v. Woodruff*, 3 N. J. Eq. 210; *Rowe v. Wood*, 2 Jac. & W. 553.

A senior mortgagee, acquiring possession by consent of the mortgagor after a foreclosure sale under a junior mortgage, but before the expiration of the year for redemption, has the rights of a mortgagee in possession. *Jones v. Rigby* (Minn.) 43 N.W. Rep. 390.

The subsequent mortgagee must redeem from the prior mortgagee. See *Mahon v. Crothers*, 28 N. J. Eq. 567; *Cortleyou v. Hathaway*, 11 N. J. Eq. 86, 64 Am. Dec. 478; *Trenton Bkg. Co. v. Woodruff*, *supra*; *Schreiber v. Carey*, 43 Wis. 213; *Hiles v. Moore*, 15 Beav. 175; *Rowe v. Wood*, *supra*.

A prior mortgagee who has had possession of the mortgaged premises must account for rents and profits to the subsequent incumbrancer; but a subsequent incumbrancer in possession is not bound to account to the prior incumbrancer. *Leeds v. Gifford*, 4 Cent. Rep. 148, 41 N. J. Eq. 464.

A mortgagee out of possession of the mortgaged premises cannot be held accountable for the rents and profits thereof. *Van Dwyne v. Shann*, 5 Cent. Rep. 118, 41 N. J. Eq. 311.

A mortgagee in rendering an account of the amount due on his mortgage is bound to use all reasonable efforts to make it just and correct; but having done so, an unintentional error, the result of accident or mistake, without culpable negligence, will not effect a forfeiture of his security. *Gibbs v. Parsons*, 2 New Eng. Rep. 912, 64 N. H. 66.

A mortgagee, either in possession or out of possession, is not entitled to purchase the mortgaged estate at a tax sale, and set up the tax title as against the mortgagor or other mortgagees. It is to be presumed that he made the purchase for the common protection. *Hall v. Westcott*, 2 New Eng. Rep. 887, 15 R. I. 373.

Purchaser at foreclosure sale.

The purchaser will acquire title to the fixtures as a part of the realty. *Voorhees v. McGinnis*, 48 N. Y. 278; *Snedeker v. Warring*, 12 N. Y. 170; *Bishop v. L. R. A.*

Bishop, 11 N. Y. 123, 62 Am. Dec. 68; *Rice v. Dewey*, 54 Barb. 455; *Gardner v. Finley*, 19 Barb. 317; *Miller v. Plumb*, 6 Cow. 665, 16 Am. Dec. 456; *Robinson v. Preswick*, 3 Edw. Ch. 243; *Babcock v. Utter*, 32 How. Pr. 430, 1 Abb. App. Dec. 27; *Sullivan v. Toole*, 26 Hun, 206; *Main v. Schwarzwalder*, 4 E. D. Smith, 273; *Sands v. Pfeiffer*, 10 Cal. 258; *Clore v. Lambert*, 78 Ky. 224; *Wight v. Gray*, 78 Me. 297; *Union Bank v. Emerson*, 15 Mass. 159; *Lackas v. Bahl*, 43 Wis. 58.

The rules as to fixtures which pass to a purchaser on a mortgage foreclosure sale are the same as those which govern a conveyance from a grantor to a grantee. *Snedeker v. Warring*, *supra*. See *Bishop v. Bishop*, *supra*; *Bank of Utica v. Finch*, 3 Barb. Ch. 293, 299; *Robinson v. Preswick* and *Main v. Schwarzwalder*, *supra*; *Winslow v. Merchants Ins. Co.* 4 Met. 303, 38 Am. Dec. 368; *Union Bank v. Emerson*, *supra*; *Longstaff v. Meagoe*, 2 Ad. & EL. 187.

The grantor of a mortgagor, subject to the mortgage, cannot retain possession against a purchaser under foreclosure. *Chadwick v. Island Beach Co.* 10 Cent. Rep. 863, 43 N. J. Eq. 616.

A bona fide purchaser at a foreclosure sale of a senior mortgage, to which junior mortgagees were not made parties, who takes possession of the land and makes lasting and valuable improvements thereon, is entitled to credit therefor in a suit against him by the junior mortgagees to require him to redeem, and should not be charged with the rental value of the premises during his possession. *Higginbottom v. Benson*, 24 Neb. 461.

Permanent improvements pass to purchaser.

All additions of a permanent character by way of improvement are regarded as part of the mortgaged estate and will inure to the benefit of the holder of the mortgage, and will pass to the purchaser on a foreclosure sale. *Baird v. Jackson*, 36 Ill. 78; *Wood v. Whelen*, 33 Ill. 157.

A house erected on the premises by the mortgagor becomes part of the realty and passes with it to the purchaser at the mortgage sale. *Matzon v. Griffin*, 78 Ill. 477; *Dooley v. Crist*, 25 Ill. 551.

A bona fide occupant under claim of title, who erects permanent and valuable improvements, is entitled to compensation, at least as a set-off, against meane profits; but knowledge or notice of adversary rights is fatal to the claim for compensation, and a mortgagee who repudiates the relation, or a purchaser from him with notice, is regarded as a wrong-doer, and is not entitled to compensation. *Gresham v. Ware*, 79 Ala. 192.

Pell v. Ulmar, 18 N. Y. 189; *Craft v. Merrill*, 14 N. Y. 456.

And in such case it seems that an entry by the mortgagee after condition broken, without actual force, is sufficient.

In *Pell v. Ulmar*, *supra*, it is said: "Formerly the mortgagee could maintain ejectment, but this is prohibited by the Revised Statutes. 2 Rev. Stat. p. 812, § 57. If, however, the mortgagee obtains possession without force, he is entitled as well since as before the Statute to hold it against the mortgagor. *Van Duyne v. Thayer*, 14 Wend. 283; *Phyfe v. Riley*, 15 Wend. 248; *Watson v. Spence*, 20 Wend. 260; *Fox v. Lipe*, 24 Wend. 164; *Olmsted v. Elder*, 2 Sandf. 325."

On the point under consideration these authorities are fully approved by the court.

It results, therefore, that while a mortgagee is not permitted to maintain a possessory action to recover the mortgaged premises by reason of the default of the mortgagor, still, if he can make a peaceable entry upon the mortgaged premises after condition broken, he may do so, and may maintain such possession against the mortgagor and every person claiming under him subsequent to the mortgage, subject to be defeated only by the payment of his debt. This view of the law in no manner interferes

with the just rights of the mortgagor, and at the same time it does not sacrifice the interest of the mortgagee to the merest technicalities of the law, which have sometimes been permitted to prevail, and the mortgagee turned out of possession stripped both of the property and his mortgage debt as well.

2. Having reached the conclusion that George Cooper, at the time of the removal of the house mentioned in the pleadings, was a mortgagee in possession, he is not to be treated as a mere stranger would be, who went upon the land of another and placed improvements there without the consent of the owner. The rights of a mortgagee in possession, who had placed improvements on the mortgaged premises, came directly before the court in *Taylor v. Townsend*, 8 Mass. 411, where it was held that a mortgagee, after a recovery on a bill in equity by the mortgagor to redeem, and before possession taken under the judgment, may lawfully take down and carry away any buildings erected by him on the land mortgaged, the materials of which were his own, and not so connected with the soil that they cannot be removed without prejudice to it.

And *Ellwell*, on *Fixtures*, 237, says in reference to this case, that the same rule was here apparently applied as in the relation of landlord

Mortgagee as purchaser.

Where by statutory provision, or by the permission of the court, the mortgaged premises are purchased by the mortgagee or his assignee, such purchase does not extinguish the mortgage debt nor any balance that may remain unpaid. *Holcomb v. Holcomb*, 11 N. J. Eq. 281.

It does not necessarily follow that, by a mortgagee becoming the purchaser and taking title at the sale under the foreclosure, his mortgage is merged or extinguished in his legal title. *Benedict v. Gilman*, 4 Paige, 58; *Parker v. Child*, 25 N. J. Eq. 43; *Forbes v. Moffatt*, 18 Ves. Jr. 384, 394; *Mocatta v. Murgatroyd*, 1 P. Wms. 393; *Hinchman v. Emans*, 1 N. J. Eq. 100, 110; *Gibson v. Crehore*, 3 Pick. 475; *Hunt v. Hunt*, 14 Pick. 374, 384; *Duncan v. Smith*, 81 N. J. L. 325, 327; *Mulford v. Peterson*, 35 N. J. L. 127, 131; *Clos v. Boppe*, 23 N. J. Eq. 270; *Thompson v. Chandler*, 7 Me. 377, 380, 381; *Cooper v. Martin*, 1 Dana, 25; *Vanderkemp v. Shelton*, 11 Paige, 23.

The mortgagee as purchaser takes the title with notice of the defects, if any, in the foreclosure proceedings. *Boyd v. Ellis*, 11 Iowa, 97; *Corriell v. Doolittle*, 2 G. Greene (Iowa) 385, 389.

He cannot be heard to say that the sale is illegal or irregular where the holder of the subsequent mortgages and the mortgagor make no objection. *Andrews v. O'Mahoney*, 112 N. Y. 567.

Where he bid in the land on a judgment for more than the debt, he is liable to the person whose land was sold, and who elects to affirm the sale for the excess of the judgment over what he was entitled to. *Mitchell v. Weaver*, 118 Ind. 55.

Where he purchases on execution sale subject to this mortgage, the purchase money being paid by the debtor, and at the debtor's request conveyance is made to the wife of the debtor, the mortgagee does not thereby lose his right to foreclose his mortgage. *Corbett v. Howell*, 10 Ky. Law Rep. 793, 10 S. W. Rep. 653.

A mortgagee who becomes the purchaser on foreclosure is not entitled to ice cut by a lessee of the mortgagor before foreclosure although the house in which it was stored, the land on which the house was situated and the pond from which the ice was cut, were all sold under the mortgage. *Gregory v. Rosenkrans*, 72 Wis. 220.

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Removal of fixtures takes them out of the lien.

On a bill to foreclose a mortgage, where a building removed by the mortgagor in possession could not be returned to the mortgaged land, the remedy of the mortgagee is at law. *Betz v. Verner* (N. J.) 19 Atl. Rep. 208.

When buildings are severed from the mortgaged premises and become part of another freehold, the lien upon them is gone. *Harris v. Bannon*, 78 Ky. 568.

Where materials of a house were used in the construction of a house on other land, the right of property vested in the grantee of the land. *Peirce v. Goddard*, 22 Pick. 559.

And so where mill-stones were severed from the mill and sold by the mortgagor.

Where a house was floated off the lot by a flood, and sold, it was severed from the land and the lien thereon was lost. *Buckout v. Swift*, 27 Cal. 433.

Where property affixed to mortgaged land is severed and sold to a bona fide purchaser, it cannot be followed and reclaimed. *Hutchins v. King*, 63 U. S. 1 Wall. 53 (17 L. ed. 544); *Clark v. Reyburn*, 1 Kan. 251; *Gore v. Jenness*, 19 Me. 53; *Gowding v. Shea*, 103 Mass. 360; *Byrom v. Chapin*, 118 Mass. 308; *Kircher v. Schalk*, 39 N. J. L. 335; *Van Pelt v. McGraw*, 4 N. Y. 110; *Wilson v. Maltby*, 59 N. Y. 123; *Gardner v. Heartt*, 8 Denio, 232; *Lane v. Hitchcock*, 14 Johns. 213; *Kimball v. Darling*, 32 Wis. 684; *Citizens Bank v. Knapp*, 22 La. Ann. 117; *Codrington v. Johnstone*, 1 Deav. 520; *Fryatt v. Sullivan Co.* 5 Hill, 116; *Cooper v. Davis*, 15 Conn. 556.

But opinions differ in determining the rights of parties when fixtures are severed from the mortgaged lands; so in *Hoskin v. Woodward*, 45 Pa. 42, it is said that while a mortgagor may sell things usually intended for consumption and sale, yet in the case of a factory or other building, from whose use as it is its profits are to be derived, the fixtures which are necessary to its operation cannot be severed.

Where a mortgagor moved a dwelling to an adjoining lot belonging to his wife, without the knowledge of the mortgagee, but with her knowledge, it was held that the lien on the dwelling-house remained. *Hamlin v. Parsons*, 12 Minn. 108.

and tenant, and to this we see no objection. This party owned the materials used in the construction of that house. He did not intend to part with their ownership. He acted in good faith in placing them on another's land while he was in the lawful possession under the belief that he owned the same, and upon the discovery of his mistake removed his structure from the land without injury to it and before he was ousted. I confess it is difficult to see the justice of a rule of law that could by mere construction thus take one man's property and give it to another, or, what seems still more repugnant to every sense of right, to compel a party to pay for his own property. But this is authority for carrying the principle of the right to remove even further.

In *Tyler v. Decker*, 10 Cal. 485, D. purchased a lot of land at sheriff's sale, on execution, and entered into possession, and erected certain buildings thereon, and afterwards removed the buildings. On the same day the buildings were removed the defendants in the execution sold the premises to T., and a day or two afterwards T. redeemed the lot from the sale and then brought suit against D. to recover the value of the buildings. *Held*, That, as there was no evidence that the buildings were attached to the soil, T. could not recover.

Little v. Willford, 81 Minn. 173, is a case where a party made a deed of certain lands to "the trustees of M. E. Church for Elgin Circuit," for a church building, upon which a building was erected, and, the title failing because no granters were named in the deed, it was held the building was property removable.

So in *Wickliffe v. Clay*, 1 Dana, 585, it was decided that where one was in possession of land held bona fide as his own, and had erected

buildings thereon, he (or those claiming under him) might remove them without incurring any responsibility to the owner of the paramount title.

It was argued by counsel for the appellant that while it might be true that George Cooper would in equity have been entitled to claim compensation for the house placed on the land, or possibly have been entitled to retain the possession of the property until he had been paid for his improvements, as in *Hatcher v. Briggs*, 6 Or. 81, the right is purely equitable in its nature, and must be sought in that forum only. If George Cooper's heirs or legal representative were seeking compensation for betterments placed upon another's lands by him in his lifetime, no doubt appellant's contention might be sustained. If the improvements were of such a nature that they were not removable, such as grubbing, clearing land and the like, as in *Hatcher v. Briggs*, *supra*, then the only remedy open to him would be in equity, where complete relief would be administered on equitable principles; but when he has simply placed his own chattels on such lands under the honest belief that he owned such lands, and had reason so to believe, and acted in good faith in the matter, and upon the discovery of the true status of the title he removes such chattels, though they had been erected into a house, it is not perceived that he has in any manner injured the plaintiff, or that equity could be successfully invoked in such case. There is no occasion for the interposition of equity, for the reason that such party has exercised no right to remove his chattel, and he has no cause of suit against the owners of the land.

These conclusions lead to an affirmation of the judgment of the court below, and it is so ordered.

IOWA SUPREME COURT.

William BEARD *et al.*

v.

ILLINOIS CENTRAL R. CO., *Appt.*

(....Iowa....)

1. A carrier's duty is not limited to the transportation of goods delivered for carriage. He must exercise such diligence as is required by law to protect the goods from destruction and injury from any source which may be averted, and which in the exercise of care and ordinary intelligence may be known or anticipated.
2. A carrier that has accepted butter for transportation cannot escape liability for damage to the butter from the heat during transportation, by the fact that it did not have refrigerator cars which were ready for use, at least when it could have been carried safely by the use of ice in the cars, which were used.
3. The sealing of a car containing butter when received from a connecting carrier is no excuse for failure to put ice in the car if necessary to protect the butter from the heat.
4. A custom to take cars from connecting carriers without changing the goods cannot be invoked to protect from negligence in failing to transport the goods with care.

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5. The rate of charges as shown by the way bill of butter, if it does not express a contract to excuse the carrier from the exercise of the care required by law, although it is the rate for common cars, will not limit the care to be exercised by the carrier, or restrict its liability.
6. A petition charging negligence of a carrier in not taking proper precautions to preserve butter will admit evidence of a custom to put the butter into cold storage until refrigerator cars are ready to receive it.
7. A carrier has the burden of proving that goods were not in good condition when received from a connecting carrier.

(February 10, 1890.)

APPEAL by defendant from a judgment of the Superior Court for Cedar Rapids in favor of plaintiffs in an action to recover damages for injuries to certain butter while in defendant's possession for the purpose of transportation and alleged to have resulted from defendant's negligence. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Mills & Keeler*, for appellant:

The St. Louis, Alton & Terre Haute R. R. Co. was the agent of plaintiffs in turning over this butter to defendant.

It had full actual knowledge that the butter was to be, and would be, carried through to New Orleans without change, and in the manner in which it was actually forwarded, and impliedly so directed and consented on behalf of plaintiffs.

Marquette, H. & O. R. Co. v. Kirkwood, 45 Mich. 54; *Patten v. Union Pac. R. Co.* 29 Fed. Rep. 592; *Snow v. Indiana, B. & W. R. Co.* 109 Ind. 422.

Wetzel v. Chicago & Alton R. Co. 12 Mo. App. 599, is directly in point, and decisive against plaintiffs in this action.

The damage to this butter was caused by the ordinary action of the weather, and its own inherent tendency to damage by heat, for which the owner, and not the carrier is responsible.

Nelson v. Woodruff, 66 U. S. 1 Black, 156 (17 L. ed. 97); *Warden v. Greer*, 6 Waits, 424; *Story*, Bailm. par. 492 a, and cases; *Lawson*, Carr. p. 15, par. 14; 2 Am. & Eng. Encyclop. L. p. 858 (7).

Plaintiffs had the burden of showing that the butter was in good condition when it came into defendant's possession.

Marquette, H. & O. R. Co. v. Langton, 32 Mich. 251; *Marquette, H. & O. R. Co. v. Kirkwood*, supra; *Naugatuck R. R. Co. v. Beardsley Seythe Co.* 33 Conn. 218.

Messrs. Rickel & Crocker, for appellees: Failure to open the seals, thereby failing to acquire any information that defendant might have acquired by doing so, was negligence.

Dixon v. Richmond & D. R. Co. 74 N. C. 588, 18 Am. R. R. Rep. 99.

Having accepted the goods the carrier cannot escape liability by claiming that he had not the means at hand at time of acceptance with which to safely forward them.

2 Am. & Eng. Encyp. L. p. 788; *Hannibal & St. J. R. Co. v. Swift*, 79 U. S. 12 Wall. 262 (20 L. ed. 428); *Hellinwell v. Grand Trunk R. Co. of Canada*, 7 Fed. Rep. 76.

A railroad company by the very act of accepting goods for transportation thereby enters into an implied undertaking to furnish such cars and exercise such diligence as may be necessary for their safe transportation.

Merchants Dispatch Transp. Co. v. Cornforth, 8 Colo. 280, 25 Am. Rep. 759; *Wing v. New York & E. R. Co.* 1 Hilt. (N. Y.) 241; 2 Wood, Railway Law, p. 1582, §§ 429, 430; *Ogdensburg R. Co. v. Pratt*, 89 U. S. 22 Wall. 123 (22 L. ed. 827); *Hawkins v. Great Western R. Co.* 17 Mich. 62, 18 Mich. 427; *Sager v. Portsmouth, S. & P. & E. R. Co.* 31 Me. 235.

If the carrier is informed that the goods are perishable, or should know it from the nature of the goods, the carrier is bound to use all reasonable precautions and means to prevent loss.

2 Parsons, Cont. 5th ed. p. 162; *Hastings v. Pepper*, 11 Pick. 41; *Sager v. Portsmouth, S. & P. & E. R. Co.* 31 Me. 228; *Hawkins v. Great Western R. Co.*, *Merchants Dispatch Transp. Co. v. Cornforth* and *Wing v. New York & E. R. Co.* supra.

When property is perishable the law imposes a duty of the carrier to use diligence to guard it.

Ilexett v. Chicago, B. & Q. R. Co. 63 Iowa, 611.

It is a part of the common-law liability of 7 L. R. A.

the carrier in the selection of his vehicles to provide himself with those of the most approved modes of construction and such contrivances as are in approved use for the prevention of loss or damage to the goods he undertakes to carry.

Boscovitz v. Adams Exp. Co. 98 Ill. 523, 34 Am. Rep. 191; *Steinweg v. Erie R. Co.* 43 N. Y. 127. See also *Hutchinson*, Carr. § 294.

The habit of a single railroad company does not constitute a legal custom of any character.

Lawson, Usages and Customs, p. 41; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99.

If the "established and customary mode" defendant had of doing business with the St. Louis, Alton & Terre Haute Railway Company was negligent, it was no excuse in any event.

Hamilton v. Des Moines M. V. R. Co. 36 Iowa, 37; *Horic v. Chicago, R. I. & P. R. Co.* 75 Iowa, 683; *Allen v. Burlington, C. R. & N. R. Co.* 64 Iowa, 94; *Cole v. Goodwin*, 19 Wend. 251; *Lawson*, Usages and Customs, p. 187; *Sumner v. Southern R. Asso.* 7 Baxt. 345, 9 Am. & Eng. R. R. Cas. 18.

The presumption is that goods transported by several successive carriers came into possession of the last carrier in the same order and condition in which they were delivered to the first carrier, there being no direct evidence to the contrary.

Shriver v. Sioux City & St. P. R. Co. 24 Minn. 506, 31 Am. Rep. 855; *Leo v. St. Paul, M. & M. R. Co.* 30 Minn. 438; *Laughlin v. Chicago & N. W. R. Co.* 28 Wis. 204; *Smith v. New York Cent. R. Co.* 43 Barb. 225; *Dixon v. Richmond & D. R. Co.* 74 N. C. 588, 18 Am. R. R. Rep. 99; *Hutchinson*, Carr. § 761; 2 Am. & Eng. Encyclop. L. p. 788; *Brintall v. Saratoga & W. R. Co.* 32 Vt. 665.

Beck, J., delivered the opinion of the court:

1. The plaintiff delivered to the Burlington, Cedar Rapids & Northern Railway Company, at West Union, in two consignments, a large quantity of butter for transportation to New Orleans. The facts as to both separate consignments are identical. In the further statement of facts they will be referred to as but one transaction. The butter was put in refrigerator cars by the company first receiving it, and was transported therein over connecting roads to St. Louis, where it was transferred by drays across the river, and delivered to the St. Louis, Alton & Terre Haute Railway Company, known as the "Cairo Short-Line," and put in a common box car, and a lined fruit car, each of which was sealed, as is usually done, and sent on the same day to Duquoin, Ill., and delivered to defendant, which transported it to New Orleans in the same cars. The butter was not examined by defendant, and no attempt was made to ascertain its condition, on the probability that it could or would not be transported in the cars, without injury, to New Orleans. The Cairo Short-Line Company billed the butter to New Orleans at a rate of freight charged for common cars. It appears that the consignment took the usual course of transaction between defendant and the Cairo Short-Line, at Duquoin. It is not shown that plaintiff, the initial or connecting carrier, made any demand of defendant or the Cairo Short-Line Company for a refrigerator car, or for the pro-

tection of the butter from the effects of heat by the use of ice in the common car in which it was transported, and it is not shown that plaintiff, or the initial carrier, or the connecting companies to St. Louis, had any notice or information in any way, directly or indirectly, of the shipment of the butter without protection from the effects of the heat, nor did they have any notice or information of the practice and course of business adopted by defendant and the Cairo Short-Line at Duquoin. We are required to determine whether, under the law upon these facts, the defendant is liable. The discussion of this question will dispose of certain objections made by the counsel of defendant to the rulings of the court below upon instructions and admissions of evidence.

2. We will proceed to inquire as to the duty of defendant upon receiving the butter in a car from the Cairo Short-Line for transportation to New Orleans, without directions or instructions as to the character of the car in which it should be carried. A carrier's duty is not limited to the transportation of goods delivered for carriage. He must exercise such diligence as is required by law to protect the goods from destruction and injury resulting from conditions which, in the exercise of due care, may be averted or counteracted. He must guard the goods from destruction or injury by the elements; from the effects of delays; indeed, from every source of injury which he may avert, and which, in the exercise of care and ordinary intelligence, may be known or anticipated. Unknown causes, or those which are inherent in the nature of goods, and cannot be, in the exercise of diligence, averted, will not render the carrier liable. The nature of the goods must be considered in determining the carrier's duty. Some metals may be transported in open cars. Many articles of commerce, when transported, must be protected from rain, sunshine and heat, and must have cars fitted for their safe transportation. Live animals must have food and water, when the distance of transportation demands it. Fruit, and some other perishable articles, must be carried with expedition and protection from frost. So the carrier must attend to the character of the goods he transports. He is informed thereof by inspection of the freight bills, or by other papers accompanying the shipment.

In the case before us the marks on the package and the way-bill disclosed that the subject of shipment was butter. The employés of defendant were endowed with intelligence which taught them that the season was summer, when warm weather prevailed; that butter in common cars would be greatly injured by the ordinary heat of the climate; and that the butter, as it approached its destination, would be subject, by reason of the change of latitude, to greatly increased heat from the weather. All these things are familiarly known to all men. Surely, the law will presume that defendant's employés had full knowledge thereof. The law required the defendant, having received the perishable cargo involved in this suit, to exercise the care and diligence necessary to protect it; and if improved cars for the transportation of articles of commerce liable to injury from heat were in use, it was defendant's duty to use such cars in carrying the but-

ter. These views are supported by the following, among other cases: *Hewett v. Chicago, B. & Q. R. Co.* 63 Iowa, 611; *Sager v. Portsmouth, St. P. & E. R. Co.* 81 Me. 228; *Hawkins v. Great Western R. Co.* 17 Mich. 62; *Great Western R. Co. v. Hawkins*, 18 Mich. 427; *Ogdensburg R. Co. v. Pratt*, 89 U. S. 23 Wall. 123 [23 L. ed. 827]; *Wing v. New York & E. R. Co.* 1 Hilt. (N. Y.) 241; *Merchants Dispatch Transp. Co. v. Cornforth*, 8 Colo. 280.

As to the duty of defendant to use cars so constructed and used as to avoid injury from heat, see *Hutch. Carr.* § 294; *Boscovits v. Adams Exp. Co.* 98 Ill. 525; *Steinweg v. Erie R. Co.* 48 N. Y. 123.

3. But it is said (1) that defendant did not have refrigerator cars which it could have used on the day it received the butter; (2) that the cars were sealed; (3) that it was accustomed to haul the cars received from the Cairo Short-Line without changing the cargo. We may here assume that defendant will be excused from using refrigerator cars. But it is shown that the butter could have been carried safely by the use of ice in the box cars. It was defendant's duty to use it. But, having accepted the butter for transportation, defendant cannot escape liability for not safely transporting it, on the ground that it did not have cars sufficient for that purpose. *Hannibal & St. J. R. Co. v. Swift*, 79 U. S. 12 Wall. 262 [20 L. ed. 428]; *Hellivell v. Grand Trunk R. Co.* 7 Fed. Rep. 76; *Paramore v. Western R. Co.* 58 Ga. 385.

The sealing of the car was not to protect it from defendant, the carrier having it under control. Surely, if it was necessary for the protection of the goods, defendant had full power to enter the car, and failure to exercise the power was negligence. *Dizon v. Richmond & D. R. Co.* 74 N. C. 538.

The custom of the defendant and Cairo Short-Line cannot be invoked to protect one or both from negligence causing destruction to goods transported by them. A custom to take cars without changing the goods in them when their safety demanded it would be a custom based upon negligence, and cannot be regarded or enforced. *Hamilton v. Des Moines Valley R. Co.* 36 Iowa, 81; *Allen v. Burlington C. R. & N. R. Co.* 64 Iowa, 95.

4. It is said that the rate of charges, as shown by the way-bill, was for common cars, and the defendant, therefore, undertook to furnish no other kind. If the freight charges fixed in the way-bill do not express a contract that the butter may be transported so as to destroy its value, and that the carrier is excused from the exercise of the care required of him by law, we think the freight charges in no case will limit the care to be exercised by the carrier, and restrict his liability. The defendant was not restricted, by the rate of freight charges named in the way-bill, from claiming and enforcing the payment of a just compensation for charges incurred on account of outlays made in order to safely transport the goods. *Sumner v. Southern R. Assn.* 7 Baxt. 345.

Many of the rulings of the district court upon the admission of evidence and instructions, objected to by defendant, are in accord with the views we have expressed.

5. Evidence was admitted, against defend-

ant's objection, tending to show that a custom prevailed among carriers by railroads to put butter into cold storage, when refrigerator cars were not ready to receive it. This evidence was objected to on the ground that the petition contained no allegation of negligence by reason of the failure of defendant to put the butter into cold storage. But the petition does charge negligence on the part of the defendant in not taking proper precautions to preserve the butter. The evidence tends to show what precautions ought to have been taken in this case. Besides, the evidence serves to show that defendant's excuse for sending the butter in the common car, and for not retaining it until a refrigerator car on defendant's road came along, is not sufficient. It is shown that such a car was run on defendant's trains on two or three days each week.

6. The superior court, in the seventh instruction given, directed the jury that they could infer that the butter was in good order when received by defendant, from the fact that it was shipped in good condition, in a refrigerator car, for St. Louis. Of this instruction defendant complains. It is correct. The presumption arises that goods shipped in good order continue in that condition when in the hands of a connecting carrier. The burden

rests on such carrier to show that they were not in good condition when received by him. *Hutch. Carr.* § 761; *Shriver v. Sioux City & St. P. R. Co.* 24 Minn. 506; *Leo v. St. Paul, M. & M. R. Co.* 80 Minn. 488; *Laughlin v. Chicago & N. W. R. Co.* 28 Wis. 204; *Dixon v. Richmond R. Co.* 74 N. C. 588; *Paramore v. Grand Trunk R. Co.* 53 Ga. 385.

7. The defendant, in its answer, set up as a defense that plaintiffs had fully compromised this claim for loss of the butter with preceding connecting carriers, transporting the butter to defendant. The court withdrew the issue upon this defense from the jury, on the ground that there was no evidence supporting the defense. Of this ruling the defendant now complains. The court, we think, ruled rightly. The evidence totally fails to show a settlement. The most that could be said is that the evidence shows propositions for settlements, and agreements to settle. But it is not shown, as is alleged in defendant's answer, that there was in fact a settlement and payment thereon, and a discharge of the claim. The action of the court in this regard is correct. The foregoing discussion disposes of all the questions requiring consideration in this opinion.

The judgment of the District Court is affirmed.

ARKANSAS SUPREME COURT.

John M. DAVIS, Admr., etc., of Clarence Davis, Deceased, *Appt.*,

v.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN R. CO.,

AND TWO OTHER CASES.

(....Ark.....)

1. **The Act of 1883** (Mansf. Dig. §§ 5225, 5226) embodying the provisions of Lord Campbell's Act in regard to suits to recover damages for death resulting from the wrongful act, neglect or default of another, applies to all cases in which a recovery may be had under that Act regardless of the agency by which the injury was inflicted, and supersedes the Act of 1875 relating to suits for injuries by railway trains; hence such suits must be brought by the personal representative for the benefit of the widow and next of kin.

2. **That Act does not take away the right which survives** to the personal representative by § 5223, Mansf. Dig., to recover upon the cause of action for the injuries which accrued by the common law to the injured party in his lifetime; nor does it deprive a father of his right to maintain his common-law action for loss of services of his minor child. Therefore in the case of the death of a minor the three actions may be prosecuted at the same time and recoveries had in each and all of them.

3. **In an action by a father to recover for the loss of services** of his minor child by reason of injuries inflicted upon him by a third person, which result in his death, the recovery must be limited to the damages which accrued

during the period between the injury and the death, and cannot embrace those accruing after the death occurred.

4. **An employee does not, by entering the service, assume a risk of danger** incident thereto, which by reason of his youth and inexperience he does not know or appreciate, and to which the employer exposes him without warning him of it.

5. **Whether or not a youth employed in coupling cars had, or ought to have had, knowledge or appreciation of the danger** incident to the use of guard rails with no blocking between them and the main rails is a question for the jury.

6. **Although it is the duty of counsel** to present their prayers for instructions to the court, the court should embody no more than the substance of them in the charge, and should not give them *in extenso* as requested, to the jury.

(April 5, 1890.)

APPEALS from judgments of the Circuit Court for White County in actions to recover damages alleged to have accrued from a death due to defendant's negligence. *Reversed.*

The facts are fully stated in the opinion.

Messrs. Sanders & Watkins, for appellant:

The first cause of action was based upon § 5223, Mansf. Dig., and is simply the cause of action which accrued to the deceased by reason of the injury, and covered only the period from the injury to the death of the injured party. The Act providing for this cause of action has not been repealed.

Ward v. Blackwood, 41 Ark. 295.

A youth of immature years, inexperienced, and naturally and necessarily incapable of understanding and appreciating the dangers and

NOTE.—See also *Crisack v. Merchants Woolen Co.* (Mass.) 6 L. R. A. 732.

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risks incident to the service such as he was called on in this case to engage in, does not waive or assume the unknown hazards incident to his employment.

Jones v. Florence Min. Co. 66 Wis. 277; *Sandborn v. Madera Plums Co.* 70 Cal. 261; *Russell v. Minneapolis & St. L. R. Co.* 82 Minn. 283; *Cook v. St. Paul, M. & M. R. Co.* 84 Minn. 45; 32 Alb. L. J. 319; *Smith v. Penninsular Car Works Co.* 60 Mich. 502; *Huhn v. Missouri Pac. R. Co.* 10 West. Rep. 405, 92 Mo. 440, 81 Am. & Eng. R. R. Cas. 221; *Hulehan v. Green Bay, W. & St. P. R. Co.* 68 Wis. 520; *Colbert v. Rankin*, 72 Cal. 197; *Kane v. Northern Cent. R. Co.* 128 U. S. 91 (32 L. ed. 339); *Franklin v. Winona & St. P. R. Co.* 87 Minn. 409; *Snow v. Housatonic R. Co.* 8 Allen, 441; *Coombs v. New Bedford Cordage Co.* 103 Mass. 572; *Sullivan v. India Mfg. Co.* 118 Mass. 396; *Grieze v. Frost*, 8 Fost. & F. 622; *Gilman v. Eastern R. Co.* 13 Allen, 433; *Union Pac. R. Co. v. Fort*, 84 U. S. 17 Wall. 558 (21 L. ed. 789); *Parkhurst v. Johnson*, 50 Mich. 70; 8 Wood, Railways, note 2, p. 1483; 2 Thompson, Neg. 977; *Little Rock, M. R. & T. R. Co. v. Leverett*, 48 Ark. 338.

Messrs. Dodge & Johnson, for appellee:

Section 5223 of Mansfield's Digest was repealed by sections 5225 and 5226.

Little Rock & Ft. S. R. Co. v. Townsend, 41 Ark. 388.

An administrator has no legal capacity under the laws of Arkansas to sue for the death of a minor, for the reason that under section 8 of the Act of February 3, 1875, that right devolved upon, and survived alone to the father, who was living at the time of the institution of the action.

See *Lehigh Iron Co. v. Rupp*, 100 Pa. 95, 7 Am. & Eng. R. R. Cas. 25; *Litchfield Coal Co. v. Taylor*, 81 Ill. 590; *St. Louis, I. M. & S. R. Co. v. Yocum*, 84 Ark. 493; Acts 1875, p. 133.

A suit by the father for such wrongful or negligent act bars all other actions, whether instituted by an administrator or other legal representative.

Sheldon, Subr. § 230; *Houston & T. C. R. Co. v. Moore*, 49 Tex. 31; *Sibley v. Railiffe*, 50 Ark. 477.

The knowledge of the employé, of the character of the guard rail, and his election to work with it in the condition in which it was constructed, bars all right of recovery for injuries resulting therefrom, for the reason that he assumes the risk as one of the usual hazards of the employment.

Wood v. Locke, 147 Mass. 605; *Pingree v. Leyland*, 135 Mass. 398; *Moulton v. Gage*, 138 Mass. 390; *Leary v. Boston & A. R. Co.* 139 Mass. 580; *Taylor v. Carew Mfg. Co.* 140 Mass. 150; *Rains v. St. Louis, I. M. & S. R. Co.* 71 Mo. 164, 5 Am. & Eng. R. R. Cas. 610; *Crutchfield v. Richmond & D. R. Co.* 78 N. C. 800; *Piquegno v. Chicago & G. T. R. Co.* 52 Mich. 40, 13 Am. & Eng. R. R. Cas. 210; *Batterson v. Chicago & G. T. R. Co.* 49 Mich. 184.

Cockrill, Ch. J., delivered the opinion of the court:

These appeals involve three suits brought against the railway on account of an injury to a minor resulting in his death. Two are by the personal representative of the minor—one of them for the benefit of his estate, the other

for the benefit of the next of kin. The third is an action by the father of the minor to recover for the loss of his son's services during his minority.

The question presented at the threshold of the cases is, Who can maintain action against a railroad for an actionable injury resulting in the death of a minor?

The answer involves a consideration of the common law and the statutes on this subject.

The cause of action which accrued to the injured party by the common law survives to his administrator after his death by virtue of a provision of the Revised Statutes of 1838, which is carried into Mansfield's Digest as section 5223.

The third section of the Act of February 3, 1875, prescribed that when a wife was killed by a railway train, the husband should sue; when a minor was killed, the father, mother or guardian should sue; in all other cases the suit was to be by the legal representative. Acts 1875, p. 133.

The Act applied only to injuries by the trains of railways.

In 1883 another Act upon the subject was passed, embodying in this particular the provisions of the English Statute of 9 and 10 Victoria, known as Lord Campbell's Act. Mansf. Dig. §§ 5225, 5226.

It contains no express repeal of either of the other provisions, and it is argued that as the Act of 1875 is a special Act relating only to railways, none of its provisions are abrogated by the subsequent General Act, but, unless it supersedes the Act of 1875 in so far as it affects this inquiry, the law is left in an anomalous condition. It would stand thus: If an actionable injury resulting in death should occur by an agency other than the trains of a railway, the widow and next of kin would enjoy the benefit of damages recovered therefor under the last Act; but if the injury was inflicted by the trains of a railway, the recovery would be solely for the benefit of the estate, because the last Act would not apply in such cases. *Little Rock & Ft. S. R. Co. v. Townsend*, 41 Ark. 382.

Again, a mother dependent upon her adult son for support could recover nothing for a culpable injury to him by the trains of a railway resulting in death, but could recover if the injury was inflicted by a natural person, a street railway or other corporation, or perhaps by a steam railway by other means than through its trains. We cannot attribute an intention to the Legislature to work out such a result. As if to dispel all doubt as to the intent to extend the benefits of the last Act to the widow and next of kin of the deceased in all classes of cases, the Act declares that it shall apply in every case where "the person who, or the company or corporation which," is liable for the injury, is sued. The reasonable construction of the Act is that it applies to all cases in which a recovery may be had regardless of the agency by which the injury was inflicted. Such has been the accepted construction of the Act by bench and bar without an express ruling on the point. See *Fordyce v. McCants*, 51 Ark. 509; *Little Rock & Ft. S. R. Co. v. Townsend*, *supra*.

The question then is, What is the effect of this Statute (Mansf. Dig. §§ 5225, 5226) upon the

general provision (Id. 5223) regulating the survival of actionable wrongs to the administrator or executor of the injured person? We are not without authority upon the question. The English rule which is commonly followed by the courts of the States whose statutes embody the provisions of Lord Campbell's Act is that the right of action given by the latter Statute to the personal representative of one whose death has been caused by the default of another is created by the Statute, and is not a continuation of the right of action which the deceased had in his lifetime, although the new right, it has been ruled, arises only by preserving the cause of action which was in the deceased. If the deceased never had a cause of action none accrues to his representative or next of kin. The right which accrued to the deceased reverts to his administrator by virtue of the former Statute (Mansf. Dig. § 5223); the newly created right results from an accrual on the death of the injured party. Both actions are prosecuted in the name of the personal representative where there is one, and may proceed *pari passu* without a recovery in the one having the effect of barring a recovery in the other, because the suits are prosecuted in different rights and the damages are given upon different principles to compensate different injuries. One is for the loss sustained by the estate and for the suffering from the personal injury in the lifetime of the decedent, the recovery in which goes to the benefit of the decedent's creditors, if there are any; the other takes no account of the wrongs done to the decedent, but is for the pecuniary loss to the next of kin, occasioned by the death alone. The death is the end of the period of recovery in one case and the beginning in the other. In one case the administrator sues as legal representative of the estate, for what belonged to the deceased; in the other he acts as trustee for those upon whom the Act confers the right of recovery for the pecuniary loss inflicted upon them. *Blake v. Midland R. Co.* 13 Q. B. 98; *Pym v. Great Northern R. Co.* 2 Best. & S. 759; *Barnett v. Lucas*, 6 Ir. Rep. C. L. 247; *Needham v. Grand Trunk R. Co.* 38 Vt. 294; *Ansonia B. & O. Co. v. Babbitt*, 74 N. Y. 896; *Littlewood v. New York*, 89 N. Y. 24; *Vicksburg & M. R. Co. v. Phillips*, 64 Miss. 693; *Hulbert v. Topeka*, 34 Fed. Rep. 510; *Fordyce v. McCants*, *supra*.

The statutes under which the two actions are brought do not therefore cover the same ground; there is no repugnancy between them, and the latter does not impair the right conferred by the former. *Needham v. Grand Trunk R. Co.* *supra*; *Com. v. Metropolitan R. Co.* 107 Mass. 236.

We are aware that the cases are not harmonious to this effect. The conflicting arrays are marshaled in an elaborate article on the subject in 37 Am. Law Reg. pp. 885, 513. But the position assumed above is, as we conceive, sustained by principle and the weight of authority.

The same reasons which prevent the right given by the Statute to the next of kin from being exclusive of that which accrued to the decedent and survived to his administrator preserve the right of the father to maintain his common-law action against the railway for the deprivation of his minor child's services.

The Statute confers no right of recovery

upon the father for the loss of services prior to the minor child's death, nor was it intended to deprive him of any right. Its object was to enable him, through the personal representative, to recover the value of the services of which he is deprived, just as he recovers for any other pecuniary loss which he sustains by the death.

But where the injury resulted in death, the father's right of recovery by the common law was limited to the interim between the disabling injury to the child and its death. His right of recovery was restricted to the value of the minor's services and the cost of medical attendance and nursing to the time of death. The right fell with the life of the minor. This was upon the theory that no civil action would lie for a right springing from the death of a human being. The application of the rule to a case like this has been ably contested and denied (see opinion by Judge Dillon in *Sullivan v. Union Pac. R. Co.* 8 Dill. 334), but the question is not an open one upon authority. *Little Rock & Ft. S. R. Co. v. Barker*, 38 Ark. 350; *Little Rock & Ft. S. R. Co. v. Townsend*, *supra*; *Mobile L. Ins. Co. v. Brame*, 95 U. S. 754 [24 L. ed. 580]; *The Harriaburg*, 119 U. S. 199 [30 L. ed. 358]; Cooley, Torts, § 282.

It follows from these views that the court erred in dismissing the action prosecuted by the administrator for the benefit of the estate; and also in permitting the plaintiff in his suit as parent to recover the value of his minor son's services after the latter's death. Damages accruing from that cause could be recovered only in the suit by the administrator, prosecuted for the benefit of the father as next of kin. In that suit the verdict was for the railway company and we are asked to reverse it upon the ground that the court's charge to the jury is erroneous.

While the plaintiff's intestate, who was a youth eighteen years old and of limited experience in railway matters, was in the discharge of his duty in uncoupling the cars of one of the defendant's trains in its yard at Knobles where he was employed, his foot caught in a space between the guard and main rails of the track, and he was injured by the moving train. The testimony was conflicting upon the question whether a block in the space where the boy's foot was caught could be used so as to lessen the hazard of the employé without enhancing the danger of derailing the trains.

The question for the jury's consideration was not whether the railway company was guilty of negligence in failing to block the space between the main and guard rails, because even if the failure to do that could upon the evidence adduced be found to constitute negligence (as to which see *Chicago, R. I. & P. R. Co. v. Lonnegan*, 118 Ill. 45, 6 West. Rep. 59; *Rush v. Missouri Pac. R. Co.* 36 Kan. 129, 28 Am. & Eng. R. R. Cas. 488 and note; *Mayer v. Chicago R. I. & P. R. Co.* 63 Iowa, 562; *Huhn v. Missouri Pac. R. Co.* 10 West. Rep. 405, 92 Mo. 440, 31 Am. & Eng. R. R. Cas. 221), the proof shows that the deceased continued in the service after he knew, or, what is the same thing, had full opportunity to know, that the rails were unblocked. *Little Rock, M. R. & T. R. Co. v. Leverett*, 48 Ark. 333.

But service about the unblocked rails was attended with danger, and the knowledge of the

fact that the rails were unblocked did not necessarily imply knowledge of the attendant danger. Knowledge of the danger was itself a question of fact, and if the jury believed that the deceased, by reason of his youth and inexperience, did not know of or appreciate the danger incident to service about the unblocked rails, and that the Company had exposed him to the danger without warning him of it, they should have found that the risk was not one he had assumed by entering the service. *Little Rock, M. R. & T. R. Co. v. Leverett*, 48 Ark. 383; *Fones v. Phillips*, 89 Ark. 17; *Bauer v. St. Louis, I. M. & S. R. Co.* 46 Ark. 396; *Jones v. Florence Min. Co.* 66 Wis. 268.

It is useless to follow the charge on these points. The duty of the master to instruct the young and inexperienced servant so as to enable him to appreciate the danger attending the employment was submitted to the jury in an instruction given on behalf of the plaintiff, while the charge given at the instance of the defendant submitted the case as though there were no question of inexperience in the servant presented by the evidence. That was at least misleading and its tendency was to confuse the jury. But there was positive error in the charge in saying to the jury, in effect, that the intestate's knowledge of the fact that the rails were unblocked was knowledge of the attendant danger. Whether he had knowledge of or appreciated the danger or ought to have done so, was a question for the jury to determine upon the facts and circumstances shedding light upon the question. The charge is made up wholly of requests for instructions from the parties, and the two theories of the case presented by them are not so consistent and harmonious as to render it an easy task for the jury to determine where their duty lay. The fault is inherent in the practice of giving in charge to the jury the requests for instructions prepared by counsel. They are not uncommonly framed with a view to giving the greatest advantage to the side which presents them,

and do not in that event tend to lighten the labors of the jury; and when they are accurately and fairly framed on both sides and involve no contradictions, the issues are presented in disconnected propositions of law which the jury will find more difficult to comprehend than in a charge presenting all the issues on a single phase of the case together in close contrast, and presenting the whole law of the case as emanating from the court without apparent instigation from either side. What can be a greater paradox in the administration of justice or more confounding to a jury than for a court to say to them, as is sometimes done, "For the plaintiff, the court declares the law to be thus; for the defendant, so, and on its own motion as follows," as though there were three sides to a single legal proposition between which the jury are at liberty to choose?

It is the duty of counsel to present their prayers for instructions in order to aid the court and to show their position in the case on appeal, but the better rule for the court would be to treat the request only as counsel's suggestions of what they desire the court to call the jury's attention to, and to embody no more than the substance of them in the charge.

The records of this court bear abundant testimony of the success of this practice at the hands of the learned and usually careful and painstaking judge who tried this cause. The practice of making up the charge from the requests for instructions prepared by counsel leads to the constantly recurring argument in this court that the charge to the jury is inconsistent and misleading and has resulted in the remanding of many causes, and perhaps in the miscarriage of justice in many others by the indulgence of the presumption that the jury was able to reconcile the apparent inconsistencies or penetrate the obscurities of the charge.

For the errors indicated each of the judgments will be reversed, and the causes remanded for further proceedings.

CONNECTICUT SUPREME COURT OF ERRORS.

Dwight PIERCE

2.

Frank H. WHITTLESEY, *Appd.*

(58 Conn. 104.)

1. An agreement between an employer and employe that either shall forfeit two weeks' wages by terminating the employment without two weeks' notice thereof, is not unreasonable, and is not affected by Gen. Stat., § 1748, imposing a penalty upon an employer who withholds any part of the wages of any person because of any agreement requiring notice before leaving the employment. Two weeks' wages of the employe quitting without notice being forfeited are not due him, and therefore a refusal to pay them is not a withholding of any part of his wages.

NOTE.

Substantial breach of contract resulting in more than nominal damages to the other party must
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2. Where one employed under a valid contract, providing that in case he leaves the service without giving two weeks' notice he shall forfeit two weeks' wages, leaves without giving the required notice and sues to recover the wages forfeited, such forfeiture may be relied on as a defense, although no special damage is alleged or shown.

(December 16, 1899.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for Hartford County in favor of plaintiff, upon appeal from a justice of the peace, in an action brought to recover the amount alleged to be due for the rendition of certain personal services. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. J. W. Johnson for appellant.

Mr. M. M. O'Sullivan for appellee.

exist before liability attaches to pay liquidated damages. *Hathaway v. Lynn* (Wis.) 6 L. R. A. 551.

Carpenter, J., delivered the opinion of the court:

This is an action by an assignee of a claim for personal services. The answer is that Thomas Nolan, the assignor of the claim, entered the employment of the defendant in June, 1888, under an agreement that if he should at any time desire to leave the employment of the defendant, he should give him two weeks' notice thereof; and that in case he should leave his employment without giving two weeks' notice of his intention to do so, he should forfeit two weeks' wages to the defendant; and it was also agreed that the defendant should give Nolan two weeks' notice if he desired to dismiss him from his employment, and in case he failed to give such notice he should forfeit to him two weeks' wages; that he entered into the employment of the defendant and there remained until October 16, 1888, when he left without giving two weeks' notice and without just cause; and that the two weeks' wages claimed by the plaintiff are the same two weeks' wages forfeited by him, etc.

The plaintiff denied all the allegations in the answer. On that issue the cause was tried in the court below, and the allegations of the answer found true, and judgment rendered for the plaintiff on the ground that it did not appear, and was not alleged, that the defendant had suffered damages from Nolan's leaving his employment without notice. The defendant appealed to this court.

Questions of pleading and practice are raised, but we pass them and will consider the case and dispose of it upon its merits. The case was submitted without oral argument, counsel for the defendant filing a printed brief and counsel for the plaintiff filing no brief. The defendant's counsel proceeds upon the theory that the defense was held insufficient by reason of the Statute (§ 1748, Gen. Stat.), while it may be fairly inferred from the record that the court overruled the defense for the reason that no special damage was alleged or shown.

Considering the case in either aspect, or in both, we are constrained to say that we think the court erred.

The section of the Statute referred to is as follows: "Any person or corporation who shall withhold any part of the wages of any person, because of any agreement, expressed or implied, requiring notice before leaving the employment, shall forfeit fifty dollars, half to him who shall sue therefor and half to the State."

Here a penalty is prescribed for doing an act; hence the act is impliedly prohibited. What is the act? Simply withholding payment for the reason given. A contract requiring notice is lawful, as there is no penalty imposed for making it. It is withholding wages that comes under the consideration of the Statute, and not the making of the contract. Such a contract may be made and enforced, if it can be done without withholding wages.

The spirit of the Act, and perhaps its letter, forbids the setting up of the broken agreement as a defense to an action for wages; that would be using such agreement as a means of withholding payment.

The distinction between resisting an action for wages and bringing an action for damages is not new. *Hunt v. The Otis Co.* 4 Met. 464, 7 L. R. A.

decided in 1842, turned on that distinction. But it was not alone, or principally, for cases in court that the Act was passed. A refusal to pay for the reason given by the Statute, either with or without a suit, is an offense. If this case was defended solely on the ground of a broken agreement to give notice, it would be difficult to deliver it from the operation of the Statute. But the agreement is more extensive. It is coupled with a like agreement by the defendant. Each party makes precisely the same agreement. Each party agrees to give the same notice, and in case of failure to submit to the same forfeiture—Nolan to lose two weeks' wages, and the defendant to pay two weeks' wages in addition to payment for services actually rendered. In this there was nothing oppressive, one-sided, unfair or unreasonable. Presumptively it was mutually advantageous. Whatever may be said of a unilateral obligation by an employe, it can hardly be said that the Legislature intended to prohibit a fair and reasonable agreement in which both parties assume the same obligation.

Even if it be conceded that such legislation would be constitutional, we should expect to find the intent expressed in direct and unequivocal language. We cannot give language of doubtful import any such effect by implication or construction.

The Act was passed for the benefit of the employe—to protect him against injustice and oppression. So far as effect can be given to that intention without violating important principles, it is well. In cases of a mere promise by an employe to give notice of his intention to terminate a contract, the Legislature may well say that the employer shall not take advantage of it to withhold wages, and the courts may well enforce the restriction. But when it is a mutual agreement on equal terms another principle is to be considered. Let us illustrate by a supposed case. If the defendant had discharged Nolan without giving the agreed notice, and Nolan had brought a suit to recover the two weeks' wages agreed to be forfeited, is it not clear that the defendant could not have set up this Statute as a defense? The agreement and the acts of the parties are neither within the letter nor spirit of the Act. If the Statute does not annul the agreement as to one, why should it as to the other? If it does, it makes the contract void as to one, leaving it in force as to the other—a result which the Legislature could not have intended.

But the contract is not only mutual, but it covers ground otherwise not contemplated by the Statute. It provides in direct terms that a violation by either party shall work a forfeiture of two weeks' wages—that is, they agree upon the amount of damages in case of a breach—liquidated damages. It is not an extravagant sum, it is moderate and reasonable; large enough to insure a probable compliance, and not large enough to make it inequitable to enforce it. Besides, the duty required is light, imposing no hardship, so that the forfeiture can be easily avoided. With such a contract it cannot be said that wages were withheld because of a mere agreement to give notice. They were withheld because Nolan in a fair contract upon a sufficient consideration agreed to relinquish them. By their contract no

fact that the rails were unblocked did not necessarily imply knowledge of the attendant danger. Knowledge of the danger was itself a question of fact, and if the jury believed that the deceased, by reason of his youth and inexperience, did not know of or appreciate the danger incident to service about the unblocked rails, and that the Company had exposed him to the danger without warning him of it, they should have found that the risk was not one he had assumed by entering the service. *Little Rock, M. R. & T. R. Co. v. Leverett*, 48 Ark. 888; *Fones v. Phillips*, 89 Ark. 17; *Bauer v. St. Louis, I. M. & S. R. Co.* 46 Ark. 896; *Jones v. Florence Min. Co.* 66 Wis. 288.

It is useless to follow the charge on these points. The duty of the master to instruct the young and inexperienced servant so as to enable him to appreciate the danger attending the employment was submitted to the jury in an instruction given on behalf of the plaintiff, while the charge given at the instance of the defendant submitted the case as though there were no question of inexperience in the servant presented by the evidence. That was at least misleading and its tendency was to confuse the jury. But there was positive error in the charge in saying to the jury, in effect, that the intestate's knowledge of the fact that the rails were unblocked was knowledge of the attendant danger. Whether he had knowledge of or appreciated the danger or ought to have done so, was a question for the jury to determine upon the facts and circumstances shedding light upon the question. The charge is made up wholly of requests for instructions from the parties, and the two theories of the case presented by them are not so consistent and harmonious as to render it an easy task for the jury to determine where their duty lay. The fault is inherent in the practice of giving in charge to the jury the requests for instructions prepared by counsel. They are not uncommonly framed with a view to giving the greatest advantage to the side which presents them,

and do not in that event tend to lighten the labors of the jury; and when they are accurately and fairly framed on both sides and involve no contradictions, the issues are presented in disconnected propositions of law which the jury will find more difficult to comprehend than in a charge presenting all the issues on a single phase of the case together in close contrast, and presenting the whole law of the case as emanating from the court without apparent instigation from either side. What can be a greater paradox in the administration of justice or more confounding to a jury than for a court to say to them, as is sometimes done, "For the plaintiff, the court declares the law to be thus; for the defendant, so, and on its own motion as follows," as though there were three sides to a single legal proposition between which the jury are at liberty to choose?

It is the duty of counsel to present their prayers for instructions in order to aid the court and to show their position in the case on appeal, but the better rule for the court would be to treat the request only as counsel's suggestions of what they desire the court to call the jury's attention to, and to embody no more than the substance of them in the charge.

The records of this court bear abundant testimony of the success of this practice at the hands of the learned and usually careful and painstaking judge who tried this cause. The practice of making up the charge from the requests for instructions prepared by counsel leads to the constantly recurring argument in this court that the charge to the jury is inconsistent and misleading and has resulted in the remanding of many causes, and perhaps in the miscarriage of justice in many others by the indulgence of the presumption that the jury was able to reconcile the apparent inconsistencies or penetrate the obscurities of the charge.

For the errors indicated each of the judgments will be reversed, and the causes remanded for further proceedings.

CONNECTICUT SUPREME COURT OF ERRORS.

Dwight PIERCE

v.

Frank H. WHITTLESEY, *Appd.*

(58 Conn. 104.)

1. An agreement between an employer and employe that either shall forfeit two weeks' wages by terminating the employment without two weeks' notice thereof, is not unreasonable, and is not affected by Gen. Stat., § 1748, imposing a penalty upon an employer who withholds any part of the wages of any person because of any agreement requiring notice before leaving the employment. Two weeks' wages of the employe quitting without notice being forfeited are not due him, and therefore a refusal to pay them is not a withholding of any part of his wages.

NOTE.

Substantial breach of contract resulting in more than nominal damages to the other party must
7 L. R. A.

2. Where one employed under a valid contract, providing that in case he leaves the service without giving two weeks' notice he shall forfeit two weeks' wages, leaves without giving the required notice and sues to recover the wages forfeited, such forfeiture may be relied on as a defense, although no special damage is alleged or shown.

(December 16, 1899.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for Hartford County in favor of plaintiff, upon appeal from a justice of the peace, in an action brought to recover the amount alleged to be due for the rendition of certain personal services. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. J. W. Johnson for appellant.

Mr. M. M. O'Sullivan for appellee.

exist before liability attaches to pay liquidated damages. *Hathaway v. Lynn* (Wis.) 6 L. R. A. 551.

Carpenter, J., delivered the opinion of the court:

This is an action by an assignee of a claim for personal services. The answer is that Thomas Nolan, the assignor of the claim, entered the employment of the defendant in June, 1888, under an agreement that if he should at any time desire to leave the employment of the defendant, he should give him two weeks' notice thereof; and that in case he should leave his employment without giving two weeks' notice of his intention to do so, he should forfeit two weeks' wages to the defendant; and it was also agreed that the defendant should give Nolan two weeks' notice if he desired to dismiss him from his employment, and in case he failed to give such notice he should forfeit to him two weeks' wages; that he entered into the employment of the defendant and there remained until October 16, 1888, when he left without giving two weeks' notice and without just cause; and that the two weeks' wages claimed by the plaintiff are the same two weeks' wages forfeited by him, etc.

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Questions of pleading and practice are raised, but we pass them and will consider the case and dispose of it upon its merits. The case was submitted without oral argument, counsel for the defendant filing a printed brief and counsel for the plaintiff filing no brief. The defendant's counsel proceeds upon the theory that the defense was held insufficient by reason of the Statute (§ 1748, Gen. Stat.), while it may be fairly inferred from the record that the court overruled the defense for the reason that no special damage was alleged or shown.

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Here a penalty is prescribed for doing an act; hence the act is impliedly prohibited. What is the act? Simply withholding payment for the reason given. A contract requiring notice is lawful, as there is no penalty imposed for making it. It is withholding wages that comes under the consideration of the Statute, and not the making of the contract. Such a contract may be made and enforced, if it can be done without withholding wages.

The spirit of the Act, and perhaps its letter, forbids the setting up of the broken agreement as a defense to an action for wages; that would be using such agreement as a means of withholding payment.

The distinction between resisting an action for wages and bringing an action for damages is not new. *Hunt v. The Otis Co.* 4 Met. 464, 7 L. R. A.

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Even if it be conceded that such legislation would be constitutional, we should expect to find the intent expressed in direct and unequivocal language. We cannot give language of doubtful import any such effect by implication or construction.

The Act was passed for the benefit of the employé—to protect him against injustice and oppression. So far as effect can be given to that intention without violating important principles, it is well. In cases of a mere promise by an employé to give notice of his intention to terminate a contract, the Legislature may well say that the employer shall not take advantage of it to withhold wages, and the courts may well enforce the restriction. But when it is a mutual agreement on equal terms another principle is to be considered. Let us illustrate by a supposed case. If the defendant had discharged Nolan without giving the agreed notice, and Nolan had brought a suit to recover the two weeks' wages agreed to be forfeited, is it not clear that the defendant could not have set up this Statute as a defense? The agreement and the acts of the parties are neither within the letter nor spirit of the Act. If the Statute does not annul the agreement as to one, why should it as to the other? If it does, it makes the contract void as to one, leaving it in force as to the other—a result which the Legislature could not have intended.

But the contract is not only mutual, but it covers ground otherwise not contemplated by the Statute. It provides in direct terms that a violation by either party shall work a forfeiture of two weeks' wages—that is, they agree upon the amount of damages in case of a breach—liquidated damages. It is not an extravagant sum, it is moderate and reasonable; large enough to insure a probable compliance, and not large enough to make it inequitable to enforce it. Besides, the duty required is light, imposing no hardship, so that the forfeiture can be easily avoided. With such a contract it cannot be said that wages were withheld because of a mere agreement to give notice. They were withheld because Nolan in a fair contract upon a sufficient consideration agreed to relinquish them. By their contract no

wages were due, and therefore there were none to pay, strictly speaking none to withhold. The case is not within the letter, and it certainly is not within the spirit, of the Statute.

The ground on which the court placed its judgment is equally untenable, and partly for reasons already suggested. It virtually puts into the contract what the parties did not place

there—that a breach should entitle the other party to such damages only as he could show that he actually sustained; whereas the parties in effect agreed that a sum equal to two weeks' wages should be regarded as liquidated damages.

There is error and the judgment is reversed.

In this opinion the other Judges concurred.

IDAHO SUPREME COURT.

TERRITORY OF IDAHO, *Resp.*,

v.

Thomas EVANS, Impleaded, etc., *Appt.*

(....Idaho....)

*Section 7193, Rev. Stat., prohibiting the exportation of fish from this Territory, being in conflict with § 8, art. 1, of the Constitution of the United States, providing for the regulation by Congress of commerce between the States, is void.

(February 24, 1890.)

A PPEAL by defendant from a judgment of the District Court for Bingham County convicting him of a violation of the Statute against shipping fish from the Territory. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. Hawley & Reeves* for appellant. *Mr. R. Z. Wood, Atty-Gen.*, for respondent.

Beatty, Ch. J., delivered the opinion of the court:

The appellant, Thomas Evans, was indicted with George Rae for a violation of section 7193 of the Revised Statutes of Idaho, as same is amended by Act of the Fifteenth Legislative Assembly, which, as amended, reads: "It is unlawful for any person in this Territory to make any dam, or use any nets, seines, fish-traps or any similar device or measures for catching fish, or to ship the same out of this Territory for speculative purposes." The appellant, Evans, alone, was tried upon this charge, and from the judgment rendered against him upon his conviction thereof he has appealed to this court. While the record contains various specifications of alleged error, the appellant has in his argument of the cause referred to but two, viz.: That the Statute does not prohibit the exportation of fish, and, if it does, it is in violation of § 8, art. 1, of the Constitution of the United States.

It is true the Statute does not read as it undoubtedly was intended it should, and it is surprising that it passed unchallenged the ordeal of six readings in the presence of careful legislators. Construed as it reads, it prohibits the exportation from this Territory only of dams, and the use of nets, fish-traps, and other devices for catching fish, and not the nets, fish-traps, etc., themselves. As dams cannot be shipped, and the use of a thing is an incorporeal right, this Statute, if construed by its words,

undertakes to prevent the performance of an impossibility; hence, in effect, is void. Conceding, however, that it may be construed to prohibit the exportation of fish, as the Legislature undoubtedly designed it, is it in violation of the section referred to of the supreme law of the land? This question was involved in the court below, in the demurrer to the indictment, on the exceptions to the instructions, and in the motion for arrest of judgment, and is saved by appellant's exception to the ruling of the court in those matters.

The provision of § 8, art. 1, of the Constitution of the United States, that "Congress shall have power . . . to regulate commerce with foreign nations and among the several States," having been so frequently and fully considered by the ablest, including the highest, courts in the nation, it will not be expected we shall, to any length, now attempt its discussion. It is clearly settled and conceded by all, that the above provision of the Constitution confers upon Congress the exclusive power to regulate commerce between the States, and any statute which attempts to prohibit the shipment into or out of a State of any lawful commodities or articles of commerce or trade is in conflict therewith, and necessarily void. To each State is reserved the power of regulating commerce within its borders, but not that extending across its boundary lines. The State may also, under its police power, enact such laws as are necessary to the protection of the lives, the health and comfort of its citizens, and for the promotion of good order within its limits. But whenever, under the pretence of an exercise of its police power, the State enacts any statute which operates to prevent the free exchange between the States of lawful articles of trade, it is void because in conflict with that constitutional provision. This is clearly illustrated in a number of recent and interesting cases.

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 468 [24 L. ed. 529], is a case in which the State of Missouri, under the claim of exercising its police prerogative, and to prevent the spread of contagious cattle disease in the State, enacted a Statute forbidding the unloading of Texas cattle within the State, but allowing their passage through it on board of cars or vessels. The court held that cattle were subjects of lawful commerce, and could not be excluded, except when diseased; that the Statute practically operated, not in the exclusion of diseased cattle alone, but of all Texas cattle, and was void. The business of butchering cattle, and shipping the dressed fresh meat into the surrounding States from the place of slaughter,

*Head note by BEATTY, Ch. J.

has in recent years become an important pursuit, but one which came in conflict with local dealers. To prevent this, Statutes were enacted in several of the western States, purporting to be in pursuance of their police power, and to promote the health of their inhabitants by preventing the importation of diseased meat. They required that all animals should be inspected within twenty-four hours before their slaughter, and the sale of meat of animals not so inspected should be prohibited. The courts have uniformly held that such statutes are not within the police power of the State, and that, whatever their design, they operate as a prohibition to the importation of dressed meat, which is a lawful article of trade; and whenever these Statutes have come before the courts for consideration, they have been held void. The following cases on this subject will be found of interest, and in them the whole subject is fully reviewed: *Swift v. Sulphin*, 39 Fed. Rep. 630; *Re Barber*, Id. 641; *Re Christian*, Id. 630; *Harvey v. Huffman*, Id. 646; *Ex parte Kieffer*, 40 Fed. Rep. 400.

In the State of Indiana a statute prohibiting the exportation of natural gas from the State through pipes has, upon the same principle, recently been held void. The State of Kansas has had a statute to prevent the shipment

therefrom of fowls and other game. For a violation of this, an express agent was indicted for shipping to Chicago four prairie chickens. The Act only prevented the exportation of chickens, and did not prevent their capture and use by the denizens of Kansas, but seemed rather to preserve them for their exclusive use and comfort. It was held void in *State v. Saunders*, 19 Kan. 123.

By the law of this Territory we recognize fish as a lawful article of trade. The Statute only attempts to preserve them for us, and to deprive our neighbors of their use, which, in the light of the authorities, we must conclude is in violation of the constitutional provision referred to, and therefore void.

It follows that the demurrer to the indictment above referred to should be sustained, and it is therefore ordered that *the judgment appealed from be set aside, and the indictment dismissed.*

Berry, J.:

I concur that the Act, so far as it prohibits the shipping of fish out of this Territory for speculative purposes, is unconstitutional. I think the Statute is not against the shipping of dams, etc., but is against shipping of fish only.

Sweet, J., concurs.

NEW YORK COURT OF APPEALS (2d Div.).

David NEWMAN, *Resp't.*,

v.

METROPOLITAN ELEVATED R. CO. *et al., App'ls.*

(.....N. Y.)

1. The benefits which will accrue to

NOTE.—Elevated railroad; benefits considered on assessment of damages to abutting owner.

On the establishment of a street private rights of access to adjacent property attach, as well as an uninterrupted right to light and air. *South Car. R. Co. v. Steiner*, 44 Ga. 546; *Chicago v. Union Bldg. Assn.* 102 Ill. 379; *Denver v. Bayer*, 7 Colo. 113; *Lexington & O. R. Co. v. Appleton*, 8 Dana, 289; *Pennsylvania University v. Lexington*, 3 B. Mon. 27; *Elizabethtown & L. R. Co. v. Combs*, 10 Bush, 332; *Rensselaer v. Leopold*, 106 Ind. 29; *Indiana, B. & W. R. Co. v. Eberle*, 110 Ind. 542, 9 West. Rep. 206; *Grand Rapids & L. R. Co. v. Helsel*, 38 Mich. 62; *Lackland v. North Mo. R. Co.* 31 Mo. 180; *Thurston v. St. Joseph*, 51 Mo. 510; *Burlington & M. R. Co. v. Reinhackle*, 15 Neb. 279; *People v. Kerr*, 27 N. Y. 188; *Kellinger v. 42d St. R. Co.* 50 N. Y. 206; *Crawford v. Delaware*, 7 Ohio, 459; *Jackson v. Jackson*, 16 Ohio, 163; *Anderson v. Turbeville*, 6 Coldw. 150.

The rights of abutters on streets are subject to the use of the public, only for the purposes of a highway, and any interference for other purposes is a taking of private property, and a damage to the extent of such interference. *Shawneetown v. Mason*, 82 Ill. 337; *Buchner v. Chicago, M. & N. W. R. Co.* 60 Wis. 264; *Story v. New York Elevated R. Co.* 90 N. Y. 122.

Where the fee of land has been taken by the city in trust to be kept open and used as a public street, no structure can be authorized which is inconsistent with its use as a public open street, even if the obstruction be to the crossing of light and air. *Doyle v. Lord*, 64 N. Y. 423.

An abutting owner is entitled to have the whole 7 L. R. A.

property by reason of the construction of a railroad must necessarily be considered in determining the amount of the consequential damages to be allowed to its owner on account of such construction, and their consideration for such purpose is not prohibited by the statute which forbids commissioners in determining the compensation to be made to owners of property acquired

space occupied by a street, open from the soil upward to the free admission of light and air and the prospect unobstructed from any point. *Codman v. Evans*, 5 Allen, 308.

The right to the enjoyment of the unobstructed passage of light and air is so essential that it exists by a law common to the whole civilized world. *Barnett v. Johnson*, 15 N. J. Eq. 499. See *Stevens v. Paterson & N. R. Co.* 34 N. J. L. 564.

The right of abutting owners in such cases was first passed upon in the case of *Story v. New York Elevated R. Co.* 90 N. Y. 122, 11 Abb. N. C. 236, and this case has been followed in *Tiffany v. United States* Ill. Co. 67 How. Pr. 73, and *Peyser v. New York Elevated R. Co.* 12 Abb. N. C. 276, where it was held that the rule applies where the street is held by the city in trust for public use as a highway, as well as where the fee, subject to such easement, is in the abutting owners.

That special benefits only may be set off against both the value of the part taken and the damages to the remainder is a doctrine maintained by the courts of the following States: Connecticut, Kansas, Maine, Minnesota, Massachusetts, Missouri, New Hampshire, New Jersey, North Carolina, Pennsylvania and Vermont. *Lewis, Em. Dom.* § 469.

Special benefits are such as affect the actual use and enjoyment of property and thereby render it more valuable. Id. § 476.

Condemnation advantages and disadvantages considered in condemnation proceedings. See notes to *San Diego Land & Town Co. v. Neale* (Cal.) 8 L. R. A. 88; *Leroy & Western R. Co. v. Ross* (Kan.) 3 L. R. A. 217.

for the construction of railroads to make any allowance or deduction on account of any real or supposed benefits which the party in interest may derive from the construction of the proposed road.

2. The damages to abutting property owners by reason of the destruction of their easements for ingress and egress to and from a public street and the free circulation of light and air therefrom to their property by the construction of an elevated railroad in such street, are entirely consequential; and in determining the amount to be awarded therefor the jury may consider the benefits as well as the injuries resulting from such construction.

3. In an action by a lessee of property abutting upon a street through which an elevated railroad is constructed to recover damages for the permanent impairment of his easement in the street for light, air and access, the general appreciation of the value of property consequent upon such improvement cannot be considered as it belongs to the property owner, but special and peculiar advantages which tend to increase the rental value of the property are elements which the jury must consider in determining the amount of their award.

(March, 1890.)

APPPEAL by defendants from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the New York Circuit in favor of plaintiff, and an order denying a motion for a new trial in an action by a lessee of property abutting on a street through which an elevated railroad was constructed to recover damages for the permanent injuries to his easements therein. *Reversed.*

Statement by **Brown, J.:**

Appeal from a judgment of the General Term of the First Judicial Department affirming a judgment entered in favor of plaintiff upon a verdict and affirming an order denying a motion for a new trial.

At the commencement of this action the plaintiff held a lease of property situated upon the northwest corner of Church and Rector Streets, in the City of New York. The lease bore date May 1, 1877, and was for the term of fifteen years with a right of renewal for an additional term of ten years. Upon the property there was a brick building five stories in height, the first floor of which was used as a restaurant, and the other floors for dwellings.

The Metropolitan Elevated Railway was constructed through Church Street in front of said premises, and in Rector Street there had been erected by the defendants a station from which a covered platform ran to Greenwich Street, and there connected with the Ninth Avenue Elevated Road.

The plaintiff claimed in his complaint that the defendants' structure interfered with the ingress and egress to and from his premises, and also impaired the circulation of light and air from the street to his building, and deprived him of its customary and lawful use, and greatly reduced its value to him as lessee.

It was admitted that the action was brought and tried as to one to recover in one sum the whole damage sustained and to be sustained from the depreciation of the plaintiff's estate, on the assumption that the defendant's struc-

ture caused a permanent impairment of the easements in the street for light, air and access.

The court having charged the jury that "the damage to plaintiff's leasehold was to be measured by the depreciation of rents caused by defendant's structure in depriving the premises of the accustomed light, air and access which it had had before said structure was placed thereon," and that in considering the question of damages "the fact that real estate had risen generally in that district of the city, did not relieve the Railroad Company from the element of damage," was requested by the defendants to charge as follows: "That in estimating the damages to the leasehold interest in this plaintiff caused by the interference by the defendants with the light, air and access appurtenant to the premises, the jury may take into consideration any benefits peculiar to his house which have arisen by the construction of the road as shown by the evidence." To this the court replied: "That I refuse to charge. On the contrary, the jury have no right to take any such fact into consideration."

The defendants gave evidence tending to show, and from which the jury might have found, that while the upper parts of the building had been made less desirable for dwellings by reason of the erection of defendant's structure, and in consequence thereof the rents had fallen, the location of the station in Record Street had, from the greater number of people resorting there, caused the first or store floor of the building to become more desirable for business purposes, and greatly enhanced in rental value.

Messrs. W. Bourke Cockran, Julien T. Davies and Edward S. Rapallo, for appellants:

"Just compensation" does not exclude the consideration of special benefits in the estimation of consequential damages.

Rexford v. Knight, 15 Barb. 627; *Betts v. Williamsburgh*, Id. 255; *Granger v. Syracuse*, 28 How. Pr. 808; *Genet v. Brooklyn*, 99 N. Y. 298.

The plaintiff can recover only consequential damages to his lease, which can only be estimated by taking into consideration all the consequences, beneficial or injurious, of the taking of the condemned portion of the parcel, to wit, so much of plaintiff's easements as have been interfered with or destroyed.

Drucker v. Manhattan R. Co. 106 N. Y. 157.

The clauses in the 16th section of the General Railroad Act relating to the non-allowance of benefits, while providing that no benefits shall be considered as offsetting the value of property taken, cannot be reasonably construed to prevent the consideration of benefits in estimating consequential damages.

Gould v. Hudson River R. Co. 6 N. Y. 558; *Canandaigua R. Co. v. Payne*, 16 Barb. 273; *Albany R. Co. v. Lansing*, 16 Barb. 68; *Cooley, Const. Lim.* *565; *Lewis, Em. Dom.* § 471; *Setzler v. Pennsylvania R. Co.* 113 Pa. 56; *Bangor & P. R. Co. v. McComb*, 60 Me. 290; *Meacham v. Fitchburg R. Co.* 4 Cush. 291; *Nicholson v. New York & N. H. R. Co.* 22 Conn. 74; *Adams v. St. Johnsbury & L. O. R. Co.* 57 Vt. 240; *Paducah & M. R. Co. v. Storall*, 12 Heisk. 1; *Adden v. White Mts. N. H. R. Co.* 55

N. H. 418; *Raleigh v. Wicker*, 74 N. C. 220; *Page v. Chicago, M. & St. P. R. Co.* 70 Ill. 824; *Deputy v. Chicago & N. W. R. Co.* 115 Ill. 100; *Chicago & E. R. Co. v. Blake*, 116 Ill. 163; *McReynolds v. Burlington & O. R. R. Co.* 106 Ill. 152; *Oregon Cent. R. Co. v. Wait*, 3 Or. 91; *Cleveland & P. R. Co. v. Ball*, 5 Ohio St. 568; *Henderson v. New York Cent. R. Co.* 78 N. Y. 423; *Matter of Utica, C. & S. V. R. Co.* 56 Barb. 456; *Matter of New York Cent. & H. R. R. Co.* 15 Hun, 63; *Matter of New York, L. & W. R. Co.* 29 Hun, 1; *Matter of New York, L. & W. R. Co.* 49 Hun, 539.

If the General Railroad Act does not prohibit the consideration of special benefits in ascertaining the amount, if any, of consequential damages, it certainly did not prohibit the jury, in the case at bar, from taking into account special benefits in forming their verdict.

Lahr v. Metropolitan Elevated R. Co. 104 N. Y. 295; *Fletcher v. Auburn & S. R. Co.* 25 Wend. 462; *Williams v. New York Cent. R. Co.* 16 N. Y. 97; *Drake v. Hudson River R. Co.* 7 Barb. 508.

Messrs. James M. Smith and Inglis Stuart, for respondent:

Story v. New York Elevated R. Co. 90 N. Y. 122, and *Lahr v. Metropolitan Elevated R. Co.* 104 N. Y. 268, have settled the law as to the right of the plaintiff to recover damages for the injury done to his property.

See also *Ireland v. Metropolitan Elevated R. Co.* 20 Jones & S. 455; *McGean v. Manhattan R. Co.* 117 N. Y. 219.

Brown, J., delivered the opinion of the court:

The basis of the court's refusal to charge as requested is to be found in the Rapid Transit Act, chap. 606 (Laws 1875, § 20), and in the General Railroad Law (chap. 40, Laws 1850, § 16); which by § 8, chap. 885, Laws of 1872, was made applicable to the Gilbert Elevated Railroad Company, to whose rights the Metropolitan Railway Company succeeded.

These laws provide that commissioners of appraisal shall not, in determining the amount of compensation to be made to parties owning or interested in property acquired for the construction and operation of railways formed thereunder, "make any allowance or deduction on account of any real or supposed benefits which the party in interest may derive from the construction of the proposed railway." What is the true meaning of this provision and how far it is applicable to a case of the character we are considering, are the questions we are to determine upon this appeal. The principle upon which compensation is to be made to the owner of lands taken by proceedings under the General Railroad Law has been frequently considered by the courts of this State, and the rule is now established that such owner is to receive, first, the full value of the land taken, and, second, where a part only of land is taken a fair and adequate compensation for all injury to the residue sustained, or to be sustained, by the construction and operation of the railroad. *Troy & B. R. Co. v. Lee*, 18 Barb. 169; *Matter of Utica, C. & S. V. R. Co.* 56 Barb. 456; *Matter of Prospect Park & C. I. R. Co.* 18 Hun, 845; *Matter of New York Cent. & H. R. R. Co.* 15 Hun, 63; *Matter of New York, L. & W. R. Co.* 49 Hun, 539.

R. Co. 29 Hun, 1; *Matter of New York, L. & W. R. Co.* 49 Hun, 539; *Henderson v. New York Cent. R. Co.* 78 N. Y. 423.

The first element in the award represents the compensation for land which the railroad takes, and to which it acquires title. The second element represents damages which are the result or consequences of the construction of the road upon property not taken, and which the owner still retains. Such damages are wholly consequential, and to ascertain them necessarily involves an inquiry into the effect of the road upon the property, and a consideration of all the advantages and disadvantages resulting and to result therefrom. The rule is well stated in Lewis, on Eminent Domain, § 471, as follows: "When part of a tract is taken, just compensation would therefore consist of the value of the part taken, and damages to the remainder, less any special benefits to such remainder by reason of the taking and use of the part for the purpose proposed."

In this rule, thus settled in this State, and which controls all awards for taking of land under the General Railroad Act, is to be found the true application of the statutory provision which forbids deductions and allowances to be made by commissioners for any real or supposed benefits which the parties interested may derive from the construction of the railroad. Whatever land is taken must be paid for by the railroad company at its full market value, and from such value no deduction can be made, although the remainder of the land owners' property may be largely enhanced in value as a result of the operation of the railroad. But in considering the question of damages to the remainder of the land not taken, the commissioner must consider the effect of the road upon the whole of that remainder, its advantages and disadvantages, benefits and injuries, and if the result is beneficial there is no damage, and nothing can be awarded. The rule established under the General Railroad Law must govern and control awards made under the Rapid Transit Act. The last-named Act confers upon corporations formed thereunder the power to acquire property for railroad purposes, and the statutory proceedings prescribed are substantially the same as those under the General Railroad Act, and no reason is apparent why the same rule should not apply to proceedings under both Acts.

While this court has decided that owners of land abutting upon public streets have easements therein for ingress and egress to and from their premises, and for the free circulation of light and air to their property, which easements are interests in real estate, and constitute property within the meaning of that term, as used in the Constitution, it is impossible to consider such easements as separate and distinct from the land to which they are appurtenant. They cannot be severed from the land abutting on the street, and the effect of the construction of a railroad in the street is not to transfer them to the company, but to destroy or impair them. The right, therefore, of the property owner to compensation is not the value of the easements, in the street separate and distinct from his abutting property, but the damages his property sustains as a result or consequence of the loss of those easements.

It follows that in making an award to a party situated as the plaintiff was with reference to the defendant's railroad, there could be no compensation for property taken beyond a nominal sum, and that his right to recover rested entirely upon proof of consequential damages. An estimate of such damages, as I have already shown, involves an inquiry into the effect of the railroad upon the whole property and a consideration of all its advantages and disadvantages. If the rental value of the whole building was shown to have been diminished, there was injury for which plaintiff was entitled to recover, but if the diminished rental value of the upper floors was equalled or overcome by increased rental value in the store, then there was no injury and no basis for a recovery of substantial damages against the defendants. While the precise question presented by the exception in this case has not heretofore been decided in this court it is covered by the decisions under the General Railroad Law which have been cited, and the rule established by those decisions has recently been applied in the Second Judicial Department to the case of an elevated railroad (*Re Brooklyn Elevated R. Co. v. Phillips*, 18 N. Y. Supp. 78). That case was an appeal by property owners from an award of nominal damages in proceedings by an elevated railroad company to condemn an easement in a street. The court said: "The inquiry necessarily takes in the advantages from the railroad when the extent of the injury is to be based upon the diminution of value by reason of its construction. The basis of appraisal must then be the difference in value between the abutting house before the construction of the railroad and afterwards."

In *Drucker v. Manhattan R. Co.* 106 N. Y. 157, this court held admissible evidence offered by the property owner that trade and business had fallen off in the street since the erection of the railroad, and that property was for that reason diminished in value. If such evidence is competent to sustain a recovery it is difficult to see why it is not competent for the railroad company to show that the effect of the road has been to cause an increase in business and have an enhancement of the value in abutting property. The question whether in awarding damages flowing from the construction of a railroad, its injurious effect upon a part of a residue of a tract of land could alone be considered has been expressly decided in Illinois. *Page v. Chicago M. & St. P. R. Co.* 70 Ill. 324.

That case was an assessment of damages for a right of way across a tract of forty acres of land. Compensation was awarded for the part taken, but the evidence showing that the residue of the tract would be enhanced in value by the construction and operation of the road, no consequential damages were allowed to the land owner. The owner claimed that a strip of land next to the railroad was lessened in value by the proximity of the road. The constitutional provision in Illinois relating to the taking of property for public use is the same as our own, and the Statute under which the assessment was made provided that benefits should not be set off against or deducted from compensation.

The award was sustained on appeal, the
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court holding "that it was not the damages to a strip lying within a limited number of feet of the road-bed that the jury were required to assess, but the damages, if any, to the entire tract. That the effect of the road upon a part of the tract was not to be considered, but upon the whole tract. "This," the court said, "is not deducting benefits from damages, but it is ascertaining whether there be damages or not." To the same effect is the case of *Oregon R. Co. v. Wait*, 8 Or. 91.

The Statutes we have considered are founded upon the provision of the Constitution forbidding the taking of private property for public purposes without just compensation. Their purpose was to do exact and equal justice among all citizens of the State and to award to everyone full and fair compensation for all property taken for public use or injured by the erection of public improvements. The rule established by the courts and prevailing under the General Railroad Law accomplished in a broad and liberal manner that object. The meaning of the expression "just compensation" has not been limited to the value of property actually taken, but has been held to include all consequential injuries which the land owner may sustain by reason of depreciation of value in the residue of the property by reason of the taking of a part and the construction thereon of the public improvement. This rule affords full indemnity to the property owner, and leaves him in as good condition as he was before the construction of the road. And this is all that any citizen has a right to ask. If the rule which the court held in this case is to govern awards made against railroad companies when structures are erected in the public streets under public authority, when no land is taken and the compensation is confined to consequential injuries sustained by abutting property, the companies will be compelled in many instances to pay where no injury has been done, and parties will recover who have sustained no loss. Such a rule has not yet received judicial sanction.

The increase of value resulting from the growth of public improvements, the construction of railroads, and improved means of transit accrues to the public benefit generally, and the general appreciation of property consequent upon such improvements belongs to the property owner, and the Railroad Company is not entitled to the consideration of that element in the ascertainment of the compensation it must pay to the abutting proprietor. But the special and peculiar advantages which property receives from the construction and operation of the road, and the location of the stations, are elements which enter largely into the inquiry whether there is injury or not, and the jury must consider them and give to them due weight in their verdict. Between this rule and the statutory provision quoted there is no conflict. The property owner will in every instance receive the "just compensation" which the Constitution secures to him for his property which is taken or injured by the Railroad, and the corporation will be compelled to pay whenever damages result from the erection of its structures and the construction of the road.

Our conclusion is that the defendant was entitled to the instruction requested, and the exception to its refusal was well taken.

The judgment should be reversed and a new trial granted, with costs to abide the event. All concur, Follett, Ch. J., in result.

NEW YORK COURT OF APPEALS.

John T. BAXTER, *Resp't.*,
v.
BROOKLYN LIFE INSURANCE CO., *App't.*

(.....N. Y.....)

1. **Failure of a person insured to pay a premium** becoming due before his death, under a contract which requires proof of death "during the life of the policy," and renders the policy void upon failure to pay a premium when due, where no notice that the premium is due has been sent him, does not destroy the validity of the policy under the Act of 1877, chap. 821, which requires that if a premium becomes due notice must be given, and thirty days allowed in which to pay, before the policy can be forfeited for nonpayment of premium.
2. **Before an insurance company can question the validity of a policy** issued since the Act of 1877, because of the nonpayment of a premium, it must show that it has complied with the terms of the Statute by giving notice to insured stating that the premium has become due, its amount and the place where and person to whom it is payable.
3. **Payment or tender of a premium** becoming due before the death of insured is not necessary before bringing action on the policy which was continued in force under the Act of 1877, by reason of the company's failure to give notice after the premium was due.

(*Andrews, Earl and Gray, JJ., dissent.*)

(February 25, 1890.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Fifth Department, overruling its motion for new trial on exceptions taken at the Cattaraugus Circuit, and ordered to be heard at General Term in the first instance, and directing judgment upon the verdict after trial and verdict for plaintiff in an action upon a policy of life insurance. *Affirmed.*

The facts sufficiently appear in the opinion.

Mr. Nathaniel C. Moak, with **Mr. William H. Ford**, for appellant:

Where there has been no forfeiture by notice under the Statute, if the insured seeks the aid of the court he must offer to pay the premiums or a legal excuse for nonpayment, or at least plead his willingness to pay.

Howell v. Knickerbocker L. Ins. Co. 44 N. Y. 276; *Bogardus v. New York L. Ins. Co.* 2 Cent. Rep. 150, 101 N. Y. 828.

The payment of the premium during the life of the insured remains a condition precedent, statute or no statute, and by every rule of pleadings such payment must be pleaded and proved.

Bacon v. Munn, 2 Wend. 399; *Orandall v. Clark*, 7 Barb. 169; *People's Bank v. Mitchell*, 73 N. Y. 406; *Bogardus v. New York L. Ins. Co. supra*; *Oakley v. Morton*, 11 N. Y. 25; *Howell v. Knickerbocker L. Ins. Co. supra*.
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There is a legal right in every contracting party to hold himself absolved from his obligation when the other contracting party fails to keep some condition precedent which he is bound to perform.

Higgins v. Delaware L. & W. R. Co. 60 N. Y. 553; *Kimberly v. Patchin*, 19 N. Y. 830; *Russell v. Carrington*, 42 N. Y. 118.

Messrs. Cary & Rumsey, for respondent:
Defendant could not declare this policy forfeited by reason of the nonpayment of premium without showing or attempting to show that it had given the notice required by statute.

Re Booth, 11 Abb. N. C. 145; (*Carter v. Brooklyn L. Ins. Co.* 12 Cent. Rep. 756, 110 N. Y. 15.

Independent of the Statute referred to, the burden is upon the defendant of proving a forfeiture of the policy.

Van Valkenburgh v. Am. Popular L. Ins. Co. 70 N. Y. 605.

The payment of the quarterly premium falling due August 24, 1884, was a condition subsequent, and he who seeks to avoid a contract for failure to perform a condition subsequent must make proof that the condition has not been complied with.

See *Van Valkenburgh v. Am. Popular L. Ins. Co.* 9 Hun, 583, 70 N. Y. 605; *Jones v. Brooklyn L. Ins. Co.* 61 N. Y. 79; *Sands v. New York L. Ins. Co.* 50 N. Y. 628.

O'Brien, J., delivered the opinion of the court:

The plaintiff is the assignee of a policy of insurance upon the life of one Joel J. Mattison issued by the defendant, dated May 24, 1884, whereby in consideration of a quarter-annual premium of \$20.97 to be paid upon delivery of the policy and thereafter on the 24th day of August, November, February and May in each year the defendant insured Mattison's life in the sum of \$3,000 payable to his wife at the office of the Company, in the City of New York, within sixty days after receipt of satisfactory proof of death during the life of the policy. The policy was made subject to numerous conditions, none of which are important for the purposes of this appeal except the condition that it should be void upon failure to pay the premium when due. The complaint alleged the delivery of this contract to the insured, his death on the 7th day of September, 1884, the presentation to the defendant of satisfactory proofs of death according to the terms of the policy, the refusal of the defendant to pay, and that the insured had made the payments of premium according to his agreement with the defendant. No issue was made by the defendant upon any of the allegations of the complaint, except the averment that the insured had paid the premiums according to the terms of the policy, which it denied, and specially alleged that the premium which became due on

the 24th day of August, 1884, had not been paid. On the trial the plaintiff put in evidence the policy and a written assignment by the wife of the insured to him of the claim or cause of action, and rested. The defendant moved for a nonsuit on the ground that the insured had failed to comply with the terms and conditions of the policy by neglecting to pay the quarterly premium stipulated to be paid by the terms of the policy on the 24th day of August prior to the death of the insured. This motion was denied, and the defendant excepted, and the only question in the case is thus presented. The death of the insured occurred within less than four months from the time that the policy was delivered. The production of the policy at the trial proved the payment of the first quarterly premium. But it was essential to the maintenance of the plaintiff's cause of action to show that the policy was a valid subsisting contract at the time of the death of the insured. The policy itself contained the stipulation that it was a contract made and to be executed in the State of New York, and construed only according to the laws of that State. Aside from this provision of the policy, and under general rules of law, this contract was subject to the terms and conditions expressed in chapter 841 of the Laws of 1876, as amended by chapter 821 of the Laws of 1877. This Statute was a part of the contract in question, and governed the rights and obligations of the parties in precisely the same way and to the same extent as if all its terms and conditions had been actually incorporated into the policy.

The promise of the defendant was to pay to the beneficiary named the sum of \$3,000 upon the death of the insured, in case that event occurred during the continuance of the contract. It therefore becomes important to inquire whether the policy in question was in force at the time of the death of the insured, on the 7th day of September, 1884. If upon that day it was a valid subsisting contract, notwithstanding the failure to pay the premium due on the preceding 24th day of August, then the very contingency upon which the defendant agreed to pay the amount of insurance has happened.

The Statute above referred to (Laws 1877, chap. 821) declares that no life insurance company doing business in this State shall have power to declare forfeited or lapsed any policy thereafter issued by reason of nonpayment of premium, unless, after it becomes due, a notice stating the amount of such premium, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, at his last-known postoffice address, postage paid by the company; and further stating that unless the premium then due shall be paid to the company or its agent within thirty days after the mailing of such notice, the policy and all payments thereon will become forfeited and void. It is also provided by the same section that in case such payment is made within the thirty days limited therefore, it shall be deemed a full compliance with the requirements of the policy in respect to the payment of premium, and it declares that no such policy shall in any case be forfeited until the expiration of thirty days after the mailing of such notice. These provisions are to have full effect,

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any condition of the policy to the contrary notwithstanding. There was no proof given at the trial by either party to show whether this notice was served or not. It is obvious that this Statute when imputed into the contract modified its conditions in very material respects. The duration and validity of the policy is not then dependent upon payment of the premium on the day named therein, but upon payment within thirty days after the notice has been given. The condition upon which the policy can be forfeited, or in any way impaired, as a subsisting contract of insurance, is a failure on the part of the insured to pay the premium within thirty days after notice. The complaint alleges that the insured, up to the time of his death, made the payments on the policy as agreed with the defendant. That he actually paid the premium necessary to keep the policy in life till the 24th of August, prior to his death, was established and admitted. It was not necessary to prove that he also paid the premium on the 24th of August because the contract was not impaired by a failure to pay on that day, but by a failure to pay within thirty days after the defendant had served the statutory notice.

The Statute prescribes this notice as a necessary condition of forfeiture, and unless it was served the insured was not in default, because payment within thirty days after notice is to be taken as a full compliance with the conditions as to payment of premium. In the absence of proof on the part of the defendant as to the service of the notice, this allegation of the complaint was sufficiently established within the meaning of the contract as evidenced by the policy and the Statute when read together. Before the defendant could raise any question in regard to the nonpayment of the August premium it was necessary for it to show that it had complied with the Statute by serving the notice, as this step was essential in order to put the insured in default or to raise any point based on his omission to pay the last quarterly premium. It must therefore be assumed, in the absence of such notice, that the policy in question was in full force at the death of the insured; and even if the payment of the last premium was omitted, the obligation and promise of the defendant to pay upon death, during the life of the policy, was unimpaired. The purpose of the Statute referred to was to establish a rule which would preserve to the assured the benefit of premiums paid and to prevent the lapse of policies of life insurance without ample notice and an opportunity to save them from forfeiture by payment of premiums due within the specified time, and at the same time secure to the company, in case it is obliged to pay, the full amount of the premiums which the policy calls for.

When the provisions of this Statute are adopted in a contract of insurance for the purpose of modifying the forfeiture clause and the other strict conditions contained therein, then this clause and these conditions shall be so construed as to give to the assured the full benefit contemplated, without altering any other provision of the policy, if this can be done without violating any rule of law. When the scope and purpose of the law as deduced from the decisions of this court and the courts of

other States involving a construction of the same or similar Statutes is considered, no good reason is perceived for interfering with the result in this case in the courts below. *Phelan v. Northwestern Mut. L. Ins. Co.* 118 N. Y. 147; *Carter v. Brooklyn L. Ins. Co.* 110 N. Y. 15, 12 Cent. Rep. 756; *Carter v. John Hancock L. Ins. Co.* 127 Mass. 153; *Boyd v. Cedar Rapids Ins. Co.* 70 Iowa, 325.

It was not necessary, in order to enable the plaintiff to recover the sum insured, to pay, or tender before action brought, the premium that was payable on the 24th day of August prior to the death of the insured. If the policy was in full force when the assured died, as we think it was, that event fixed the liability and obligation of the defendant, notwithstanding the omission to make that payment. Nothing remained to be done by the widow of the assured or her assignee except to present to the defendant the proofs of death required by the policy. The death of the assured terminated the contract. The defendant's promise to pay, if it was not discharged, had matured, and the persons entitled to the benefits of the policy had only to establish the fact of death within the time and in the manner prescribed therein. The contract was kept in life by force of the Statute till the contingency upon which payment depended occurred. The death of the assured created the relation of debtor and creditor between the defendant and his widow, and the unpaid premium, with interest from the date when payable, was a claim to be deducted by the defendant from the sum due upon the policy. This puts the defendant in precisely the same position in which it would have been if the premium had been duly paid. *Carter v. John Hancock L. Ins. Co. supra.*

It was conceded upon the argument in this case that the unpaid premium, and interest thereon, was deducted from the verdict, and therefore no injustice has been done.

The judgment should be affirmed.

Ruger, Ch. J., Finch and Peckham, JJ., concur.

Andrews, J., dissenting:

I dissent from the prevailing opinion in this case. The sole purpose of the Statute of 1877, a purpose indicated as well by the title as the body of the Act, was to abrogate the rule that the failure to pay the premium on a life policy on the day specified therein created a forfeiture and rendered the policy void. The Act, therefore, provided that nonpayment of the premium at the day should not work a forfeiture,

and that the policy should continue in force, notwithstanding such omission, until notice by the Company and default of the insured for thirty days thereafter to make payment.

The construction placed on the Statute in the prevailing opinion, that by its operation the premium does not become due until after notice and expiration of the thirty days, and that meanwhile an action may be brought and a recovery had on the policy, although the premium has not been paid or tendered, is, I think, untenable. The premium is due from the time it becomes due according to the terms of the policy, and remains due at all times thereafter until actually paid, but under the Statute default in making payment at the pay-day nevertheless leaves the contract of the Company subsisting, and an action may therefore be maintained upon it in case of the death of the insured, unless it is shown that the notice has been given and that the premium was not paid within thirty days thereafter.

But it is a condition precedent to the maintenance of such action, that the plaintiff must before suit brought have paid or tendered the premium unpaid. The plaintiff under the Statute of 1877 is not required, as before, to show that it was paid or tendered on the day fixed in the policy, but he must aver and prove that payment was made at some time before the action was commenced, or else no right of action has accrued. This is in accordance with the well-settled rule that in mutual promises the plaintiff, seeking to charge the defendant, must aver and prove performance on his part of that which was the consideration of the defendant's promise, and this as well where the promise of the plaintiff was to be performed before the day fixed for performance by the defendant, as where the performance of respective promises were concurrent and dependent. The construction I have given to the Statute of 1877 fully accomplishes its purpose, while relieving it of the anomaly that a contract to pay an insurance on condition of the payment of the premiums may be enforced although the party claiming performance has never paid or offered to pay what was stipulated.

The cases in Massachusetts and other States have, I think, no bearing upon the present one. They were well decided and involved no such question as is presented in this case under the Statute of 1877.

The judgment should be reversed.

Earl and Gray, JJ., concur.

IOWA SUPREME COURT.

STATE OF IOWA

**Con CREEDEN, Certain Intoxicating Liquors,
and
CHICAGO, ROCK ISLAND & PACIFIC
R. CO., Appt.**

(....Iowa....)

1. Intoxicating Liquors transported

NOTE.—Right of State to prohibit manufacture and sale of spirituous liquors.

**A state law prohibiting the manufacture of
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from one State cannot be sold within another State for uses forbidden by its laws, although the transportation itself cannot be prevented by such State.

2. When a carrier ceases to be a carrier and becomes a warehouseman he cannot be protected as a carrier by the constitutional provisions as to regulations of commerce.

3. A railroad company which has en-

liquor within its limits, to be there sold as a beverage, does not necessarily infringe any right, privilege or immunity secured by the Federal Consti-

gaged with and aided a person in violation of the law against the sale of intoxicating liquors by keeping them in its warehouse for him, cannot defeat a proceeding to condemn them and escape the judgment of the law, on the ground that it has a lien upon the liquors for freight.

(October 18, 1890.)

APPEAL by defendant, The Chicago, Rock Island & Pacific Railway Company from a judgment of the District Court of Polk County condemning to destruction certain liquors in its possession and ordering it to pay the costs of the proceeding. *Affirmed.*

An information was filed in the office of a justice of the peace alleging that certain intox-

icating liquors were kept in the freight depot of the defendant Railway Company which were owned by Con Creeden and were intended to be sold by him in violation of law. A search warrant was issued and six separate boxes containing in all about twenty-eight and three-fourths gallons of whiskey were found in such depot and seized. The Railway Company answered that it was not guilty of the offense charged in the information; that the liquors were shipped from points without the State into the State, and were not subject to seizure; that defendant held the liquors simply as a common carrier having a lien thereon for freight charges, and denied that the liquors were kept for sale in violation of law.

tution. *Mugler v. Kansas*, 123 U. S. 623 (31 L. ed. 205); *Re Hoover*, 30 Fed. Rep. 51.

The prohibition may be supported upon the ground that *per se* it has a deleterious effect upon good order and the peace, comfort and morals of the people of the State. *Pearson v. International Distillery*, 72 Iowa, 848.

A State has the right to prohibit, restrict or regulate all sale and traffic in intoxicating liquors within the State; and to inflict penalties for their manufacture and sale, and provide regulations for the abatement of property used for such forbidden purposes. *Kidd v. Pearson*, 128 U. S. 1 (32 L. ed. 846), 2 Inters. Com. Rep. 222; *Kohn v. Melcher*, 29 Fed. Rep. 433; *State v. Kane*, 8 New Eng. Rep. 143, 15 R. I. 386; *Groesch v. State*, 42 Ind. 547; *State v. Allmond*, 2 Houst. (Del.) 512; *Ex parte Campbell*, 74 Cal. 20; *State v. Schweiter*, 27 Kan. 499; *Mugler v. Kansas*, 123 U. S. 623 (31 L. ed. 205).

The power to make laws regulating or prohibiting the sale of intoxicating liquors is undoubtedly within the police power of the State or nation. *Cooley, Const. Lim.* 720; *United States v. Nelson*, 29 Fed. Rep. 212; *Com. v. Kendall*, 12 Cush. 414; *Com. v. Clapp*, 5 Gray, 97; *Santo v. State*, 2 Iowa, 202; *State v. Wheeler*, 25 Conn. 290; *People v. Hawley*, 8 Mich. 330; *Jones v. People*, 14 Ill. 193; *State v. Prescott*, 27 Vt. 194; *Territory v. O'Connor*, 8 L. R. A. 357, 5 Dak. 397; *State v. Wright*, 14 Or. 385.

It is within the police power of the State to prohibit the giving away of intoxicating liquor, in a social or other manner, to one who at the time is already visibly intoxicated, although he be a friend. *Altenburg v. Com.* 4 L. R. A. 543, 126 Pa. 632.

The Legislature has authority absolutely to prohibit "drinking saloons" or saloons for the purpose of carrying on the liquor traffic; and to regulate the mode, manner and circumstances in which they shall be conducted and carried on, and to surround the right with such conditions, restrictions and limitations as may appear judicious. *Ex parte Bell*, 24 Tex. App. 428.

Iowa Laws 1873, chap. 113, prohibiting sale of malt or vinous liquors within two miles of the corporate limits of any municipality, is constitutional. *State v. Schroeder*, 51 Iowa, 197.

Ark. Act of March 2, 1875, "to prevent the sale or giving away of vinous, spirituous or intoxicating liquors within three miles of any academy, college or university," is constitutional (*Boyd v. Bryant*, 35 Ark. 69, 37 Am. Rep. 6); in Tennessee within four miles (*State v. Tarver*, 11 Lea, 638; *Tillery v. State*, 10 Lea, 35; *Harney v. State*, 8 Lea, 113); in Rhode Island within 400 feet of any public school. *Re Liquor Locations*, 13 R. I. 733.

Cal. Code, § 172, making it a misdemeanor to sell, give away or expose for sale, intoxicating liquor within two miles of the State prison or within one mile of the insane asylum or of the University of California or in the state capitol grounds, is valid. *Ex parte McClain*, 61 Cal. 436, 44 Am. Rep. 554, 7 L. R. A.

Transportation prohibited.

The words "any other person," in Iowa Code, § 1553, following a specification of certain companies and other carriers and their agents, etc., who are prohibited from transporting intoxicating liquors without a certificate, mean simply other persons of like kind or in like employment with those specified. *State v. Campbell*, 76 Iowa, 123.

One employed to transport goods sold is a carrier for hire, and his driver is required to have a certificate for transporting intoxicating liquors, under this section. *Ibid.*

A statute prohibiting the manufacture of intoxicating liquor for exportation from the State is valid. *Pearson v. International Distillery*, 72 Iowa, 848.

Iowa Code, § 1555, prohibiting the sale of wine made from fruits grown outside the State, but permitting the sale of that made from fruits grown in the State, is constitutional, not being a regulation of commerce, nor an invasion of "the privileges and immunities" of the citizens of another State. *State v. Stucker*, 58 Iowa, 496.

Defendant must show that the wine sold was made from domestic fruits. *State v. Miller*, 53 Iowa, 84.

Imported liquors.

The United States Supreme Court decided on April 28, 1890, in the case of *Lelsy v. Hardin*, generally known as the "Original Package Case," that in the absence of Congressional permission a State has no right to interfere with the sale by an importer of intoxicating liquors, imported from another State, in the original packages in which they were imported, as such action would infringe upon the right of Congress to regulate commerce (134 U. S. —, 33 L. ed. —). Prior to that time the Iowa court had made the following decisions:

Sales of intoxicating liquors in the original packages in which they were received could be and were prohibited. *State v. Bowman* (Iowa) 43 N. W. Rep. 302; *Collins v. Hills*, 3 L. R. A. 110, 77 Iowa, 181.

After reaching their destination, they are subject to the restrictions of the Iowa statute applicable to liquors kept for use as a beverage. *State v. Zimmerman* (Iowa) 43 N. W. Rep. 458.

Liquors imported by express, and held by the company as agent for the consignor, to be delivered to the consignee upon payment of the purchase price, are subject to be seized and destroyed as contraband property, in a proceeding against the liquors. It is wholly immaterial whether the officers of the express company know the character of the property or the uses to which it is to be put; and where the company voluntarily appears in the proceeding and claims the liquors, the costs may properly be taxed against it. *State v. U. S. Exp. Co.* 70 Iowa, 371.

The justice entered a judgment condemning the liquors and taxing the costs to the Railway Company, whereupon it appealed to the district court.

In that court it was admitted that the packages were shipped as stated in the answer; that upon their arrival they were taken into the Company's freight warehouse, the consignee was notified, and they remained in the warehouse until seized under the warrant issued in this case. That payment of the freight charges was demanded of the officer making the seizure.

There was nothing to show why the packages were left at the Company's depot so long as they were, and the only evidence bearing

on the question was that of the Company's freight agent and freight-house foreman. The former testified as follows:

"When goods are received as these were, it is customary for the Company to notify the consignee by postal card through the government postoffice. We deliver freight as soon as we can. In the mean time we hold it in the Company's freight house. We give the consignee notice and hold the goods to wait their sending for them, but where the drayman has an order from the consignee authorizing him to receipt for the goods, we deliver directly from the depot or sometimes from the car. I have no personal knowledge of any other shipments than these in question from the same

The mere giving an order for liquors to an agent of a seller, residing in another State, subject to the approval or disapproval of his principal, does not fix the place of contract, in Iowa, within the meaning of Rev., § 1571, making payment for liquors sold, etc., to be without consideration. Otherwise as to the sale for which the agent had power to contract, and intended by the seller to aid the purchaser to violate the liquor law. *Tegler v. Shipman*, 33 Iowa, 184.

Statutes construed.

The statute expressly requires courts and jurors to construe its provisions so as to prevent evasion, and so as to cover the act of giving as well as selling. *State v. Reinhartz*, 69 Iowa, 224.

The Iowa laws forbidding the sale of intoxicating liquors are applicable to all persons irrespective of their residence, or of the manner or vessels in which the liquors are put up. *Leisey v. Hardin* (Iowa) 43 N. W. Rep. 183, but see S. C. 134 U. S. —, 33 L. ed. —.

The proviso in Ala. Act of February 23, 1881, prohibiting the sale of liquor, except wine raised from grapes grown in Alabama, being a discrimination against foreign wines, is unconstitutional. *McCreary v. State*, 73 Ala. 490.

But the Act of March 1, 1881, prohibiting the sale of intoxicating liquors, but providing that it shall not prevent the sale of domestic wines manufactured from grapes grown in the State, is valid in its prohibitory section. *Powell v. State*, 69 Ala. 10.

Under the Iowa statute, providing that the words "intoxicating liquors" as used therein shall be construed to mean "alcohol, wine, beer, spirituous, vinuous and malt liquors and all intoxicating liquors whatever," liquor containing alcohol is, as a matter of law, intoxicating, however much it may be diluted, and regardless of the fact that the quantity drunk at any one time would not produce intoxication. *State v. Intoxicating Liquors*, 2 L. R. A. 408, 76 Iowa, 243.

Special licenses for sale.

Iowa Code, §§ 1523, 1526, which limit the giving of licenses to sell and buy intoxicating liquors to certain classes of citizens for certain purposes, do not violate the Federal Constitution. *Kohn v. Melcher*, 20 Fed. Rep. 433.

Municipal corporations under Iowa Law 1888, chap. 154, § 2, may license their sale. *Keokuk v. Dressell*, 47 Iowa, 597.

The Acts authorizing all towns and cities incorporated under special charters to regulate and prohibit the sale of intoxicating liquors not prohibited by state law, are constitutional. *State v. King*, 37 Iowa, 462.

Where the town prohibited the sale of liquors which it had authority to do, and also others which it had no power to prohibit, the ordinance may be enforced as to the former. *Eldora v. Burlingame*, 68 Iowa, 32.
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The town has no authority to prohibit any liquors but those prohibited by the statutes. *Cantril v. Sainer*, 59 Iowa, 26.

An ordinance entitled "regulating the use and sale" and in substance being entirely prohibited is unconstitutional (*Id.*); or it may be taken away by the town ordinance (*Columbus City v. Cutcomb*, 61 Iowa, 672); and it may be revoked for a single unlawful sale. *Hildreth v. Crawford*, 65 Iowa, 330.

For the violation of an ordinance under which a liquor license was granted, the city may cause the license to be forfeited. *Ottumwa v. Schaub*, 59 Iowa, 515.

A licensed liquor dealer must act in good faith in his sales, but is not liable, if his purchaser entertains a secret purpose to use the liquor for unlawful purpose. *Taylor v. Pickett*, 52 Iowa, 487.

Permits to pharmacists.

Code, § 1556, does not apply to a physician who treats a person professionally who is injured while intoxicated. *Sansom v. Greenough*, 55 Iowa, 127.

To give a right of action under Code, § 1557, the liquor sold must contribute to the intoxication by which the wife is injured. *Welch v. Jugenheimer*, 56 Iowa, 11.

Iowa Laws 1880, chap. 75, regulating the sale of liquor by apothecaries, and providing a somewhat different penalty for an unlawful sale than Iowa Code, title 11, chap. 6, was held not to repeal the latter. *State v. Mercer*, 58 Iowa, 132.

The Laws of 1884, chap. 145, providing additional penalties for illegal sales of liquors, is not repugnant to Const., art. 3, § 29, which provides that "every Act shall embrace but one subject," etc.; nor is it in conflict with art. 1, § 6, which declares that "all laws of a general nature shall have a uniform operation." *Martin v. Blattner*, 68 Iowa, 236.

It is a general prohibitory law and repeals by implication earlier statutes excepting pharmacists from their operation. *State v. Bissell*, 67 Iowa, 616.

A person who holds a permit to manufacture or sell intoxicating liquors, and who fails to make return to the county auditor on the last Saturday of each month, or within five days thereafter, renders himself and bondsmen liable for the penalty prescribed by Laws 1884, chap. 143, § 8. *State v. Montee*, 68 Iowa, 331.

As to druggists, physicians and pharmacists in other States, see *People v. Hinohman* (Mich.) 4 L. R. A. 707; *Battle v. State*, 51 Ark. 97; *State v. Pierce*, 26 Kan. 777; *Intoxicating Liquor Cases*, 25 Kan. 751; *Sarris v. Com.* 83 Ky. 327; *Com. v. Minor*, 10 Ky. L. Rep. 1008, 11 S. W. Rep. 472; *Carrington v. Com.* 78 Ky. 88; *Wright v. People*, 101 Ill. 128; *State v. Scott*, 2 West. Rep. 544, 20 Mo. App. 418; *State v. Roller*, 77 Mo. 120; *State v. Shaw*, 58 N. H. 72; *State v. McBrayer*, 98 N. C. 619; *The Druggist Cases*, 85 Tenn. 449; *Boone v. State*, 10 Tex. App. 418; *State v. Thompson*, 20 W. Va. 674; *State v. Cox*, 23 W. Va. 797; *Miles v. State*, 5 W. Va. 524.

consignors to Con Creeden. I have not examined the books to determine as to others. There may have been others but I did not look up the records to see. Knowing I was going to be inquired of in regard to these shipments, I consulted the books and now have a recollection in regard to them. I was not the person who demanded the freight of the officer."

The latter testified: "I never saw Con Creeden at the freight house in my life. There has been freight taken from there consigned to him before the time of this seizure. The expressman came and got goods, receipted for them and paid the freight bills. It is customary to deliver freight to all transfer lines that take

up the expense bills when they present an order from the consignee, or if we know the expressmen are responsible, and they call for the goods, we would deliver them, especially if they have a bill of lading. Before this seizure, I think there was but one package at a time there for Con Creeden. It always came in single packages. These packages came singly, but he did not call for them."

A jury having been waived, the court entered judgment condemning the liquors and directing the Company to pay the costs; whereupon it appealed to this court.

Messrs. Thomas S. Wright and George E. McCoughan, for appellant:

The defendant, a common carrier, was bound

Remedy by criminal prosecution.

The Iowa Revision, § 5110, does not attempt any restrictions upon subsequent legislation, and the Act of 1870, chap. 69, applies to convictions for keeping liquor nuisances. *State v. Winstrand*, 37 Iowa, 110.

One who keeps liquor which he intends shall be sold lawfully is not liable for a sale made without his knowledge. *State v. Hayes*, 57 Iowa, 27.

Treating a drunken person is the offense of disposing of liquor to an intoxicated person. *State v. Hubbard*, 60 Iowa, 466.

Where a pint of whiskey was sold to a stranger on his mere statement that he wanted it for medicine, the finding that it was sold as a beverage is justified. *State v. Knowles*, 57 Iowa, 669.

An indictment charging unlawful sale of whiskey is not supported by proof of sale of other liquors. *State v. Hesner*, 55 Iowa, 494.

An indictment charging in one count the keeping of liquors with intent to sell contrary to law, and in another count the unlawful sale, is not bad for duplicity. *State v. Howorth*, 70 Iowa, 157.

An information charging an illegal sale with a view to having the permit revoked (Code, § 1535) is not a criminal proceeding, and a bond to supersede the judgment appealed from may be given. *State v. Schmidtz*, 65 Iowa, 556.

Unlawful intent may be presumed from the fact of their sale in violation of law. *State v. Sartori*, 55 Iowa, 340.

Where the sale of intoxicating liquors is a crime under the Prohibitory Law, the purchaser is not a participant in the crime, and he cannot excuse himself from testifying as to such purchases made by him, on the ground that his testimony would tend to criminate himself. *Wakeman v. Chambers*, 69 Iowa, 169.

One indicted for a third offense may be convicted of a first offense. *State v. Gaffney*, 66 Iowa, 262.

A conviction of selling ale, beer and wine without license is not invalidated by the fact that the sale of ale is prohibited by state law. *Keokuk v. Dressell*, 47 Iowa, 597.

The Amendment to the Constitution prohibiting the sale of beer, submitted to the people June 27, 1882, not having been lawfully adopted, no one could be convicted of a sale thereof, under Iowa Code, § 4082.

A party, to justify the act of giving intoxicating liquors to a minor, must show that the order was in writing. *State v. Coonan*, 48 Iowa, 567.

Seizure of liquors.

The compensation which a sheriff is entitled to receive for executing a warrant for the seizure of intoxicating liquors is \$2,—the fee fixed by Laws 1882, chap. 94, § 4, for serving all warrants. Section 3807 stands repealed as to sheriffs, but remains good as to constables and other officers. *Painter v. Polk Co.*, 70 Iowa, 596.

7 L. R. A.

Intoxicating liquors seized under proceedings for their forfeiture are not subject to replevin. *Fries v. Porch*, 49 Iowa, 351.

Judgment lien for violation of Liquor Law.

The Iowa Laws of 1862, chap. 47, § 8, making a judgment for violation of the Liquor Law a lien on the property of a third person, is constitutional. *Polk Co. v. Hierb*, 37 Iowa, 361.

Property which the owner knows is used for the unlawful sale of liquors is subject to the lien of a judgment against the occupant for any unlawful sale, although the owner did not know of or consent to the particular sales relied on. *Wing v. Benham*, 76 Iowa, 17.

To charge the premises with the lien it must be shown that the owner consented to their unlawful use. *Meyers v. Kirt*, 57 Iowa, 421.

To establish the lien, consent of the owner need not be shown by any affirmative act. *Loan v. Etzel*, 62 Iowa, 420.

Where different judgments were rendered upon separate trials against the several defendants, plaintiff must elect upon which he would rely as a lien upon the premises where the sale took place. *Putney v. O'Brien*, 53 Iowa, 117.

The lien given by Iowa Code, § 1558, for fines and costs for the unlawful sale of intoxicating liquors, upon the property occupied for that purpose, is not defeated by a conveyance pending a suit to enforce the lien. *McClure v. Braniff*, 75 Iowa, 38.

Keeping liquor nuisance.

Under Iowa Code, §§ 1542, 1543, one making a sale of liquor for other purposes than that authorized by his permit is guilty of keeping a liquor nuisance; and the fact that he thus sells is evidence of the intent with which he keeps such liquors. *State v. Webber*, 76 Iowa, 686.

Where drunkenness, quarreling and breaches of the peace are carried on, though but once, it is a nuisance. *State v. Pierce*, 65 Iowa, 85.

An information charging a defendant with keeping intoxicating liquors "for the purpose of sale" is sufficient under Iowa Code, § 1542, which uses the words "with intent to sell." *State v. Mohr*, 58 Iowa, 261.

In an indictment under Code, § 1543, for the nuisance of selling liquors, it is not necessary to allege that it is the second offense. *State v. Howorth*, 70 Iowa, 157.

Proceedings for seizure of intoxicating liquors under Iowa Code, § 1544. See *Weir v. Allen*, 47 Iowa, 452.

In Iowa Code, § 1550, providing that all sales, liens, pledges, etc., made on account of intoxicating liquors, shall be void, the word "lien" does not include the lien of a judgment. *Smith v. Luddy*, 50 Iowa, 112.

A fine of \$1,000 was held not excessive for nuisance in the illegal sale of liquors, where defend-

to receive and carry the packages when offered to it at Rock Island. They were properly marked and labeled.

McClain's Code, ed. 1888, § 2412.

It could not lawfully refuse to carry the goods, and no statute of Iowa could be relied on to justify such refusal.

Bowman v. Chicago & N. W. R. Co. 125 U. S. 500 (31 L. ed. 719). See *Hutchinson, Carr*, § 47; *Collins v. Hills*, 3 L. R. A. 110, 77 Iowa, 181.

Having received and carried the goods, the law conferred upon the defendant certain rights with relation to them. These were:

1. A lien upon them for their transportation, and also for their storage, if it was compelled to store them.

McClain's Code, ed. 1888, § 3364 (2177); *Winne v. Illinois Cent. R. Co.* 81 Iowa, 593; *Chicago & S. W. R. Co. v. Northwestern Union Packet Co.* 88 Iowa, 377.

2. If the goods were unclaimed for six months and the charges unpaid, it could sell them; and, after reimbursing itself for its lien and costs, deposit the money with the county treasurer, through whom it was liable eventually to pass into the school fund.

McClain's Code, §§ 3365, 3369 (2178, 2182).

It might and it became its duty to store the goods after a reasonable time.

Angle v. Mississippi & M. R. Co. 18 Iowa, 555.

The law contemplated that these liquors,

ants appeared to have flagrantly violated the law, without much regard for its regulations. *State v. Aulman*, 76 Iowa, 624.

Abatement of liquor nuisance.

Under Iowa Acts, 20 Gen. Assem. chap. 143, § 12, and 21 Gen. Assem. chap. 66, §§ 1, 2, a place where liquor has been illegally sold may be abated. *Elwood v. Price*, 75 Iowa, 223.

Under Iowa Laws 1886, p. 82, providing for the abatement of a liquor nuisance by the seizure and destruction of the liquor and the removal of all articles used in the business on the premises, when the nuisance is established, the court should provide for its abatement. *McClure v. Braniff*, 75 Iowa, 33.

Owners of premises which were fitted up with a bar and other appliances for the sale of drinks, and on which the evidence showed that a saloon nuisance had been permitted to exist, will be enjoined from maintaining the nuisance, although they reside in another place, where they made no showing that they acted in good faith in leasing the property. *State v. Douglass*, 75 Iowa, 432.

Where the front room of defendant's building was used as a liquor saloon, but other portions of the building were occupied by his family, and a back room was used for a kitchen and also as a place for storing liquors, the back room was considered an "appendage" to the saloon. *State v. Fertig*, 70 Iowa, 272.

The method of abating nuisances kept in violation of the Liquor Law, defined in Laws 1886, chap. 66, was properly employed in cases which were pending when the Statute was enacted, but not finally determined until afterwards. *McLane v. Bonn*, 70 Iowa, 752.

The abatement should be decreed, although defendant, who had for years maintained the nuisance, discontinued it four days before filing his answer. *Halfman v. Spreen*, 75 Iowa, 309.

The Iowa statute providing that evidence of general reputation shall be admissible to prove the existence of such nuisance, and for the allowance of an attorney's fee, is applicable to an action brought under a former statute, but before the trial of which it took effect. And it is admissible to show the amount of attorneys' fees both in the state courts and in the federal courts to which the action was removed. *Farley v. O'Malley*, 77 Iowa, 531.

The Iowa Act of 1886, providing that pharmacists alone shall have the right to permits to sell liquors for medicinal purposes, though making no mention of the Code, § 1526, abrogates a brewer's right to sell by virtue of a permit under that section. *State v. Aulman*, 76 Iowa, 624.

A registered pharmacist, permitted to sell liquors for medicinal purposes under Iowa Laws 1886, chap. 63, is guilty of maintaining a liquor nuisance under the Code, § 1543, when he sells for other purposes. 7 L. R. A.

State v. Salts, 77 Iowa, 196; *State v. Webber*, 76 Iowa, 686.

Where he claimed on the trial that the sales were made by his clerk, evidence that the business was conducted under his supervision, and was drunk on the premises, shows knowledge on his part. *Elwood v. Price*, 75 Iowa, 223.

As to abatement of liquor nuisance in other States, see *Streeter v. People*, 69 Ill. 565; *Duke v. Marston*, 6 New Eng. Rep. 919, 64 N. H. 603.

In Kansas it is a criminal, and not a civil, proceeding. *State v. Crawford*, 23 Kan. 743.

A decree for injunction and the abatement of a saloon nuisance, obtained by a citizen of a county, is a bar to a suit by another citizen of the same county in the absence of anything to show why such first decree remains unenforced. See *Dickinson v. Eichorn* (Iowa) 6 L. R. A. 721 and note.

Remedy by injunction.

A statute declaring a building where liquors are unlawfully sold a nuisance and allowing it to be enjoined by a citizen of the county, is not a violation of the right of trial by jury. *Littleton v. Frita*, 65 Iowa, 438.

Laws 1884, chap. 143, in providing that the nuisance in a building or place where prohibited liquors have been kept or sold may be enjoined, merely provides an additional remedy; and before a defendant can claim that he is about to be deprived of his property without compensation, he must show that such property was owned by him or those under whom he claims, and that it was used for the sale of intoxicating liquors, prior to the enactment of the Statute of 1855. *McLane v. Leicht*, 69 Iowa, 401.

Where it was shown to have been voluntarily abated before the commencement of the action injunction will not lie. *Eckert v. David*, 75 Iowa, 302.

A Methodist clergyman who settled in a town, under an appointment by the bishop for a year, is a citizen, and may maintain an action to enjoin a liquor nuisance. *Fuller v. McDonnell*, 75 Iowa, 230.

An allegation that the unlawful sale of liquors is conducted with the owner's permission is equivalent to saying that it is done with his knowledge and consent; and a temporary injunction should issue to restrain him from further permitting the use of his building for such a purpose. *Gray v. Stienes*, 69 Iowa, 124.

An adjudication, upon information, that defendant was not guilty of the crime of selling intoxicating liquors contrary to law, is not an adjudication that he is not maintaining a nuisance, and is not a bar to proceedings by injunction to restrain him from continuing it. *Martin v. Blattner*, 68 Iowa, 236.

The lessor of a building used as a place for the unlawful sale of intoxicating liquors becomes an aider and abettor in violating the law, and he is a

properly marked and labeled, should be carried and stored.

McClain's Code, ed. 1888, § 2412; Laws, 22 Gen. Assem. chap. 78, § 7.

If defendant was bound to receive and carry the goods, it was equally bound to take care of them and for carriage and care it was entitled to compensation. When received and while being carried the goods were lawfully articles of commerce, and no legal seizure could be made of them.

See *Hall v. DeCuir*, 95 U. S. 488 (24 L. ed. 548).

The articles seized and condemned were articles of interstate commerce.

The Daniel Ball, 77 U. S. 10 Wall. 565 (19 L. ed. 1002).

The goods do not lose their interstate commerce character because they are held by the carrier awaiting delivery.

See *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 203 (29 L. ed. 161); *License Cases*, 46 U. S. 5 How. 575 (12 L. ed. 256).

These articles embarked in interstate commerce were still *in transitu*, so far as the rights of the consignor were concerned. They had not been delivered to the consignee nor to his agent, but were in the hands of the defendant either as carrier or warehouseman, and in either case were still subject to be recalled by the consignor.

O'Neil v. Garrett, 6 Iowa, 480; *Greve v. Dunham*, 60 Iowa, 108.

Mr. J. A. Harvey, with **Mr. John Y. Stone**, *Atty-Gen.*, for the State:

At the time of the seizure, the duty of the Railroad Company as a common carrier had terminated.

2 Kent, Com. 602; Edwards, Bailm. pp. 515-517, also pp. 284-286, 295, 296, 506; *Angle v. Mississippi & M. R. Co.* 18 Iowa, 555.

In this class of cases, the regulation of com-

merce, in the constitutional sense, embraces transportation only.

See *Kidd v. Pearson*, 128 U. S. 1 (32 L. ed. 846), 2 Inters. Com. Rep. 232.

It is the duty of a common carrier to harmonize its regulations and professions with the law.

State v. U. S. Exp. Co. 70 Iowa, 271; *Milwaukee Malt Extract Co. v. Chicago, R. I. & P. R. Co.* 73 Iowa, 98.

The Statute makes this whiskey subject to condemnation, if, at the time of seizure, it was owned or kept by anyone for sale in violation of law.

§ 1546.

It was in possession of the Railroad Company but was owned by either the consignor or the consignee. If by the former then it was contraband.

State v. U. S. Exp. Co. 70 Iowa, 271.

If it was owned by the consignee it was held for unlawful sale, for he was engaged in that business.

Beck, J., delivered the opinion of the court:

1. The facts established by the undoubted preponderance of the evidence are these: There was shipped from Rock Island, Ill., by the Chicago, Rock Island & Pacific Railway Company, consigned to defendant Con Creeden, at Des Moines, six packages of whiskey, in separate shipments. The packages contained about five gallons each. Two were shipped on the 7th, and one each on the 9th, 14th, 15th and 17th days of November. Each package was received at the railroad freight depot at Des Moines in two days after the date of its shipment. The charge on each package was 34 cents. They were kept in the freight house or warehouse of the Company until taken upon the search-warrant issued in this case. The de-

proper party to proceedings by injunction to restrain the unlawful traffic as a nuisance. *Ibid.*

Disobedience of injunction a contempt of court.

The statute which provided a fine of \$500 for the disobedience of an injunction against the unlawful sale of intoxicating liquors is not unconstitutional. *Jordan v. Wapello Co.* Circuit Ct. 69 Iowa, 177.

Where the selling of intoxicating liquors has been enjoined, proceedings for contempt in disobeying the injunction may be entitled the same as the action in which the injunction was issued. *Manderscheid v. Plymouth Co.* District Ct. 69 Iowa, 240.

Where one has been fined for violating an injunction issued under the Prohibitory Liquor Law, he may, upon default in paying the fine, be imprisoned, under the general provision of Code, § 4500; and, under Laws 1884, chap. 143, § 12, such person cannot avail himself of the benefits of Code, § 4611, which permits a poor person, after having been imprisoned thirty days for failure to pay a fine in a criminal case, to be released upon giving his note for the amount of the fine, together with a written schedule of his property. *Hanks v. Workman*, 69 Iowa, 600; *Ex parte Tulchro*, 69 Iowa, 393. See *Carleton v. Rugg*, 5 L. R. A. 193, 149 Mass. 550.

Action by wife for damages for injury to her means of support.

In an action by a wife for damages, an original petition claiming a lien on the saloon property, which did not state all the facts necessary to establish L. R. A.

lish it, was held sufficient to prevent the running of the Statute of Limitations; and an amended petition after two years was good. *Myers v. Kirt*, 68 Iowa, 124.

Defendant is only liable for all the damages to which he contributed, even though it be difficult to separate the damages to which he did not contribute. *Huggins v. Kavanagh*, 52 Iowa, 368; *Richmond v. Shickler*, 57 Iowa, 488.

The fact that the wife has purchased liquor from the defendant under compulsion, or to keep her husband at home, does not defeat her right to maintain the action. *Ward v. Thompson*, 48 Iowa, 588.

The defendant's knowing the husband to be in the habit of becoming intoxicated, and selling him intoxicating liquors while he was intoxicated, will support a verdict for exemplary damages. *Welts v. Ewen*, 50 Iowa, 84.

In an action for civil damages for intoxicating plaintiff's husband, evidence of sales made more than two years prior to the action is admissible to rebut evidence that the husband had been a confirmed toper long years before. *Gustafson v. Wind*, 62 Iowa, 231.

An instruction by which it was left to the jury whether plaintiff contributed to the injury by letting her husband have portions of his wages deposited with her, when she had reason to believe that he would purchase liquors with the money, and that if she did, she could not recover, was held proper. *Huff v. Aultman*, 69 Iowa, 71.

In an action by a wife evidence as to the number,

fendant Con Creeden had received like packages of intoxicating liquor prior to this from the Railroad Company, which had been, in the same way, shipped to him from places out of the State. The liquors were seized on the 23d day of November. Two of the packages had been for fifteen days in the railroad freight-house at Des Moines, one for thirteen days, one for nine days, one for eight days, and one for six days. Con Creeden kept a place in Des Moines for the unlawful sale of intoxicating liquors, and was guilty of frequent violation of the law against their sale. The packages were marked with the word "Whiskey," and prior to the seizure in this case like packages had been received for and delivered to Con Creeden, one at a time, by the Railroad Company.

2. In *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465 [81 L. ed. 700], the United States Supreme Court has held that the laws of this State restricting the transportation of intoxicating liquors from other States into this State are a regulation of commerce, and are therefore in conflict with the Constitution of the United States, which it is held secures the right of transportation of articles of commerce from one State to another. The features of the Iowa Statute held to conflict with the United States Constitution are those which restrict the right of common carriers to transport intoxicating liquors into this State. The restriction upon the powers and rights of carriers is the point upon which it conflicts with the Constitution of the United States. In so far as the Statute prohibits the keepers of saloons, restaurants, warehouses or any other place, from keeping intoxicating liquors for unlawful sales, it does not conflict with the Constitution of the United States. But, as commerce is dependent upon carriers for transportation of all articles of trade, their powers

and rights cannot be restricted. We think there can be no doubt that this is the correct purport of this decision.

We do not understand that the United States Supreme Court has decided in this case, or in any other, that intoxicating liquors transported from another State may be sold within this State for uses forbidden by its laws. Indeed, the court expressly declares that the question is not in the case. The United States Supreme Court in many decisions has held that the States have the constitutional right to forbid the sale of intoxicating liquors within their borders. It appears that this controlling thought has escaped attention in the discussions upon the subject of the effect of the constitutional authority of Congress to regulate commerce between the States upon the power of a State to forbid the sale of intoxicating liquors within its borders which are imported from another State. Commerce is not the use of articles of traffic. When the United States Constitution conferred upon Congress the power to regulate commerce between the States, it was not intended that provisions should be made by Congress to affect the use of the subjects of commerce. It surely was not the intention that laws should be enacted affecting the tastes, habits and wants of the people, so as to increase the demands for articles of traffic; nor could it have been intended that the governments of the States established by the people should be deprived of the power to repress the use of such articles of commerce as the State determines are detrimental to the morals, health, peace and prosperity of the people. The people, by their tastes, habits, wants and laws enacted by themselves, determine what articles of commerce they will use. Commerce in the articles of traffic thus required by the people is regulated by Congress. If the use of certain articles of

age and sex of her children is not admissible to affect the question of damages. *Huggins v. Kavanagh*, 52 Iowa, 388; *Welch v. Jugenheimer*, 56 Iowa, 11.

But she may show, to sustain a claim for exemplary damages, the number and age of her children, if she also shows that defendant, prior to selling the liquor to her husband, had knowledge that she had such children. *Ward v. Thompson*, 48 Iowa, 588.

To render evidence of recoveries from other parties admissible to reduce damages, it must be shown that such other recoveries were for sales during the same time as that covered by the alleged sales by defendant. *Jackson v. Noble*, 54 Iowa, 641.

Where a joint action is brought by a married woman against the seller and the owner of the premises, said owner is entitled to a trial by jury to decide whether he consented to or had knowledge of the sale. *Loan v. Hiney*, 53 Iowa, 89.

In an action by a wife for injury to her means of support, a judgment obtained by her in an action against another party, for injury thereto accruing, is admissible to show the actual extent of the wrong done by the defendant. *Engleken v. Webber*, 47 Iowa, 558. Compare *Ennis v. Shiley*, Id. 552.

Proof that the husband bought liquor of the defendant will not shift the burden upon the latter to show that his liquor did not cause the former drunkenness. *Macloed v. Geyer*, 53 Iowa, 615.

Proof that the vendor did not know that such person was in the habit of getting intoxicated constitutes no defense. *Dudley v. Sautbaine*, 49 Iowa, 650.

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The fact that a husband, when intoxicated, called his wife a prostitute in the presence of her neighbors, and threatened to kill her, was held, in the absence of proof that his conduct impaired her health, not to constitute a ground for the recovery of actual damages in her action against the liquor seller, and evidence thereof to be inadmissible as a ground of exemplary damages. *Calloway v. Laydon*, 47 Iowa, 456.

Evidence that plaintiff's husband had been an habitual drunkard for twenty years before his death was held incompetent to reduce the measure of damages; but evidence of his habitual drunkenness was properly admitted, on plaintiff's behalf, for the purpose of showing that the sale of beer to him was unlawful. *Huff v. Aultman*, 89 Iowa, 71.

In other States. See *Cruse v. Aden*, 8 L. R. A. 327, 127 Ill. 231; *Brockway v. Patterson* (Mich.) 1 L. R. A. 708; *Jones v. Bates* (Neb.) 4 L. R. A. 495.

Purchasers may recover purchase money.

The Iowa Code, § 1550, allowing purchasers of intoxicating liquor illegally sold to recover the purchase money by action, is valid. *Connolly v. Scurr*, 72 Iowa, 223.

A demand for money paid for liquors unlawfully sold must be made before an action therefor is maintainable. *Schober v. Rosenfield*, 75 Iowa, 455.

An agent making illegal sales of liquor, but not receiving the purchase price therefor, is not liable to an action to recover the amount of such payments, under Iowa Code, § 1550. *Ibid*.

commerce, as intoxicating liquors, is forbidden by the taxes, habits and laws of the people, it is not for the courts, by judicial interpretation of the Constitution of the United States, to force them upon the people against their wishes, and against the laws of their own enactment. The people of the State, in their sovereign capacity, as rulers of their own domestic affairs, may declare that intoxicating liquors shall not be sold in the State for use as a beverage. The provision of the Constitution of the United States in question cannot nullify such a state law, which is enacted in the exercise of full authority. Under it Congress may regulate the traffic in such things until it comes to the point of their use as a beverage. There the authority to regulate commerce ceases to extend to the interdicted liquors, for they are no longer subjects of lawful commerce.

8. A carrier is a servant of commerce, and is protected under constitutional provisions for the regulation of commerce in the discharge of all the duties of a carrier recognized by the law. Regulations of commerce reach him while he is in the discharge of duties pertaining to commerce. When he ceases to be a carrier he is beyond the protection provided by regulations for commerce. If he ceases to be a carrier and becomes a warehouseman, he cannot be protected as a carrier.

Recurring to the facts, it will be remembered that the liquor in question had been received at the place of destination from six to fifteen days prior to the seizure, and was kept in the railroad freight house, or warehouse used for storing freight transported or for transportation upon the railroad. It is a familiar rule of the law that upon the arrival of freight at the place of destination, and its deposit in the carrier's warehouse, his responsibility as carrier ceases. He becomes, as to the freight and the consignee, a warehouseman. *Francis v. Dubuque & S. O. R. Co.* 25 Iowa, 60; *Mohr v. Chicago & N. W. R. Co.* 40 Iowa, 579; 2 Am. & Eng. Cyclop. Law, 881; Ang. Carr. 5th ed. § 304, and cases cited in notes.

The defendant did not, therefore, hold the liquor as a carrier, but as a warehouseman. As such he was the agent of Con Creeden, the bailor.

4. But counsel for defendant say that the goods became impressed with the character of interstate commerce, and retained that character after they went into the custody of the warehouseman. In truth commerce, so far as transportation is concerned, ceased to have connection with the liquors when they ceased to be held by the carrier for transportation.

After that they were held for storage. It surely will not be contended that the storage of goods was a continuation of the transportation. They were stored because the transportation had ceased.

5. It is made plain by a consideration of the facts that the Railroad Company held the liquors under special arrangement with Con Creeden. Six successive shipments of liquor, each containing less than five gallons, were held for from six to fifteen days before they were seized, and it had been the practice of the Railroad Company for some time before these shipments were received to hold shipments of whiskey in the same way. The little freight bills of 84 cents on each shipment were not paid until the package was delivered. Con Creeden did not present demands for the whiskey, but sent an express wagon to get a jug at a time, as it was wanted for sale in the saloon in violation of law. He was a notorious saloon keeper and violator of the law. The packages were marked "Whiskey." All the circumstances lead to the conclusion that the Railway Company held the liquor for Con Creeden under an agreement that it should aid him to evade the law. It cannot, under these circumstances, base any defense upon the fact that its freight charges were not paid. Had it dealt with Con Creeden with a purpose to obey the law, it would not have permitted its freight bills to remain unpaid for so many days, and would not have permitted its warehouse to be used as a place where liquors kept for unlawful sale could be conveniently concealed and protected. In its attempt thus to violate the law, and to aid a notorious violator of the law to evade its provisions, it loses all claim or lien which it had, either as a carrier or warehouseman, for its freight bills of 84 cents each upon each jug of whiskey.

A violator of the law will not be enabled to justify his offenses, and escape punishment therefor, on the ground of rights of property or other rights which he holds in things used in the commission of the offense. Con Creeden's right of property in the whiskey cannot shield him from the effects of his unlawful acts in keeping the whiskey for unlawful sale. Nor can the Railroad Company, which was engaged with and aided him in the violation of the law, defeat the proceeding and escape the judgment of the law, on the ground that it has a lien for trifling sums upon the liquors which it was keeping in violation of law. The foregoing discussion disposes of all questions in the case.

The judgment of the District Court is affirmed.

RHODE ISLAND SUPREME COURT.

John N. A. GRISWOLD

v.

George WEBB.

(....R. L....)

An unlicensed hack driver specially ordered for a steamboat passenger is not a trespasser in going with his carriage, for the purpose of meeting such passenger, upon a wharf used

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by the steamboat company to receive and discharge all passengers, although the rules of the wharf forbid any but private carriages, or hackney carriages which are licensed, to stand upon the wharf.

(November 30, 1889.)

ACTION of trespass *quare clausum fregit* to recover damages for the alleged wrongful

entry of defendant upon plaintiff's wharf for the purpose of soliciting passengers as a hackman. *Judgment for defendant.*

The facts are fully stated in the opinion.

Messrs. Francis B. Peckham and Samuel R. Honey for plaintiff.

Messrs. William P. Sheffield and William P. Sheffield, Jr., for defendant.

Stiness, J., delivered the opinion of the court:

The plaintiff is owner of Commercial Wharf, in Newport, a part of which is leased to the Newport & Wickford Railroad & Steamboat Company as a terminus. To preserve order upon the wharf, stands are let for hackney carriages, and the following rules are prescribed for its use:

"Rules for Hackmen and Others.

"1. Drivers of hackney carriages shall remain on or near their carriages, except when carrying baggage to or from them.

"2. No one shall occupy a hack stand or express stand except the licensee or his employés.

"3. No hackney carriage or express wagon shall stand on the space to the eastward of the restaurant building, or on the roadways, except on licensed hack stands, even though ordered in advance by a passenger."

East of the restaurant building is a plank walk for passengers, and east of the walk a space is reserved for private carriages. The rest of the wharf is used for sidewalks, roadways, and buildings. The defendant, driver of a hackney carriage in Newport, went to the wharf on the day in question for a lady who was to arrive in the boat, as he had been ordered to do by the passenger, or someone in her behalf. He backed his hack as near as he could to the space reserved for private carriages, when he was ordered to leave the wharf by the superintendent, upon the ground that he had no right to be there, having no license from the owner. The plaintiff claimed that the wheels of the defendant's carriage were backed on to the plank walk, but, upon all the testimony, we are not satisfied this was so, or, if so, that it was anything more than accidental. At any rate the order to leave the wharf was not put upon this ground, but because he had no right there. Upon receiving the order to leave, the defendant stated, both to the plaintiff and to the superintendent of the wharf, that he had been ordered there for a passenger, and he refused to leave. The plaintiff then called a policeman, who moved the carriage to another place in the roadway, where the defendant remained until the boat arrived, when he took his passenger and drove away. The passenger was an infirm lady, who had been accustomed to ride with the defendant, and one who was obliged to use a stool, which he had with him, to aid her in getting into the carriage. The plaintiff sues in trespass, and the defendant justifies under a right as servant of the passenger. The question is whether the defendant had the right to enter and remain upon the wharf to take the passenger, notwithstanding the rules and the order to leave. We understand the rules to forbid an unlicensed hackney carriage to stand upon the wharf at all; for none are allowed to stand in the road-

ways, except on the licensed stands, and none are allowed to occupy a stand without a license. But the wharf is leased to a common carrier of passengers, with a provision that the space east of the restaurant shall be reserved for the use of private carriages of passengers arriving at the wharf.

The question of right, therefore, is the same as it would be between passengers and a company which owns its terminus. While such ownership carries with it a right of control, in most respects the same as in private property, a railroad station or steamboat wharf is, to some extent, a public place. The public have the right to come and go there for the purpose of travel; for taking and leaving passengers; and for other matters growing out of the business of the company as a common carrier. But the company has the right to say that no business of any other character shall be carried on within the limits of its property. It has the right to say that no one shall come there to solicit trade, simply because it may be convenient for travelers, and so to say that none, except those whom it permits, shall solicit in the business of hacking or expressing. When notice of such prohibition has been given, the license which otherwise might be implied is at an end, and it is the duty of persons engaged in any such business to heed the notice and to retire from the premises. *Barney v. Oyster Bay & H. Steamboat Co.* 67 N. Y. 801; *Com. v. Power*, 7 Met. 596.

But, while this is so, the company cannot deprive a passenger of the ordinary rights and privileges of a traveler, among which is the privilege of being transported from the terminus in a reasonably convenient and usual way. A company cannot compel a passenger to take one of certain carriages, or none at all; nor impose unreasonable restrictions, which will amount to that. If a passenger orders a carriage to take him from the terminus, such carriage is, *pro hac vice*, a private carriage, not in the sense that the passenger has a special property in it, so as to be liable for the driver's negligence, but in the sense that it is not "standing for hire." *Masterson v. Short*, 38 How. Pr. 481.

The driver is not engaged in his vocation of soliciting patronage, but is waiting to take one with whom a contract has already been made. No question is made that a passenger may have his own carriage enter the premises of a carrier to take him away; but to say that one who is not so fortunate as to own a carriage shall not be allowed to call the one he wants, because it is a hackney carriage, would be a discrimination intolerable in this country. Yet this is really the plaintiff's claim. Every passenger has the right, upon the premises of the carrier, to reasonable and usual facilities for arrival and departure; and, so far as this includes the right to be taken to and from a station or wharf, it is immaterial whether he goes in a private or a hired carriage. Decisions upon this question have not been numerous, and we know of but one directly in point, although in others there are dicta which indicate what is understood to be the law.

Summitt v. State, 8 Lea, 418, was a conviction of the defendant, a watchman in a depot, for assault in ejecting a hackman therefrom.

The company had forbidden hackmen to enter the building. Notwithstanding this rule, the right of a hackman to go into a part of the depot to obtain the baggage of a passenger, whose check he had, was not controverted. The prosecutor, having the check of a passenger, was in another part of the depot; but it was held that the defendant was not justified in ejecting him altogether from the station, and the conviction was sustained.

Tobin v. Portland, S. & P. R. Co. 59 Me. 188, was an action for damages by a hackman who was injured by stepping on a defective platform when leaving a passenger at the station. The court says: "The hackman, conveying passengers to a railroad depot for transportation, and aiding them to alight upon the platform of the corporation, is as rightfully upon the same as the passengers alighting."

In this case it was not claimed that any rules had been violated.

The recent case of *Old Colony R. Co. v. Tripp*, 147 Mass. 85, 6 New Eng. Rep. 866, was an action of trespass against an expressman who solicited patronage in the plaintiff's station, contrary to its rules. W. Allen, J., says: "Passengers taking and leaving the cars at the station, and persons setting down passengers or delivering merchandise or baggage for transportation from the station, or taking up passengers or receiving merchandise that had been transported to the station, had a right to use the station buildings and grounds, superior to the right of the plaintiff to exclusive occupancy. All such persons had business with the plaintiff, which it was bound to attend to in the place and manner which it had provided for all who had like business with it."

A statute of Massachusetts prescribes that railroad corporations shall give to all persons equal facilities for the use of its depot. The court held that this statute applied only to the relations between common carriers and their patrons, or those who had the right to use the station. It did not give the defendant the right to go there to solicit business because another had the right. See also *Harris v. Stevens*, 81 Vt. 79.

In *Markham v. Brown*, 8 N. H. 523, an action of trespass, brought by an innkeeper against a stage driver, the court says the defendant had clearly a right "to go to the plaintiff's inn with travelers, and he might of course lawfully enter it for the purpose of leaving their baggage and receiving his fare."

The case most nearly in support of the plaintiff's contention of those we have seen is *Barker v. Midland R. Co.* 18 C. B. 46, where

it was held that an omnibus proprietor, carrying passengers to and from a station, could not maintain an action for a refusal to allow him to drive his vehicle into the station yard. As the proprietor was not using or seeking to use the railway, it was considered that the company owed him no duty. *Jervis, Ch. J.*, said a passenger would, no doubt, have a right of action, if unduly obstructed, but a violation of duty to him would not give an action to the plaintiff. It is to be observed that the recent English cases are mainly controlled by Statute (17 and 18 Vict. chap. 81), to which the Massachusetts statute is similar. They relate chiefly to the question whether a prohibition to one, to ply for passengers within a station, when the same right is granted to another, is an undue preference, under the Statute. It is generally held that it is not. See *Beadell v. Eastern Counties R. Co.* 2 C. B. N. S. 509; *Painter v. London, B. & S. C. R. Co.* Id. 702; *Hole v. Digby*, 27 Week. Rep. 884.

In the latter case it seems to be conceded that one going bona fide to meet a passenger would not be guilty of trespass.

In *Marriott v. London & S. W. R. Co.* 1 C. B. N. S. 499, the defendant company was ordered to admit the complainant's omnibus into the station to receive and set down passengers and goods, as other public vehicles were admitted. Upon the question before us, we do not think these cases are in conflict with the views we have above expressed.

The case at bar differs from *Barker v. Midland R. Co.*, *supra*, in this: that here the hackney driver is not plaintiff, seeking to recover damages for the revocation of a license to go upon the wharf, or for a breach of duty to another, but the defendant against an alleged trespass, who relied upon his right as servant of the other to justify his being there. We think the justification is sufficient. It is substantially given by the terms of the lease to the steamboat company. This does not deprive the owner of the general control of his wharf, nor interfere with his reasonable rules for its management. It simply secures to a passenger the common privilege of a passenger, and enables the hackney driver to shield himself from an apparent violation of the rules only when he is acting, bona fide, as the servant of such passenger. This qualification guards the owner from an incursion of unlicensed drivers under a mere pretense of serving passengers, and also confines the right of soliciting business on his premises to those whom he may permit.

We give judgment for the defendant for his costs.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Charles N. WOOD *et al.*

v.

Willard A. BULLARD.

(....Mass....)

1. It seems that a covenant under seal by a life tenant, having power to dispose of the remainder of the estate by will, to refrain from disposing of a portion of such remainder

upon consideration that the will granting the power shall not be contested, is enforceable.

2. A covenantee, who with the means at hand of knowing all the facts accepts his share of money paid by the covenantor for a release from his obligation, will be precluded from afterwards proceeding to enforce the covenant.

3. Proceedings by an administrator of a deceased covenantee to carry out an agreement by such decedent to release, and to

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procure the other covenantees to release, the covenantor from his obligation, will not estop him from setting up an independent right belonging to him as a covenantee to enforce the covenant, if he has not ratified or profited by the agreement, although they may preclude him from exercising any right to enforce the covenant which he may claim through or on behalf of the decedent.

4. The fact that distributees who have received a portion of the estate of a decedent, who contracted to procure covenantees to release a covenantor from his obligation, may be called upon to contribute towards the damages which may be recovered for the breach of such contract, will not preclude them from exercising their right as covenantees to enforce the covenant, where their liability will in no event be co-extensive with their claim, and there is no means of determining what such liability will be.

5. The words "then surviving," in a will giving a woman power to dispose of an estate by will, and, in case of her failure to make a will, directing payment at her decease of one half the fund to testator's heirs-at-law then surviving, they taking by right of representation, and the other half to the heirs of such woman then surviving, they taking by right of representation, refer to the time of the death of the woman and give the half of the fund to the persons who at that time are testator's heirs-at-law.

(April 1, 1890.)

ON report from the Supreme Judicial Court for Middlesex County (Holmes, J.) for the opinion of the full court of a suit brought to compel the specific performance of an agreement not to dispose of certain property by will. *Decree in favor of two plaintiffs and against the others.*

The facts sufficiently appear in the opinion. *Messrs. Robert M. Morse, Jr., Thomas H. Armstrong and William E. Jewell*, for plaintiffs:

The evidence as to the receipt of the money by plaintiffs was not sufficient to create an estoppel.

See *Andrews v. Lyon*, 11 Allen, 849; *Howard v. Hudson*, 2 El. & Bl. 110; *Pickard v. Sears*, 6 Ad. & El. 469; *Freeman v. Cooke*, 2 Exch. 668; *Turner v. Coffin*, 12 Allen, 401; *Carroll v. Manchester & L. R. Co.* 111 Mass. 1; *Tyler v. Odd Fellows Mut. Relief Assn.* 5 New Eng. Rep. 191, 145 Mass. 134; *Audenried v. Betteley*, 5 Allen, 882; *Plummer v. Lord*, 9 Allen, 455; *Lanodon v. Doud*, 10 Allen, 438; *Peaslee v. Peaslee*, 6 New Eng. Rep. 571, 147 Mass. 171; *Plymouth v. Wareham*, 126 Mass. 475; *Hanrahan v. O'Reilly*, 102 Mass. 201; *Brigham v. Fayerweather*, 8 New Eng. Rep. 759, 144 Mass. 48.

The administrators of an insane intestate cannot ratify a contract made by him, although the other party cannot be restored to the same position as before.

Norton v. Norton, 5 Cush. 524; *Valpy v. Rea*, 180 Mass. 834; *Brigham v. Fayerweather*, *supra*; *Molton v. Camroux*, 2 Exch. 487.

Mr. Samuel Hoar, for defendant:

When a person who is *non compos mentis*, but apparently of sound mind, enters into a contract that is fair and reasonable, with a person who is ignorant of his incapacity and who takes no advantage of his infirmity, and the

contract has been fully performed so that the insane party has had the full benefit thereof, and the circumstances are such that the parties cannot be put *in statu quo*, such a contract cannot be rescinded by the lunatic himself if he becomes of sound mind nor by his legal representatives.

Molton v. Camroux, 2 Exch. 489; *Beavan v. McDonnell*, 9 Exch. 309; *Niell v. Morley*, 9 Ves. Jr. 478; *Loomis v. Spencer*, 2 Paige, 153; *New York Mut. L. Ins. Co. v. Hunt*, 79 N. Y. 541; *Johnson v. Stone*, 35 Hun, 880; *Riley v. Albany Sav. Bank*, 36 Hun, 518; *Young v. Stevens*, 48 N. H. 138; *Scanlan v. Cobb*, 85 Ill. 296; *Beale v. See*, 10 Pa. 56; *Lancaster Co. Nat. Bank v. Moore*, 78 Pa. 407; *Behrens v. McKenzie*, 23 Iowa, 833; *Abbott v. Creal*, 56 Iowa, 175; *Alexander v. Haskins*, 68 Iowa, 73; *Brodrick v. Brodrick*, 56 Cal. 563; *Wilder v. Weakley*, 34 Ind. 181; *Fay v. Burditt*, 81 Ind. 435; *Physio-Medical College v. Wilkinson*, 6 West. Rep. 535, 108 Ind. 814; *Hopson v. Boyd*, 6 B. Mon. 296; *Rusk v. Fenton*, 14 Bush, 490; *Gribben v. Maxwell*, 34 Kan. 8; *Shoulters v. Allen*, 51 Mich. 529; *Chew v. Baltimore Bank*, 14 Md. 299; *Yauger v. Skinner*, 14 N. J. Eq. 389; *Eaton v. Eaton*, 87 N. J. L. 109; *Mutthiessen v. McMahon*, 88 N. J. L. 536; *Carr v. Holliday*, 5 Ired. Eq. (N.C.) 167; *Riggan v. Green*, 80 N. C. 286; *Encking v. Simmons*, 28 Wis. 272; *Lincoln v. Buckmaster*, 82 Vt. 652.

The administratrix ratified the release, and said release and the covenant therein are binding.

Allis v. Billings, 6 Met. 415; *Arnold v. Richmond Iron Works*, 1 Gray, 434.

Abigail W. Smith, took no interest in the property, under the provisions of the will because she was not an "heir-at-law then surviving;" that is, living at the time of the death of Caroline A. Wood.

Denny v. Kettle, 185 Mass. 188; *Coveny v. McLaughlin*, 2 L. R. A. 448, 148 Mass. 576.

Hence the children of Abigail W. Smith, the plaintiffs, Mrs. Moor and Charles W. Smith, took no interest in the property of Caleb Wood by descent or devise from their mother, Mrs. Smith, and they took no interest in the property under the provisions of the will; because they were not "heirs-at-law" of said Caleb Wood.

Abbott v. Bradstreet, 8 Allen, 587; *Dove v. Torr*, 128 Mass. 38; *Whall v. Converse*, 5 New Eng. Rep. 823, 146 Mass. 845.

C. Allen, J., delivered the opinion of the court:

In August, 1877, Caleb Wood died childless, leaving a widow, Caroline A. Wood, and a will wherein he devised the residue of his estate to a trustee, in trust, to invest the same and pay over to her such sums or parts thereof as she might from time to time desire, and upon her decease to dispose of the trust fund then remaining as she might by her will direct; and in case she should fail to make a will, then to pay at her decease one half of said trust fund to his heirs-at-law then surviving, they taking by right of representation, and one half to the heirs-at-law of his wife then surviving, they taking by right of representation.

His heirs-at-law at the time of his death [besides his widow, who was a statutory heir]

were as follows: (1) a brother, Charles; (2) four children of a deceased brother, Eliphalet; (3) three children of a deceased brother, Lyman; (4) a sister, Abigail W. Smith.

As some of the heirs-at-law of the testator had been thinking of contesting the probate of the will, his widow on the 24th of September, 1877, entered into an agreement under seal with the heirs, wherein she covenanted that within two months from the probate of the will she would pay over to the said Abigail W. Smith the sum of \$5,000, and "that I will not make any testamentary disposition of the trust fund created under said will and remaining at my decease, that shall prevent one half of the said trust fund remaining at my decease from descending to the said heirs or their legal representatives exactly as it would descend to said heirs by the terms of said will, should I make no will, and that I will do no act which will prevent one half of such trust fund as shall remain in the hands of the trustee at my decease from going to the said heirs."

The will was accordingly proved and allowed, and the \$5,000 duly paid to Mrs. Smith.

It is conceded that this agreement by its terms did not have the effect to prevent Mrs. Wood from calling upon the trustee to pay to her the whole of the trust property in her lifetime, and that if the property had been thus paid over to her in pursuance of such a request it would have become her own, and that she might have disposed of it as she pleased. The agreement merely precluded her from making a testamentary disposition of the trust fund.

On the 10th of April, 1879, Charles Wood, the testator's brother, entered into an agreement under seal with the testator's widow, reciting the above-mentioned agreement, and that she was dissatisfied therewith and claimed it to be illegal: wherefore, in consideration of \$7,000 paid to him by her, "he does thereby cancel, annul and forever discharge and release said contract, and he covenants and agrees with her and her heirs and executors to protect her from said contract, and that no claim against her or her estate shall be made under the same by any person, and that no objection shall be made on account of said contract to any will she had made or may make. And he further covenants that he will procure from the heirs of Caleb Wood named in said contract a release to said Caroline of said contract and all rights under the same." The former agreement was accordingly surrendered to her by Charles Wood, in whose possession it seems to have been, and was canceled.

On the 16th of December, 1886, Mrs. Wood died, leaving a will, wherein she disposed of all of the property in the hands of the trustee, which then amounted to about \$260,000, away from the heirs of her husband. Charles Wood had already died December 11, 1884, intestate, childless, unmarried, having procured formal releases from three only out of four of Eliphalet Wood's children, dated February 2, 1880. Mrs. Smith died before the death of Charles Wood, leaving two adult children.

The four children of Eliphalet, the three children of Lyman, and the two children of Mrs. Smith [these all being also the heirs-at-law of Charles Wood], now bring this bill in equity seeking to enforce the agreement of

Mrs. Wood that she would not make any testamentary disposition of the trust fund created under her husband's will. The defenses are, the release and agreement given by Charles Wood, the formal releases given by three of Eliphalet's children, the acceptance by others of the plaintiffs of the money paid by Mrs. Wood for the release and agreement by Charles, under circumstances constituting an estoppel or an accord and satisfaction, and the death of Mrs. Smith before that of Mrs. Wood, which it is contended had the effect to cut off any claim on the part of her two children. The plaintiffs' replication alleges that the release of Charles Wood was given when he was of unsound mind, and this question was submitted to a jury, who disagreed.

As to the three children of Eliphalet who signed formal releases to Mrs. Wood, it is conceded that no claim can now be maintained in their behalf, and that they are to be treated as out of the case.

As to the fourth child of Eliphalet, Mrs. Minor, and the three children of Lyman Wood, their claim is cut off by their acceptance of \$1,000 each, as an accord and satisfaction. It is conceded that each one of them received from the administrators of the estate of Charles Wood a sum sufficient, when taken with certain payments made to Lyman's three children, by Charles Wood himself in his lifetime, to make up \$1,000 with interest from the time when Mrs. Wood paid the \$7,000 to Charles Wood. The testimony and circumstances show clearly that they received the sums, not as gifts from Mrs. Wood, but on a consideration connected with the compromise agreement which she had given with reference to the allowance of her husband's will. She had already paid all the money called for by that agreement, namely the \$5,000, to Mrs. Smith, and after having done so she had paid \$7,000 more to Charles of which he had in his lifetime paid certain portions to some of these children. A question had arisen early in respect to the purpose of Mrs. Wood in paying this money, and her letter to Mrs. Minor, dated August 9, 1879, showing that it was intended for the children of Eliphalet and Lyman, had been exhibited to several if not to all of those children, immediately after the death of Charles; all of these children were in consultation together in Worcester in December, 1884, with a common purpose to get this money. Three of them, being children of Eliphalet, had signed formal releases to Mrs. Wood in the lifetime of Charles. They all demanded and obtained from the administrators of Charles the payment of such sums as made up the sum of \$1,000 to each, with interest. The suggestion in the argument that they took it as a gift from Mrs. Wood cannot be entertained for a moment. Without going minutely into the details of the testimony, we are satisfied from reading it that they all then knew of the agreement which she had made, and knew that Charles Wood had received this money from her upon some bargain or understanding referring to her agreement, and that they either knew all the particulars of that bargain or at any rate had all the information in respect to it which they cared to have. If any particulars were wanting, it was because they shut their

eyes and turned away their ears. Under these circumstances, their taking steps to enforce the payment of the money to them by Charles Wood's administrators and their acceptance of it constitute a virtual adoption by them of the bargain upon which he obtained the money from her, so far at least as to preclude them from enforcing her original agreement. It was equivalent to saying, "Whatever he promised as to our giving up that agreement, we adopt it." *Kelley v. Newburyport & A. Horse R. Co.* 141 Mass. 496, 499, 2 New Eng. Rep. 383.

It remains to be considered whether the bill can be maintained in behalf of the two children of Mrs. Smith; one of whom is Mrs. Moor, who is also one of the administrators of the estate of Charles Wood, and the other is Charles W. Smith.

In respect to Mrs. Moor, it is contended that her claim is cut off by reason of her transactions above referred to in which she, as an administrator of the estate of Charles Wood, took part. It is contended, and the justice before whom the case was heard found as a fact [subject, however, to the question of law whether administrators of an insane intestate could so ratify], that the administrators of Charles Wood have ratified the release by him to Mrs. Wood, and the transaction in relation to it. This ratification is certainly so far effectual as to cut off any claim by the administrators or representatives of Charles Wood, under the agreement of Mrs. Wood. Charles Wood executed a formal release of said contract, and if this was invalid by reason of his insanity the ratification makes it good to this extent at least. The claim of Mrs. Moor, however, does not rest upon her rights as an heir of Charles Wood, but upon her rights as daughter of Abigail W. Smith, who was a sister of the testator.

It is not easy to see in what way her individual claim under Mrs. Wood's agreement is affected by her acts as administratrix of Charles Wood. Let it be assumed that her ratification, as administratrix, of the release and covenants of Charles Wood to Mrs. Wood was full and valid, both in fact and in law; the effect of this is only to give to that instrument the same force which it would have had if its validity had never been questioned. It makes the instrument valid and effectual as an instrument signed and sealed by Charles Wood; but it does not affect the rights of Mrs. Moor as an individual except so far as she might claim under Charles Wood. In executing that instrument, Charles Wood did not act nor assume to act as the agent of Mrs. Smith, the mother of Mrs. Moor; but in consideration of \$7,000 paid to him he covenanted with Mrs. Wood that he would procure from the heirs of Caleb Wood a release to her of her contract. If that instrument was valid at the time of its execution, or if it was made valid by being ratified afterwards, it did not cut off the claim of any heir of Caleb Wood under Mrs. Wood's agreement, except of Charles Wood himself, unless something further should be done by which their rights would be affected. As to three children of Eliphalet, something further was done, and they executed a formal release, by which their claim is cut off. As to the fourth child of Eliphalet and the three children of Lyman, 7 L. R. A.

something further was done, and their claim is cut off by their acceptance of money as shown above. But as to Mrs. Moor, she has received no money, and has signed no release, and her acts in a representative capacity as administratrix of Charles Wood may affect his estate and the rights of those claiming under him, but do not affect her rights as daughter of Mrs. Smith, unless she was called upon, by reason of what was going on, to make it known to Mrs. Wood that she as an individual did not intend to release any claim she might have under Mrs. Wood's compromise agreement. If she had a valid right to hold Mrs. Wood to that agreement, that right still continues, unless she is estopped to enforce it. The justice before whom the cause was heard found that she was thus estopped by her conduct in paying over the money, as administratrix of Charles Wood, and he mentions no other ground on which the estoppel rests. We are not able to adopt this conclusion. If Charles Wood himself had paid over the \$7,000 to the children of Eliphalet and Lyman, and had taken their receipts, and if Mrs. Moor had stood by and assented to such an application of the money, the necessary elements of an estoppel upon her would still be wanting. Mrs. Wood did not intend that any of the money should go to Mrs. Smith. Charles Wood in his lifetime paid nothing to her, or to her children. It must be assumed that Mrs. Wood knew that she was bound to Mrs. Smith, as well as to the other heirs of her husband, and that a release from her was to be procured by Charles Wood. Now if Mrs. Moor had done anything with a design to mislead Mrs. Wood into the belief that she gave up any claim she might have as a daughter of Mrs. Smith, and if Mrs. Wood had in fact been misled to her injury and had acted or omitted to act in consequence thereof, then Mrs. Moor would be estopped. But we do not find these essential elements of an estoppel in what Mrs. Moor did as administratrix of Charles Wood. When Charles Wood took Mrs. Wood's money, and executed his release and agreement, and surrendered her own agreement to her, Mrs. Wood may have jumped to the conclusion that everything had been done that needed to be done, in order to enable her to dispose of the trust property without a violation of her agreement. But we find nothing to show that she was misled into this conclusion by any act of Mrs. Moor which was intended to produce that result. Mrs. Moor did nothing actively, so far as appears, except to pay over the money which she held as administratrix of Charles Wood. She did nothing passively except to omit to make it known to Mrs. Wood that she did not intend to give up any claim which she herself might have as an individual. Was she called upon to do this? Mrs. Wood apparently was not there at the time the money was paid over by Mrs. Moor, or the consultations had.

It does not appear even that Mrs. Moor was afterwards in any communication with Mrs. Wood. It rests upon the party setting up an estoppel to show the grounds on which it rests. The circumstances disclosed in the report, and in that portion of the testimony which is laid before us, fall short of creating an estoppel upon Mrs. Moor. *Tyler v. Odd Fellows Mut. Relief Assn.* 145 Mass. 184, 188, 5 New Eng. Rep.

191; *Bragg v. Boston & W. R. Co.* 9 Allen, 54.

It is further contended in behalf of the defendants that neither Mrs. Moor nor Charles W. Smith can maintain their claim under Mrs. Wood's agreement, because if the agreement of Charles Wood to procure releases from all of Caleb Wood's heirs was ratified, then the administrators of Charles Wood would be bound to make that agreement good, and since his estate has been mostly distributed, his heirs-at-law, including these plaintiffs, who have received the same, would also in like manner be bound; and that, therefore, if these plaintiffs prevail in this suit against the estate of Mrs. Wood, they will become liable to that estate in another suit and therefore to prevent circuity of action this suit should be dismissed. This objection, however, cannot prevail, for two reasons. In the first place, if the executor of Mrs. Wood should have any claim, by reason of being held responsible upon Mrs. Wood's agreement, it would be primarily against the estate of Charles Wood, as represented by the administrators, or, if that should prove insufficient by reason of their having distributed it in great part, then the claim, if any is enforceable, would not be limited to Mrs. Moor and Charles W. Smith, but would be against all of the distributees. In either case, the liability, indirect or direct, of Mrs. Moor and Charles W. Smith would not be co-extensive with their claims against the estate of Mrs. Wood, and at the most their claims should be defeated only to the extent of their subsequent liability to that estate. In the second place, that subsequent liability cannot be ascertained in the present suit. The administrators of Charles Wood have still some property of his estate in their hands, and have not settled their accounts, and it cannot now be determined how much property they have, or whether it would be sufficient to respond to any claim in favor of the executor of Mrs. Wood. Moreover, it cannot now be determined what damages, if any, her executor would be entitled to recover by reason of Charles Wood's failure to fulfill his agreement. That question has not been discussed, nor have facts been ascertained or reported with a view to its proper determination. At the present time, we need go no further than to say that the determination of that question in the present suit is impracticable.

Finally, it is contended by the defendants that the death of Mrs. Smith after the death of Caleb Wood, the testator, and before the death of Mrs. Wood, has the effect to exclude her children from any benefit under the provision of Caleb Wood's will. That provision is, that if Mrs. Wood should fail to make a will, then at her decease the trustee should pay one half of said trust fund to the testator's heirs-at-law then surviving, they taking by right of representation. The argument is that, at the testator's decease, Mrs. Smith was an heir-at-law, and her children were not; that his heirs-at-law must be ascertained at the time of his death; and that she, being an heir-at-law at the time of his death, lost the right which she would otherwise have had by reason of not surviving until Mrs. Wood's death. This question has not been discussed by the plaintiffs.

There are very many cases where testament-

ary language has been construed, bearing some resemblance to that used by the testator; but singularly enough after some little examination no one has been found by us where a remainder over was limited to the testator's heirs-at-law then surviving. Where there is a limitation over to a class designated as the testator's heirs-at-law, or his next of kin, it is usual to hold that this class should be ascertained at the time of the testator's death, unless there is something to be found in the will showing a contrary intention; and this for two principal reasons, namely, that the law leans rather to vested remainders, and that ordinarily in such cases it appears that, after making the special and earlier provisions for the disposition of his property, the testator does not care to follow the property further, but is content to let the law take its course, and the final devise to his heirs-at-law means that at that stage he will let it go as intestate property. It will not be profitable to go over many authorities in detail, because the reasoning is often very refined and subtle and involves a consideration of minute differences of language, and the final determination of each case must after all depend upon the intention to be gathered from all of the language used by the particular testator whose will is before the court.

In the present case, we have come to the conclusion that the limitation over to the testator's heirs-at-law then surviving must mean, to those persons then surviving who at that time would be his heirs-at-law; that is to say, that his heirs-at-law must be ascertained at the time of his wife's death, as if he had lived till then. The reasons in favor of this conclusion are as follows:

The gift was only to heirs at-law then surviving. There was no gift to any heir-at-law except to heirs-at-law surviving at the time fixed. It was necessarily wholly uncertain who would fall within that class. It was indeed possible that all of those persons who were heirs at law at the testator's death might die before the time would come for this gift to take effect. The remainder was contingent. It was not like a gift over to several persons named or clearly defined with a provision that if one or more should die the survivors should take. In such case it has been considered that the remainder is vested, but determinable upon the happening of a contingency. *Blanchard v. Blanchard*, 1 Allen, 225; *Gibbens v. Gibbens*, 140 Mass. 105, 1 New Eng. Rep. 98.

In the present case, the language excludes everybody not living at the time of Mrs. Wood's death, and the interest devised was necessarily only a contingent remainder. *Colby v. Duncan*, 139 Mass. 398.

Moreover, it cannot be said in the present case that if the testator's wife were to die without leaving a will he was content to let the law take its course with the trust fund, because he expressed a wish antagonistic to such a result and gave his property, not to his heirs-at-law, at the time of his death, but to his heirs-at-law surviving at the death of his wife. He was not willing that it should at that stage go as intestate property, but undertook to control the devolution of it. The two main reasons, therefore, which have usually influenced courts to refer the ascertainment of the heirs-at-law to

the time of the testator's death fall in this case. Ascertaining them at that time might lead to intestacy, in case all those persons who were then heirs-at-law should die before Mrs. Wood; or, in case a part only of them should die, it would lead to great inequalities among the different branches of his relatives. No reason is apparent why he should wish to discriminate against any branch of the family. The use of the words "they taking by right of representation" shows no discrimination was intended against the children of his deceased brothers Eliphalet and Lyman. No reason is apparent why he should wish to discriminate against the children of his sister. The words "they taking by right of representation," though not of themselves decisive, nevertheless appear to furnish some indication that he meant to have his heirs ascertained at the time of his wife's death, and to exclude none of those who at that time would be his heirs. The fact that the other half of the trust fund was given to his wife's heirs-at-law then surviving, the language being similar in both cases, tends to support the same view, since her heirs could not be ascertained till that time. The words "to my heirs-at-law then surviving" seem to imply that the testator assumes that there must necessarily be a class of this character then in existence, so that his will would be effective to control the disposition of the property. Entering as far as possible into the feelings and wishes of the testator at the time of making his will, it seems on the whole to be satisfactorily certain that, in the event contemplated, he meant to give the one half of the trust fund in equal proportions, having regard to the right of representation, to those persons then living who at that time would be his heirs-at-law. This gives a fuller and broader and more natural meaning to his words, and seems to be more consistent with his general purposes.

The case of *Dove v. Torr*, 128 Mass. 38, seems at first sight to go somewhat in a different direction from that above expressed. In that case the words were, after the time fixed, "the estate herein devised shall descend to those persons who may then be entitled to take the same

as my heirs." The court held that they meant that, at that stage, the law should take its course, and the estate go to the testator's heirs, as if he had made no further disposition; that this view was fortified by the use of the word "descend," which ordinarily denotes the vesting of the estate by operation of law immediately upon the death of the ancestor; that the word "surviving" was not superadded; and that the word "then" was inserted, not by way of description of the persons who are to take, but by way of defining the time when they should come into the enjoyment of that which was devised to them. The case in reality therefore was quite different from the present.

In *Whall v. Converse*, 146 Mass. 845, 5 New Eng. Rep. 823, there was nothing to take the case out of the general rule that ordinarily a devise of a remainder to heirs shows an intent at that stage to let the property go according to law. And there is no occasion to do more than merely mention a few other similar cases in this State. *Minot v. Harris*, 132 Mass. 528; *Abbott v. Bradstreet*, 8 Allen, 587; *Minot v. Tappan*, 123 Mass. 535; *Childs v. Russell*, 11 Met. 16.

The following cases tend more or less to support the conclusion we have reached upon the construction of the will: *Fargo v. Miller*, 150 Mass. 225; *Knowlton v. Sanderson*, 141 Mass. 823, 2 New Eng. Rep. 100; *Scars v. Russell*, 8 Gray, 86, 94, 97; *Wharton v. Barker*, 4 Kay & J. 435, which is often cited, and nowhere questioned; *Sturge v. Great Western R. Co.* L. R. 19 Ch. Div. 444; *Clowes v. Hilliard*, L. R. 4 Ch. Div. 413; *Long v. Blackall*, 3 Ves. Jr. 486; *Pinder v. Pinder*, 28 Beav. 44; *Re Morley's Trusts*, 25 Week. Rep. 825; *Travis v. Taylor*, 13 Jur. N. S. 791; *Bessant v. Noble*, 2 Jur. N. S. 461; *Doe v. Frost*, 3 Barn. & Ald. 546; *Briden v. Hewlett*, 2 Myl. & K. 90; *Buller v. Bushnell*, 8 Myl. & K. 232; *Clapton v. Bulmer*, 5 Myl. & Cr. 108.

The result is that the bill should be dismissed as to all of the plaintiffs except Mrs. Moor and Charles W. Smith, and that these two plaintiffs are entitled to a decree in their favor.

Ordered accordingly.

MICHIGAN SUPREME COURT.

James A. RANDALL, Appt.,

v.

EVENING NEWS ASSOCIATION *et al.*

(....Mich....)

1. A publication containing imputations that a member of the Legislature went there solely for the purpose of passing a bill to enrich himself and his copartners in a certain scheme, and that he had used both liquor and money to procure votes therefor from other members, is libelous.

2. A picture which is a caricature of a member of the Legislature standing on a platform which rests upon bottles, one of which is marked "Rye" with a cask marked "Gin" with faucet all ready for opening upon the platform, on which cask his right foot rests while his left hand is pressed against his heart, and his right hand extended holds a bag marked "\$," when

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printed in connection with a publication which charges his corruption in procuring the passage of a bill, means that liquor and money were used by him in procuring its passage, and constitutes a libel if the implied charges are not true.

3. The inducement is sufficient in a declaration to recover damages for the publication of an alleged libel consisting of imputations that a certain member of the Legislature was guilty of corrupt motives and practices in introducing and procuring the passage of a certain bill, where it shows that plaintiff was a member of the Legislature, and was the introducer of such bill, and was the person referred to in the publication.

4. No innuendo is needed in pleading a libel if the meaning of the publication is plain.

(January 24, 1890.)

ERROR to the Circuit Court for Wayne County to review a judgment sustaining

a demurrer to the declaration in an action to recover damages for the publication of an alleged libel. *Reversed.*

The facts are fully stated in the opinion.

Messrs. Henry C. Wisner and Edwin F. Conely, with Mr. John J. Speed, for plaintiff, appellant:

It is not essential that the articles should impute "a legal crime, or any legal or moral offense, or legal or moral turpitude."

Root v. King, 7 Cow. 618, 4 Wend. 114; Solverson v. Peterson, 64 Wis. 200.

The charge that the conduct of Mr. Randall in accepting the office of representative, and in office, was inspired and governed solely by sordid and selfish motives, is libelous.

See opinion of Parke, B., in *Parmist v. Coupland*, 6 Mees. & W. 108; *Ourtis v. Mussey*, 6 Gray, 261.

By statute, the giving of a bribe, or attempting by any other corrupt means to control or influence the giving of votes by members of the Legislature, is a criminal offense (How. Stat. §§ 38, 39, 9241), and to falsely and maliciously publish that one had given a bribe to a member of the Legislature to secure the passage of a bill is libelous.

Wilson v. Noonan, 28 Wis. 106.

The publication was sufficiently clear and explicit, and no innuendo was needed to explain the words or point their application.

Bathrick v. Detroit Post & Tribune Co. 50 Mich. 640.

Messrs. Dickinson, Thurber & Stevenson for defendants, appellees.

Morse, J., delivered the opinion of the court:

The plaintiff commenced a suit in a plea of trespass on the case for libel against the defendants in the Wayne Circuit Court. His declaration averred that he was and is a good, true, honest, just and faithful citizen of this State, and as such had always behaved and conducted himself; that at the time of the printing and publication of the articles of which he complains he was a member of the Legislature of the State of Michigan, from the City of Detroit, being such member from the 2d day of January, 1889, up to the present time; that as such member he hath at all times conducted himself as a good, honest and faithful official, and hath executed and performed his duties as such representative in an honest and conscientious manner, and for the best interests of the State, and of the constituency represented by him, and that he has never been guilty, or, until the time of the publication of these articles by the defendants, been suspected to have been guilty, of the offenses and misconduct hereinafter mentioned to have been charged and imputed to him; that the said plaintiff, as a member of the said House of Representatives, at the session thereof, which began on the first Wednesday of January, 1889, did introduce a bill in said House, entitled "A Bill to Empower the Common Council of the City of Detroit to Borrow Money for the Purpose of Improving the Boulevard," and which said bill was duly passed by said House, and on the 7th day of May, 1889, passed by the Senate; and said bill is the same bill referred to in the publication by the said

defendants as hereinafter mentioned; and that the said defendants, contriving, and wickedly and maliciously intending, to injure the said plaintiff in his good name, fame and credit, and to bring him into public scandal, disrepute, ridicule and disgrace with and among his neighbors, and other good and worthy citizens of this State, and to cause it to be believed by them that he, the said plaintiff, had been guilty of the several acts of misconduct and offense hereinafter mentioned to have been imputed to him, heretofore, to wit, on the 8th day of May, 1889, at Detroit, in said County of Wayne, falsely, wickedly and maliciously did compose, print and publish, and cause and procure to be published, in a certain newspaper, known and styled "The Evening News," and of which numerous copies, to wit, of the number of 40,000, are circulated in said city, county and State, the words following, to wit, and the picture hereinafter delineated, to wit:

A GREAT VICTORY—WHAT NEXT?

Rep. Randall is receiving congratulations on every hand over his success in inducing the Michigan Legislature to pass a bill designed to enrich a few speculators at the general expense of the City of Detroit. The next move of the speculators will be to corrupt the caucuses of both parties, and bribe and bulldoze a sufficient number of the common council and board of estimates to vote to issue the bonds. This is somewhat of a job, but it will be cheaper than allowing the people to vote on the bonding question direct. If the \$500,000 wanted now was all that would be required, the question might arise whether it was worth fighting; but \$500,000 is only the entering wedge of a demand that will not stop short of \$2,500,000, even if it does then. And all to enrich a few men who have grabbed a street and are determined that other people's money shall make them wealthy. However, The News can stand it a great deal better than the majority of citizens, who must foot the bills. We therefore join the others who are congratulating Mr. Randall on his victory over the solid opposition of his fellow citizens. There probably never was so signal a victory against such great odds in the history of Michigan legislation. Here was a measure proposed avowedly in the personal interests of its introducer and his partners. He made no secret of it. He told his fellow members very plainly from the start that he did not go to Lansing to waste his time in the public service. He went there for this bill, and this bill alone; and he represented himself and his copartners in the deal, who, like himself, had pecuniary interests in the measure. The bill was denounced by the mayor, denounced by the common council, denounced by the board of estimates, denounced by 5,000 petitioners; and Mr. Randall candidly acknowledged before the senate committee that if it were submitted to the popular vote of Detroit it would be overwhelmed by an adverse majority. Furthermore, the majority of Detroit's representatives at Lansing opposed it, and still further, the bill was one which concerned Detroit alone, and which in no way affected the State outside of Detroit. Here was a situation which might well appall the strongest heart. But it had no terror for the boule-

warder's gall. When the Legislature was carefully sized up, it was found to be the smallest, cheapest, rottenest body that ever assembled in Lansing. The premonitory symptoms of a desire to steal something manifested themselves from the beginning. Scarcely a day passed that some measure was not introduced containing promises of boodle, or that the Legislature did not resolve upon some expedition or junket, for which the members voted themselves extra pay or allowance. Nothing was too small for them to despise, nothing too large for them to grasp at. Twenty-five per cent of the whole gang openly announced themselves by words or acts to be paid attorneys of outside interests, and most of the remainder of them waited around for these attorneys to share their fees. All who have been to Lansing this winter, and including even the lobbyists, confess that the present Legislature is the rottenest and cheapest that ever gathered at the capitol. One thing has conspicuously appeared from a very early date in the session. The Legislature of Michigan has learned the trick, long practiced in the Legislature of New York, of looking upon the metropolis of the State as a victim fatted for the sacrifice. In both States the State Legislature is overwhelmingly Republican, while the metropolis is overwhelmingly Democratic. At Albany the metropolis is robbed and pillaged by special legislation. Detroit has always been treated with just as little conscience by the Republican Legislature at Lansing, but never until the present winter did it dawn upon the rural legislative mind that she would afford fat pickings for the rural legislative pocket. Mr. Randall materially assisted in impressing the rural legislator with this lesson, by assuring him that the city was governed by Democratic rascals, and populated chiefly by Democratic thieves, knaves, rumsellers and rum drinkers, meanwhile keeping open house, and dealing out free rum himself to the thirsty granger law-maker. In all these considerations the rustic not only found argument for appropriating Detroit's money to his own use, through the medium of those who expect to recover it, and a hundred times more, from the taxpayers, but also found a salve for his hypocrisy, for he dearly loves to find a moral reason for his thefts. With such a body everything was possible, particularly when \$500,000 was at stake. But what shall the people of Detroit say to the Republican party, which, through the Legislature it controls, becomes responsible for this infamous treatment of the great city? And what shall the common people of the whole State say, who are in sympathy with the robbed toilers of the city? They and their fellows have been robbed and pillaged by the authority of the Republican party, in the name of the Republican party; their petitions and protests have been spat upon, and their spokesmen branded in the open Senate as anarchists and incendiaries,—all because Detroit gives a Democratic majority. Detroit is, in short, officially informed by the Republican Legislature that so long as she votes the Democratic ticket she will not be allowed to govern herself; she will be ignored in every measure, concerning her dearest interests; her representatives will be snubbed, and only those who go out to Lansing to rob her will be respected or

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listened to; a junto of state appointed, and irresponsible police commissioners will be sustained and supported in oppressing and abusing her law-abiding citizens, while they allow thieves and murderers to escape; and every rascal who makes his way to Lansing with a scheme to thrust his arm into her treasury shall have his way if he brings along money enough to pay for it.

THE BOULEVARD PLANA.

They are to get \$100,000 in bonds issued this year.—Ald. Lauder outlines them, and says the council and board of estimates will be "converted" very soon. Can they be "influenced" as easily as the Legislature?

The boulevard heelers are in high glee to-day over the slick way that Representative Randall worked his bonding bill through the Legislature. They don't know yet just what the next move will be, but they feel sure that by proper manipulation some of the bonds will be in shape so they can get their hands on them before many moons. Ald. Lauder came out openly this noon, and offered to bet a silk hat that \$100,000 worth of the bonds would be issued this year, and he wanted to bet another hat that the present board of aldermen would vote for the bonds by a good majority. He made the offer to a crowd near the Russell House, but, as everybody present knew how easily the boulevarders tied strings to the rural legislators, which enabled them to make the r. l. dance every time the string was pulled, nobody took up the bet. "I tell you," said the alderman, "the council and the board of estimates, too, are for the boulevard by a good majority. I have not counted noses yet, but I and others have talked to a good many, and know how they stand. They will give us what we want. Hear what I tell you now." A bystander, who surmised that the boulevarders might attempt to corrupt the aldermen as they corrupted the rural legislators, asked Ald. Lauder what it was that would make the council go back on their position of two months ago, when they voted three to one against issuing any boulevard bonds. "They didn't understand the needs of the boulevard then," he answered; "but they are getting better posted on it now. They see that all the money from the bonds will be paid to the workingmen. Oh, I tell you we will get the \$100,000 soon." The alderman is certainly candid, and, as he is in a position to speak for the boulevard, his talk would seem to settle the fact beyond dispute that the boulevarders, instead of waiting till next fall to elect enough aldermen to carry out their schemes, will try to work the present council. Their success in corrupting the rural legislators has encouraged them to try the same influences on the aldermen. But, fortunately for the taxpayers, the people can reach the corrupt aldermen when they come up for election, which they cannot do with the corrupt legislator from Oshkosh or Podunk. The commissioners which the boulevarders named in the Park and Boulevard Consolidation Bill, and who they expected would lay out an extravagant plan for boulevard improvements, will have a short lease of office. Mayor Pridgeon said to-day that under a decision of the supreme court the Legislature has no right to appoint

a permanent municipal board of Detroit, the appointment of which is vested in the mayor. The commissioners named in the bill may serve for a short time, but the mayor will appoint a park and boulevard board very soon after he has been officially notified that the law is in force.

The picture cannot well be reproduced here, but it was a caricature of Mr. Randall standing upon a platform, supported at each corner, and resting upon bottles, one of which was marked "Rye." Upon the platform was a cask marked "Gin," with faucet all ready for opening. Mr. Randall's right foot rested upon this cask. His left hand was pressed against his heart, and his right arm was extended, and clasped in his right hand was a bag marked "\$." Above the picture was the following heading:

THE BOULEVARD NAPOLEON.

(In the course of his remarks in the Legislature yesterday Mr. Randall stated that within five years the grateful citizens of Detroit would erect a monument in his honor. The News submits the following design:)

Beneath the picture were three verses of rhyme, which cut no particular figure, as Mr. Randall does not complain of them.

The declaration proceeds: "Meaning by the said publication to impute to the plaintiff that he had been guilty of gross misconduct in the discharge of his official duties, and had acted as such member of the House of Representatives in a manner which was improper, unjustifiable and discreditable to him, in this, among other things, in said publication imputed, to wit, that he had, for bad and corrupt motives, induced the Legislature to pass a bill designed to enrich a certain number of persons at the expense of the City of Detroit; and in this, to wit, that, as a member of said Legislature, he had accepted and received bribes, and was corrupted thereby in his official action in respect to bills pending in or passed by the said House of Representatives, and in this, to wit, that he had, by the giving a bribe, or by other corrupt means, influenced or controlled the giving of votes by members of said Legislature,—by means of the committing of which said grievances, by the said defendants as aforesaid, he, the said plaintiff, hath been and is greatly injured in his said good name, fame and credit, and brought into public scandal, infamy and disgrace with and amongst all his neighbors and other good and worthy citizens of this State. And the said plaintiff hath been and is by means of the premises otherwise greatly injured, to wit, at the place aforesaid. And for that, whereas, the said plaintiff was always reputed to be a person of good fame and credit, and had deservedly obtained the good opinion, and enjoyed the respect and confidence, of all his neighbors, and all other persons to whom he was known, yet the said defendants, well knowing the premises, and contriving, and wickedly and maliciously intending, to injure the said plaintiff in said good fame and credit, and to bring him into public scandal, ridicule and disgrace, on, to wit, the 8th day of May, 1889, did publish, and cause and procure to be published, of and concerning the said plaintiff a certain false, scandalous, malicious and defamatory libel in a certain newspaper known as

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'The Evening News,' and of a large circulation in said county and State, and of which said libel the following is a copy. [Here follows matter set out above.] That plaintiff avers that he is the 'Mr. Randall' mentioned in and referred to by said libel, published as aforesaid, by means whereof he, the said plaintiff, hath been and is greatly injured in said good fame and credit, and brought into public scandal, ridicule, infamy and disgrace, and he hath suffered much annoyance, and incurred public odium and contempt, and hath otherwise been greatly injured, to wit, at the county and State aforesaid, to the damage of the said plaintiff of \$100,000, and therefore he brings suit."

To this declaration the defendants demurred, assigning the following causes: "(1) That the articles, words and picture set out therein are not libelous or defamatory, and actionable, as charged in said declaration. (2) That they do not in their ordinary signification and meaning impute to the plaintiff any legal crime, or any legal or moral offense, or legal or moral turpitude, and no such signification is charged in the second count. (3) Because there are no matters of inducement or extrinsic facts set up in said declaration to warrant an extension of the meaning of the alleged libelous words and pictures beyond what they naturally imply. (4) Because the alleged matter of inducement or extrinsic facts set up in said declaration are not supported by any warranted innuendo sufficient with such inducement to give plaintiff a right of action. (5) Because the alleged libelous words and pictures complained of are incapable of the meaning attached to them by the averments contained in said declaration. (6) Because it does not appear by said declaration that the picture set up in said declaration was published or connected with any of the published words or articles appearing complete within themselves, whereby the alleged reflection upon the character of members of the Legislature generally are applied to or directed at the plaintiff. (7) Because in the second count of said declaration no time of the publication is alleged, and because there is no innuendo sufficient with the inducement to give the said plaintiff a right of action under said count. (8) Because the declaration is in other respects uncertain, informal and insufficient."

This demurrer was sustained by the court below.

The plaintiff claims, as it will be seen from his declaration, that these articles and the picture impute to him, among other things, these three things: *first*, that he had, for bad and corrupt motives, induced the Legislature to pass a bill designed to enrich a certain number of persons at the expense of the City of Detroit; *second*, that he, as a member of the Legislature, had accepted and received bribes, and was corrupted thereby in his official action in respect to the bills pending in or passed by the said House of Representatives; and, *third*, that he had, by the giving of a bribe, or by other corrupt means, influenced or controlled the giving of votes by members of said Legislature.

The second imputation does not follow from the articles, or any language contained within them, or from the picture, and was so admitted upon the argument in this court by plaintiff's counsel. But we think that the first and last

imputations are found within the articles. The plain meanings of the articles are: *first*, that Mr. Randall did not go to Lansing as a member of the Legislature to serve the public, and so publicly expressed himself, but that he went there alone for the purpose of passing this boulevard bill, to enrich himself and his co-partners in the boulevard scheme at the expense of the people of the City of Detroit; and, *secondly*, that the Legislature was of such a character that they were grasping for boodle (meaning money), and that the members were susceptible of bribery, in the shape of liquor and money, from those interested in the passage of this bill, which was to put money in his own pocket at the taxpayers' expense.

The picture itself is capable of but one meaning, and that is that Randall's monument should show that liquor and money was the source of his Napoleon-like success in passing the bill. This is libelous, if not true. It is gravely argued that men are elected to the Legislature and to the Congress of the United States at every election, avowedly in the interest of private schemes of plunder, and not in the interest of the public, to represent corporations and other bodies or associates of men for their financial advancement and profit, without reference to the interests of the people at large, or even the constituency of the member so elected; that there is nothing illegal in this, because there is no law or statute providing that a member shall lose his seat by so doing; that it is at least perfectly legal for a member of the Legislature to devote his whole time and energies as such member to enrich himself, or the class or corporation he represents, at the expense of the public. If there is now no law against such action by a member of the Legislature, it is high time that statutes be enacted looking towards not only the unseating of a member guilty of prostituting his high place to personal and corrupt greed, but providing also a punishment for such misconduct. Be that as it may, however, we are satisfied that public sentiment is not yet such as to look with either favor or complacency upon a member of the Legislature whose whole avowed aim and effort is to enrich himself, or those who hire

him, at the expense of the taxpayers. And we are satisfied that if the charge made against Mr. Randall in this respect be true, he deserves the scorn and contempt of every good citizen, and would receive it. Consequently, if untrue, it is libelous, and has damaged him in the estimation of good men and honest citizens, and whom we believe to be yet largely in the majority in every community in our State. It is equally libelous, if untrue, to state that Mr. Randall accomplished the passage of this boulevard bill by keeping open house, with liquors (which is the true and plain meaning of these publications), or that he did it by the use of boodle.

The inducement in the declaration was sufficient. It is the office of the inducement to narrate the extrinsic circumstances, which, coupled with the language published, affect its construction, and render it actionable; where, standing alone, and not thus explained, the language would appear either not to concern the plaintiff, or, if concerning him, not to affect him injuriously. It is a statement of the facts out of which the charge arises, or which are necessary or useful to make the charge intelligible. Here the inducement shows Mr. Randall to have been a member of the Michigan House of Representatives from the City of Detroit, and the introducer of the boulevard bill, or a bill authorizing the common council of the City of Detroit to raise money to improve the boulevard. With this showing the articles are intelligible, and their actionable character apparent.

Nor was there necessity of any innuendoes. As said in *Bourresseau v. Detroit Evening Journal Co.*: "If the meaning of the publications is plain, therefore, no innuendo is needed. The use of it can never change the import of the words, nor add to nor enlarge their sense." See 63 Mich. 430, 6 West. Rep. 151.

The court erred in sustaining the demurrer. *The judgment of the court below is therefore reversed*, and the demurrer of the defendant overruled. The record will be remanded, and the usual time will be allowed the defendants in which to plead to the declaration if they so desire. Costs of this court, and of the demurrer in the court below, will be granted plaintiff.

The other Justices concurred.

PENNSYLVANIA SUPREME COURT.

FARMERS & MECHANICS NATIONAL BANK of Philadelphia, *Pf. in Err.*,
v.

S. Josephine LOFTUS.

(....Pa....)

1. A State has the power to change the rule that the validity of a transfer of personal property is to be determined by the law of the owner's domicile, so far as it relates to property within its borders, and to make the transfer there-of subject to its own laws.
2. The power of a married woman to sell and transfer any of the loans of the Commonwealth of Pennsylvania, or of the City of Philadelphia, with like effect as if she were unmarried, under the Act of March 18, 1875, extends to foreign or nonresident married women owning such securities.

of Philadelphia, with like effect as if she were unmarried, under the Act of March 18, 1875, extends to foreign or nonresident married women owning such securities.

3. An Act regulating the mode of transferring certain securities for loans, which is made to apply to those issued by one only of the municipal corporations of the State, is not special legislation upon the affairs of such corporation within the prohibition of § 7, art. 3, of the Constitution.

(March 10, 1890.)

ERROR to the Court of Common Pleas, No. 4, for Philadelphia County to review a judgment in favor of plaintiff in an action to recover damages for the refusal by defendant

to transfer certain certificates of loan. *Assumed.*

The action was originally brought by one James S. Swartz, who was attorney in fact for S. Josephine Loftus. Pending the suit an agreement of counsel was filed amending the record by making Mrs. Loftus plaintiff in the place of Swartz.

The suit was submitted to the court below for its opinion upon a case stated in the nature of a special verdict, from which it appeared in substance that plaintiff was the owner of certain certificates of loan of the City of Philadelphia; that she was a married woman, the wife of Henry J. Loftus, a subject of Great Britain. She was born in Philadelphia, and resided in that city for some years. She was married to her husband in Italy in the year 1880, and has since resided with him in different places, principally abroad. Her husband has acquired no domicile in Pennsylvania. The property represented by the certificates in question accrued to plaintiff prior to her marriage.

Plaintiff executed a power of attorney to transfer the said loans, and placed the certificates in the hands of her attorney-in-fact, and on December 6, 1888, she sold a part of such certificates.

By an ordinance of the councils of the City of Philadelphia of February 16, 1872, the defendant was made the loan and transfer agent of the said city, and by an ordinance of March 16, 1872, it was required, upon presentation and delivery to it of certificates of loan of the said city for the purpose of transfer, to issue and deliver to the transferee a new certificate.

The plaintiff, through her attorney-in-fact, presented to the defendant the said certificates of loan, with the power of attorney, for the purpose of obtaining the transfer of the loans to the purchasers. Thereupon the defendant refused to make the said transfer, assigning as the reason for its refusal that the husband of the plaintiff had not joined in the power of attorney so executed as aforesaid.

It was further agreed that if upon the facts plaintiff was entitled to have the transfer made, judgment was to be entered in her favor; otherwise judgment to be entered for defendant.

Judgment was entered for plaintiff upon the ground that during the life of a married woman the law of the *situs* of her personal property alone controls in the matter of its use, enjoyment and disposition, and hence that the Married Persons' Property Act of June 3, 1887 (Pub. Laws, 332), which enacts that every married woman shall have the same right to dispose of her property, real and personal, and in the same manner as if she were a *feme sole*, furnished the rule for making the transfer in this case.

Also upon the ground that the certificates of loan were contracts to be performed in the City of Philadelphia; that the law of the place of performance should be applied in the enforcement of the contract; and that the enforcement necessarily included the right to transfer the claim and to appoint an attorney for the purpose.

Thereupon the defendant sued out this writ of error.

Messrs. R. L. Ashhurst and Rowland Evans, for plaintiff in error;
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A woman acquires her husband's domicile by marriage.

Dougherty v. Snyder, 15 Serg. & R. 84; *Hollister v. Hollister*, 6 Pa. 451; *Green v. Green*, 11 Pick. 410.

Prior to 1887, a married woman could not give a power of attorney unless her husband joined therein.

Leiper's App. 108 Pa. 377.

The Act of March 18, 1875, gives no power to a married woman to constitute an attorney to make transfers.

That Act is in violation of article 7 of the Constitution forbidding special legislation for any city or county.

Philadelphia v. Pepper, 16 W. N. C. 109; *Bets v. Philadelphia*, 21 W. N. C. 155.

All questions as to the assignment or transfer by the voluntary act of the owner of choses in action are determinable by the law of the domicile of the owner; hence the Act of 1887 cannot affect the rights or capacities or disabilities of married women domiciled abroad.

Milne v. Moreton, 6 Binn. 359; *Hanford v. Paine*, 9 Am. L. Reg. 553; *Mulliken v. Aughinbaugh*, 1 Penn. & W. 124; *Speed v. May*, 17 Pa. 91; *Law v. Mills*, 18 Pa. 186; *Sted v. Goodwin*, 4 Cent. Rep. 659, 118 Pa. 291; *Crapo v. Kelly*, 88 U. S. 16 Wall. 610 (21 L. ed. 480); *Kohn's Estate*, 1 Para. Sel. Eq. Cas. 399; *Auble v. Mason*, 35 Pa. 261; *Story*, Conf. L. § 52; *Davis v. Zimmerman*, 67 Pa. 72; *Com's App.* 11 W. N. C. 492; *Reid v. Gray*, 37 Pa. 508.

Messrs. Henry B. Robb and William W. Porter, for defendant in error:

The Act of March 19, 1875, specifically confers the right contended for by the defendant in error.

Contracts respecting public funds or stocks the local nature of which requires them to be carried into execution according to the local law, are an exception to the rule that the law of the domicile applies.

Mulliken v. Pratt, 125 Mass. 374; *Scudder v. Union Nat. Bank*, 91 U. S. 406 (23 L. ed. 24F); *Brooke v. New York, L. E. & W. R. Co.* 108 Pa. 529; *Tenant v. Tenant*, 1 Cent. Rep. 596, 110 Pa. 478; *Brown v. Camden & A. R. Co.* 83 Pa. 318; *Pritchard v. Norton*, 106 U. S. 124 (27 L. ed. 104); *Coll v. Palmer*, 116 U. S. 98 (29 L. ed. 559); *Mullen v. Morris*, 2 Pa. 85; *Allshouse v. Ramsay*, 6 Whart. 331; *Wharton*, Conf. L. § 401; *Story*, Conf. L. § 233.

Mitchell, J., delivered the opinion of the court:

The settled general rule is that the validity of a transfer of personal property is to be determined by the law of the domicile of the owner. And this is especially so in regard to the capacity to pass the title in cases of infants, married women or others who may be under legal disabilities varying in different countries. "A married woman's capacity for the alienation of movables depends in general upon the law of her domicile." *Dacey*, Domicil, Rule 88, p. 195.

The defendant in error, though by birth a citizen of Pennsylvania, by her marriage lost her domicile here, and acquired the domicile of her husband, which is English. It is entirely clear, therefore, that her general rights, capacities and disabilities as a married woman, in regard to her personal property, are governed

by the laws of Great Britain, and are not affected by the laws of Pennsylvania. No assistance, therefore, in the determination of this case can be got from the Act of June 8, 1887 (Pub. Laws, 882). That Act relates to the rights and powers of married women over the control and disposition of their separate property. But the only married women whose rights and capacities the Legislature of Pennsylvania has any power to regulate are those within the Commonwealth, and it cannot be assumed that the Act was intended to apply to any others.

How far the *lex loci contractus* might affect the rights of property arising therefrom, it is not necessary to consider, as the marriage in this case took place abroad, and the husband did not even by the place of the contract become subject to the laws of Pennsylvania.

But while the general rule as above stated is entirely settled, not only in this State, but in every jurisprudence founded on the common law, yet it is subject always to the power of the State to declare otherwise as to any property having an actual or legal *situs* within its borders. The title and mode of transfer of land are always governed by the *lex loci rei sita*, and personal property may be assimilated to land in these respects whenever the law of any State so determines.

In *Milne v. Moreton*, 6 Binn. 353, 361, Chief Justice Tilghman said: "The assignees stand upon this principle, that personal property has no locality, but is transferred according to the law of the country in which the owner is domiciled. This proposition is true in general, but not to its utmost extent, nor without several exceptions. In one sense personal property has locality, that is to say, if tangible, it has a place in which it is situated, and if invisible (consisting of debts), it may be said to be in the place where the debtor resides, and of these circumstances the most liberal nations have taken advantage, by making such property subject to regulations which suit their own convenience. In cases of intestacy, the property is distributed according to the law of the domicile of the intestate. But yet, so far as concerns creditors, it depends on the law of the country where it is situated. . . . Every country has the right of regulating the transfer of all personal property within its territory, but when no positive regulation exists, the owner transfers it at his pleasure." And see observations of Gibson, (Ch. J., in *Mulliken v. Aughinbaugh*, 1 Penr. & W. 124, and in *Speed v. May*, 17 Pa. 94; of King, P. J., in *Re Merrick's Estate*, 2 Ashm. 485; *Smith's App.* 104 Pa. 381, and *Bacon v. Horne*, 123 Pa. 452, 2 L. R. A. 355.

Indeed it may be said that the tendency of modern authorities, under the influence of the European continental jurisprudence, is towards the recognition of the law of the *situs* to such an extent that what was an exception is tending to become the rule. See *note* to the late editions of Story, Conf. L. § 388; Wharton, Conf. L. §§ 846-853, and cases there cited; Westlake, Private Internat. L. § 141.

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Even Dicey, a common-law writer whose clear and accurate pages are refreshing as the blue sky after the foggy disquisitions of Story and Wharton, generalizes the rule as to creditors to which the Pennsylvania cases above cited adhere, in this form: "Where there is a conflict between a title under the law of the country where a movable is situated, and under the law of the owner's domicile, the *lex situs* will in general prevail." Dicey, Domicil, Rule 57, p. 302.

In accordance with this tendency the Legislature of Pennsylvania, by Act of March 18, 1875 (Pub. Laws, 24), declared that it shall be lawful for any married woman owning any of the loans of this Commonwealth, or of the City of Philadelphia, etc., to sell and transfer the same with like effect as if she were unmarried. This Act rules the present case. Its intention is not so much to enlarge the capacity of a married woman to deal with her property as to regulate the mode of transfer of certain kinds of property owing their existence to Pennsylvania law, and having their legal *situs* in this Commonwealth. Being a regulation of property, made for the public safety and convenience in the transaction of business, it is applicable to all owners of the classes of property named, though it may thus incidentally enlarge the powers of some foreign or nonresident married women. The direction is peremptory and without exception that the transfer shall have the same effect as if she were unmarried, and as the purpose of the Act is the public convenience, no construction should be given to it which would operate against that purpose. The authority to transfer, therefore, must be construed to carry with it all the necessary powers to make it effective, and among these is the power to do it by attorney.

The same considerations dispose of the objection to the constitutionality of the Act of 1875, that it relates only to the loans of the City of Philadelphia among municipal corporations. The Act is not a regulation of the affairs of the City of Philadelphia, within the meaning of art. 8, § 7, of the Constitution. As already said, it is the regulation of the mode of transfer of certain kinds of property for the public business convenience. It includes the loans of the Commonwealth itself, and of all corporations chartered by its authority; and the power to include such city loans as the public convenience required is nowhere prohibited to the Legislature.

In the view we have taken, it is not necessary for us to consider the power of Mrs. Loftus under the English Statute of 45 and 46 Vict., chap. 75, further than to say that that Act appears to confer upon married women ample authority to make transfers such as the present. But as the construction of foreign statutes is a matter that courts never enter upon unless absolutely necessary, and as the plaintiff's authority, under the Act of 1875, is clearly sufficient, we rest the case upon that Act.

Judgment affirmed.

KENTUCKY COURT OF APPEALS.

Isaac T. RUPARD and Wife, *Appts.*,
v.
CHESAPEAKE & OHIO R. CO.

(---Ky.---)

1. **An individual, in the exercise of his absolute rights,** if it may be reasonably apprehended that their exercise may endanger the safety of others in the exercise of their rights, must exercise them with a due regard for the safety of such others.
2. **It is the duty of a railroad company where a train crosses a public highway on a trestle and there is danger of catching a traveler thereunder unawares and frightening the horse that he is riding or driving,** to give some timely warning of the approach of the train to the crossing.
3. **Whether or not the failure of a railroad company to give warning of the approach of a train to a crossing on a trestle over a public highway is negligence,** should be left to the jury.
4. **A traveler familiar with the place,** who hurries up to a crossing where a railroad passes over the highway on a trestle, and attempts to cross regardless of the fact that the train may come at any moment, without looking to see whether a train is approaching, and without any reasonable excuse for not looking, although the train could have been easily seen at a distance of several hundred yards, is guilty of negligence which will prevent any recovery for injuries sus-

tained in consequence of the fright of his horse caused by the train.

(February 21, 1893.)

A PPEAL by plaintiffs from a judgment of the Circuit Court of Clark County entered upon a verdict directed for defendant in an action to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. G. B. Nelson, Leland Hathaway and D. W. Lindsey for appellants.

Messrs. J. M. Benton and Breckinridge & Shelby for appellee.

Bennett, J., delivered the opinion of the court:

The appellant, Patsy E. Rupard, wife of the appellant, Isaac T. Rupard, while riding on horseback on the public road at a point where the appellee's road crosses said road on a trestle high enough from the ground to admit passage thereunder on the public road by persons on horseback or in vehicles, was thrown from her horse by his becoming frightened by the noise of the train as it passed over the trestle above him.

The appellant was seriously injured by the fall. It is contended that the injury would not have occurred but for the negligence of appellee in not giving timely notice of its ap-

NOTE.—*Railroad company not liable when exercising its legal rights in a careful manner.*

A railroad company is not liable for damage that accrues to others in the exercise of its legal rights by running its engines, etc., unless the damage is caused by its negligence. *Bernard v. Richmond, F. & P. R. Co.* 13 Va. L. J. 184, 8 S. E. Rep. 785.

It is not liable, while exercising its rights in a lawful and reasonable manner, for injuries occasioned by horses, when being driven upon the highway, taking fright at noises incident to the movement and working of engines,—as, in the escape of steam and the noise and rattling of cars. *Abbot v. Kalbus,* 74 Wis. 504.

The authority to operate a railroad includes the right to make the noises incident to the movement and working of its engines,—as, in the escape of steam and the noise and rattling of cars. *Ibid.*

No action lies against a railroad company for the inconveniences necessarily caused to premises in the vicinity by noises, smoke, jarring of the ground, etc., arising from properly and prudently operating its railroad upon its own lands, or upon land in which the party complaining has no interest. *Carroll v. Wisconsin C. R. Co.* 40 Minn. 168.

Duty to give warning on approaching highway crossing.

- It is the duty of those in charge of a railroad train to give timely and sufficient warning of its approach to the crossing of a public road; and a failure to perform such duty is negligence, the degree of which depends on the facts and circumstances of each case, to be determined by the jury. *Eckridge v. Cincinnati, N. O. & T. P. R. Co.* 11 Ky. L. Rep. 557; *Philadelphia, W. & B. R. Co. v. Stinger,* 78 Pa. 219; but compare *Pennsylvania R. Co. v. Barnett,* 59 Pa. 205.

A foot passenger on a public crossing has a right
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to expect some warning upon approaching the railroad track. *Mynning v. Detroit, L. & N. R. Co.* 7 West. Rep. 327, 64 Mich. 93.

The warnings should be given in the usual customary manner, such as ordinary care and diligence require; and if so given the company will be relieved from responsibility. *Georgia Pac. R. Co. v. Freeman (Ga.)* 10 S. E. Rep. 277.

The failure of a railroad company to give the warning required by law will not justify a recovery by a traveler who is injured while attempting to cross the track in front of a train without looking or listening for the train. *Weir v. Canadian P. R. Co.* Ont. Ct. App. 1899.

Duty of engineer when person seen crossing railroad track. See *note* to *Parsons v. New York Cent. & H. R. Co.* (N. Y.) 3 L. R. A. 633.

Duty to signal its approach to highway.

It is the duty of a railroad company to give the signals prescribed by statute, upon approaching the highway, and a failure renders the company liable where injury is sustained. Authorities cited. *Cincinnati H. & I. R. Co. v. Butler,* 1 West. Rep. 114, note, 103 Ind. 81; *Cincinnati, I. St. L. & C. R. Co. v. Gaines,* 2 West. Rep. 263, 104 Ind. 523; *Illinois Cent. R. Co. v. Slater (Ill.)* 21 N. E. Rep. 575.

Railroad trains have the precedence of passing the crossings of public ways unobstructed; but it is the duty of those directing the trains to give all proper and sufficient signals of their approach, and to take all reasonable precaution to avoid collision. *Philadelphia, W. & B. R. Co. v. Hogeland,* 5 Cent. Rep. 587, 66 Md. 149; *Baltimore & O. R. Co. v. Owings,* 8 Cent. Rep. 847, 65 Md. 502; *Pennsylvania R. Co. v. Horst,* 1 Cent. Rep. 96, 110 Pa. 226.

But a recovery cannot be had for personal injuries caused by a moving railroad train, merely because the engineer in charge of the train failed

proach to the crossing by blowing its alarm whistle or by ringing its bell, so as to warn the appellant of its approach to the crossing, by which she could and would have kept at a safe distance from the crossing until the train passed it, whereby the injury would have been avoided.

Upon the conclusion of the appellant's evidence, the lower court instructed the jury peremptorily to find for the appellee, which the jury did.

The appellee's contention is that, where its road crosses the public road on a trestle, it does not in common with the traveler have any privilege in, or use of, the public road itself; that its road and the public road, though near and adjacent to each other, are distinct and separate; the former has no rights in the public road, and the traveler has no rights in the track for the purpose of crossing it; therefore the same duties are not imposed upon the appellee that are imposed upon it when it passes over the public road itself in common with the traveler; consequently, it has a right to run its train on a trestle where the trestle crosses a public road at its common, or any, rate of speed, accompanied by the usual noise attendant upon the running of a train, and is not bound, as a matter of law, to give any warning of its approach to the crossing. In support of the foregoing views the case of *Favor v. Boston & L. R. Corp.* 114 Mass. 350, is relied on.

We cannot agree to this contention. While it is true that the appellee's train does not run

on the road itself in common with the traveler, yet it is not true that the public road is not used by the appellee and the traveler in common. It, the public road, supports the appellee's trestle over which its train passes, and the traveler has a right to pass under the track on the public highway; but for his right of passage on the public highway he would commit a trespass by passing under the track on the trestles. The public road, by being trestled across, is as much in the occupation of the appellee as it would be if its track rested immediately upon it, and for the traveler to cross under the track resting on the trestle, or over the track resting upon the ground would be equally a trespass, but for the protection afforded him by reason of being on the public highway.

So it is incorrect to say that the appellee, although its train crosses the highway on a trestle, and the travelers, do not use the same in common.

But the question as to the relative duties of the appellee and the traveler rests upon broader grounds. It is the duty of the appellee, as it is of natural persons, "to exercise its rights with a considerate and prudent regard for the rights of others."

An individual in the exercise of his absolute rights, if it may be reasonably apprehended that their exercise may endanger the safety of others in the exercise of their rights, must exercise them with a due regard for the safety of such others.

To illustrate, a person who is constructing a

to give the cautionary signals prescribed by the Statute (Code, §§ 1699, 1700), when it appears that the injuries did not result from such failure. *East Tennessee, V. & G. R. Co. v. King*, 81 Ala. 177.

Under the Missouri Statutes a prima facie case of negligence is made when the plaintiff shows that the statutory signals were not given. *Huckshold v. St. Louis, I. M. & S. R. Co.* 7 West. Rep. 764, 90 Mo. 548.

Must ring bell or blow whistle.

The statute imposes the obligation on railroads to ring a bell or sound a whistle when approaching the crossing of a public highway, and imposes a penalty for violation of the rule. *State v. Chicago, R. I. & P. R. Co.* 1 West. Rep. 400, 19 Mo. App. 104.

The statute requires this to be done at intervals. *Alexander v. Hannibal & St. J. R. Co.* 1 West. Rep. 440, 19 Mo. App. 312.

If either the bell or the whistle is sounded, the statute is complied with. *Terry v. St. Louis & S. F. R. Co.* 6 West. Rep. 445, 39 Mo. 568.

The exception as to cities applies only to the sounding of the steam whistle, and it is negligence to omit ringing the bell. *Coffin v. St. Louis & S. F. R. Co.* 4 West. Rep. 885, 22 Mo. App. 601.

The statutes of Illinois require the bell or whistle to be sounded at a certain distance from the crossings (*Mobile & O. R. Co. v. Davis* (Ill.) 23 N. E. Rep. 850); in Alabama at least one fourth of a mile before reaching a public-road crossing. *Louisville & N. E. R. Co. v. Hall*, 4 L. R. A. 710, 87 Ala. 708.

The statute requiring the ringing of a bell or blowing of a whistle on a railroad train eighty rods distant from a crossing, and continuing it until the crossing is passed, is no less obligatory because the train is running upon a side track for the reason that the main track is obstructed by a standing train. *Brown v. Griffin*, 71 Tex. 654.

A party injured a half mile from a railroad crossing

ing cannot assign the violation by the company of the statutory duty in respect to sounding the whistle and ringing the bell at the crossing, as the proximate cause of his injury. *Pike v. Chicago & A. R. Co.* 39 Fed. Rep. 754.

The omission of the employees of a railroad company to ring a bell or blow a whistle as required by law is material in estimating the amount of care that one who was struck and killed by a train while attempting to cross the track should have observed before attempting to cross the track. *Rodrian v. New York, N. H. & H. R. Co.* 28 N. Y. S. R. 625.

And the finding by the jury that the bell was rung would not necessarily establish due care, if the circumstances required other and additional precautions. *Finklestein v. New York Cent. & H. R. R. Co.* 41 Hun, 84.

The fact that a street has been discontinued by the commissioners of highways, but not practically closed, will not relieve a railroad from giving warning signals on its approach to a highway. *Rodrian v. New York, N. H. & H. R. Co.* 28 N. Y. S. R. 625.

Duty to slacken speed.

Where the track crosses a much-traveled highway, without statutory provision it is the duty of the company to give sufficient notice of the train's approach, and to moderate the speed of the train to such a rate as, under the circumstances, is reasonably consistent with the public safety. *Lehigh Valley R. Co. v. Brandtmaier*, 5 Cent. Rep. 144, 113 Pa. 610.

The statute requiring the engineer, where he cannot see at least one fourth of a mile ahead, to reduce the speed of his train before entering a curve crossed by a public road only applies to such crossings as are particularly described, his duty at other crossings being as at common law. *East Tennessee, V. & G. R. Co. v. Deaver*, 79 Ala. 216.

brick wall abutting a public street on which travelers frequently pass may be liable in damages for the falling of a brick on a traveler from the hands of one of his workmen, although the workman was not negligent in letting the brick fall and the immediate cause of the fall of the brick was accidental; but if it was an accident which the person, building the wall, in view of the danger to the life and limb of travelers on the street, should reasonably contemplate, he should provide against the same by safeguards and barriers, so that travelers might not be exposed to the danger, else he will be responsible in damages for the injury. *Jager v. Adams*, 128 Mass. 26.

It is precisely upon the same principle that the appellee is made liable for injuries to travelers at crossings. It is no excuse or justification that the act that caused the injury was in itself lawful or "that it was done in the exercise of a lawful right," if the injury arose from the negligent manner in which it was done."

Injury may occur to the traveler at the crossing in two ways, namely: by a collision with him, or by scaring the horse that he is riding or driving, whereby he is injured. It is the duty of the appellee in approaching a crossing, if danger to the traveler in either of the ways above mentioned may be reasonably apprehended, to give timely notice of its approach, in order that the traveler may not only be warned not to come in collision with the train, but secure himself from injury by his frightened horse. By the trains crossing the highway on a trestle, there is no danger of a collision with a traveler on the highway, but if he

should be under the trestle with his horse while the train is passing over it, the danger is increased, for it is well known that a horse is more likely to scare at a sound made over his head than when the same sound is made on the ground. So where the train crosses the public highway on a trestle, and in view, as above intimated, of the frequency of travel, on horseback or by driving, on the public highway, and the facility of seeing the train, as it approaches the crossing, in time to prevent injury by scaring the horse, the danger of catching the traveler unawares and frightening the horse that he is riding or driving may be reasonably apprehended, it is its duty to give some timely warning of its approach to the crossing. And the question as to whether or not the failure to give such warning is negligence should be left to the jury.

For an able presentation of the foregoing views, see the case of *Pennsylvania R. Co. v. Barnett*, 59 Pa. 263.

But it conclusively appears from the appellant's own testimony that she received the injury in consequence of her own negligence. She was familiar with the crossing and its surroundings; the track, in the direction that the train was coming, was clear of obstruction several hundred yards, and she could have seen the approaching train that distance, had she looked, but she did not look; nor did she give any reasonable excuse for not looking, but hurried up to the crossing and attempted to cross, regardless of the fact that the train might come at any moment. So, as it conclusively appeared that the injury was the result

It is the duty of a company to observe due caution and all reasonable efforts to prevent injury to persons who may be on its tracks when approaching a crowded city. *Duffy v. Missouri P. R. Co.* 2 West. Rep. 198, 19 Mo. App. 380. See note to *Parsons v. New York Cent. & H. R. R. Co.* (N. Y.) 3 L. R. A. 663.

Running a train in an incorporated town at a greater rate of speed than six miles an hour does not impose absolute liability, under Miss. Code, § 1047, for the killing of cattle, unless the killing resulted from or was rendered inevitable by the rate of speed. *Louisville, N. O. & T. R. Co. v. Caster*, (Miss.) 5 So. Rep. 388.

Where a train was run at twelve miles per hour, without its bell being constantly rung, in violation of an ordinance, and deceased was run over and killed instantaneously with his stepping on the track; and the engine was not reversed till after it passed over him,—it was negligence *per se* upon the part of the railroad company. *Henry, Ch. J., dissents.* *Keim v. Union R. & T. Co.* 7 West. Rep. 144, 90 Mo. 614.

A municipal ordinance regulating the rate of speed of trains, and requiring the display of signals on moving trains at night, applies to the private switch-yards of a railroad company situated within the corporate limits. *Grube v. Missouri Pac. R. Co.* (Mo.) 11 S. W. Rep. 739.

A city ordinance limiting the speed of trains in only one part of a city where a railroad runs is unreasonable and void where there is no material difference between the character of such part and of another part of the city through which a competing line runs. *Lake View v. Tate* (Ill.) 6 L. R. A. 268.

An ordinance prohibiting a greater rate of speed than four miles an hour by railroad trains within a city's limits is not so palpably and manifestly un- 7 L. R. A.

reasonable as to justify a court in setting it aside, where there is no evidence to show whether the locality was or was not sparsely settled. *Weyl v. Chicago, M. & St. P. R. Co.* 40 Minn. 350.

Duty of traveler to stop, look and listen.

The rule as to the duty of a person approaching a railroad crossing to stop and look and listen for the approach of trains is not a rule of evidence, but one of absolute and unyielding law. *Pennsylvania R. Co. v. Aiken* (Pa.) 20 Pustb. L. J. N. S. 183, 25 W. N. C. 13.

It applies as well to persons walking as to those driving. *Ibid.*

When the track is hidden from one's view for some distance, and the noise made by his own wagon interferes with his hearing the approaching train, it is his absolute duty to stop his team and listen before attempting to cross the track. *Abbot v. Dwtinnell*, 74 Wis. 514.

One who recognized the approach of the train should remain in a place of safety, and should he undertake to cross imprudently he will be guilty of negligence and cannot recover damages. *McNeal v. Pittsburgh & W. R. Co.* (Pa.) 25 W. N. C. 181.

Where he exercised no diligence in listening and looking for the train, and does not pretend ignorance that it was train time, or suggest any mistake or misapprehension, he cannot recover for injuries received from the train. *Smith v. Central R. & Bkg. Co.* 82 Ga. 801.

No amount of negligence on the part of a railway company in failing to close its gates at a crossing will absolve a traveler from the duty to stop and listen. *Lake Shore & M. S. R. Co. v. Franz*, 4 L. R. A. 389, 127 Pa. 297; and see note to *Freeman v. Duluth S. S. & A. R. Co.* (Mich.) 3 L. R. A. 594; *Greenwood v. Philadelphia, W. & B. R. Co.* (Pa.) 3 L. R. A. 44.

of the appellant's own negligence, the instruction was not improper.

The judgment is affirmed.

An extension of the time for filing a rehear-

ing was obtained in this case, but counsel finally neglected to avail themselves of the extension, and the extended time expired without the filing of such petition, and the decision thereby became absolute.

OHIO SUPREME COURT.

STATE of Ohio, *ex rel.* J. A. KOHLER,
Attorney-General,

v.

CINCINNATI, WASHINGTON & BALTIMORE R. CO.

SAME

v.

CINCINNATI, NEW ORLEANS & TEXAS
PACIFIC R. CO.

(.....Ohio St.....)

*1. Where a railway company, incorporated under the laws of this State, misuses a franchise, privilege or right conferred upon it, or claims the right to exercise, or has exercised "a franchise, privilege or right in contravention of law," this court has jurisdiction to inquire into and correct the mischief, though the corporation may be engaged in interstate commerce, and the misuser or usurpation to be corrected relate to and concern that traffic.

2. A corporation, created by this State, and engaged in carrying goods for hire, as a common carrier, has no franchise, privilege or right to discriminate in its freight rates in favor of one shipper, even when it is necessary to do so to secure his custom, if the discriminating rate will tend to create a monopoly by excluding from their proper markets the products of the competitors of the favored shipper.

*Head notes by the COURT.

NOTE.—*Quo warranto, for illegal exercise of corporate franchise.*

A private corporation created by the Legislature may lose its franchises by a misuser or a nonuser of them; and they may be resumed by the government, under a judicial judgment upon a *quo warranto* to ascertain or enforce forfeiture. *State Board of Education v. Bakewell*, 8 West. Rep. 49, 122 Ill. 339; *Terrett v. Taylor*, 13 U. S. 9 Cranch, 51 (3 L. ed. 658); *State v. Real Estate Bank*, 5 Ark. 595; *People v. Manhattan Co.* 9 Wend. 351.

The writ of *quo warranto* is the proper remedy for usurpation of a franchise. *Reynolds v. Baldwin*, 1 La. Ann. 193; *State v. Kamos*, 10 La. Ann. 430.

It may be maintained in the name of the people to restrain a corporation from exercising authority not possessed by it under its charter or by law. *People v. New York*, 32 Barb. 35, 10 Abb. Pr. 144; *Com. v. Delaware & H. Canal Co.* 43 Pa. 295; *People v. Utica Ins. Co.* 15 Johns. 355.

An information in the nature of a *quo warranto* against a private corporation is a public prosecution. *People v. Golden Rule*, 114 Ill. 34.

It is of legal, not equitable, cognizance, and the issues therein are strictly legal. *People v. Albany & S. R. Co.* 37 N. Y. 161.

It is a civil suit and must be governed by the rules applicable thereto, and be proceeded with like any other civil action. *Central & G. Road Co. v. People*, 5 Colo. 59; *Atchison, T. & S. F. R. Co. v. People*, 10 Mo. 495; *State v. Lingo*, 20 Mo. 495.

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3. Where such corporation fixes a rate of freight per hundred pounds, for carrying petroleum oil in oil-tank cars, substantially lower than its rate for transporting it in barrels in car-load lots, it is exercising "a franchise, privilege or right in contravention of law" within the meaning of the fourth clause of § 6761, Rev. Stat.

(March, 4, 1890.)

PETITIONS in *quo warranto* to oust defendants from certain franchises alleged to be illegally exercised by them. *Judgment of ouster.*

Statement by Bradbury, J.:

The pleadings, together with the report of the referee, Hon. Channing Richards, disclose that the Cities of Marietta, O., and Parkersburg, West Va., are situated on opposite sides of the Ohio River, about twelve miles apart; that one of the defendants, the Cincinnati, Washington & Baltimore Railway Company, owns and operates a railway that connects Marietta directly, and, by means of a railway bridge across the Ohio River at Parkersburg, the latter place, also with the City of Cincinnati, Ohio, where it has connections with an extensive system of railways operated by the other defendant, the Cincinnati, New Orleans & Texas Pacific Railway Company, both which railway companies are corporations created by and under the laws of this State; and that the entire line of the first-named Company lies within the State, while only about one mile of

Original jurisdiction is conferred on the supreme court by the Constitution. *People v. Boughton*, 5 Colo. 437; *State v. Milwaukee*, L. S. & W. R. Co. 45 Wis. 579.

In New York the remedies may now be obtained by civil action. *People v. Hall*, 80 N. Y. 117. See note to *State v. Minnesota T. Mfg. Co.* (Minn.) 3 L. R. A. 510.

The granting of leave to file the information is within the sound discretion of the court. *People v. Waite*, 70 Ill. 25; *People v. Moore*, 73 Ill. 132; *State v. Smith*, 48 Vt. 255.

When the attorney-general *ex officio* files an information, no leave of court is requisite. *Vanatta v. Delaware & B. R. Co.* 33 N. J. L. 232.

The information is properly filed against the corporate body, not the individual members. *State v. Barron*, 57 N. H. 436; *State v. Taylor*, 25 Ohio, 230.

One charged with having usurped powers and franchises and exercising the same without authority of law must either justify or disclaim the alleged acts. *Illinois M. R. Co. v. People*, 84 Ill. 423.

It is not competent for this court, in a *quo warranto* proceeding ousting an acting corporation of the franchise to be a body corporate, to consider or determine the rights or liabilities of third parties acquired and incurred in their dealings. *Society Perun v. Cleveland*, 1 West. Rep. 506, 43 Ohio St. 431. See note to *State v. Minnesota T. Mfg. Co.* (Minn.) 3 L. R. A. 510.

the extensive system operated by the last-named Company is so located, the remainder thereof extending through the States south of the Ohio River. That the Camden Consolidated Oil Company, a branch of the Standard Oil Company, owns and operates an extensive establishment at Parkersburg, West Va., for refining petroleum oil; and that there are a number of smaller establishments at Marietta, O., engaged in the same business, not connected, however, with the Standard Oil Company, one of which, owned and operated by George Rice, is of considerable magnitude, though much less extensive than the Camden Consolidated Oil Company. That the several owners of these oil refineries mainly depend for transporting their finished product to its principal market, the towns and cities south of the Ohio River, upon the railways owned and operated by the defendants, both of whom are common carriers of freight and passengers. That there are two methods of transporting oil to market, in use by refiners and wholesale dealers, one in barrels shipped in carload lots, in cars furnished by the carrier, the other in iron-tank cars owned and furnished by shippers; and that defendants furnished no tank cars, and did not hold themselves out as prepared to transport oil in that way; and that the tank cars on the road of the Cincinnati, Washington & Baltimore Railway Company were owned and controlled by the Camden Consolidated Oil Company, while those on the road of the Cincinnati, New Orleans & Texas Pacific Railway Company were owned and controlled by the Chess-Carly Company, a branch of the Standard Oil Company, located in Kentucky, and that the Camden Consolidated Oil Company and the Chess-Carly Company usually adopted the iron-tank car method of shipment, all other refiners using the barrel method only. That for some years prior to the bringing of this action the freight rates established by defendants for transporting oil in tank cars, were made much lower than those for transporting it in barrel packages in carload lots, and that the rates charged George Rice and other refiners and wholesale shippers over these railroads by the barrel method were much higher than the rates charged the Camden Consolidated Oil Company and the Chess-Carly Company respectively for similar services by the barrel method; so that, whatever method was adopted, a marked discrimination was made in favor of these two companies.

Any further statement of facts necessary to understand the decision will be found in the opinion.

Messrs. J. A. Kohler, Atty-Gen., W. B. Loomis, A. D. Follett and George E. Nash, for relator:

An Ohio railroad company has no right to give lower rates to a favored shipper. Such a corporation makes an unlawful discrimination in favor of the larger shipper contrary to public policy, when, in consideration of the fact that such shipper furnishes a greater quantity of freights than other shippers during a given time, it agrees to make a rebate on the published tariff on such freights, to the prejudice of other shippers of like freights under the same circumstances.

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Seofield v. Lake Shore & M. S. R. Co. 1 West. Rep. 812, 48 Ohio St. 571; *Talcott v. Pine Grove* 1 Flipp. 120; *Orough v. London & N. W. R. Co.* 14 C. B. 255; *Parker v. Great Western R. Co.* 7 Scott, N. R. 835.

Messrs. McClintick & Smith and Edward W. Strong, for the C. W. & B. R. Co., defendant:

The petition is based wholly upon the ground that the defendant has misused the franchise, privilege and right conferred upon it by law, or has exercised a franchise, privilege or right in contravention of law.

8 Rev. Stat. § 6761, p. 386.

Acts of misuser must relate to matters which are of the essence of the contract between the State and the corporation, and they must be willful and repeated.

Harris v. Mississippi Valley & S. I. R. Co. 51 Miss. 602; *Com. v. Pennsylvania Com. Bank*, 28 Pa. 383; *State v. New Orleans Gaslight & Bkg. Co.* 2 Robt. (La.) 529.

Mere mistake in the mode of exercising a power will not be such a misuser as to constitute a ground of forfeiture.

People v. Kingston & M. Turnp. R. Co. 23 Wend. 193.

If violation of the law has been shown, the same law has provided an extraordinary remedy and punishment, which indicates the intention of the Legislature to limit the party aggrieved to this particular statutory relief.

Com. v. Breed, 4 Pick. 460; *Seofield v. Lake Shore & M. S. R. Co.* 1 West. Rep. 812, 48 Ohio St. 571; *Peters v. Marietta & O. R. Co.* 42 Ohio St. 275.

A judgment of forfeiture will not be ordered if there be any other remedy for the grievance complained of.

High, Extr. Legal Rem. 649; *State v. Cincinnati Com. Bank*, 10 Ohio, 539; *State v. Farmers College*, 32 Ohio St. 489.

Discrimination in rates of freight, if fair and reasonable, and founded on grounds consistent with public interest, is allowable.

Hersh v. Northern Cent. R. Co. 74 Pa. 181; *Chicago & A. R. Co. v. People*, 67 Ill. 11; *Fitchburg R. Co. v. Gage*, 12 Gray, 393; *Garton v. Bristol & E. R. Co.* 1 Best & S. 112, 154, 165; *McDuffee v. Portland & R. R. Co.* 52 N. H. 430, 3 Am. & Eng. R. R. Cas. 602; *Ransom v. Eastern Counties R. Co.* 1 C. B. N. S. 437, 4 C. B. N. S. 135.

Forfeitures are not favored.

High, Extr. Legal Rem. 649; *State v. Cincinnati Com. Bank*, 10 Ohio, 539; *People v. Kingston & M. Turnp. R. Co.* 23 Wend. 211; *Re Franklin Teleg. Co.* 119 Mass. 448; *State v. Farmers College*, 32 Ohio St. 489.

Messrs. Harmon, Colston, Goldsmith & Hadley, for C. N. O. & T. F. R. Co., defendant:

The States have no jurisdiction whatever over interstate commerce, and a money penalty cannot be imposed by state law for a breach of duty relating to interstate commerce. If such a breach cannot be the basis of a fine, much less can it justify the most severe penalty which by law can ever be inflicted upon a corporation, namely, the forfeiture of its franchise.

See *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557 (30 L. ed. 244); *Com. v. Housatonic R. Co.* 3 New Eng. Rep. 449, 148 Mass. 264.

Bradbury, J., delivered the opinion of the court:

These actions are brought under the fourth clause of § 6761, Rev. Stat., which authorizes an action of *quo warranto* to be brought against a corporation "when it has misused a franchise, privilege or right conferred upon it by law, or when it claims or holds by contract or otherwise, or has exercised a franchise, privilege or right in contravention of law."

The petitions charge, among other things, that the defendants misused their corporate powers and franchises by discriminating in their rates of freight in favor of certain refiners of petroleum oil connected with the Standard Oil Company, by charging other shippers of like products unreasonable rates, by arbitrarily and suddenly changing the same, and, finally, by confederating with the favored shippers to create and foster a monopoly in refined oil, to the injury of other refiners and the public; and, further, that the defendants claimed and exercised, in contravention of law, the right to charge for shipping oil in tank cars a lower rate of freight per hundred pounds than they charged for shipping the same in barrels, in carload lots. The defendants by answer, among other matters, denied charging any shippers unreasonable rates of freight, or that they arbitrarily or suddenly changed such rates, and denied any confederacy with anyone to establish a monopoly.

The actions were referred to a referee to take the evidence and to report to this court his findings of fact and conclusions of law therefrom; all which has been done and the cases are before us upon this report.

To the report of the referee exceptions were filed by all parties. The defendants, however, do not now insist upon their exceptions to the finding of the referee in so far as it relates to the facts; indeed, it is difficult to conceive any grounds for their doing so, for these findings are mainly based upon the testimony of the officers and agents of the Railroad Companies.

On the other hand, however, counsel for the relators urge upon us with much force their exceptions to the facts as they were found by the referee; four of which findings at least—the eighth, ninth, twenty-second and twenty-third—deserve consideration. The eighth was, that the open rate of freight made for the public for oil was not excessive, and the ninth, that those open rates were not frequently or arbitrarily changed. Without absolutely committing ourselves to the correctness of these findings, we think they are made immaterial by other findings that require the rendition of the same judgment that should have been rendered had these two findings been the reverse of what they are.

The twenty-second and twenty-third findings of fact should be considered together. The first of the two negatives the existence of a conspiracy or confederation between either of the defendants and the Camden Consolidated Oil Company on the one hand, or the Chess-Carly Company on the other, to foster or create a monopoly in the traffic in petroleum oil, while the other one rests the action of the Railroad Companies, in giving rebates and special rates to these favored shippers, upon the necessity they were under of doing so to secure large ship-

ments of oil over their roads which would otherwise have been lost to them.

It is contended, in this connection, that as the evidence shows, and the referee in another part of his report found, that this action of the Railroad Companies tended to create a monopoly and to injure the business of George Rice in all the markets reached by their lines, and in some instances did in fact create a monopoly, they (especially as their officers were men of large capacity and wide experience in the affairs of the commercial world) must be held to have contemplated and intended these natural results.

It is true that in relation to many matters, both civil and criminal, one must be held to intend the natural and probable consequences of an act and cannot be heard to deny it. We think the principle hardly applicable here, and that the charge of an actual conspiracy by the defendants with others, to misuse the franchises conferred on them by the State, to injure the public, is not necessarily sustained by proof that a course was pursued beneficial to their interests, though it tended to and in fact did produce that result. The inference thus arising is to be given due force, but is not conclusive; and the fact of conspiracy is to be established, if at all, from a consideration of all the circumstances in the case, and we cannot say, in view of all those circumstances, that the finding of the referee in this respect is not supported by the evidence. The exceptions to the report are therefore overruled.

All of the oil of the Camden Consolidated Oil Company that was transported over the Cincinnati, Washington & Baltimore Railroad Company, all of that which was refined by George Rice and other refiners operating at Marietta, Ohio, which was carried south of the Ohio River, and all of that belonging to any of those parties which was transported over the Cincinnati, New Orleans & Texas Pacific Railway, was commerce between the States, the regulation of which, by the Constitution of the United States, is denied to the several States; and as the discrimination, of which complaint is made in this action, relates to this traffic, defendant's counsel contend that this court has no jurisdiction of the subject. No doubt the regulation of interstate commerce belongs exclusively to the national government; but does the controversy now before us, in any proper sense of the term, relate to a regulation of commerce between the States? Does this exclusive right in Congress to regulate interstate commerce preclude any action by a State upon any subject that may incidentally affect such commerce? Certainly a State cannot be compelled to create corporations in aid of, or to facilitate, commerce between the States; but if it does create one capable of engaging in such commerce, and the corporation in fact so engages, is that an emancipation of the corporation from the control of the State? That the power to regulate commerce between the States cannot safely be pressed to such extreme consequences is, we think, recognized by the supreme court in *Robbins v. Shelby Co. Tanning Dist.* 120 U. S. 4-9 [80 L. ed. 694]. The corporation has received vitality from the State; it continues during its existence to be the creature of the State; must live subservient to its laws, and has such

powers and franchises as those laws have bestowed upon it, and none others. As the State was not bound to create it in the first place, it is not bound to maintain it, after having done so, if it violates the laws or public policy of the State, or misuses its franchises to oppress the citizens thereof.

For such offenses the State, acting through its Legislature and courts, and in the exercise of a sound discretion, may either destroy the corporation entirely, by forfeiting its charter, or oust it from the wrongful exercise of its powers; and if, instead of, or in addition to, misusing the franchises actually conferred, it usurps others, the circumstance that the usurped franchises relate to and concern commerce between the States ought not to deprive the State of its visitatorial power. If the State creating the corporation is deprived of this power, none exists elsewhere. "The government creating the corporation can alone institute such a proceeding [*quo warranto* to adjudge forfeiture of a corporate franchise], since it may waive a broken condition of a compact made with it." *Angel & A. Corp.* § 777, and cases cited. See note 6.

That the Cincinnati, Washington & Baltimore Railway Company did discriminate in its rates for freight on petroleum oil in favor of the Camden Consolidated Oil Company, and that the Cincinnati, New Orleans & Texas Pacific Railway Company did the same in favor of the Chess-Carly Company, is shown by the finding of the referee, which is clearly sustained by the evidence. That these discriminating rates were in some instances strikingly excessive, tended to foster a monopoly, tended to injure the competitors of the favored shippers and were in many instances prohibitory, actually excluding these competitors from extensive and valuable markets for their oil, giving to the favored shippers absolute control thereof, is established beyond any serious controversy. The justification interposed is that this was not done pursuant to any confederacy with the favored shippers or with any purpose to inflict injury on their competitors, but in order that the Railroad Companies might secure freight that would otherwise have been lost to them. This we do not think sufficient. We are not unmindful of the difficulties that stand in the way of prescribing a line of duty to a railway company, nor do we undertake to say they may not pursue their legitimate objects, and shape their policy to secure benefits to themselves, though it may press severely upon the interests of others; but we do hold that they cannot be permitted to foster or create a monopoly, by giving to a favored shipper a discriminating rate of freight. As common carriers, their duty is to carry indifferently for all who may apply, and in the order in which the application is made and upon the same terms; and the assumption of a right to make discriminations in rates for freight, such as was claimed and exercised by the defendants in this case, on the ground that it thereby secured freight that it would otherwise lose, is a misuse of the rights and privileges conferred upon it by law. A full and complete discussion of the principles and a thorough collection of the authorities bearing upon the duties of railroad companies towards their customers is to be

found in the opinion of Judge Atherton, in the case of *Seofield v. Lake Shore & M. S. R. Co.* 43 Ohio St. 571, 1 West. Rep. 812, to which nothing need be now added.

It appears that of the two methods of shipping oil, that by the barrel in carload lots and that in tank cars, the first only was available to George Rice and the other refiners of petroleum oil at Marietta, Ohio, as they owned no tank cars, nor did the defendants own or undertake to provide any; but that both methods were open to the Camden Consolidated Oil Company and the Chess-Carly Company, by reason of their ownership of tank cars; and that the rate per barrel in tank cars was very much lower than in barrel packages in box cars; that in fact the Cincinnati, Washington & Baltimore Railway Company, after allowing the Camden Consolidated Oil Company a rebate, and allowing the Baltimore & Ohio Railway Company for switching cars, received from the Camden Consolidated Oil Company only about one half the open rates it charged the Marietta refiners, and that both Railroad Companies claimed the right to make different rates, based upon the different methods of shipping oil, and the fact of the ownership by shippers of the tank cars used by them. It was the duty of the defendants to furnish suitable vehicles for transporting freight offered to them for that purpose, and to offer equal terms to all shippers.

A railroad is an improved highway; the public are equally entitled to its use; it must provide equal accommodation for all upon the same terms. The fact that one shipper may be provided with vehicles of his own entitles him to no advantage over his competitor not so provided. The true rule is announced by the Interstate Commerce Commission in the report of the case of *George Rice v. Louisville & N. R. Co.* 1 Inters. Com. Rep. 722: "The fact that the owner supplies the rolling stock when his oil is shipped in tanks, in our opinion, is entitled to little weight when rates are under consideration. It is properly the business of railroad companies to supply to their customers suitable vehicles of transportation (*Ogdensburg & L. O. R. Co. v. Pratt*, 89 U. S. 82 Wall. 123 [23 L. ed. 827]), and then offer their use to everybody impartially." Page 50 of the report of the case.

No doubt a shipper who owns cars may be paid a reasonable compensation for their use, so that the compensation is not made a cover for discriminating rates or other advantages to such owner as a shipper. Nor is there any valid objection to such owner using them exclusively as long as the carrier provides equal accommodations to its other customers. It may be claimed that if a railroad company permit all shippers indifferently and upon equal terms to provide cars suitable for their business, and to use them exclusively, no discrimination is made. This may be theoretically true, but is not so in its application to the actual state of the business of the country, for a very large proportion of the customers of a railroad have not a volume of business large enough to warrant equipping themselves with cars, and might be put at a ruinous disadvantage in the attempt to compete with more extensive establishments. Aside from this, how-

ever, a shipper is not bound to provide a car; the duty of providing suitable facilities for its customers rests upon the railroad company, and if instead of providing sufficient and suitable cars itself, this is done by certain of its customers, even for their own convenience, yet the cars thus provided are to be regarded as part of the equipment of the road. It being the duty of a railroad company to transport freight for all persons indifferently and in the order in which its transportation is applied for, it cannot be permitted to suffer freight cars to be placed upon its track by any customer for his private use, except upon the condition that, if it does not provide other cars sufficient to transport the freight of other customers in the order that application is made, they may be used for that purpose. Were this not so, a mode of discrimination fatal to all successful competition by small establishments and operators with larger and more opulent ones could be successfully adopted and practiced at the will

of the railroad company and the favored shipper.

The advantages, if any, to the carrier, presented by the tank-car method of transporting oil over that by barrels in box cars in carload lots, are not sufficient to justify any substantial difference in the rate of freight for oil transported in that way; but if there were any such advantages, as it is the duty of the carrier to furnish proper vehicles for transporting it, if it failed in this duty it could not in justice avail itself of its own neglect as a ground of discrimination; it must either provide tank cars for all of its customers alike, or give such rates of freight in barrel packages, by the carload, as will place its customers using that method on an equal footing with its customers adopting the other method.

Judgment ousting defendants from the right to make or charge a rate of freight per hundred pounds for transporting oil in iron tank-cars, substantially lower than for transporting it in barrels, in carload lots.

ALABAMA SUPREME COURT.

Robert T. SMITH, *Appt.*,
v.
GEORGIA PACIFIC R. CO.

(....Ala.....)

Calling the name of a station and stopping the train soon after to take a side track while another train passes will not make the carrier liable for injuries to a passenger who attempts to get off at that place, where all the surroundings indicate that it is not the proper place for alighting.

(January 15, 1890.)

APPEAL by plaintiff from a judgment of the Circuit Court for Cleburne County in favor of defendant in an action to recover damages for personal injuries alleged to have resulted from the negligence of defendant's servants. *Affirmed.*

The facts are fully stated in the opinion.
Messrs. Kelly & Smith for appellant.
Messrs. Knox & Bowie for appellee.

Clopton, J., delivered the opinion of the court:

Appellant's injuries, for which he sues, were received while alighting from a train at Hedlin, a regular station on defendant's road. His right of recovery is founded on the allegation that his injury was caused by the negligence of defendant's servants. The specific negligence complained of is alleged to consist in calling out the name of the station, bringing the train to a stand-still immediately thereafter, thereby inducing plaintiff to believe, and to act upon the belief, that the train had reached the usual place for landing passengers, and suddenly starting it without giving him notice. Plaintiff's act in leaving the train being voluntary, it is incumbent on him, in order to entitle him to a recovery, or before the opinion of a jury is required to be taken as to the question of negligence, to produce evidence from which the

inference may be reasonably drawn that his injury was caused by the negligence of the defendant. We shall therefore direct our consideration to the question whether, on the facts clearly proved, and having regard to the liberty to draw inferences therefrom, the court would have been justified in taking the question of negligence from the jury; for if on the facts, which admit of no dispute, and allowing all adverse inferences, it would have been the duty of the court to set aside the verdict had one been rendered in favor of plaintiff, and the affirmative charge in favor of the defendant was authorized, we need not consider the various rulings of the court. *Bentley v. Georgia Pac. R. Co.* 86 Ala. 484.

A railroad company, being a carrier of passengers, is under obligation to use reasonable care to transport them safely. This general duty includes the specific duty not to expose them to unnecessary danger, and not intentionally or negligently to mislead them by causing them to reasonably suppose that their point of destination has been reached, and that they may safely alight, when the train is in an improper place. Calling out the name of the station is customary and proper, so that passengers may be informed that the train is approaching the station of their destination, and prepare to get off when it arrives at the platform. The mere announcement of the name of the station is not an invitation to alight, but, when followed by a full stoppage of the train soon thereafter, is ordinarily notification that it has arrived at the usual place of landing passengers. Whether the stoppage of the train, after such announcement and before it arrives at the platform, is negligence, depends upon the attendant circumstances. The rule is aptly expressed in *Bridges v. North London R. Co.* L. R. 6 Q. B. 377, by Willes, J.: "It is an announcement by the railway officers that the train is approaching, or has arrived at, the platform, and that the passengers may get out when the train stops at the platform, or under circumstances induced

and caused by the company, in which the man may reasonably suppose he is getting out at the place where the company intended him to alight. To that extent calling out is an invitation."

A reference to a few leading cases will aid in the solution of the question whether, on the facts hereafter stated, plaintiff should or could have supposed that the train had reached the usual place for the discharge of passengers.

In *Bridges v. North London R. Co.*, *supra*, the executrix and wife sued for injuries suffered by her husband which resulted in his death. The train on which he was a passenger had to pass through a tunnel before reaching the main platform. There was within the tunnel a platform, similar to but narrower than the main platform. The train went partially up to the main platform and stopped, the last two carriages remaining in the tunnel, the last but one opposite the small platform, and the last, in which the deceased was riding, opposite a heap of rubbish lying near the track. A passenger who had alighted on the platform from the carriage next to the last, found the deceased lying on the heap of rubbish fatally injured. There was no light in the tunnel, and it was filled with steam. The name of the station had been called in the usual way. It was ruled, on appeal from the Exchequer Chamber to the House of Lords, that it might be reasonably inferred that the deceased, having heard the name of the station called, and finding that the train had stopped, got out of the carriage supposing that he would alight on the platform, and that the evidence furnished matter on which it was necessary to take the opinion of a jury. *L. R. 7 H. L. 218.*

In *Central R. R. Co. of N. J. v. Van Horn*, 83 N. J. L. 188, the name of the station which was plaintiff's destination was announced while the train was in motion, and soon thereafter it was brought to a full stop, some distance from the station. The plaintiff went out on the platform of the car for the purpose of alighting, and while standing thereon the train was suddenly put in motion towards the depot, whereby she was thrown off and injured. This was at night. It is said: "The court would not be warranted in saying that it is not negligence to give notice of the approach to a station, and then to stop the train short of such station, in the night time. Such a course would naturally tend to jeopard passengers, for it would induce them to believe that they had arrived at the station designated, and they would, in the ordinary course, go to the car platform. At night, this must be the inevitable result."

In *Taber v. Delaware, L. & W. R. Co.* 71 N. Y. 480, Andrews, J., says: "The plaintiff was justified, under the circumstances, in supposing that she had reached her destination, and that the train was at the place where passengers were to alight; at least, the jury might have come to the conclusion that she was free from negligence. The defendant was bound to take notice of the circumstances, viz.: that the station had been announced; that passengers for Williams would naturally assume that the train, when it stopped, was at the station, and at the place where they were to alight; that by reason of the darkness of the night, and the absence of a depot, or other external indication

of a station, passengers, especially those not familiar with the surrounding objects, would not, by observation, know that the train had run beyond the highway crossing; that passengers, in the absence of notice, would, according to the usual custom, start to leave the train as soon as it came to a stand-still." In that case the night was dark, and there was no depot or station light or anything to indicate the stopping place, which was a highway crossing, to a person not familiar with it. It was held that whether notice should have been given to the passengers, as a reasonable precaution, that the train was to back, and whether the omission to do so was negligence, were questions for the jury.

On the other hand, in *Mitchell v. Chicago & G. T. R. Co.*, 51 Mich. 236, the plaintiff intended to take another train at the crossing of two railways. Before arriving at the junction, the name of the station was called out, and the train came to a full stop, as required by law, before reaching crossings. Plaintiff hurried to leave the car, went down the steps where there was no platform or other convenience for landing, and, as she was stepping off, the cars were suddenly started to go forward to the depot, when she fell and was injured. This was in daylight, and it does not appear that any person employed on the train observed her. It was held that the injury was purely accidental, unless plaintiff was herself negligent, and that the company was not liable. Campbell, J., said: "The only cause of the mischief, leaving defendant's carelessness or negligence out of view, was her mistaken supposition that the cars had stopped for the station, and that she should therefore get out. There was nothing at the spot to indicate a landing place, and there was at the proper place, a short distance further on, a building and platform, appropriate and used for that purpose. The stoppage of the cars was required by statute, as well as by usage, as a precaution against collisions. The calling of the station was not shown to have been out of the usual course, and, from the distances mentioned, we can hardly conceive it should have been delayed. No one representing the company, whether conductor or brakeman, is shown to have known or suspected that plaintiff had put herself in peril or left her place. Nothing is shown which put them in fault for not knowing this."

We have specially referred to the cases cited, because they distinguish between the instances in which the negligence of the defendant is and is not a question for the jury, and have made the foregoing extracts because they clearly declare the principles on which the distinction rests. They all concur that neither the announcement of the station, nor stopping the train before it arrives at the platform, if required by law or usage, for the purpose of avoiding collisions or other accidents, is negligence *per se*.

In *Bridges v. North London R. Co.*, *supra*, Baron Pollock observes, in reference to the conduct of the passenger who was injured: "Had he known the rubbish was there instead of the platform, to jump out onto it with such a fall as would break his leg and occasion mortal internal injuries would indeed have been negligent, and rash in the extreme. But

it was two hours after sunset, there was no light within the tunnel, and the deceased was near-sighted, and he might well have supposed he would step on the platform, as did the passenger in the next carriage, with impunity."

It will be observed that, in each of the cases in which it was ruled there was evidence of negligence sufficient to be submitted to the jury, there existed the element that, by reason of the want of light or other things, the passenger may have been deceived into supposing the train had arrived at the platform or place where it was intended he should alight. Comparing all the cases, we deduce that when the name of the station is called, and soon thereafter the train is brought to a stand-still, a passenger may reasonably conclude that it has stopped at the station, and endeavor to get off, unless the circumstances and indications are such as to render manifest that the train has not reached the proper and usual landing place.

The undisputed facts are: Heflin was the point at which the regular passenger trains met and passed each other. It was customary for the east-bound train, on which plaintiff was a passenger, to take the side track, leaving the main track unobstructed for the passage of the train going westwardly. This was necessary to avoid collision. Heflin was plaintiff's point of destination. As the train was approaching, the name of the station was called, as was usual, and the train was stopped very soon thereafter, the object being to take the side track. On its stoppage, plaintiff went out of the rear door of the car, and was descending with one foot on the first step of the car and the other about touching the ground, when the train moved to go forward to the depot, which caused him to fall. It was drawn to the usual place for the

discharge of passengers, and again stopped. The rear of the car, from which plainiff was getting off, was about 200 yards from the depot building, the proper place for the discharge of passengers. The train was first stopped in a cut, about 360 feet long, and from 5 to 11 feet deep. This was in daylight, about 1 o'clock P. M. Plaintiff had been in Heflin once before, but, as he states, arrived and departed in the night-time, and was not about the depot in day-time. Nevertheless he knew, or ought to have known, that there was a depot at which passengers got off and on the trains, and that it was not in such a cut. All the surroundings indicated that the spot at which plaintiff attempted to leave the train was not the proper place for landing. From the description of the place given by witnesses and shown by the diagram in evidence, it is unreasonable to conclude or infer that any person possessing the ordinary sense of sight, and using it, could have supposed that the train had arrived at the place where the Company intended passengers to get off. It does not appear that any of those in charge of or employed on the train noticed the plaintiff when leaving it, or had cause to suspect his intention to get off. There were no circumstances or surroundings caused by the Company which should have induced plaintiff to reasonably suppose he was getting out at the place where the Company intended him to alight. The evidence clearly establishes that his injury was accidental, if not produced by his own negligence. On the undisputed facts, the court would have been justified in giving the affirmative charge in favor of defendant.

Affirmed.

NEBRASKA SUPREME COURT.

Owen JONES *et al.*, *Plffs. in Err.*,
v.

STATE OF NEBRASKA.

(....Neb.....)

*1. An information against certain parties charging that at certain times and places they "did willfully, maliciously and unlawfully interrupt, molest and disturb a religious society, to wit, 'the Welsh Presbyterian Church,' and the members thereof, while said members were met to perform the duties enjoined upon them and appertaining to them as members," etc., is sufficient to sustain a conviction.

2. A church organization may make rules by which the admission and expulsion of its members are to be regulated, and the members must conform to these rules. If, however, it has no rules on the subject, those of the common law prevail; and, before a member can be expelled, notice must be given him to answer the charge made against him, and an opportunity offered to make his defense; and an order of expulsion without such notice and opportunity is void.

(January 14, 1890.)

*Read notes by MAXWELL, J.

† L. R. A.

ERROR to the District Court for Gage County to review a judgment convicting defendants of interrupting and molesting a religious meeting and sentencing them to pay a fine therefor. *Reversed.*

The facts are fully stated in the opinion. *Messrs. Pemberton & Bush*, for plaintiffs in error:

This complaint states no offense. The manner of the disturbance must be alleged, as by talking and laughing aloud, by profane swearing, etc.

2 Bishop, Cr. Proc. §§ 285, 289, 290, 293, 294; *Stratton v. State*, 13 Ark. 688; *State v. Sherrill*, 1 Jones (N. C.) 508; *State v. Ringer*, 6 Blackf. 109.

It is not sufficient to charge a conclusion of law.

1 Wharton, Cr. L. § 285.

It is sufficient as a general rule to charge a statutory offense in the words of the statute, but when a more particular statement of the facts is necessary to set it forth with requisite certainty, they must be averred.

State v. Graham, 38 Ark. 519; *Oscarson v. State*, 42 Md. 403; *Com. v. Richardson*, 126 Mass. 84; *State v. Armell*, 8 Kan. 238; *United States v. Mills*, 32 U. S. 7 Pet. 142 (8 L. ed.

640); *State v. Seamons*, 1 Greene (Iowa) 418. A complaint must set forth all the facts necessary to constitute an offense.

Lambertson v. State, 11 Ohio, 282.

The justice of the common law permits no investigation of facts which may be followed by the loss of a right or by the infliction of a penalty, to be conducted *ex parte*.

State v. Bryce, 7 Ohio (pt. 2) 83; *Hiss v. Bartlett*, 8 Grav, 406, 68 Am. Dec. 776.

Messrs. William Leese, Atty-Gen., and Burke & Prout, for defendant in error:

An indictment in the language of the statute, that the defendants unlawfully and willfully did disturb a congregation then and there assembled for religious worship, and conducted themselves in an unlawful manner, is sufficient.

Maxwell, Cr. Proc. —; *Kindred v. State*, 83 Tex. 67; *State v. Stubblefield*, 23 Mo. 563; *Com. v. Daniels*, 2 Va. Cas. 402; *State v. Ratliff*, 10 Ark. 530; *State v. Louver* (Neb.) 42 N. W. Rep. 762.

A complaint charging a misdemeanor is good if it contains sufficient to show a violation of law.

Ex parte Maule, 19 Neb. 273.

Civil courts will not review the procedure leading up to a judgment in an ecclesiastical court, except where such judgment affects some property right.

Bird v. St. Mark's Church, 62 Iowa, 567; *Hardin v. Baptist Church*, 51 Mich. 137; *Sale v. First Baptist Church*, 62 Iowa, 26; *Atty-Gen. v. Geerlings*, 55 Mich. 563; *State v. Farries*, 45 Mo. 183; *Watson v. Jones*, 80 U. S. 18 Wall. 679 (20 L. ed. 666), Cent. L. J. Jan. 24, 1890.

The offense was proven regardless of the question of membership, and the allegation in the complaint as to the want of membership, at least so far as the plaintiff in error, Jones, is concerned, is mere surplusage.

State v. Prubnow, 14 Neb. 484.

Maxwell, J., delivered the opinion of the court:

The plaintiffs in error were convicted of "interrupting and molesting a religious meeting, charged in the complaint," and sentenced to pay a fine of \$10 each, and the costs. The first ground of error, as assigned, is that the complaint does not charge an offense. The complaint is as follows:

The complaint and information of David Edwards, made before Richard Whitten, one of the justices of the peace in and for Gage County, Nebraska, who, being first duly sworn, on his oath says that Owen Jones and Owen Parry, late of said county, at and within said county, on the 11th day of December, A. D. 1887, and on divers other Sundays before said date, did willfully, maliciously and unlawfully interrupt, molest and disturb a religious society, to wit, "the Welsh Presbyterian Church," and the members thereof, while said members were met to perform the duties enjoined upon them and appertaining to them as members of said religious society, the said Owen Jones and Owen Parry not then and there being members of said religious society, and having no right to be present at said meeting. He therefore prays that the said Owen Jones and

Owen Parry may be arrested, and dealt with according to law. David Edwards,

Subscribed in my presence, and sworn to before me, this 12th day of December, 1887.

Richard Whitten,
Justice of the Peace.

The general rule is that the manner of the disturbance should be alleged, as by talking, laughing or profane swearing. *Cockreham v. State*, 7 Humph. 11; *State v. Stubblefield*, 23 Mo. 563; *Kidder v. State*, 58 Ind. 68; *State v. Ringer*, 6 Blackf. 109; *Lockett v. State*, 40 Tex. 4; Maxwell, Cr. Proc. 286.

We are not prepared, however, to say that the complaint is void. The charge that the plaintiffs in error at certain dates "did willfully, maliciously and unlawfully interrupt, molest and disturb a religious meeting, to wit: 'the Welsh Presbyterian Church,' and the members thereof, while such members were met to perform the duties enjoined upon them," etc., states an offense under the Statute. *State v. Louver* (Neb.) 42 N. W. Rep. 762.

The language of the Statute is: "If any person or persons shall at any time interrupt or molest any religious society, or any member thereof or any persons, when meeting or met together for the purpose of worship, or performing any duties enjoined on or appertaining to them as members of such society" (Crim. Co 'e, § 32); and the complaint is nearly in the words of such Statute. The objections to the complaint, therefore, are overruled.

It will be observed that it is charged in the information that "the said Owen Jones and Owen Parry, not then being members of said religious society, and having no right to be present at said meeting," were present, etc. This allegation having been made, it becomes material in the case. The proof shows—in fact, it is admitted—that the plaintiffs in error had been members of the church in question; but it is claimed they were expelled, and thereby ceased to be members. It is not claimed that any open trial was had, or that the parties accused were notified to appear and defend any accusation against them; nor do any facts appear from which the society would have the right to exclude the parties named from its membership. Any society may make rules by which the admission and expulsion of its members are to be regulated, and the members must conform to those rules. If, however, there are no rules governing the case, then, before a member can be expelled, a charge must be made against him, and notice given to him to make his defense, and opportunity presented to make the same. *Innes v. Wylie*, 1 Car. & K. 257.

In the case cited, a member of a society had used menacing language towards another member of the society, and for this a majority of a general meeting of the society voted that he should no longer be considered a member thereof, but gave him no notice of the intention to take his conduct into consideration, or any opportunity to make his defense. It was held that he was still a member, and the order of expulsion was void. *Rez v. Richardson*, 1 Burr. 540; *Rez v. Liverpool*, 2 Burr. 781; *Bagg's Case*, 11 Coke, 99; Aug. & A. Corp. § 420.

The rules of the church, if any, for the ad-

mission and expulsion of members, were not offered nor introduced in evidence, nor any proof of a public trial upon any charge, or any notice to the plaintiffs in error to appear and answer any specific charges. In the absence of any rules, the common law prevails.

In *State v. Bryce*, 7 Ohio (pt. 2), 82, it is said: "This proceeding is essentially adversary in its character. The justice of the common law permits no investigation of facts which may be followed by the loss of a right or by the infliction of a penalty, to be conducted *ex parte*. It is essential to its validity that the party should be duly summoned. 4 Bl. Com. 272: *Rez v. Stone*, 1 East, 639; *Fuller v. Plainfield Academic School*, 6 Conn. 542; *Com. v. Pa. Ben. Institution*, 2 Serg. & R. 141; *Rez v. Richardson*, 1 Burr. 540; *Rez v. Lyme Regis*, 1 Doug. 154."

The case cited was one where it was alleged that the relator had forfeited his office of trustee of the Ohio University by neglecting his duties, but it is applicable to that under consideration. A church society is a voluntary organization, founded for the advancement of the spiritual welfare of its members, by counsel, admonition and example, and to enable the society to employ and pay a pastor to look after, not only the welfare of that particular organization, but many charitable objects requiring aid, and to promote, as far as possible, with the means at hand, the welfare

of the race. There must be freedom of individual thought, and, in respectful language, expression to such thought. It may be presumed that no sincere follower of the Master will so far forget his duty as to indulge in railings or unjust accusation. The right of membership is a valuable privilege, of which no one should be debarred except for adequate cause shown, either by the rules of the society, or after a fair examination of the charges, after due notice. As neither of those things appear to have taken place, the order of expulsion would seem to be void. In saying this, however, we do not intend to justify the conduct of the plaintiffs in error, as shown by the testimony of some of the witnesses. The respect due to their associates certainly required the use of words of a less belligerent character. Whether the use of the words and the conduct of the parties generally were sufficient, under the rules of the organization, if any such there were, or would be deemed sufficient, after a fair trial, for the expulsion of the parties, is a matter for the determination of the church tribunals, and need not be considered here; but for the want of proof showing the right of the society to expel the plaintiffs in error, *the judgment is reversed, and the cause remanded for further proceedings.*

The other Judges concur.

Petition for rehearing denied April 10, 1890.

GEORGIA SUPREME COURT.

HENDERSON *et al.*, *Plffs. in Err.*,

REYNOLDS.

(...Ga....)

1. Instructing a jury shortly before twelve o'clock Saturday night that they will have to cease deliberations during Sunday, and will be kept together and given their meals and a place to sleep at their own expense, is sufficient to require a setting aside of a verdict which was rendered by the jury in a few minutes thereafter.
2. The use of railroad "standard" time in all the cities and towns along the line of railroads does not authorize the use of that time in running the courts, where there is no law recognizing any other standard time in the computation of a day or the hours of a day than the meridian of the sun.
3. A verdict may lawfully be received in the early hours of Sunday where the case was commenced, the evidence, argument and charge of the court were concluded, and the jury had retired, before the beginning of Sunday.

(December 16, 1889.)

NOTE.—Sunday; verdict may be received on.

The mere fact that the jury conclude their deliberations on Sunday does not of itself vitiate their verdict. *Stone v. Bird*, 16 Kan. 433; *True v. Plumley*, 36 Me. 406; 2 Thompson, Trials, 199.

This is so, it seems by the principal case, in a State where it has been held that a verdict cannot be received on Sunday. *Reas v. Irvin*, 49 Ga. 436.

The courts of other States hold that a verdict re-

ERROR to the Superior Court for Cobb County to review a judgment for defendant entered upon a verdict alleged to have been rendered under circumstances rendering it illegal. *Reversed.*

The case is fully stated in the opinion.

Messrs. Gober & Alexander and Harrison & Peeples for plaintiffs in error.

Messrs. C. D. Phillips and Clay & Blair for defendant in error.

Simmons, J., delivered the opinion of the court:

1. It appears from the record in this case that Henderson & Son brought their action of complaint against Reynolds. After the evidence had all been submitted to the jury, and the charge of the court delivered, the jury were sent to their room, about half-past 8 on Saturday night. Some time before 12 o'clock the judge sent the sheriff to inquire of the jury if they were likely to agree. The sheriff reported that the jury told him they were not. About half an hour after, the court ordered the jury brought in, and told them it was nearly 12 o'clock, and that, the next day being Sunday,

turned on Sunday is good. *Baxter v. People*, 8 Ill. 335; *Cary v. Silcox*, 5 Ind. 370; *Rosser v. McColly*, 9 Ind. 587; *McCorkle v. State*, 14 Ind. 39; *Houghtaling v. Osborn*, 15 Johns. 119; *Butler v. Kelsey*, 15 Johns. 177; *Webber v. Merrill*, 34 N. H. 202; *Com. v. Marrow*, 3 Brewst. 403; *Hiller v. English*, 4 Strobl. L. 436. At common law, the Lord's day is not a day for legal proceedings, and a judgment cannot be rendered on that day. See note to *Parsons v. Lindsay* (Kan.), 3 L. R. A. 658.

they would have to cease their deliberations until after midnight of the next day; that during that time they were not to discuss the verdict, or anything connected with the case; that they would have to keep together during the entire day and night; that the sheriff would provide a place for them to sleep together; and that they would be furnished their meals, but that it would be at their own expense. The jury were then sent back to their room, and in a few minutes returned with a verdict. This, in substance, is the eighth ground of the motion for a new trial.

We think the court erred in refusing to grant a new trial upon this ground. In the case of *Physioc v. Shea*, 75 Ga. 466, it was held error for the court to state, in effect, after the jury had been out all night without supper or breakfast, that they would not be allowed their meals, except at their own expense. "This operated as a threat to starve such as had no money into finding a verdict, and resulted in a speedy finding."

The instructions given by the trial judge in that case were in substance the same as given in the case under consideration. In that case the judge told the jury that they could have breakfast at their own expense. In this case the judge told the jury that they must be kept together from 12 o'clock Saturday night until Monday morning, and could have meals at their own expense. And in both cases the result was that the jury agreed upon a verdict within a few minutes after such instructions.

In the case cited the court says: "The old idea of starving juries, to coerce a verdict, has passed away, . . . and the judge is empowered to furnish refreshments at the expense of the county."

We are not surprised that this jury should agree so quickly, after being instructed by the judge that they would be kept together for more than twenty-four hours longer at their own expense. It may have been that the very jurors who were holding out against the proposed verdict were unable to pay for their meals, and therefore agreed to the verdict, rather than go without food until the court should meet again, the next Monday morning.

2. The ninth and tenth grounds complain that the verdict was made and returned on Sunday. The judge ran the court by railroad or "standard" time, which was twenty-two minutes behind the sun time: the verdict being rendered at two minutes before 12 by the railroad time, and twenty minutes after 12 by the sun time. It was contended in the argument before us that, as the railroad or "standard" time is now used in all the cities and towns along the line of the railroads, that time should be observed by the courts, instead of the meridian or sun time, and that the judge, in this case, having announced at the beginning of the term that he would run the court by the railroad or "standard" time, the verdict was received on Saturday, instead of Sunday. The trial judge, in his note to these grounds of the motion, seems to take this view of the law. We do not agree with him therein. The law, which is strict, and requires certainty where time enters into legal duty, fixes that time with reference to a certain, unvarying and uniform standard, than which none could be more

certain. The only standard of time in the computation of a day, or the hours of a day, recognized by the law of Georgia, is the meridian of the sun; and a legal day begins and ends at midnight,—the mean time between meridian and meridian, or 12 o'clock P. M. (post meridian), twelve hours after meridian. The Code, where it mentions the hours of a day, usually affixes "M." (meridian), "A. M." and "P. M." (before and after meridian), to indicate this standard. As instances, see sections 1286, 1287, 1312. The civil day begins and ends at 12 o'clock, midnight. Anderson, Law Dict. Day, 811.

It seems idle to waste words in saying that the standard of time fixed by persons in a certain line of business cannot be substituted at will, by persons in a certain locality, for the standard recognized by the statutes of the State, as well as the general law and usage of the country, especially when it is considered that such an arbitrary and artificial standard could as easily fix 5 o'clock for midnight as it could twenty minutes past 12, as was done in this case. Legal custom cannot in this way change Sunday into Saturday. To expect courts of justice, officers of the law and the public generally, especially that large class of the population who do not live in cities or at railroad stations, to go to the railroads for the time which is to guide them in the performance of their duties under the law, when they have in the heavens above them a certain standard by which to ascertain or regulate the time, or to permit them at will to follow two standards of time, would be highly impracticable, and would be productive of great uncertainty and confusion in the administration of the law. Thus, the legality of elections might be made to depend upon conflicting proof of local custom; for what might be considered a legal election in one precinct might be regarded as illegal in the next precinct, because of the time of opening or closing the polls, or the people of a precinct might differ among themselves as to this. And so with regard to the enforcement of the criminal law. The law requires the railroads to cease running their freight trains by 8 o'clock on Sunday mornings. Code, § 4578. To allow the railroads to fix the standard of time would be to allow them at pleasure to violate or defeat the law. Even in cities, where it is insisted the adoption of railroad time has become general, the same difficulties might exist; for instance, in the City of Augusta, in this State, which is at the dividing line of two railroad standards, the railroads which enter the city from the east have one standard of time, and the railroads which enter from the west another standard, an hour different, both differing considerably from the meridian or sun standard.

But, while we think the court erred in its view as to the time when Saturday expired and Sunday began, we do not think its refusal to grant a new trial on the ground that the verdict was received on Sunday was error. We do not think that the reception of this verdict on Sunday rendered it invalid or void. It seems to us that it was a very proper thing for the court to do. It was much better to receive this verdict upon Sunday morning than to keep twelve jurors, and the officers attending

them, confined in a room throughout the sabbath, and for nearly thirty-six hours. It was an act of charity and of necessity to receive this verdict, so that the jurors could return to their homes for rest and refreshment during the night, and, if they so desired, could attend public worship during the day.

Where the trial of a case is commenced on a "week day," and the evidence and argument and the charge of the court are concluded and the jury retire before the end of the day, and a verdict is not agreed upon until the early hours of the Sunday, we do not think it wrong, in morals or in law, for the trial judge to receive the verdict, and allow the jurors and officers to go home to spend the sabbath. There is now very little conflict in the courts of this country upon this question. The great and decided weight of authority is in favor of receiving verdicts on Sunday.

The case of *Hiller v. English*, 4 Strob. L. 496, is one of the leading cases upon this subject. In the discussion of that case, *Mr. Justice Wardlaw* says (p. 500): "It was then charity to the jurors to receive and publish their verdict when they were ready to present it. Their duty was done. Why should they have been punished? If the observance of the Lord's day by them was looked to, it was surely better to permit them to be at home, to take their natural rest, and to join in public worship, if they would, than to lock them up during the Sunday, uncomfortable, dissatisfied and ill suited to each other, as they probably would have been."

This decision also shows that the case of *Show v. McCombs*, 2 Bay, 232, which has been frequently cited in support of the invalidity of receiving verdicts upon Sunday, was incorrectly reported, and that the decision of that case was not as stated by *Judge Bay* ten or fifteen years after the decision was made.

In the case of *Cory v. Silcox*, 5 Ind. 878, it is said: "The verdict of the jury was returned and received by the court on Sunday. We will not elaborate this point. Much useless learning has recently been displayed upon it by able jurists, and some variety of opinion has been the result. While we admit that many cases are to be found in the books deciding that no judicial act can be done on Sunday, and that verdicts returned on that day are void, we are not satisfied that we would be subserving morality, religion, justice or the spirit of the common law, by following their example as to verdicts. The reason of the rule making Sunday *die non juridicus* was founded in those principles of religion which require a strict observance of that day, and surely that which tends to its non-observance cannot be regarded as being within the reason of the rule. We apprehend that jurors worn out by the laborious investigation of a lengthy case, and unnecessarily pent up together from twelve to twenty-four hours, would be little inclined, while in that condition, to observe the sabbath as they should. We can easily conceive of places where their minds would be far more religiously inclined."

In the case of *Stone v. Bird*, 16 Kan. 494, *Brewer, J.* (now justice of the Supreme Court of the United States), in discussing this question says: "The great weight of authority goes 7 L. R. A.

to this extent (and it is sufficient to sustain the proceedings in this case), that, where the trial is completed by the introduction of testimony, the arguments of counsel, and the charge of the court, and the case has passed to the jury for consideration before midnight of Saturday, the fact that they do not finally arrive at and return a verdict until some time in the early hours of Sunday morning does not vitiate the entire proceedings, and compel a retrial."

In the case of *Barter v. People*, 8 Ill. 835, *Caton, J.*, in discussing this question, says: "But, although the law seems to be well settled that a judgment cannot be entered of record on Sunday, yet I think it equally settled that a verdict of a jury may be entered of record on Sunday. . . . We think the authorities clearly establish that when a cause is submitted to the jury before 12 o'clock on Saturday night the verdict of the jury may be received on Sunday, but that it is not a judicial day for the purpose of rendering any judgment, and, if it attempt to render a judgment, still, in law, it would be no judgment, but absolutely void, and will be so declared, and may be reversed by this court. Not that such reversal will take from it any force or vitality, for it never had any, nor having been rendered by a court having authority to render any judgment whatever at the time."

In the case of *Reid v. State*, 53 Ala. 403, *Judge Manning* says: "We are of opinion that when a jury, to whom a cause has been committed on a Saturday or other secular day of the week, are lawfully kept together under charge of officers of court, and are ready on Sunday to deliver in their verdict, it is lawful for the judge then to meet them, with the other officers of court, to receive it, and thereupon to discharge the jury, and adjourn the court until the next day."

In the case of *Webber v. Merrill*, 84 N. H. 203, it was held that a verdict may be lawfully returned on Sunday, if the case has been committed to the jury before that day.

In the case of *Sargeant v. Butts*, 21 Vt. 96, *Judge Redfield* says: "The arbitrators might retain the case under consideration during Sunday, and make their award upon any her day, or close it at the earliest possible moment, and then set themselves to the appropriate celebration of the Lord's day, freed from the care of this and other worldly anxieties of a secular character. The latter course to us seems the more consistent with that unostentatious humble-mindedness which is so befitting the Christian profession."

In the case of *Huidekoper v. Cotton*, 3 Watts, 59, it is held that a judgment is not erroneous because the verdict upon which it was rendered was delivered on Sunday. See also *Hooser v. McColly*, 9 Ind. 587; *McCorkle v. State*, 14 Ind. 89; *Joy v. State*, Id. 189; *True v. Plumley*, 36 Me. 466; *Butler v. Kelsey*, 15 Johns. 177; *Houghtaling v. Osborn*, Id. 119; *State v. Ricketta*, 74 N. C. 187; *State v. McGimsey*, 80 N. C. 877. See also *Coleman v. Henderson*, Litt. Sel. Cas. (Ky.) 171, 12 Am. Dec. 291, note. Also, a full discussion of this subject, and citation of authorities *pro* and *con*, *Hausenrath v. Sullivan*, 6 Mont. 203, 9 Pac. Rep. 808, note, and note on the same subject in *Wright v. Dressel*, 3 N. E. Rep. 12, 140 Mass. 147.

It may be argued, however, that this court.

in the case of *Bass v. Irvin*, 49 Ga. 486, held a contrary doctrine to the views above announced. The reasoning of the court in that case, we admit, is in conflict with the views we have announced in this case, as well as in conflict with all the other authorities we have been able to find, except the case of *Davis v. Fish*, 1 G. Greene (Iowa) 410, and the case of *Shaw v. McCombs*, 2 Bay, 282, referred to in *Huller v. English*, 4 Strob. L. 486, *supra*. We have already seen that the case of *Shaw v. McCombs* was improperly reported; and it is said in the notes to 9 Pac. Rep. *supra*, that the case of *Davis v. Fish* is no longer law in Iowa. We do not think it was necessary to the decision in *Bass v. Irvin*, 49 Ga. 486, for this court to go as far as it did in its reasoning upon this question. In that case a verdict had been obtained that was written upon the wrong paper, and no judgment had been entered. A motion was made to transfer the verdict to the proper declaration in the case, and to enter up judgment thereon *nunc pro tunc*. The defendant was called upon to show cause why the motion

should not be granted; and he showed for cause that no legal verdict was rendered in said case, the pretended verdict having been returned on the Sabbath day, in the absence of, and without the consent of, the defendant. The facts seem to be that the judge opened his court on Sunday, and received the verdict in the absence of the defendant or his counsel, and without their knowledge. We think that under this state of facts the judgment rendered by the court was perhaps right. We do not think the trial judge had a right on Sunday, in the absence of the parties, to go to the courthouse, open the court, and receive the verdict; for the parties had a right to be present when the verdict was received. This court, as now constituted, would follow that case, under an exactly similar state of facts, unless we were called upon to review it; but we would not feel bound by all of the reasoning of the decision.

We reverse the judgment of the court below because of the refusal to grant a new trial on the eighth ground of the motion.

Judgment reversed.

WISCONSIN SUPREME COURT.

STATE of Wisconsin, *ex rel.* Frederick WEISS *et al.*, *Appts.*,
v.

DISTRICT BOARD OF SCHOOL DISTRICT NO. 8, of the City of Edgerton, *Resp't.*

(...Wis....)

1. A petition stating that petitioner is taxed for the support of the public schools and is equally entitled to the benefits thereof, and that the reading of the Bible therein is contrary to the rights of conscience and is in violation of law and the Constitution, is sufficient to raise the question of the legality of such reading.
2. Averments of legal conclusions from facts stated, or of facts not well pleaded, are not admitted by a general demurrer to the pleading.
3. Courts will take judicial notice of the contents of the Bible, and that the religious world is divided into sects, and of the general doctrines maintained by each sect.
4. The "sectarian instruction" prohibited by art. 10, § 3, of the Constitution, is instruction in religious doctrines which are believed by some religious sects and rejected by others.
5. There is no room for construction of a constitution outside of the words themselves if they are unambiguous; and the rules as to the authority of surrounding circumstances and contemporaneous exposition are unimportant in such cases.
6. The use of the Bible as a text-book and the stated reading thereof in the public schools without restriction is "sectarian instruction" within the meaning of art. 10, § 3, of the Constitution, which ordains that no such instruction shall be allowed in such schools; and the fact that children are not compelled to remain in the school-room during such reading does not remove the cause for complaint on the part of one feeling himself aggrieved thereby.
7. When a man's conscience coincides with

the law, and he obeys its dictates, he will be protected.

(*Per Cussoday, J.*)

8. The stated reading of the Bible in a public school renders it a place of worship within the provision of the Constitution, art. 1, § 18, that no man shall be compelled to support a place of worship against his will; hence taxpayers compelled to aid in the erection and support of such school-house have a legal right to object to its being put to such a use.
9. Such reading also renders the school a religious seminary, and is prohibited by the provision of art. 1, § 18, of the Constitution, that no money shall be drawn from the treasury for the benefit of religious seminaries.

(March 18, 1890.)

APPEAL by relators from an order of the Circuit Court for Rock County overruling a demurrer to the answer in a proceeding for a writ of mandamus to compel respondent to cause the reading of the Bible in a certain public school to be discontinued. *Reversed.*

Statement by **Lyon, J.:**

The relators filed their petition in the Circuit Court of Rock County praying that a writ of mandamus issue to the District Board of School District No. 8, of the City of Edgerton, in said county, commanding said Board to cause the teachers in the public schools of that district to discontinue the practice, which had theretofore prevailed, of reading therein selections from the Bible. The petition is as follows:

"The petition of Frederick Weiss, W. H. Morrissey, Thomas Mooney, James McBride, J. C. Burns and John Corbett respectfully shows unto this court that your petitioners are, and for many years last past have been, residents and taxpayers of the City of Edgerton, in Rock County, Wisconsin; that there are in said City of Edgerton, kept and maintained in

accordance with and in pursuance of the Revised Statutes of said State of Wisconsin, certain free common schools; that the residents of said City of Edgerton who are taxed for the support of said schools are equally entitled to the benefits thereof by having their children instructed therein according to law; that your petitioners are parents of children, which children they are desirous of having educated in said schools; that said children of your petitioners, respectively, to wit: Annie Mooney, Ettie Weiss, Thomas Burns, Nora Corbett, Bessie Corbett, Kattie Corbett, Annie McBride, Jane McBride and James McBride are pupils of and attend said schools for the purpose of receiving instruction.

"Your petitioners further show that certain of the teachers employed by the District Board having charge of said schools to conduct the same and instruct the pupils attending said schools read to said pupils, and among them the children of your petitioners above named, each and every day when said schools are in session and during the hours fixed for the instruction of pupils certain portions of the book commonly known as the Bible, said teachers themselves selecting the portions so read, and uniformly using in such reading the translation of said Bible known as the King James version; that such reading as above set forth was and is a custom followed by certain of said teachers in said schools.

"Your petitioners further show that they and many others of the residents and taxpayers of said city and school district, whose children attend said schools and are under the control and are instructed by the teachers above named, and who are lawfully entitled to the equal benefits of said schools, are, together with their said children, members of the Roman Catholic Church, and conscientiously believe its doctrines, faith and forms of worship, and that by said church the version of the Scriptures referred to in this petition is taught and believed to be incorrect as a translation, and incomplete by reason of the omission of a part of the books held by such church to be integral portions of the Inspired Canon; and it is further taught by the said Roman Catholic Church and believed by its members that the Scriptures ought not to be read indiscriminately, inasmuch as said church has divine authority as the only infallible teacher and interpreter of the same, and that the reading of the same without note or comment, and without being expounded by the only authorized teachers and interpreters thereof, is not only not beneficial to the children in said schools, and especially to the above-named children of your petitioners, who are members of said church, but likely to lead to the adoption of dangerous errors, irreligious faith, practice and worship, and that by reason thereof, the practice of reading the King James version of the Bible, commonly and only received as inspired and true by the Protestant religious sects, is regarded by the members of said Roman Catholic Church, among whom are your petitioners, as contrary to the rights of conscience and as wholly contrary to, and in violation of, the law; and that your petitioners believe such exercises as are above set forth, and each and all of them, to be sectarian instruction, and in violation of § 3, art. 10 of the Constitution of the State of Wisconsin.

tion, and in violation of § 3, art. 10 of the Constitution of the State of Wisconsin.

"Your petitioners further show that they, with others of said residents and taxpayers of said city and school district, have petitioned and requested said Board having the control and management of said schools, to interfere as they lawfully might and should do, and to direct said teachers to discontinue the unlawful and wrongful practices and exercises above set forth, and to confine the instruction to be given by such teachers to the studies and branches of knowledge lawfully provided for the said pupils; but that said Board has wholly neglected and refused, and still does wholly neglect and refuse to in any way interfere in said matter, and has and does wholly refuse to perform the duties legally devolving upon it, and has and does now permit said above-mentioned exercises to be carried on as above set forth.

"Wherefore your petitioners pray that a writ of mandamus may issue from said court to said District Board, commanding said Board to cause said teachers to discontinue the practices and exercises above set forth."

Upon such petition an alternative writ of mandamus was issued and served, to which the District Board made return as follows:

"The answer of the District Board of School District Number 8, of the City of Edgerton, to the amended alternative writ of mandamus issued by the Circuit Court for Rock County in the above-entitled action.

"I. The District Board of School District Number 8, of the City of Edgerton, for return and answer to the amended alternative writ of mandamus issued in the above-entitled action, admit that the said Frederick Weiss, W. H. Morrissey, Thomas Mooney, James McBride, J. C. Burns and John Corbett are and for many years have been residents and taxpayers of the City of Edgerton; that there is in said City of Edgerton, kept and maintained in accordance with and in pursuance of the statutes of the State of Wisconsin, a free common school; that the residents of the City of Edgerton taxed for the support of said school, and having children to be instructed therein, are entitled to the benefits of such school; that the petitioners Frederick Weiss, Thomas Mooney, James McBride, J. C. Burns and John Corbett are parents of children which they are desirous of having educated in said school; that the children named in said amended alternative writ are pupils of and attend said school, for the purpose of receiving instruction therein.

"The said District Board, further answering the allegations of said amended alternative writ, admit that two of the teachers employed by said District Board, and having charge of two of the departments in said school, did, prior to the filing of this petition of the relators of this action, read to the pupils in their departments, daily when said school was in session, portions of the book known as the Bible; that said teachers selected the portions of the Bible so read by them; that these selections so read were made from the translation of the Bible known as the King James version, and that some of the children whose names are set forth in the said amended alternative writ attended

and received instruction in the departments of said school in which such selections from the Bible were so read; but said Board allege that the children of said petitioners were not and are not required to remain in said school during the reading of such portions of the Bible, but are at liberty to withdraw during such reading if they desire to do so.

"The said District Board, further answering the allegations of said alternative writ, deny that selections from the Bible were read by all of the teachers in said school, or that such selections were read in all the departments of said school.

"The said District Board, further answering the allegations of said amended alternative writ, admit that the petitioners above named, together with the children in said alternative writ named, were and are members of the Roman Catholic Church; that they believe in the doctrines, faiths and form of worship of the Roman Catholic Church, and that by said Roman Catholic Church the translation of the Bible known as the King James version is believed to be incorrect as a translation, and incomplete by reason of the omission of certain books held by said church to be integral portions of the Inspired Canon.

"The said District Board, further answering the allegations of said amended alternative writ, admit that it is taught by said Roman Catholic Church and believed by some of its members, that the Scriptures ought not to be read indiscriminately; that said Roman Catholic Church has divine authority as the only infallible teacher and interpreter of the Scriptures, and that the reading of the same without note or comment, and without being expounded by the only authorized teacher and interpreter thereof, is not only not beneficial to children, but likely to lead to the adoption of dangerous errors, irreligious faith, practice and worship, and that by reason thereof, the practice of reading the King James version of the Bible is regarded by some of the members of the Roman Catholic Church, and by the petitioners above named, as contrary to the rights of conscience, and as contrary to and in violation of law, and that the petitioners above named believe that the reading of the King James version of the Bible as set forth in said amended alternative writ, to be sectarian instruction, and in violation of § 8, art. 10 of the Constitution of the State of Wisconsin.

"But said District Board, further answering the allegations of said amended alternative writ, upon information and belief, deny that the Roman Catholic Church is the only infallible teacher or interpreter of the Bible, but on the contrary said Board allege, upon information and belief, that every person has the right to read the Bible and interpret it for himself; that the claim of the relators in that regard is sectarian, and that an enforcement thereof would be a violation of the Constitution of this State.

"The said District Board, upon information and belief, further deny that the reading of selections from the King James version of the Bible, as alleged in said alternative writ, is contrary to the rights of conscience or in violation of law, or that the same is sectarian instruction, or in violation of § 8 of art. 10 of

the Constitution of this State, or of any provision or requirement of said Constitution, or of the statutes or the common law of this State; and the said Board, upon information and belief, deny that the reading of such selections from the Bible by some of the teachers in said school, in some of the departments thereof, as the same were in fact read, was contrary to or in violation of law, or that the same was or is sectarian instruction, or that the same was or is in violation of § 8 of art. 10 of the Constitution of this State, or that the same was or is in violation of any provision or requirement of the Constitution or the statutes or the common law of this State.

"The said District Board, further answering the allegations of said amended alternative writ, admit that they have permitted, and now do permit, some of the teachers in some of the departments of said school to read, without comment, selections made by such teachers from the King James version of the Bible, and said Board, upon information and belief, allege that they have the lawful right to permit such selections to be made and read by some of said teachers, in some of the departments of said school.

"The said District Board, further answering the allegations of said amended alternative writ, upon information and belief allege that they have no lawful right or authority to require the teachers in said school to discontinue the reading of selections from the Bible in said school, and that therefore they ought not, and cannot, lawfully require said teachers to discontinue the reading of selections from the Bible in some of the departments of said school.

"II. The said District Board, for a further answer and return to the allegations of the amended alternative writ issued by said court in this action, admit that the petitioners named in said writ, with their children, are members of the Roman Catholic Church, and that they believe that the translation of the Bible known as the King James version is incorrect as a translation, and incomplete by reason of the omission of a portion of the books held by the Roman Catholic Church to be integral portions of the Inspired Canon; but the said District Board, upon information and belief, allege that the said Roman Catholic Church does also believe and teach that the translation of the Bible known as the Douay and Rheims version, and commonly called the Douay version is correct and complete; that said church and the members thereof constantly use said Douay version in the worship conducted in and by said church; and said Board, upon information and belief, allege that said translation of said Bible known as the King James version contains no book, or part of book, not contained in the translation known as the Douay version; that the King James version and the Douay version are different translations of the same Bible; that there is no material difference in said translation; that while the selections from the Bible read by the teachers in the school of said district were read from the King James version, the portions and passages so read are contained in the Douay version, and were not and are not materially different from the translation of the same portions and passages

of the Bible in the Donay version used by said Roman Catholic Church.

"The said District Board, upon information and belief, further show that the following are the only portions of said Bible so selected by the said teachers in said school and read therein, and that the same were read from the King James version of said Bible:"

Quotations from the Scriptures are inserted in the answer, consisting of the 1st, 15th, 19th, 23d, 24th, 27th, 37th, 40th, 100th, 121st, 125th Psalms; the 1st, 3d, 18th, 16th and 20th verses of chapter 15 of the Book of Proverbs; the 16th, 20th and 22d chapters of Proverbs; the 2d chapter of Matthew; the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th and 13th verses of the 5th chapter of Matthew; the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th and 16th verses of the 6th chapter of Matthew; the 13th chapter of Matthew; the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22d, 23d, 24th, 25th, 26th, 27th and 28th verses of the 25th chapter of Matthew; the first 14 verses of the 11th chapter of Luke; the first 23 verses of the 19th chapter of Luke; the first 5 verses of the 21st chapter of Luke; the 4th, 5th, 6th, 7th and 8th verses of the 14th chapter of Romans; and the 13th chapter of 1st Corinthians.

The answer then proceeds as follows: "This said District Board, upon information and belief, further allege that the portions of the Bible above set forth and so selected by said teachers and read in said schools as aforesaid were not and are not sectarian; that the reading of those portions of the Bible above set forth was not and is not sectarian instruction; that the reading of the portions of the Bible above set forth was not and is not contrary to the rights of conscience, nor in violation of § 8 of art. 10 of the Constitution, or the statutes or the common law of this State, and that said § 8 of art. 10 of the Constitution was not intended by the people of said State, when said Constitution was adopted, to prohibit the reading of the Bible in the schools of said State, and does not prohibit the reading of the Bible in such schools

"III. The said District Board, for a further answer and return to the amended alternative writ issued by said court in this action, respectfully show that prior to, and at the time of, the filing of the petition of the relators in this action, said School District Number 8 was duly formed and organized as a school district under and in pursuance of the laws of this State, that prior to the time of the filing of said petition the said school district owned and maintained a school-house in said district; that prior to the time of filing such petition a school with different departments therein was maintained and taught in said school house under the direction of said District Board, and that such school was being maintained and taught in said school-house at the time of the filing of the petition of the relators herein.

"The said District Board further show that prior to the time of filing said petition the District Board of said district had the right and authority to determine what school and text books should be used in the several branches of study pursued in the school of said

district; that prior to the filing of said petition the said District Board, in pursuance of their authority, decided and determined what school and text books should be used in the school in said district, and made a list of such books, and adopted the same as the books to be used in said district in the manner required by law; that such list was and is as follows:" Here follows a list of such text-books, one of which is the Bible.

The return then goes on to its close as follows:

"The said District Board further show that the translation of the Bible selected and included in said list of text and school books and adopted by said Board was and is the version thereof known as the King James version, and that the readers so selected and included in such list and adopted by said Board contain many selections from the King James version of the Bible.

"The said District Board further show that said King James version of the Bible was so selected by said Board and included in said list of text-books and adopted by said Board for the purpose of being used in the general education of the scholars attending said school, and not for sectarian instruction.

"The said District Board further show that when a list of text-books has been made by it, that it is by the statutes of this State prohibited in making any changes in said list for the term of three years; that it cannot make any change in said list until after the expiration of three years without the consent of the state superintendent, and that three years have not elapsed since said list of text books was so made by said District Board.

"The said District Board, upon information and belief, further show that prior to the time of the reading of the Bible in the school of said district, and prior to the adoption of said list of text-books by said District Board as aforesaid, the superintendent of public instruction in said State of Wisconsin recommended for adoption and use in the schools of said State a list of text-books; that in such list of text-books so recommended by said state superintendent and as a part thereof is the King James translation of the Bible, and that such recommendation has not been in any way revoked or withdrawn, but still remains in full force.

"The said District Board, for a further return and answer to the amended alternative writ issued in this action, allege that said school district was, long prior to the reading of the Bible as mentioned in the petition of the relators, duly formed and organized as a school district under and in pursuance of the statutes of this State; that the members of said District Board were duly elected and qualified as required by law; that, as members of such Board, they entered upon the discharge of their duties, and the performance of the trusts reposed in them as members of such Board; that the school in said district is established and maintained for the benefit and advantage of all of the children residing in said district between the ages of four and twenty years; that there are residing in said school district, in addition to the children named in the petition of the relators, about 500 children, a small proportion of whom are children of Catholic parents, or

members of the Roman Catholic Church, but nearly all of whom are children of Protestant parents; that such school is established and maintained for the purpose of giving and securing to all of the children within the ages aforesaid residing in said district as complete an education as the educational facilities of said district will permit; that it is the duty of said District Board to so maintain, conduct and control said school that every child within the ages aforesaid residing in said district shall have the advantage of every educational facility that may be afforded by said school; that the Bible is an important text-book in said school; that there is no book known to said Board that can be used as a text-book in said school which will take the place of the Bible in said school; that the reading of the Bible to the children attending said school at suitable and proper times is an important part in the education of the children attending said school; that the parents of the children in said district, with the exception of the petitioners and a very few others, desire that the King James translation of the Bible be used as a text book in said school; that the reading of the Bible in said school is not in any way sectarian instruction in said school, and is not in any way prohibited by the Constitution or the laws of this State.

"And the said Board, upon information and belief, further allege that it is the duty of said Board to require said Bible to be used in said school as a text-book at suitable and proper times, when the use thereof will aid in the education of the children attending said school; and that said Board has no right to prohibit, and should not attempt to prohibit, the use of the Bible in said school at proper and suitable times, when such use will aid in making more complete the education of the children attending said school; and said Board submits that, for the reasons above set forth, they ought not to discontinue the use of the Bible in the school of said district, and that they have no right nor authority to discontinue such use of the Bible in said school.

"Wherefore said Board pray the judgment of this court denying the prayer of the petition of the relators, and that said Board recover their costs and disbursements in this action."

The petitioners interposed a general demurrer to such answer and return, and the same was overruled by the court, and the petitioners appeal to this court from the order overruling such demurrer.

Messrs. Humphrey J. Desmond and J. H. M. Wigman, with Messrs. Winans & Hyzer, for appellants.

Messrs. J. P. Towne and A. A. Jackson for respondent.

Lyon, J., delivered the opinion of the court:

The petitioners are residents and taxpayers of the City of Edgerton, and their children are pupils in the public schools of that city. They allege in their petition that certain of the teachers employed by the District Board having charge of such schools read daily to the pupils therein, during school hours, certain portions of the King James version of the Bible,

selected by the teachers; and that the petitioners have requested the District Board to require the teachers to discontinue such practice, but the Board refuses to do so. The petitioners further allege that such practice is a violation of certain provisions of the Constitution of this State, hereinafter more particularly mentioned, and pray that a writ of mandamus may issue from the circuit court to the School Board commanding such Board to cause the teachers to discontinue the practice and exercises complained of.

Upon the filing of such petition in the circuit court, the usual alternative writ of mandamus was issued and served upon the School Board. The Board made return to such writ by filing an answer to the petition, admitting the existence of the practice complained of, and the refusal of the Board to cause it to be discontinued, denying the authority of the Board to interfere with the practice, and alleging that the practice is legal and proper, and that the Bible is a duly authorized and selected text-book for use in said schools.

Further statement of the contents of the petition and answer is hereinafter made.

The petitioners demurred to the answer of the School Board, alleging as ground of demurrer that the answer fails to state facts showing that a peremptory writ of mandamus, as prayed, should not issue. The circuit court overruled the demurrer, and the petitioners appeal to this court from the order in that behalf.

The questions which must be adjudicated on this appeal have been argued by the respective counsel with great ability, and with all the earnestness of intense personal conviction. The arguments, and the opinion of the learned circuit judge overruling the demurrer to the answer of the respondent, show great learning and historical research, and have been valuable to us in our deliberations upon the case.

The constitutional objections urged by the petitioners to the reading of the Bible in the district schools are that, (1) It violates the rights of conscience. (2) It compels them to aid in the support of a place of worship against their consent (Const. art. 1, § 13). (3) It is sectarian instruction (art. 10, § 8).

This opinion will be confined quite closely to a discussion of the question, whether the adoption of the Protestant or King James version of the Bible, or any version thereof, in the public schools in the City of Edgerton, as a text-book, and the reading of selections therefrom in those schools at the times and in the manner stated in the answer, is sectarian instruction within the meaning of that term as used in § 8, art. 10 of the Constitution, which ordains that no sectarian instruction shall be allowed in the district schools of this State.

1. Some questions as to the effect of the demurrer upon certain allegations in the answer of the respondent to the petition for a writ of mandamus will first be considered. It is a familiar rule that a demurrer to any pleading reaches back through the whole record, and seizes hold of the first defective pleading. In this case, the petition for a writ of mandamus and the answer of the School Board thereto constitute the pleadings. Hence, if the petition is insufficient, judgment on the demurrer to

the answer should go for the respondent, although the answer may also be insufficient. This rule is invoked by the learned counsel for the respondent.

It best comports with the gravity and importance of the case to fully consider and determine it upon the merits, to the end that the controversy which has grown out of the practice complained of be put at rest in this State. Hence, no narrow or technical construction of the pleadings should prevail which will defeat or postpone a final adjustment of the controversy.

The petitioners are members of the Roman Catholic Church, and believers in its doctrines. Hence, it is quite natural that most of the averments in their petition should be made, as they in fact are, from the stand point of such doctrines. But should it be held that members of that church have no valid grounds, as such, for their objections to the reading of the Bible in the district schools, still the petition contains general averments sufficiently broad to cover any valid objection to such reading, which might be made by any citizen of the State aggrieved by the action of the School Board. These averments are: "That the residents of said City of Edgerton who are taxed for the support of said schools are equally entitled to the benefits thereof, by having their children instructed therein according to law," and that such reading of the Bible "is contrary to the rights of conscience, and wholly contrary to and in violation of the law, and that your petitioners believe such exercises as above set forth, and each and all of them, are sectarian instruction, and in violation of § 8, art. 10 of the Constitution of the State of Wisconsin."

The answer contains several averments which counsel claim are admitted by the demurrer, but which are mere legal conclusions from facts stated therein, such as that the reading of the Bible in schools is not sectarian instruction, or that the School Board have lawful right to permit, and none to prevent, such reading of the same. Averments of this kind, or of facts not well pleaded, are not admitted by a general demurrer to the pleading. 6 Am. & Eng. Encyclop. Law, 581, and cases cited in note 6.

It is averred in the return that there is no material difference between the King James version of the Bible used in the Edgerton schools, and the Douay version, which is the only one recognized by the Catholic Church as correct and complete. It is universally known that there are differences between these two versions in many particulars, which the respective sects regard as material. Hence, the averment is against common knowledge, and therefore not well pleaded.

Our conclusion is that if such reading of the Bible is sectarian instruction, or if it violates any other constitutional right of any citizen or sect, the petition is sufficient.

2. In considering whether such reading of the Bible is sectarian instruction, the book will be regarded as a whole, because the whole Bible, without exception, has been designated as a text-book for use in the Edgerton schools, and the claim of the School Board is substantially (although perhaps not in terms) that the whole contents thereof may lawfully be so read therein if the teachers so elect. This being so, it is

quite immaterial if the portions thereof set out in the return as the only portions thus far read are not sectarian. Yet it should be observed that some of the portions so read seem to inculcate the doctrines of the divinity of Jesus Christ, and the punishment of the wicked after death, which doctrines are not accepted by some religious sects.

3. The courts will take judicial notice of the contents of the Bible; that the religious world is divided into numerous sects; and of the general doctrines maintained by each sect,—for these things pertain to general history and may fairly be presumed to be subjects of common knowledge. 1 Greenl. Ev. §§ 5, 6, and notes.

Thus they will take cognizance, without averment, of the facts that there are numerous religious sects, called "Christians," respectively maintaining different and conflicting doctrines; that some of these believe the doctrine of predestination, while others do not; some the doctrine of eternal punishment of the wicked, while others repudiate it; some the doctrines of the apostolic succession, and the authority of the priesthood, while others reject both; some that the Holy Scriptures are the only sufficient rule of faith and practice, while others believe that the only safe guide to human thought, opinion and action is the illuminating power of the Divine Spirit upon the humble and devout heart; some in the necessity and efficacy of the sacraments of the church, while others reject them entirely; and some in the literal truth of the Scriptures, while others believe them to be allegorical, teaching spiritual truths alone or chiefly. The courts will also take cognizance of numerous other conflicts of doctrine between the sects; also that there are religious sects which reject the doctrine of the divinity of Christ, among which is the Hebrew or Jewish sect, which denies the inspiration and authority of the New Testament; and, further, that the sect known as the Latter Day Saints, or Mormons, while accepting the Bible, is reputed to believe the Book of Mormon, and the deliverances of its own alleged prophets, to be of equal authority therewith. Many, if not most, of the above sects include within their membership citizens of Wisconsin. A great majority, if not all, of them, base their peculiar doctrines upon various passages of Scripture which may reasonably be understood as supporting the same.

It should here be said that the term "religious sect" is understood as applying to people believing in the same religious doctrines, who are more or less closely associated or organized to advance such doctrines and increase the number of believers therein. The doctrines of one of these sects which are not common to all the others are sectarian, and the term "sectarian" is, we think, used in that sense in the Constitution.

4. Counsel for the School Board maintain in their argument that the Christian religion is part of the common law of England; that the same was brought to this country by the colonists, and, by virtue of the various colonial charters, was embodied in the fundamental laws of the Colonies; that this religious element or principle was incorporated in the various State Constitutions, and in the Ordinance of 1787, for the government of the Northwest Territory, by virtue of which ordinance it be-

came the fundamental law of the Territory of Wisconsin. Numerous quotations are given by him from the above documents, from the utterances of Congress and Legislatures, and from the writings of our early statesmen, to prove these propositions. That the learned counsel have fairly demonstrated their accuracy is freely conceded. More than that, counsel have proved that many, probably most, of those charters, and some of the State Constitutions, not only ordained and enforced some of the principles of the Christian religion, but sectarian doctrines as well.

They have also attempted, at considerable length, to show that the Church of Rome is hostile to our common-school system. This court neither affirms nor denies the accuracy of this position. Moreover, counsel on both sides have argued, to some extent, as to whether certain religious dogmas are true or false.

None of these matters are material or pertinent to the questions to be determined on this appeal. This case must be decided under the Constitution and laws of this State now in force, and it is entirely immaterial to the decision thereof whether the interference of the courts to compel a faithful execution of the law by school boards is invoked by those who are hostile or friendly to our common-school system. The question is, What is the law of the case? not, What opinions are entertained by those who demand its enforcement? It is scarcely necessary to add that we have no concern with the truth or error of the doctrines of any sect. We are only concerned to know whether instruction in sectarian doctrines has been or, under existing regulations, is liable to be, given in the district schools of the State, and especially in the public schools of the City of Edgerton.

5. We come now to the more direct consideration of the merits of the controversy. The term "sectarian instruction" in the Constitution manifestly refers exclusively to instruction in religious doctrines, and the prohibition is only aimed at such instruction as is sectarian, that is to say, instruction in religious doctrines which are believed by some religious sects and rejected by others. Hence, to teach the existence of a Supreme Being of infinite wisdom, power and goodness, and that it is the highest duty of all men to adore, obey and love Him, is not sectarian, because all religious sects so believe and teach. The instruction becomes sectarian when it goes further, and inculcates doctrine or dogma concerning which the religious sects are in conflict. This we understand to be the meaning of the constitutional prohibition.

That the reading from the Bible in the schools, although unaccompanied by any comment on the part of the teacher, is "instruction," seems to us too clear for argument. Some of the most valuable instruction a person can receive may be derived from reading alone, without any extrinsic aid by way of comment or exposition. The question, therefore, seems to narrow down to this: Is the reading of the Bible in the schools—not merely selected passages therefrom, but the whole of it—sectarian instruction of the pupils? In view of the fact already mentioned, that the Bible contains numerous doctrinal passages, upon some of which

the peculiar creed of almost every religious sect is based, and that such passages may reasonably be understood to inculcate the doctrines predicated upon them, an affirmative answer to the question seems unavoidable. Any pupil of ordinary intelligence who listens to the reading of the doctrinal portions of the Bible will be more or less instructed thereby in the doctrines of the divinity of Jesus Christ, the eternal punishment of the wicked, the authority of the priesthood, the binding force and efficacy of the sacraments, and many other conflicting sectarian doctrines. A most forcible demonstration of the accuracy of this statement is found in certain reports of the American Bible Society of its work in Catholic countries (referred to in one of the arguments), in which instances are given of the conversion of several persons from "Romanism" through the reading of the Scriptures alone. That is to say, the reading of the Protestant or King James version of the Bible converted Catholics to Protestants without the aid of comment or exposition. In those cases the reading of the Bible certainly was sectarian instruction. We do not know how to frame an argument in support of the proposition that the reading thereof in the district schools is not also sectarian instruction.

It should be observed in this connection that the above views do not, as counsel seemed to think they may, banish from the district schools such text-books as are founded upon the fundamental teachings of the Bible, or which contain extracts therefrom. Such teachings and extracts pervade and ornament our secular literature, and are important elements in its value and usefulness. Such text-books are in the schools for secular instruction and rightly so, and the constitutional prohibition of sectarian instruction does not include them, even though they may contain passages from which some inferences of sectarian doctrine might possibly be drawn.

Furthermore, there is much in the Bible which cannot justly be characterized as sectarian. There can be no valid objection to the use of such matter in the secular instruction of the pupils. Much of it has great historical and literary value which may be thus utilized without violating the constitutional prohibition. It may also be used to inculcate good morals—that is, our duties to each other—which may and ought to be inculcated by the district schools. No more complete code of morals exists than is contained in the New Testament, which reaffirms and emphasizes the moral obligations laid down in the Ten Commandments. Concerning the fundamental principles of moral ethics, the religious sects do not disagree.

6. It is urged on behalf of the School Board that the Constitution must be interpreted in the light of the surrounding circumstances existing when it was framed and adopted, and that contemporaneous exposition thereof is of great authority. Cases in this court and elsewhere are cited to these propositions. Undoubtedly they are correct rules of interpretation, applicable alike to constitutions, statutes and all written instruments, where the language employed is of uncertain import. But if the words of the instrument are unambiguous, there is no room

for construction outside the words themselves, and the above rules cease to be controlling or important. It is proper, however, to consider the constitutional prohibition in the light of such rules of interpretation.

On the subject of contemporaneous exposition, counsel refer us to the uniform action of the department of public instruction in this State, from 1853 to the present time, recommending the Bible as a text-book in the district schools, as evidence that the constitutional provision under consideration was not understood by the framers of that instrument, or the people who adopted it, as excluding from such schools the reading of the Bible. The action of that department upon the subject, showing, as it does, the opinions of the eminent scholars and teachers who have presided over it for a long series of years, is entitled to great weight, and on a doubtful question of construction would doubtless be held controlling. But we do not think the true interpretation of the constitutional provision under consideration is doubtful or uncertain, or that any extraneous aid is required in order to interpret it correctly. Hence our judgment cannot properly be controlled by the action of the department of public instruction, or the opinions of its learned chiefs. The fact probably is that the practice of Bible reading in the district schools was not seriously challenged at the outset, and not subjected to close legal scrutiny until the policy of the department had become fixed. It was but natural that such policy should, to some extent at least, be thereafter adhered to.

It is further said that the practice of reading the Bible in the district schools prevailed generally after the adoption of the Constitution. This is claimed to be a most persuasive fact showing that it was not the intention of the framers of the Constitution and the people to prohibit the practice. We do not know how the fact was, but we must be permitted to doubt whether the practice was ever a general one in the district schools of the State. We are quite confident that it is not so at the present time. It was said in argument, and not denied, that the practice does not prevail in the public schools in any of the larger cities in the State. But were the fact otherwise, for the reasons above stated, it would not be controlling.

It may not be uninteresting to consider somewhat certain other circumstances existing when the Constitution was adopted, which may fairly be presumed to have influenced the inserting therein of the provision against "sectarian instruction" in the district schools.

The early settlers of Wisconsin came chiefly from New England and the Middle States. They represented the best religious, intellectual and moral culture, and the business enterprise and sagacity of the people of the States from which they came. They found here a Territory possessing all the elements essential to the development of a great State. They were intensely desirous that the future State should be settled and developed as rapidly as possible. They chose from their number wise, sagacious, Christian men, imbued with the sentiments common to all, to frame their Constitution.

The convention assembled at a time when

immigration had become very large, and was constantly increasing. The immigrants came from nearly all the countries of Europe, but most largely from Germany and Ireland. As a class they were industrious, intelligent, honest and thrifty—just the material for the development of a new State. Besides they brought with them, collectively, much wealth. They were also religious and sectarian. Among them were Catholics, Jews and adherents of many Protestant sects. These immigrants were cordially welcomed, and it is manifest the convention framed the Constitution with reference to attracting them to Wisconsin.

Many, perhaps most, of these immigrants came from countries in which a state religion was maintained and enforced, while some of them were non-conformists and had suffered under the disabilities resulting from their rejection of the established religion. What more tempting inducement to cast their lot with us could have been held out to them than the assurance that, in addition to the guarantees of the right of conscience and of worship in their own way, the free district schools in which their children were to be, or might be, educated, were absolute common ground where the pupils were equal, and where sectarian instruction, and with it sectarian intolerance, under which they had smarted in the old country, could never enter.

Such were the circumstances surrounding the convention which framed the Constitution. In the light of them, and with a lively appreciation by its members of the horrors of sectarian intolerance, and the priceless value of perfect religious and sectarian freedom and equality, is it unreasonable to say that sectarian instruction was thus excluded to the end that the child of a Jew, or Catholic, or Unitarian, or Universalist, or Quaker, should not be compelled to listen to the stated reading of passages of Scripture, which are accepted by others as giving the lie to the religious faith and belief of their parents and themselves?

It is argued that the reading of the Bible in the district schools is not included in the constitutional prohibition of sectarian instruction therein, because the Bible is not specifically mentioned in the Constitution. It is said that if it was intended that such reading was to be excluded, it would have been so provided in direct terms. The argument may be plausible, but is believed to be unsound. Constitutions deal with general principles and policies, and do not usually descend to a specification of particulars. Such is the character of the provision in question. In general terms it excludes sectarian instruction, and the exclusion includes all forms of such instruction. Its force would or might have been weakened had the attempt been made to specify therein all the methods by which such instruction may be imparted.

We have a statute upon this general subject which must not be overlooked. Sec. 3, chap. 251, Laws 1883, amending § 514, Rev. Stat., provides that in cities "no text-books shall be permitted in any free public schools which will have a tendency to inculcate sectarian ideas." Of course this applies to the public schools of the City of Edgerton. This statute certainly emphasizes the constitutional prohibition, although

it may not extend its scope. It is, in effect, a legislative declaration that the use of text-books which have "a tendency to inculcate sectarian ideas" is sectarian instruction, prohibited by the Constitution.

For the reasons above stated, we cannot doubt that the use of the Bible as a text-book in the public schools, and the stated reading thereof in such schools, without restriction, "has a tendency to inculcate sectarian ideas," and is sectarian instruction, within the meaning and intention of the Constitution and the Statute.

7. The answer of the respondent states that the relators' children are not compelled to remain in the school-room while the Bible is being read, but are at liberty to withdraw therefrom during the reading of the same. For this reason it is claimed that the relators have no good cause for complaint, even though such reading be sectarian instruction. We cannot give our sanction to this position. When, as in this case, a small minority of the pupils in the public school is excluded for any cause from a stated school exercise, particularly when such cause is apparent hostility to the Bible, which a majority of the pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows and is liable to be regarded with aversion, and subjected to reproach and insult. But it is a sufficient refutation of the argument that the practice in question tends to destroy the equality of the pupils which the Constitution seeks to establish and protect, and puts a portion of them to serious disadvantage in many ways with respect to the others.

8. The foregoing views render unnecessary any extended discussion of the question whether such reading of the Bible is or may be a violation of the rights of conscience guaranteed by section 18 of the Bill of Rights art. 1, Const.). There has been considerable discussion concerning the limitations of that right. That there are limitations thereto must be conceded. For example, a Mormon may believe that the practice of polygamy is a religious duty, yet no court would regard his conscience in that behalf for a moment should he put his belief into practice.

The petition alleges that, in addition to their objections to the King James version, the relators have conscientious scruples against the reading of any version of the Bible to their children, either in the district schools, or elsewhere, without authoritative note, comment or exposition, because the practice may lead their children to adopt dangerous errors, and irreligious faith, practice and worship. When we remember that wise and good men have struggled and agonized through the centuries, to find the correct interpretation of the Scriptures, employing to that end all the resources of great intellectual power, profound scholarship and exalted spiritual attainments, and yet with such widely divergent results; and further, that the relators conscientiously believe that their church furnishes the means, and the only means, of correct and infallible interpretation,—we can scarcely say their conscientious scruples against the reading of any version of the Bible to their children, unaccompanied by such interpretation, are entitled to no consideration.

7 L. R. A.

But however this may be, it may safely be said, and nothing further need be said upon the subject, that when a man's conscience coincides with the law, and he obeys its dictates, he will be protected.

9. Whether the reading of the Bible in the public schools is religious worship, and whether it constitutes the school-house for the time being a place of worship, and, if so, whether such reading during school hours as a school exercise against the consent of a taxpayer, compels him to support a place of worship, within the meaning of section 18 of the Bill of Rights, are questions which will not be here discussed. These questions are considered in an opinion by *Mr. Justice Cassoday* filed herewith.

10. A number of cases in different States, supposed to have a bearing upon the main question here considered and determined, have been cited, and quotations made therefrom at considerable length by the respective counsel, and by the circuit judge in his elaborate opinion overruling the demurrer to the answer. None of the States in which those decisions were made seem to have in their Constitutions a direct prohibition of sectarian instruction in the public schools. It is believed that this State was the first which expressly embodied the prohibition in its fundamental law, and we are not aware of any direct adjudication of the question under consideration, by any court previously to *Judge Bennett's* decision in this case, except (as we are informed) the late *Judge Stewart* decided in some case before him in the Circuit Court of Sauk County (but at what time we are not advised) that the Constitution prohibits the reading of the Bible in the district schools. Practically, therefore, we are now determining a question of first impression, and it must necessarily be determined upon general principles of law. Cases from which only mere inferences, more or less remote, can be deduced, afford but little aid to correct judgment in this case. Hence, the cases cited have not been specially referred to in this opinion. Some of them are nearer in point on the question considered by *Mr. Justice Cassoday*, and he has referred to and commented upon them in his opinion.

11. The drift of some remarks in the argument of counsel for the respondent, and perhaps also in the opinion of *Judge Bennett*, is that the exclusion of Bible reading from the district schools is derogatory to the value of the Holy Scriptures, a blow to their influence upon the conduct and consciences of men, and disastrous to the cause of religion. We must emphatically reject these views. The priceless truths of the Bible are best taught to our youth in the church, the sabbath and parochial schools, the social religious meetings, and above all by parents in the home circle. There those truths may be explained and enforced, the spiritual welfare of the child guarded and protected, and his spiritual nature directed and cultivated in accordance with the dictates of the parental conscience. The Constitution does not interfere with such teaching and culture. It only banishes theological polemics from the district schools. It does this, not because of any hostility to religion, but because the people who adopted it believed that the public good would

thereby be promoted, and they so declared in the preamble. Religion teaches obedience to law, and flourishes best where good government prevails. The constitutional prohibition was adopted in the interests of good government, and it argues but little faith in the vitality and power of religion to predict disaster to its progress because a constitutional provision, enacted for such a purpose, is faithfully executed.

The order of the Circuit Court overruling the demurrer of the relators to the answer of the School Board must be reversed, and the cause remanded with directions to that court to give judgment for the relators on the demurrer, awarding a peremptory writ of mandamus, as prayed in the petition.

Cassoday, J.

The gravity of the questions involved in this case are fully appreciated. They have received the careful consideration of all the members of the court. The writing of the formal opinion has fallen to the lot of *Mr. Justice Lyon*. At his suggestion a separate presentation of one branch of the case is here made. Before entering upon its direct discussion, however, but as leading to it, a few general observations may not be wholly unprofitable. It is undoubtedly true, as once observed by *Mr. Justice Baldwin*, that "in the construction of the Constitution we must look to the history of the times, and examine the state of things existing when it was framed and adopted, to ascertain the old law, the mischief and the remedy." *Rhode Island v. Massachusetts*, 37 U. S. 12 Pet. 723 [9 L. ed. 1260].

A few years later *Mr. Justice Story* said: "Perhaps the safest rule of interpretation, after all, will be found to be, to look to the nature and objects of the particular powers, duties and rights, with all the lights and aids of contemporary history; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed." *Prigg v. Pennsylvania*, 41 U. S. 16 Pet. 610, 611 [10 L. ed. 1087].

These observations were of course made with reference to our Federal Constitution, but they are equally applicable to our State Constitution. In so far as the rules there suggested may aid in the construction of the provisions of our Constitution here involved, they may properly be invoked. It is probably in this view that counsel have dwelt so extensively upon the history of the Christian Church and its status under different charters and Constitutions, although much of it has a very remote, if any, bearing upon the questions here presented. All are familiar with the fact that the Jews, in the time of the apostles, were divided into "the sect of the Sadducees" and "the sect of the Pharisees." Paul declared in the presence of Agrippa "that after the strictest sect" of their religion, he had "lived a Pharisee;" and when Tertullus charged him with being "a ringleader of the sect of the Nazarenes," he boldly confessed "that, after the way which they" called "heresy," or, as the new version has it, "a sect," he had worshiped or served the God of his fathers; and afterwards to the "chief of the Jews" at Rome, he discoursed "concern-

ing this sect," and persuaded "them concerning Jesus both from the law of Moses and from the prophets." Of course "the sect of the Nazarenes," subsequently acquired the more honorable name of "Christians." As the centuries rolled on and Christians became more numerous, disputes arose among themselves, from time to time, in matters of faith, doctrine, practice and interpretation of certain passages of scriptures, and these led to repeated divisions and subdivisions until the different sects of Christians became very numerous. There is no purpose here of indicating that the Holy Scriptures,—the Old and New Testament,—if considered as a whole and fully comprehended, would exclude from the promises therein contained any of the human race complying with the essential conditions therein prescribed; but since every translation made by man must be more or less imperfect, and since the application of particular passages is liable to be made with partial apprehension, and biased or even distorted judgment, it is easy to perceive how texts of scripture may be read with such an emphasis and tone as to become excessively sectarian. While the members of any particular sect may be willing to have one of their own number read the Bible in the public schools, yet they are not always willing to concede the same to a member of a sect believing in an opposite faith or doctrine. But the law is impartial and has given no rights to any one sect that are not equally secured to every other. The relation of the church to the Scriptures has been a subject of controversy ever since the Reformation. Upon that question even Protestants have differed. Some have gone so far as to say that "the Bible and the Bible only is the religion of Protestants;" while others have declared that "the living church is more than the dead Bible, for it is the Bible and something more."

The relations of church and state have been the subject of discussion for many centuries; and at certain times and in certain nations of Europe one particular sect has been the established church of the state, and at other times or in other nations the belief of some other sect has been the established religion,—while other sects, not so favored, were either exterminated altogether, or permitted to remain on conditions more or less disagreeable and humiliating. These discriminations naturally generated bitterness, enmities and even cruel war among brethren. Many of the early immigrants to this country had felt the despotism of such intolerance and came hither in consequence of it. They came from different countries of Europe and consequently had experienced different types of intolerance. Some of them were as narrow-minded in such matters as their oppressors had been, and hence no sooner acquired civil power than they themselves became intolerant toward all sects except their own. Such divisions, controversies and contentions among professing Christians were supposed by many to be repugnant to the sublime teachings and fraternal spirit revealed to the world through Jesus Christ. Many of the colonists—especially when they came to the formation of state governments—proved to be sufficiently broad and liberal to exact nothing for themselves or their particular sect that

they were unwilling to grant to every other citizen and his particular sect. This benign spirit seemed to extend as its wisdom became more manifest by experience. True, the Constitution of South Carolina, adopted in 1778, declared that the "Christian Protestant Religion" was the "established religion" of that State; but that was modified in 1790 so as to secure freedom and prevent discrimination or preference in worship or religion. The Constitution of North Carolina of 1776 excluded from office all non-believers in the Protestant religion or the divine authority of the Old or New Testament; while the Constitution of Delaware, of the same year, made every official subscribe to a confession of faith; but that was abrogated sixteen years afterwards, and equal protection was extended to all sects. So the first Constitutions of Maryland, Massachusetts and New Hampshire, and, later, of Connecticut, provided for the support by taxation or otherwise, of the Christian or Protestant Christian religion, with more or less toleration guaranteed to other sects. Such direct sanction and toleration seem to have been inspired by a lingering attachment for, or a sympathy with, the European theory of union between church and state. But the several States of New Jersey, New York, Pennsylvania, Vermont and Virginia from the first, and later Maine and Rhode Island of the New England States, and every or nearly every State admitted into the Union after the organization of the federal government, expressly secured, in effect, in their respective State Constitutions, the equal freedom of every religious sect, organization and society, with a guaranty against preference or discrimination. No firm had become the public conviction in favor of a broad liberality and equal protection in such matters, at the time of the organization of our national government, that, although the Federal Constitution, as originally adopted, did not mention nor refer to the subject, yet the first session of the first Congress proposed the first amendment to that instrument prohibiting Congress from making any "law respecting an establishment of religion, or prohibiting the free exercise thereof," notwithstanding no power had therein been granted to enact such a law, and no such law could be legally enacted without such grant of power first being made. The learned counsel for the School Board contends, in effect, that the third of the "articles of compact between the original States, and the people and States" carved out of the old "Northwest Territory," is still in force in Wisconsin; and that under it this State is required and bound to directly foster and encourage "religion" through schools and education. Assuming such to be the meaning of the article, which is, to say the least, debatable, still it is only necessary here to say, in addition to what is said by my associate, that, by the adoption of our State Constitution, and the admission of the State into the Union, that article became superseded and ceased to be longer in force. This has in effect been firmly settled by the repeated decisions of the Supreme Court of the United States. *Polard v. Hagon*, 44 U. S. 8 How. 212 [11 L. ed. 565]; *Perrin v. First Municipality*, 44 U. S. 8 How. 609 [11 L. ed. 742]; *Strader v. Graham*, 51 U. S. 10 How. 94, 97 [18 L. ed. 841, 842]; 7 L. R. A.

Escanaba Co. v. Chicago, 107 U. S. 678 [27 L. ed. 442]; *Cardwell v. American River Bridge Co.*, 118 U. S. 205 [28 L. ed. 959]; *Huss v. Glover*, 119 U. S. 543 [30 L. ed. 481]; *Sands v. Manistee River Imp. Co.*, 128 U. S. 288 [31 L. ed. 149]; *Willamette Iron B. Co. v. Hatch*, 125 U. S. 9 [31 L. ed. 632].

The question therefore recurs whether the provisions of our State Constitution, here involved, when construed with reference to the evils, or supposed evils, thereby sought to be suppressed, and the object or purpose thereby sought to be secured, permitted or prohibited the stated reading of the Bible as a text-book in the public schools. Wisconsin, as one of the later States admitted into the Union, having before it the experience of others, and probably in view of its heterogeneous population, as mentioned in the opinion of my associate, has, in her Organic Law, probably furnished a more complete bar to any preference for, or discrimination against, any religious sect, organization or society, than any other State in the Union. Our State Constitution expressly prohibits any religious test as a qualification for office, or the exclusion of any witness in consequence of his religious opinion. § 19, art. 1.

Aside from the clause just referred to, and the one against sectarian instruction, so fully considered by my brother Lyon, our State Constitution provides that, (1) "the right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; (2) nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent; (3) nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishments, or modes of worship; (4) nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." § 18, art. 1.

The decisions of courts in States having no such constitutional prohibition, of course, can have no application to the case at bar. The question thus presented is not one of sectarian predilection, nor of religious belief, nor of theological conception, nor of sentiment, but one of fundamental law. It is no part of the duty of this court to make or unmake, but simply to construe, this provision of the Constitution. All questions of political and governmental ethics—all questions of policy,—must be regarded as having been fully considered by the convention which framed, and conclusively determined by the people who adopted, the Constitution more than forty years ago. The oath of every official in the State is to support that Constitution as it is, and not as it might have been. *Wisconsin Cent. R. Co. v. Taylor Co.*, 53 Wis. 58; *Lake Co. v. Rollins*, 180 U. S. 672 [33 L. ed. 1083].

That oath is to be kept sacred, with strict integrity of purpose, and without any sectarian, religious or political bias or equivocation. In considering the meaning of the section of the Constitution quoted, we are to remember that canon of construction adverted to by my associate, and aptly expressed by Marshall, *Ch. J.*, in these words: "Although the spirit of an in-

strument, especially of a Constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of an instrument expressly provide shall be exempted from its operation." *Sturges v. Crowninshield*, 17 U. S. 4 Wheat. 202 [4 L. ed. 550].

Similar expressions have come to us from the same court within a year. "If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning apparent on the face of the instrument must be accepted, and neither the courts nor the Legislature have the right to add to it or take from it." *Lake Co. v. Rollins*, 130 U. S. 670 [32 L. ed. 1062].

The first and third clauses of the section of the Constitution quoted are similar in their scope and may therefore be considered together. They read:

"(1) The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; . . . (3) nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishment, or modes of worship."

This language is quite similar to and may have been taken in part from the Constitution of Pennsylvania, as well as other States. In commenting upon a similar clause in the Pennsylvania Constitution, in the celebrated *Girard Will Case*, Mr. Justice Story, speaking for the whole court, observed: "Language more comprehensive for the complete protection of every variety of religious opinion could scarcely be used; and it must have been intended to extend equally to all sects, whether they believed in Christianity or not, and whether they were Jews or infidels. So that we are compelled to admit that although Christianity be a part of the common law of the State, yet it is so in this qualified sense that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public. Such was the doctrine of the Supreme Court of Pennsylvania in *Upham v. C-m.* 11 Serg. & R. 394;" *Vidal v. Girard*, 48 U. S. 2 How. 193 [11 L. ed. 284].

In commenting upon a similar clause in the Ohio Constitution, Mr. Justice Thurman, speaking for the whole court, said: "We sometimes hear it said that all religions are tolerated in Ohio; but the expression is not strictly accurate; much less accurate is it to say that one religion is a part of our law, and all others only tolerated. It is not by mere toleration that every individual here is protected in his belief or disbelief. He reposes, not upon the leniency of government, or the liberality of any class or sect of men, but upon his natural, indefeasible rights of conscience, which in the language of the Constitution are beyond the control or interference of any human authority." *Bloom v. Richards*, 2 Ohio St. 800.

In considering the two clauses quoted from our Constitution, we are to bear in mind the general proposition, conceded by all, that our State Constitution is not a grant, but a limitation of powers. *State v. Forest Co.* 74 Wis. 615, 7 L. R. A.

Viewed in this light, and it will readily be perceived that these clauses operate as a perpetual bar to the State, and each of the three departments of the state government, and every agency thereof, from the infringement, control or interference with the individual rights of every person, as indicated therein, or the giving of any preference by law to any religious sect or mode of worship. They presuppose the voluntary exercise of such rights by any person, or body of persons, who may desire, and by implication guarantee protection in the freedom of such exercise. We neither have nor can have in this State, under our present Constitution, any statutes of toleration, nor of union directly or indirectly between church and state, for the simple reason that the Constitution forbids all such preferences and guarantees all such rights. But the exercise of such rights by one person, or any given number of persons, cannot be so extended as to interfere with the exercise of similar rights by other persons, nor so far as to prevent the legitimate exercise of the police powers of the State in preserving order, securing good citizenship, the administration of the law, and the Sabbath as a day of rest. *Stansbury v. Marks*, 2 U. S. 2 Dall. 218 [1 L. ed. 353]; *Com. v. Wolf*, 3 Serg. & R. 43; *Com. v. Lecher*, 17 Serg. & R. 155; *McGatrick v. Wason*, 4 Ohio St. 536; *Simon v. Gratz*, 2 Penn. & W. 412, 23 Am. Dec. 33; *Shover v. State*, 10 Ark. 259; *Ferriter v. Tyler*, 48 Vt. 469; *State v. Judge of Section "A."*, 89 La. Ann. 132.

Such statutes come within no constitutional prohibition and are founded upon an impregnable basis. The two clauses mentioned recognize the existence of different religious establishments or sects, and different modes of worship, but they do not have so direct a bearing upon the question here presented as the second and fourth clauses, which will now be considered. The second clause of the section quoted is to the effect that no man shall "be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent." Is the stated reading of the Bible in the public schools, as a text book, "worship" within the meaning of this clause? As indicated in the clauses already considered, the word "worship" as here used, includes any and every mode of worshipping Almighty God. Webster has defined it as: "The act of paying divine honors to the Supreme Being; religious reverence and homage; adoration paid to God, or a being viewed as God. . . . 'The worship of God is an eminent part of religion, and prayer is a chief part of religious worship.'"

Worcester defines it as: "3. Adoration; a religious act of reverence; honor paid to the Supreme Being, or by heathen nations to their deities. Worship consists in the performance of all those external acts, and the observance of all those rights and ceremonies, in which men engage with the professed and sole view of honoring God. . . . They join their vocal worship to the choir of creatures wanting voice. . . . 4. Honor; respect; civil deference."

The Imperial defines it as: "4. Chiefly and eminently the act of paying divine honors to the Supreme Being; or the reverence and homage paid to him in his religious exercises, consisting in

adoration, confession, prayer, thanksgiving and the like."

The Bible Dictionary declares, that the "worship of God, both spiritual and visible, private and public, by individuals, families and communities . . . is abundantly commanded in his word."

In theology, we are told, that, "the honor which is due in a peculiar sense to God consists supremely in religious worship; in making him the object of our supreme affection; and rendering to him our supreme obedience." 1 Dwight, Theol. 555.

Certainly the reading of the Holy Scriptures, as the eternal word of God, in obedience to the often repeated injunction therein contained, whether by the individual in private, or in the family, or in the public assembly, is an essential part of divine worship. Every sermon is based upon some text of Scripture. Most prayers are preceded by the reading of some passage of Scripture, as an intelligent guide to the thoughts of the worshiper or worshipers.

The Sermon on the Mount contains the prayer taught by the blessed Lord. Is it possible for any genuine believer in the Christian religion to read or listen to the reading of that sermon, and especially that prayer, without being filled with a holy sense of honor, reverence, adoration and homage to Almighty God, which is the very essence of worship?

We must hold that the stated reading of the Bible in the public schools, as a text-book, may be "worship" within the meaning of the clause of the Constitution under consideration. If, then, such reading of the Bible is worship, can there be any doubt but what the school-room in which it is so statedly read is a "place of worship," within the meaning of the same clause of the Constitution? Counsel seem to argue that such place of worship should be confined to some church edifice, or place where the members of a church statedly worship. Some of the earlier Constitutions having similar clauses, used the words "building" and "church." Manifestly the words, "place of worship," were advisedly used, as applicable to any "place" or structure where worship is statedly held, and which the citizen is "compelled to attend," or the taxpayers are compelled "to erect or support." The mere fact that only a small fraction of the school hours is devoted to such worship in no way justifies such use as against an objecting taxpayer. If the right be conceded, then the length of time so devoted becomes a matter of discretion. If such right does not exist, then any length of time, however short, is forbidden. The relators, as taxpayers of the district, were compelled to aid in the erection of the school building in question, and also to aid in the support of the school maintained therein. S. & B. Ann. Stat. §§ 450, 480 (a).

Being thus compelled to aid in such erection and support, they have a legal right to object to its being used as a "place of worship." In fact it has been held that it can be devoted to no other use as against an objecting taxpayer. *School District No. 8 v. Arnold*, 21 Wis. 658.

In that case a temperance society obtained permission from a majority of the electors present at a school meeting, duly called, to hold its meetings in the school-house. But it

was held that such electors had no authority to thus divert its use. The present chief justice, speaking for the court, among other things said: "The statute has not given the board, nor the electors of the district, any authority to permit a school house to be used for meetings of the Sons of Temperance, or anything of the kind. So the action of the electors of the district . . . was wholly unauthorized, and furnished no defense to the action." To the same effect are: *Spencer v. Joint School Dist.* 15 Kan. 259, 22 Am. Rep. 268; *Dorton v. Hearn*, 67 Mo. 301; *Schofield v. Eighth School Dist.* 27 Conn. 499, and *Weir v. Dav*, 35 Ohio St. 143.

There are cases of a contrary import, but it is very certain that, as against an objecting taxpayer, such school-house cannot be devoted to a use expressly forbidden by the Constitution of the State—as for instance as a place of worship.

There is another feature of the clause we are considering which requires attention. Under our statutes, the children of the relators, between certain ages, were bound to attend some public or private school for a certain period of each year. S. & B. Ann. Stat. § 489a (chap. 121, Laws 1879, chap. 298, Laws 1882, chap. 73, Laws 1887), superseded by S. & B. Ann. Stat. § 489b (chap. 519, Laws 1889).

In the case of a poor man incapable of educating his children at private expense, they are "compelled to attend" such school without the consent of themselves or their parents, notwithstanding it is, in a limited sense, a place of worship; and in the case of men of property, it might impose an unauthorized burden. This, as we understand, is prohibited by the clause of the Constitution we are considering.

The fourth clause of the section of the Constitution quoted, declares, in effect, that no money shall "be drawn from the treasury, for the benefit of religious societies, or religious or theological seminaries." As argued by the learned counsel for the School Board, the word "treasury" in this clause, probably refers to the state treasury. But we are to remember that the school in question receives annually from the state treasury its proportionate share, not only of the school-fund income (§ 554, Rev. Stat., § 3, chap. 124, Laws, 1885, chap. 277, Laws, 1887), but also of the one-mill tax, § 1070a, S. & B. Ann. Stat. (chap. 287, Laws 1885).

The question thus recurs, whether the money thus drawn from the state treasury for the maintenance and support of the school in question is for the benefit of a religious seminary within the meaning of this clause of the Constitution. A seminary, is defined by Webster, as a "place of training; institution of education; a school, academy, college or university, in which young persons are instructed in the several branches of learning which may qualify them for their future employments." It manifestly includes institutions of learning or education of different grades. But a religious seminary of any one grade is just as effectually forbidden as a religious seminary of any higher or other grade. The thing that is prohibited is the drawing of any money from the state treasury for the benefit of any religious school. If the stated reading of the Bible in the school, as a text-book is not only, in a limited sense,

worship, but also instruction, as it manifestly is, then there is no escape from the conclusion that it is religious instruction; and hence the money so drawn from the state treasury was for the benefit of a religious school within the meaning of this clause of the Constitution. The Constitutions of Massachusetts, New Hampshire and some other States differ so widely from ours as to make the adjudications in those States almost wholly inapplicable to the question here presented. It is conceded that no decision has been found, under constitutional provisions like ours, squarely sustaining the ruling of the learned trial court. Some things have been said in some of the cases cited, arising under somewhat similar constitutional provisions, that may seem to support it. Among these are: *Donohoe v. Richards*, 88 Me. 879, 61 Am. Dec. 256; *Ferriter v. Tyler*, 48 Vt. 444; *Moore v. Monroe*, 64 Iowa, 367; *Millard v. Board of Education*, 121 Ill. 297, 8 West. Rep. 372.

The main case, largely involving other considerations, is based, in part upon decisions under Constitutions widely differing from ours, and was decided under a Constitution containing none of the provisions upon which especial stress is here laid. The same is partially true of the Vermont case. The same is true in a limited sense of the Iowa and Illinois cases; and in neither of which is any adjudication cited. The following cases seem to be in harmony with the conclusions we have reached: *State v. Hallock*, 16 Nev. 373; *Cincinnati Board of Education v. Minor*, 23 Ohio St. 211; *State v. White*, 82 Ind. 278, 43 Am. Rep. 496; *Spencer v. Joint School Dist.*, *Dorton v. Uearn*, *Schofield v. Eighth School Dist.* and *Weir v. Day*, *supra*.

They are, moreover, in harmony with prior decisions of this court. *Morrow v. Wood*, 85 Wis. 59; *School Dist. No. 8 v. Arnold*, *supra*. In the Nevada case the decision was adverse to the use of the Catholic Bible.

We deem it unnecessary to enter upon an extended analysis of the numerous adjudications cited, since the constitutional provisions here involved rest upon us with an imperative command. The unanimous result of our deliberations is as directed by *Mr. Justice Lyon*.

Orton, J. concurring:

I most fully and cordially concur in the decision, and in the opinions of *Justices Lyon and Cassoday*, in this case.

It is not needful that any other opinion should be written, but I thought it proper to state briefly some of the reasons which have induced such concurrence in the decision.

"The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, . . . nor shall any control or interference with the rights of conscience be permitted or any preference be given by law to any religious establishments or modes of worship." Const. art. 1, § 18.

"No religious test shall ever be required as a qualification for any office of public trust, under the State, and no person shall be rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion." Const. art. 1, § 19.

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"The interest of 'the school fund,' and all other revenues derived from the school lands, shall be exclusively applied . . . to the support and maintenance of common schools in each school district," etc. Art. 10, § 2, subd. 1.

"The Legislature shall provide by law for the establishment of district schools which shall be as nearly uniform as practicable; and such schools shall be free, and without charge for tuition, to all children between the ages of four and twenty years; and no sectarian instruction shall be allowed therein." Art. 10, § 3.

"Each town and city shall be required to raise by tax annually, for the support of common schools therein, a sum not less," etc. Art. 10, § 4.

"Provision shall be made by law for the distribution of the income of the school fund among the several towns and cities of the State, for the support of common schools therein," etc. Art. 10, § 5.

These provisions of the Constitution are cited together to show how completely this State, as a civil government, and all its civil institutions, are divorced from all possible connection or alliance with any and all religions, religious worship, religious establishments or modes of worship, and with everything of a religious character or appertaining to religion. And to show how completely all are protected in their religion and rights of conscience, and that no one shall ever be taxed or compelled to support any religion or place of worship, or to attend upon the same, and more especially to show that our common schools, as one of the institutions of the State created by the Constitution, stand, in all these respects, like any other institution of the State, completely excluded from all possible connection or alliance with religion, or religious worship, or with anything of a religious character, and guarded by the constitutional prohibition, that "no sectarian instruction shall be allowed therein." They show also that the common schools are free to all alike, to all nationalities, to all sects of religion, to all ranks of society, and to all complexions. For these equal privileges and rights of instruction in them, all are taxed equally and proportionately. The constitutional name, "common schools," expresses their equality and universal patronage and support. Common schools are not common as being low in character or grade, but common to all alike, to everybody and to all sects, or denominations of religion, but without bringing religion into them. The common schools, like all the other institutions of the State, are protected by the Constitution from all "control or interference with the rights of conscience," and from all preferences given by law to any religious establishments or modes of worship. As the State can have nothing to do with religion, except to protect everyone in the enjoyment of his own, so the common schools can have nothing to do with religion in any respect whatever. They are as completely secular as any of the other institutions of the State, in which all the people, alike, have equal rights and privileges. The people cannot be taxed for religion in schools, more than anywhere else. Religious instruction, in the common schools, is clearly prohibited by these general clauses of the Constitution, as religious instruction or worship in any other department

of the State, supported by the revenues derived from taxation. The clause, that, "no sectarian instruction shall be allowed therein," was inserted *ex industria* to exclude everything pertaining to religion. They are called by those who wish to have not only religion, but their own religion, taught therein, "Godless schools." They are Godless and the educational department of the government is Godless in the same sense that the executive, legislative and administrative departments are Godless. So long as our Constitution remains as it is, no one's religion can be taught in our common schools. By religion, I mean religion as a system, not religion in the sense of natural law. Religion in the latter sense is the source of all law and government, justice and truth. Religion, as a system of belief, cannot be taught without offense to those who have their own peculiar views of religion, any more than it can be without offense to the different sects of religion. How can religion, in this sense, be taught in the common schools without taxing the people for or on account of it. The only object, purpose or use for taxation by law in this State must be exclusively secular. There is no such source and cause of strife, quarrel, fights, malignant opposition, persecution and war, and all evil in the State, as religion. Let it once enter into our civil affairs, our government would soon be destroyed. Let it once enter into our common schools, they would be destroyed. Those who made our Constitution saw this, and used the most apt and comprehensive language in it, to prevent such a catastrophe. It is said, if reading the Protestant version of the Bible in school is offensive to the parents of some of the scholars, and antagonistic to their own religious views, their children can retire. They ought not to be compelled to go out of the school for such a reason, for one moment. The suggestion itself concedes the whole argument. That version of the Bible is hostile to the belief of many who are taxed to support the common schools, and who have equal rights and privileges in them. It is a source of religious and sectarian strife. That is enough. It violates the letter and spirit of the Constitution. No State Constitution ever existed that so completely excludes and precludes the possibility of religious strife in the civil affairs of the State, and yet so fully protects all alike in the enjoyment of their own re-

ligion. All sects and denominations may teach the people their own doctrines in all proper places. Our Constitution protects all, and favors none. But they must keep out of the common schools and civil affairs. It requires but little argument to prove that the Protestant version of the Bible, or any other version of the Bible, is the source of religious strife and opposition, and opposed to the religious belief of many of our people. It is a sectarian book. The Protestants were a very small sect in religion at one time, and they are a sect yet, to the great Catholic Church against whose usages they protested, and so is their version of the Bible sectarian, as against the Catholic version of it.

The common school is one of the most indispensable, useful and valuable civil institutions this State has. It is democratic, and free to all alike, in perfect equality, where all the children of our people stand on a common platform, and may enjoy the benefits of an equal and common education. An enemy to our common schools is an enemy to our state government. It is the same hostility that would cause any religious denomination, that had acquired the ascendancy over all others, to remodel our Constitution, and change our government and all of its institutions, so as to make them favorable only to itself, and exclude all others from their benefits and protection. In such an event, religious and sectarian instruction will be given in all schools. Religion needs no support from the State. It is stronger and much purer without it. This case is important and timely. It brings before the courts a case of the plausible, insidious and apparently innocent entrance of religion into our civil affairs, and of an assault upon the most valuable provisions of the Constitution. Those provisions should be pondered and heeded by all of our people, of all nationalities and of all denominations of religion, who desire the perpetuity, and value the blessings of our free government. That such is their meaning and interpretation no one can doubt, and it requires no citation of authorities to show. It is religion and sectarian instruction that are excluded by them. Morality and good conduct may be inculcated in the common schools, and should be.

The connection of church and state corrupts religion, and makes the state despotic.

VIRGINIA SUPREME COURT OF APPEALS.

VIRGINIA MIDLAND R. CO., *Pff. in Err.*,
v.

George WASHINGTON, Jr.

(....V....)

A railroad company that has leased its road under due authority of law is not liable

for injuries inflicted by the lessee company upon its own agent or servant in operating the road.

(March, 1890.)

ERROR to the Circuit Court of Alexandria City to review a judgment in favor of plaintiff in an action to recover damages for personal injuries received by plaintiff while an employé of the lessee of defendant's road and

NOTE.—Lessor railroad, not liable for injuries resulting from negligence of its lessee.

It has been held in Texas that a railroad company cannot, without statutory authority, lease its road to another so as to absolve itself from its duties to 7 L. R. A.

the public; and when such lease is made the lessor will be liable for injury to a passenger resulting from negligence of the lessee. *International & G. N. R. Co. v. Underwood*, 67 Tex. 599; *East Line & R. R. Co. v. Rushing*, 69 Tex. 308.

alleged to have resulted from the negligence of such lessee's servants. *Reversed.*

The case sufficiently appears in the opinion.

Mr. William H. Payne, for plaintiff in error:

There are some dicta tending to the opinion that the lessor is not released from liability for injuries, but those are cases where there was no authority given to lease (*Roper v. McWhorter*, 77 Va. 219); where the surrender of autonomy was voluntary and a fraud (*Washington, A. & G. R. Co. v. Brown*, 84 U. S. 17 Wall. 445 21 L. ed. 875), to escape a condition in its charter. But where the Legislature had authorized the act, responsibility ceases.

Pierce, Railroads, 268 and *note*.

Where a company had been duly leased by competent authority, the lessee is responsible solely for torts committed by it.

See *Atchison, T. & S. F. R. Co. v. Crugen* (Kan.) 15 Am. & Eng. R. R. Cas. 516; *Patterson, Railway Acct. Law*, §§ 130, 131; *Freeman v. Minneapolis & St. L. R. Co.* 28 Minn. 443, 7 Am. & Eng. R. R. Cas. 410-413.

The true distinction is as to liability arising out of law and duties to the public exacted by public policy (which they cannot shirk), and liability for injuries to those whom they employ and contract with to enable them to discharge their public duties.

Nugent v. Boston, U. & M. R. Co. 5 New Eng. Rep. 870, 80 Me. 62; *Georgia R. & Bkg. Co. v. Fiddell*, 79 Ga. 489; *Singleton v. Southwestern R. Co.* 70 Ga. 464.

Messrs. George A. Mushbach and J. K. M. Norton, for defendant in error:

Plaintiff can sue either lessor or lessee or both, jointly or separately.

Ohio & M. R. Co. v. Dunbar, 20 Ill. 623, 71 Am. Dec. 291.

Though the charter or the Act of the Legislature gives a railroad company authority to make a lease of its road, the lessor can be sued for all torts of the lessee, unless it is expressly exempted from liability in the Act. Unless the lessor is thus exempted, the lessee is merely its agent, and the lessor is liable therefor as fully as if they had been done by the lessor.

Thomas v. West Jersey R. Co. 101 U. S. 71 (25 L. ed. 9'0); *Oregon R. & Nav. Co. v. Oregonian R. Co.* 130 U. S. 1 (32 L. ed. 887); *Halsey v. St. Louis, A. & T. H. R. Co.* 6 West. Rep. 469, 119 Ill. 68, 25 Am. & Eng. R. R. Cas. 497; *York & M. L. R. Co. v. Winans*, 58 U. S. 17 How. 29 (15 L. ed. 30); *Washington, A. & G. R. Co. v. Brown*, 84 U. S. 17 Wall. 445 (21 L. ed. 675); 1 Redfield, *Railways*, 5th ed. chap. 22, § 1, p. 616; *Chesnut-wood v. Hood*, 68 Ill. 132; *St. Clair Co. Turnp. Co. v. People*, 82 Ill. 174; *Sedgwick, Stat. and Const. L.* 338; *Green's Brice, Ultra Vires*, 62; *Ohio & M. R. Co. v. Dunbar*, 20 Ill. 623, 71 Am. Dec. 291; *Fontaine v. Southern Pac. R. Co.* 54 Cal. 645, 1 Am. & Eng. R. R. Cas. 159; *Illinois R. Co. v. Finnegan*, 21 Ill. 646; *Chicago & R. C. R. Co. v. Whipple*, 22 Ill. 105; *Peoria & R. I. R. Co. v. Lane*, 88 Ill. 448; *Wabash, St. L. & P.*

R. Co. v. Peyton, 106 Ill. 584; *Langley v. Boston & M. R. Co.* 10 Gray, 103; *Freeman v. Minneapolis & St. L. R. Co.* 28 Minn. 443, 7 Am. & Eng. R. R. Cas. 410; *Albott v. Johnstown R. Co.* 80 N. Y. 27; *Naglee v. Alexandria & F. R. Co.* 83 Va. 707; *Nelson v. Vermont & C. R. Co.* 26 Vt. 721.

Fauntleroy, J., delivered the opinion of the court:

This is a writ of error to a judgment of the Circuit Court of Alexandria City, rendered on the 26th day of September, 1888, in an action of trespass on the case brought in said court by the appellee, George Washington, Jr., plaintiff, against the Virginia Midland Railway Company, defendant.

The declaration claims \$30,000 damages for injuries alleged to have been inflicted upon the plaintiff, George Washington, Jr., while he was serving the said Virginia Midland Railway Company as a fireman upon one of its freight trains, by the negligence of the servant of the said Company, which, on the 23d day of August, 1888, in Orange County, Virginia, caused the train upon which the appellee was so employed at the time as fireman, as aforesaid, to collide with the passenger train of the said Company, marked on the schedule as No. 53.

Soon after the institution of this suit in the Circuit Court of Alexandria City the said Washington brought a like suit for the same cause of action, and for the same amount, \$30,000 damages, in Orange County, where the accident occurred, against the Richmond and Danville Railroad Company, which suit is now pending in the circuit court of said county.

There was a demurrer to the whole declaration, and especially to each count thereof. The Circuit Court of Alexandria City overruled the demurrer, and compelled the defendant to go to trial. In the progress of the trial the defendant objected to the introduction of the testimony of the plaintiff until a foundation was laid, and then moved to exclude it, upon the ground of total irrelevancy to the case alleged in the declaration, it not only failing utterly to prove the alleged relation of the plaintiff, Washington, to the defendant, Virginia Midland Railway Company, as its employé at the time and place of the accident, and that the said accident or injury was caused, done or occasioned by the said defendant Company, but distinctly and absolutely proving that the said plaintiff was in the employment of the Richmond and Danville Railroad Company, then and there, as fireman upon a train of the said company, and that the injury was done by the said train being collided with another train of the said company, under the management, control and conduct of another servant or employé of the said Richmond and Danville Railroad Company—viz., the conductor on the said passenger train No. 53.

But the court overruled the motion to exclude the said testimony, and not only permitted it

So the lessor company was held responsible to a passenger on a train of the lessee who was improperly expelled by a servant of the lessee, in *Washington, A. & G. R. Co. v. Brown*, 84 U. S. 17 Wall. 445 (21 L. ed. 675).

But the servant of a railway company operating 7 L. R. A.

under a lease from another company, made without authority of law, cannot recover against the lessor for injuries sustained by the negligence of his employer or of its officers or agents. *East Line & R. R. Co. v. Culberson*, 3 L. R. A. 567, 73 Tex. 375.

to go to the jury, but instructed them that "the defendant could not, by the lease shown in evidence, exonerate itself from the duties and liabilities imposed upon it by law, and that it was the duty of the jury to consider the evidence before them as though the said motion (to exclude) had not been made." To which ruling of the court the defendant excepted.

Upon this evidence, and this instruction, the jury rendered a verdict for \$10,000 damages for the plaintiff, which verdict the defendant moved the court to set aside; but the court overruled the motion, and entered judgment upon the verdict. To this action of the court the defendant excepted, and the case comes up to this court upon the three bills of exceptions to the said rulings of the court.

The exceptions may be all grouped, as the demurrer to the declaration, the motion to exclude the testimony of the plaintiff, and the instruction given by the court to the jury, all present the question for this court to decide—viz., the liability of the defendant, Virginia Midland Railway Company, to respond in damages to the suit of the plaintiff, Washington, for injuries inflicted on him while he was an employé of the Richmond & Danville Railroad Company, by the negligence of the conductor of another train of the said Richmond & Danville Company, which company had leased the said Virginia Midland Railway, by virtue and authority of an express Act of the General Assembly of Virginia, for ninety-nine years, and was in the exclusive and absolute operation, possession, management and control of the same when its own employé, Washington, a fireman upon one of its own freight trains, was run into and injured by another train of its own, under the conduct of another employé of its own—the conductor of its passenger train No. 53—without the knowledge or complicity of the Virginia Midland Railway Company, defendant, who, by solemn Act of the Legislature, had ceased to exist, so far as operating its road, and who had given up its road before this appellee was employed by the Richmond & Danville Railroad Company, and who owned and operated no trains, employed no servants, and had no knowledge of, contract or affinity with, the plaintiff whatever, at any time or in any way.

We are of opinion that the circuit court erred in not excluding the evidence, after it manifestly failed to prove the case set out by the declaration against the defendant, and did, as manifestly, show an entire disparity between the *allegata* and the *probata*; and it aggravated the error, to the prejudice of the defendant, by its instruction, which, without defining what were the "duties and liabilities" which the defendant Company could not escape by the lease in evidence, virtually told the jury that one of the "duties and liabilities" to the public of the Virginia Midland Railway Company is to pay damages to the employés and servants of the Richmond & Danville Railroad Company who are hurt by the negligence of the Richmond & Danville Railroad Company, provided the accident occurred on the road-bed of the lessor, Virginia Midland Company. The court erred in refusing to set aside the verdict. It is established beyond question or controversy, by the evidence of the appellee, and by the pleadings

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in the record, that the appellee, Washington, was not in the employment of the Virginia Midland Railway Company, which had, before Washington entered the service of the Richmond & Danville Railroad Company, by solemn and formal lease, for a term of ninety-nine years (as it was duly authorized to do by Acts of General Assembly of Virginia, passed February 15, 1866, and July 11, 1870), surrendered and transferred the sole and exclusive use, management, possession and control of itself and of everything pertaining to its autonomy, rights, powers and duties (except only so much as to keep itself alive) to the Richmond & Danville Railroad Company, of which said lease and transfer notice was given in the most public manner, by the authorities of the Virginia Midland Railway Company, that they had abdicated, and by the Richmond & Danville Railroad Company that they had acquired and assumed, control of the Virginia Midland Railway, and the pay-rolls and vouchers running through the whole period of Washington's employment, all signed by him and all paid by the Richmond & Danville Railroad Company, show conclusively that Washington knew of the change of ownership and management, and knew whose "servant he was to obey." He had contracted with the Richmond & Danville Company, was in its service when he was hurt, and he was injured by the negligence of the conductor in the employ of the said company. These facts are all proved in the record, and there is no question of the fact of negligence, and of the severe injuries inflicted on the plaintiff, Washington, nor of his right to recover damages for the wrong and injury; but it is contended by the plaintiff, and was held by the circuit court, that, in spite of the lease, the contract relation of master and servant between appellee, Washington, and the Richmond & Danville Railroad Company, and of the negligence of that company; by whom and whose conductor he was injured, the defendant, Virginia Midland Railway Company, is liable to the suit of the plaintiff, Washington, for injuries received in the service of the lessee, Richmond & Danville Railroad Company, and which were caused by the negligence of that company.

A corporation exists and acts towards the public through and by its agents and agencies, but there is a discrimination between its duties, obligations and liabilities to the public, as such, and its duties and responsibilities to its own necessary employés, to whom it stands in the relation of master and servant by contract of employment, which may, or may not, implicate the risk or hazard of the employment. That question obtains between Washington and the Richmond & Danville Railroad Company, in whose service and by whose servant he was injured. His case against the defendant is not within the reason or the rule of the numerous cases decided by this and other courts, involving the policy and law of the duty and responsibility of railway carriers to the passenger public, nor even the duty and measure of redress due for injuries inflicted by the negligence of their own servants upon those whom they employ and contract with to enable them to discharge their public duties. But the decision of the Circuit Court of Alexandria City, under review, is that the

lessor, Virginia Midland Railway Company, is liable to be sued and mulcted in damages by the employes of the lessee, Richmond & Danville Railroad Company, for injuries caused in the service of that company to its own employes by the negligence or malfeasance of the lessee company's own servants, *non obstante*, the Act of the General Assembly of Virginia authorizing the lease of its road and the transfer of all its rights and powers, and the actual lease or transfer thereof in pursuance of the said legislative authority given and enacted by the same grantor of its charter, and in as public a law, and as much in the interests of the public, as the charter itself.

It is contended, however, by the appellee, and was so decided by the court, that, as the Act of the General Assembly authorizing the Richmond & Danville Company to acquire, "by lease or otherwise," of the Virginia Midland Railway "its franchises and property, and to hold, use and enjoy the same in like manner as the proper franchises and property of the Richmond & Danville Railroad Company are held, used and enjoyed," does not, expressly and in terms, grant a positive exemption from the liabilities imposed upon it by law under its charter, the lease and transfer of its road for ninety-nine years to the absolute and entire and exclusive use, conduct and control of the Richmond & Danville Railroad Company does not operate in law to relieve it from liability—not to the passenger public, or even to its own servants and for its own negligence, but to the working agencies employed by the Richmond & Danville Railroad in operating and discharging its own duties to the public, and for the negligence and wrong-doing of the Richmond & Danville Company's own servants.

This construction is not tenable in law or reason, and is not warranted by the broad scope, comprehensive language and obvious intentment of the Act of the General Assembly, nor by the act of the parties to the lease. "The lease of a railroad, under due authority of law, effects a transfer of rights and liabilities in its management, so that the corporation owning the railroad is discharged from responsibility for the lessee's torts," *Pierce, Railroads*, 288, and *note*, citing *Mahoney v. Atlantic & St. L. R. R. Co.* 68 Me. 68; *Ditchett v. Spuyten Duyvil & P. M. R. Co.* 67 N. Y. 425, 5 Hun, 165; *Norton v. Wiswall*, 26 Barb. 618.

"Statutes imposing police and other duties and liabilities on railroad companies are usually construed to apply to companies and persons who are in possession, under contracts with or by permission of the company owning the railroad." *Pierce, Railroads*, 283, 244.

"A railway cannot, without express statutory authority, divest itself of its franchise, or delegate to others the performance of that duty which the Legislature has imposed upon it." "On the other hand, where a railway, under due authority of law, has leased its line to another railway, the lessor railway is not liable for torts committed by the lessee railway in the operation of the line. Yet in *Singleton v.*

Southwestern R. Co. 70 Ga. 464, where a lease had been authorized by statute, the lessor railway was held liable to a passenger who was injured by the negligent operation of a train by the servants of the lessee railway, upon the ground that the Statute authorizing the lease did not, in terms, exempt the lessor railway from liability, but this case is certainly in conflict with the current of authority." *Patterson, Railway Acct. Law*, §§ 130, 131.

In the case of *Mahoney v. Atlantic & St. L. R. R. Co.* 68 Me. 68, it was decided that the lessee company, for the purposes of the lease, became, *pro hac vice*, the owner of the road, and that, while the lessee operates the road under its lease, the lessor is not liable, under its charter or the statutes of the State, for an injury sustained thereon by a passenger, caused by the wrongful acts of the agents or servants of the lessee towards him; nor is there, in such case, any privity, either of contract or by implication of law, between the passenger and the lessor as common carrier of passengers by which it is rendered liable for such an injury. The remedy of the passenger for an injury thus caused is against the lessee, who had the exclusive use, care, direction and control of the road, and with whom alone the passenger contracted. See the case of *Georgia R. & Bkg. Co. v. Friddell*, 79 Ga. 489; *Nugent v. Boston, C. & M. R. Co.* 5 New Eng. Rep. 865, 80 Me. 63-72.

All the cases cited and relied on by the appellee to support his suit against the Virginia Midland Railway Company for damages for injuries inflicted by the Richmond & Danville Railroad Company upon Washington, its own contract servant and agent, in the operation of a road which was exclusively its own road, under a lease for ninety-nine years, by special legislative consent, given in a special Act of the General Assembly of Virginia, of as much public importance and as high a sanction as the original charter of the lessor company, are inapplicable to the facts of this case, which take it wholly out of the purview and the policy of the law which holds railroad companies to the strict and inexorable duties which they owe to the public, and to their own servants withal; but not one of them involved the question of liability of a lessor company to an employe of the lessee company, for injuries inflicted by the lessee company upon its own agent or servant in its own operations.

There is a proper suit of the appellee pending in the Circuit Court of Orange County—the scene of the accident—against the Richmond & Danville Railroad Company, in whose service alone Washington was, and by whose conductor he was injured, and in that suit the question of gross negligence, the extent of his injuries and the just measure of his redress must be adjudged. The verdict in this suit must be set aside and the cause dismissed.

There is error in the judgment of the Circuit Court of Alexandria City, as shown by this record, and it must be reversed and annulled.

Reversed.

CALIFORNIA SUPREME COURT.

PEOPLE of the State of California, *ex rel.*
Ben MORGAN, *Appt.*,

v.

R. Y. HAYNE *et al.*, *Respts.*

(....Cal....)

1. An Act providing for the appointment by the supreme court of commissioners "to assist" "in the performance of its duties" "under such rules and regulations as said court may adopt" is not in violation of the Constitution.
2. Commissioners "to assist" a court do not usurp judicial functions or exercise any judicial power by taking such transcripts and briefs as the court shall assign to them, and reporting the result of their examination thereof, with opinions and suggestions merely for the consideration of the court, as to the proper disposition of the cases.
3. The possibility that the court may be unduly influenced by the reports and opinions of commissioners appointed to assist it does not affect the question of the constitutionality of the Act providing for their appointment when it is shown that they are not usurping judicial power.

(February 6, 1890.)

APPEAL by relator from a judgment of the Superior Court for the City and County of San Francisco in favor of defendants, and from an order denying a motion for new trial in a proceeding to test the right of defendants to exercise judicial powers as allowed in the capacity of Supreme Court Commissioners. *Affirmed.*

The case sufficiently appears in the opinion.

Mr. George A. Johnson, Atty-Gen., with Mr. Ben Morgan, in propria persona, for relator.

Messrs. Samuel M. Wilson and John Garber, for respondents:

That commissioners are not judges and may lawfully be appointed to assist in the determination of causes, see

Janeville Cotton Mfg. Co. v. Ford, 55 Wis. 200; *Grinstead v. Buckley*, 82 Miss. 148; *Ex parte Gray*, Bailey, Eq. 77; *Carson v. Smith*, 5 Minn. 78; *Phillip's App.* 68 Pa. 180; *Stewart v. Turner*, 8 Edw. Ch. 458; *Dunlap v. Kennedy*, 10 Bush, 539; *Hardy v. Burton*, 70 Ill. 509; *Young v. Ledrick*, 14 Kan. 100; *United States v. Berry*, 2 McCrary, 58; *Middleton v. Bankers & M. Tel. Co.* 82 Fed. Rep. 524.

Fox, J., delivered the opinion of the court:

This case comes to us on appeal from the Superior Court of the City and County of San Francisco. It is one of such commanding public importance, involving, as it does, the course of procedure in, and validity of, many of the judgments rendered by this court, that upon motion it has been advanced on the calendar, and is given precedence in the order of determination. It is a proceeding against the defendants, R. Y. Hayne, H. S. Foote, I. S. Belcher, J. A. Gibson and P. Van Clief, the commissioners of this court, to inquire "by what authority they claim to exercise any ju-

dicial powers within the State of California, and particularly of considering and determining cases on appeal to the supreme court of said State."

The complaint charges: (1) that the defendants are exercising the office of judges of the Supreme Court of the State of California, and as such claim the right to and do pass upon cases appealed from the superior courts of the State to the supreme court, and decide the same by virtue of their appointment as supreme court commissioners; (2) that the Act of the Legislature creating the commission, approved March 12, 1885, and the Acts amendatory of and supplementary thereto, are contrary to the provisions of article 6, §§ 1-4, of the Constitution of the State of California, and are null and void; (3) that the only authority of the defendants to consider and pass upon appeals to the supreme court is by virtue of their appointment as commissioners, and the authority conferred under and by virtue of said Acts; (4) that they and each of them are usurping the office of supreme judge of the State of California, and exercising the judicial powers of the State, vested solely in the supreme court by the Constitution and laws of the State; and (5) that their only claim so to do is by virtue of their appointment under the Acts of the Legislature aforesaid.

The defendants answer, denying that they or either of them claim, or have ever claimed, or that they or either of them have ever exercised, or are now exercising, the office of judges of the supreme court; that they or either of them, as such or otherwise, claim the right to or do pass, or have ever passed, upon cases, or any case, appealed from the superior court to said supreme court, or to decide, or have decided, the same, by virtue of their appointment as supreme court commissioners or otherwise; deny that they or either of them claim, or have ever claimed, the right or authority to hear or determine causes, or any cause, on appeal from the superior court to the supreme court; deny that they or either of them do claim, or have ever claimed, the right to exercise any judicial power within the State; and deny that they or either of them are or ever have been usurping the office of supreme judge of the State of California, or exercising any judicial office or function whatever. They further aver that they are commissioners appointed under the Act of the Legislature approved February 15, 1889, to provide for the appointment by the supreme court of five commissioners, to be known as "commissioners of the supreme court," etc., and that the only work which they or either of them perform, or claim the right to perform, or have ever performed, or claimed the right to perform, by virtue of their appointment or otherwise, consists in the preliminary examination of the records and briefs in cases referred to them by the supreme court, or the justices thereof, and of the authorities cited in such briefs, and in the making to the court, and the justices thereof, of written suggestions and opinions of the defendants, or some of them, as to the proper disposition of said causes, so referred

as aforesaid, for the consideration of the said court and justices in the determination and disposition of said causes by said court and the justices thereof; that said suggestions and opinions have no force or effect whatever as judgments or decisions, nor are they filed or recorded as such; that neither of the defendants or any of them ever enter or direct any judgment or decision whatever in any case whatever, or ever have entered or caused to be entered any judgment, order or decision whatever, in any case whatever, or ever claimed the right so to do; that neither they nor any of them do perform or exercise, or ever have performed or exercised, any other function than as above stated. They further deny that they or either of them hold or claim to hold their positions as such commissioners under the said Act of March 12, 1885, or any Act amendatory thereof or supplementary thereto.

On the issues thus framed trial was had, resulting in a judgment in favor of the defendants, and dismissing the action. Motion for a new trial was made, and heard upon a statement of the case, and denial, when plaintiff appealed from the judgment, and from the order denying the motion for new trial.

Upon the record, and as the case is presented in this court, there are but two questions for consideration: (1) Is the Act under which it is conceded that these defendants were appointed—the Act entitled “An Act to Provide for the Appointment by the Supreme Court of Five Commissioners, to be Known as ‘Commissioners of the Supreme Court,’ and to Appoint a Secretary Therefor, to Relieve Said Court from the Overburdened Condition of its Calendar, and to Provide for the Compensation of Said Commissioners and Secretary, and to appropriate Money therefor,” approved February 15, 1889 (Stat. 1889, p. 18)—in conflict with the Constitution? (2) Are the defendants usurping powers not conferred by the Act?

1. The first section of the Act is the only one which needs to be considered in the discussion of either of these questions. It reads as follows: “Section 1. The Supreme Court of the State of California shall immediately, upon the expiration of the term of office of the present supreme court commissioners, appoint five persons, of legal learning and personal worth, as commissioners of said court. It shall be the duty of said commissioners, under such rules and regulations as said court may adopt, to assist in the performance of its duties, and in the disposition of the numerous causes now pending in said court undetermined. The said commissioners shall hold office for the term of four years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a judge of said court, payable at the same time and in the same manner. Before entering upon the discharge of their duties they shall each take an oath to support the Constitution of the United States and the Constitution of the State of California, and to faithfully discharge the duties of the office of commissioner of the supreme court to the best of their ability. The said court shall have power to remove any and all members of said commission

at any time, by an order entered on the minutes of said court, and all vacancies in said commission shall be filled in like manner.”

This section contains all that there is in the entire Act on the subject of the powers or duties of the commissioners. Every presumption is, as is the case with all legislative enactments, in favor of the constitutionality of the provision. It was enacted by a senate and Assembly, every member of which was sworn to support the Constitution, and is presumed to have passed his judgment to the effect that it is not in conflict with that instrument. It was approved by the Chief Executive, who was under like obligation, and whose judgment is usually exercised with even more deliberation than can be had in the hurry and confusion often attending upon the action of legislative bodies. The judgment of these two great departments of the government is not to be lightly disregarded or turned aside. Yet it is the province of the Judicial Department to finally determine the question of the constitutionality of this or any other statute law, whenever a litigant shall challenge the judgment of the other departments, and appeal to this for that final determination. It is also the duty of the Judicial Department, of its own motion, to pass upon and determine this question for itself, whenever it is called upon to act, in the exercise of its own jurisdiction, under a statute like the one under consideration. This court was so called upon to act when, on the 13th day of May, 1890, it appointed these commissioners, under and in conformity with the provisions of said Act of February 15, 1889. By the very act of appointment it, by necessary implication, if not by direct ruling, held the Act to be a valid law under the Constitution; and this holding was not without direct precedent, even in this State and under the present Constitution. Under a similar Act, approved March 12, 1885, this court as then constituted appointed a commission for a like purpose, and with like powers, consisting of three members, and by such appointment recognized the Act as a valid law under the Constitution. From that time until the creation of the present board, under the Act of 1889, the commissioners so appointed exercised all the functions that are authorized to be exercised, or are in fact exercised, by these defendants under the said Act of 1889. That commission and the present one have, unchallenged, assisted the court in the examination and preparation for decision of over a thousand cases, wherein the judgments were *coram non jure*, if it be true, as claimed by the relator, that the Act authorizes the commissioners to exercise functions, and they have exercised functions, judicial in their character, and which, by the Constitution, are conferred alone upon the justices of this court. To reverse a construction which must of necessity have been given to these statutes before or at the time of the appointment of these commissioners, and which has been acquiesced in for so long a time, and thereby produce such a result as would follow such reversal, is a thing which ought not to be done by any court, unless there is found the gravest necessity for doing it. If the question of the constitutionality of the Act was even doubtful, after such a lapse of time and such

a practice under the Act, the doubt ought to be resolved in favor of its validity, and the case be left to rest on the doctrine of *stare decisis*.

But to our minds there is no doubt about the validity of the statute. In the language of the court below: "The Act in question is not open to objection of a constitutional character. In order to bring it into conflict with the Constitution, a strained construction of its words becomes necessary, as well as an utter disregard of the natural import of those words. . . . The phrase 'assist the court' must, for the purpose of creating a conflict, be understood not merely to facilitate the court, which is the natural import,—to lessen its labors,—but, beyond this, to assume the exercise of, or a participation in the exercise of, the appropriate function of the court to decide causes; that the commissioners are to take part in that decision as the members of the court themselves take part in it; in short, it is necessary to say that 'assistance' means 'supersession.'" Nothing in the language used, or in its context, will justify any construction which will bring the provisions of this Act in relation to the powers or duties of the commissioners in conflict with any provision of the Constitution. If the language employed was capable of two or more constructions, any one of which would be in harmony with the Constitution, it would be our duty to give it that construction. But, fortunately, we are not driven to the selection of one of several possible constructions. There is but one "warranted by the natural import of the language employed." One who attacks the constitutionality of such an enactment must not only overcome the strong presumption in favor of its validity, but he must show that, by the natural and necessary import of the language, it is clearly in conflict with the supreme law. That has not been and cannot be done in this case. Not only is there an entire failure to confer judicial power upon these commissioners but there is also an entire absence of an attempt to interfere with the exercise of the power conferred by the Constitution upon and belonging to the Judicial Department of the government. The Legislature has provided for the appointment and compensation of these commissioners. They are given no power except to "assist the court," under such rules and regulations as it may adopt in the performance of its duties.

The great burden of the work of this court is that which is necessarily done in sifting the causes, to ascertain, from the mass of matter brought here in each case, the truth and the law bearing upon it, preparatory to the processes of adjudication and judgment. To say that the court cannot be assisted in this preliminary work by men sworn to fidelity, learned in the law, unconnected with and unbiased in the causes, is to deny us unbiased assistance in the very direction in which we are bound to receive it, and do receive it, in every cause that comes before us, from counsel not equally free or likely to give us unprejudiced opinions and statements; and to deny us such assistance as courts of every grade have been accustomed, time out of mind, to receive, without objection, in this country and in England. It is no more unconstitutional for this court to receive such

assistance from commissioners designated by itself, or from *amici curiæ*, than to accept similar assistance from the statements of fact and arguments of the counsel in the cause. As well might it be said that section 206 of the Code of Civil Procedure, which provides that the secretaries and bailiffs of this court shall hold their offices at the pleasure of the justices, and "shall perform such duties as may be required of them by the court or the justices thereof," is unconstitutional, and conferred upon those officers judicial power. "The power to hear (examine) causes, and report facts or conclusions to the court for its judgment is not judicial, within the meaning of the Constitution." *Shoults v. McPheeters*, 70 Ind. 373.

"No action which is merely preparatory to an order or judgment to be rendered by some different body can be properly termed judicial."

It is the inherent authority not only to decide, but to make binding orders or judgments, which constitutes judicial power; and the instrumentalities used to inform the tribunal, whether left to its own choice or fixed by law, are merely auxiliary to that power, and operate on persons or things only through its action and by virtue of it." *Underwood v. McDuffee*, 15 Mich. 861.

The only case cited by the relator in support of his argument against the constitutionality of this Act is that of *State v. Noble*, decided by the Supreme Court of Indiana, and reported in 118 Ind. 350, 4 L. R. A. 101. While this case, or that of any other state court of last resort, is not binding as authority upon this court, it would be strongly persuasive, if the Act of the Legislature under consideration was not so unlike our own as entirely to defeat the purpose for which it is cited here. There, as here, the Legislature provided for the appointment of a commission to assist the supreme court in the performance of its duties. But there it provided that the Legislature should appoint the commissioners, and in case of vacancy in the commission the same should be filled by appointment made by the governor, thus taking away from the judicial department the power to select its own assistants, and thrusting upon the court men selected by the political and executive departments of the government. *Chief Justice Elliott*, who wrote the opinion, is widely and favorably known, not only for his legal learning and ability, but for the tenacity with which he insists upon the independence of the several departments of the government, and resents any encroachment upon the powers and rights of the judiciary. The only question which he was called upon necessarily to decide in the case was as to the right of the Legislature to appoint, or to provide for the appointment of, by any other officer than the court itself, commissioners who should act as assistants to the court in the performance of its duties. This question he discusses ably, and finally declares: "It cannot be doubted that judicial power includes the authority to select persons whose services may be required in judicial proceedings, or who may be required to act as the assistants of the judges in the performance of their judicial functions, whether they be referees, receivers, attorneys, masters or commissioners. . . .

As the judicial power embraced the authority to select 'assistants and ministers' at the time the Constitution was adopted, that right was sanctioned and confirmed, for it was the power then existing that was so carefully and fully vested in the courts. It was, as we have shown, a well known and fully recognized principle that courts should, as part of the judicial power, have the right to choose their own assistants, and the Constitution has secured and confirmed that principle beyond the power of the Legislature to shake it." The court then discusses other features in the Act, not found in our own, conferring upon the commissioners certain powers not conferred by our Act, and which in their nature constitute a part of the judicial power of the court; and, in view of these several features, holds the Act to be unconstitutional. But, as we read it, there is nothing in the decision to indicate that the Act here under consideration would have been held by that court to be in conflict with the Constitution, or that the Legislature might not provide for the court itself appointing commissioners to assist it or its justices in the preliminary and preparatory work necessary to the final adjudication and determination of the causes before it.

2. In the investigation of the second question involved, one of the justices of this court long-est in commission,—one who has been upon this bench ever since the organization of the court under the present Constitution,—and one of the commissioners longest in service, were called and examined as witnesses, and it was agreed that the other justices and commissioners would testify substantially the same way. From the testimony thus elicited it was distinctly and clearly shown that the answer of the defendants was and is true; that they do not usurp the functions of judges of this court, and do not exercise any judicial power whatever. They receive, not from the clerk—for they have no communication with him,—but from the secretaries of the court, such of the transcripts and briefs as the court shall have assigned to them, and make a critical examination of the transcripts, briefs and of the authorities cited by counsel, and report to the court the result of such examination, with their opinion thereon, accompanied with a citation of the authorities, and also with frequent references to folios of the transcript, to aid the court in its investigations. These reports and opinions have no force or effect whatever as judgments of the court, do not go to the clerk, but through the secretaries come back to the judges, and they never reach the office of the clerk of the court, or become in any manner public, unless, upon examination by the justices themselves of the record, the briefs and the opinions so furnished by the commissioners, they are approved and adopted by a constitutional number of the justices, and the judgment of the court is ordered in conformity therewith. Many of these reports and opinions are never approved and never see the light. Others of them are used in part, and only in part. In every case, when the judgment is rendered, it is the judgment of the court, and not of the commissioners. Nothing originates before these commissioners, and nothing terminates with their labors or their opinion.

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The conclusions to which they arrive are but opinions submitted for our adoption, if we think they are founded in reason and law. Hence their reports and opinions are neither decisions nor infallible guides, but they are serviceable instrumentalities to aid us in performing our functions. The commissioners exercise no power *proprio vigore*. The court acquires the jurisdiction, and the court renders the judgment upon the controversy. Therefore the whole exercise of the judicial power is by the court, the commissioners acting only in an intermediate capacity, as auxiliary to the court in the ascertainment of certain facts and law necessary to its enlightenment in giving the proper decision and judgment.

Another objection urged against this commission is that the reports and opinions of the commissioners are likely to or may have an undue influence on the court, or the justices thereof, in their subsequent consideration of the cases, and in the rendition of judgments thereon. A complete answer to this, so far as this action is concerned, is that, if it has any force as an objection, it is not the fault of the Act, but of the court. It does not go to the question of the constitutionality of the law, nor does it tend to show that the commissioners are usurping judicial power. Neither do we see any good reason to apprehend that a careful and impartial collation of the facts and points in a case, with references to the transcript for the verification thereof, made by men skilled in that service, and entirely unbiased and uninterested in the cause, accompanied by an expression of opinion as to the law and reference to the authorities to sustain it, as well as a reference to the authorities claimed to be adverse to such opinion, is any more likely, or even as likely, to improperly influence the court in arriving at a judgment, as a similar service rendered by retained counsel, acting under the spur of retainer, and in the direct interest of their clients. And such assistance the court is constantly bound, under the law, to receive, and give to it most careful consideration. If this objection has any foundation in fact, it addresses itself to the Legislature, and not to the court.

The judgment and order appealed from are affirmed, and it is further ordered that the remittitur herein issue forthwith.

We concur:

McFarland, J.; Sharpstein, J.; Thornton J.; Paterson, J.

Beatty, Ch. J.:

I concur in the judgment of affirmance, and in most of the reasoning of Justice Fox's opinion, but I do not think that a determination now that the Act in question is unconstitutional would have the effect of invalidating judgments heretofore rendered in cases referred to the commission, and based upon their opinion or report. Therefore I do not rely at all upon the doctrine of *stare decisis* as a ground of my conclusions. And I do not agree that there is nothing in the opinion of Justice Elliott, in the case of *State v. Noble*, to indicate that he would have held our Act unconstitutional. On the contrary, he expresses views from which, in my opinion, such a conclusion must follow, but I do not assent to his views. It seems to

me that the point at which he goes wrong is where he declares that the duty of writing its opinions is specifically imposed upon the supreme court by the Constitution. If I held to this view, I confess I could see no escape from the conclusion that the duties we assign to our commissioners, and which are performed by them, involve a delegation by us, and a usurpation by them, of judicial functions. But I see nothing in the language of the Indiana Constitution, as quoted by Judge Elliott, and nothing in the language of our own Constitution, to warrant the conclusion that the writing of opinions is specifically imposed upon the members of the court. The precise language of our Constitution is as follows: "In the determination of causes, all decisions of the court in bank or in departments shall be given in writing, and the grounds of the decision shall be stated." Article 6, § 2. In order to comply with this injunction, it is undoubtedly necessary that the court, or some member to whom the duty is assigned, shall in most cases prepare a written opinion; but there may be, and in fact are, many cases in which the labor of formulating a statement of the grounds of the decision has been performed in advance, or may be properly delegated to others. It not infrequently happens that the judge of the superior court prepares an opinion fully covering every proposition involved in a case, and that his opinion is found to be in all respects correct. In such cases there is certainly no necessity for the preparation of a new opinion here, which could differ in form only from the opinion of the trial judge. On the contrary, this court may, and frequently does, adopt the opinion of the trial judge as its own, and for the reasons therein stated affirms the judgment or order appealed from. *Burrell v. Ilaw*, 48 Cal. 223; *Meredith v. Sacramento Co.* 50 Cal. 438; *Williams v. Williams*, 73 Cal. 101.

Many similar instances might be cited from the reports of this and other States, and in this case we might well have adopted the opinion of Judge Wallace of the superior court as the ground for affirming his judgment. Sometimes a proposition covering the whole or one or more branches of a case is found to be so aptly and correctly stated in the printed argument of counsel that the court can do no better than to adopt it as the ground of its decision. *Sneath v. Griffin*, 48 Cal. 438; *Brown v. Burbank*, 64 Cal. 101.

Can it be said that this is a violation of the Constitution? I certainly think not. The object of the constitutional requirement is not to compel the judges to formulate opinions in their own language, but to put upon record the grounds of their decisions, for the guidance of the public in their business transactions. The cases which are referred by us to the commission are those which are fully presented on the papers. The object of the reference is to obtain a report containing a brief and logical statement of the material facts exhibited by the record, and of the legal propositions upon which the judgment depends. When that report is submitted in the form of an opinion by one or more of the commissioners, with a suggestion that for the reasons stated a particular judgment should be given, it then becomes the duty of the court to compare the report with the record, and with the printed arguments of counsel, and to determine for itself whether the reported opinion ought to be adopted, modified or rejected. If upon such examination the court finds that the facts and the law have been correctly stated by the commission, and it adopts the opinion as its own, the case is not different from those in which the opinion of the trial judge is adopted. The court, though not the author of the opinion, by adopting it makes it its own. "But," it is asked, "if the court, after receiving the report of the commission, re-examines the case for itself, what is the use of the commission? It saves the court no labor, and does nothing to facilitate the disposition of causes." This is a wholly mistaken assumption. The examination of the record of a case and the argument of counsel, for the purpose of ascertaining the material facts and the law bearing upon them, is a very large part of the labor of decision, but it is by no means all. There are some persons in whom the literary faculty is highly developed, to whom the writing of opinions may be a trifling task, but I apprehend that, according to the experience of most judges, the putting of their opinions in form, even after their minds are fully made up, is a very serious labor, requiring the expenditure of a large portion of the time at their disposal. By the labors of the commission this time and much serious labor is saved to the court in a large proportion of the cases referred to them, without any abdication or delegation by the court of its constitutional functions.

INDIANA SUPREME COURT.

CITIZENS STREET R. CO., *Appt.*,
v.

James E. TWINAME.

(.....Ind.....)

1. Damages for loss of services of plaintiff's wife by reason of personal injuries are not confined to the value of her services within the household, but may include the value of her services as manager of her husband's business where she was thus engaged at the time of the injury, without any contract or expectation of pay for her services.

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2. A married woman's right to carry on business on her own account does not prevent her from giving her services to her husband in carrying on his business, or prevent him in that case from recovering the value of such services in an action to recover damages for personal injuries inflicted upon her.

(January 7, 1890.)

APPEAL by defendant from a judgment of the Superior Court for Marion County in favor of plaintiff in an action to recover dam-

ages for personal injuries inflicted upon plaintiff's wife through defendant's alleged negligence. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs. F. Winter, John S. Duncan and H. C. Allen* for appellant.

Messrs. Miller & Elam for appellee.

Olds, J., delivered the opinion of the court:

This action was brought by the appellee against the appellant in the court below for damages sustained by the appellee on account of alleged injuries received by his wife while she was a passenger on appellant's car. By the complaint the appellant sought to recover for medical attendance furnished, and loss of service and the society of his wife. It is alleged with particularity in the complaint that before and at the time of the injury the plaintiff was carrying on a large and profitable millinery business, in which his wife was acting as the manager, and that the business was rendered more lucrative and profitable by reason of her personal services in the management of said business, and her services were of great value to the plaintiff, to wit, \$2,000; that by reason of the injury she had been unable to perform such duties as she was accustomed to perform in the management of said business, whereby the plaintiff had suffered damage. Issue was joined by answer in general denial, and trial had resulting in a verdict and judgment for the appellee. On the trial of the cause evidence was admitted, over the objection of the appellant, as to the value of the services of the wife of the appellee in the capacity in which she served the appellee as fore-woman, and the court instructed the jury to the effect that, if the plaintiff was the sole owner of the store, and his wife served him as fore-woman or manager of the store, the plaintiff would be entitled to recover whatever loss, if any, he had sustained on account of being deprived of his wife's services, in whole or in part, in his household affairs or business, by reason of her disability.

It is contended by counsel for appellant that the plaintiff cannot recover for the services of his wife as a clerk or assistant in his business; that the right of the husband to recover damages for loss of services of the wife is limited to services within the household; that by the Statute (§ 5180, Rev. Stat. 1881) "a married woman may carry on any trade or business, and perform any labor or services, on her sole and separate account. The earnings and profits of any married woman accruing from the trade, business, services or labor, other than labor for her husband or family, shall be her sole and separate property," and that the wife is entitled to recover for her own services. This Statute in no way changes the situation between husband and wife. It neither attempts to exonerate her from the performance of any proper services for the benefit of the husband, either in the household or in his business, nor does it attempt to create any liability on the part of the husband to pay for such services. It very properly makes the wife the sole owner of her earnings, when she performs services for persons other than her husband, and of profits made from any trade or business carried on by her. It enables the wife, if she

chooses so to do, to carry on a trade or business on her own account, and to perform services for persons other than her husband, and in such cases she is the owner of the profits and earnings.

The Statute was passed to remedy an evil, and, when the wife is compelled to support herself or her family by engaging in business on her own account, or performing labor for persons other than her husband, or where circumstances exist making it desirable, and for the best interest of the family, that the wife engage in business, to give to the wife in such cases the same right to control her business and earnings as if she were sole; but it in no way affects or changes the marital relations, and the Statute has no application in a case where the wife is not carrying on a separate trade or business, or performing services for persons other than her husband. The wife has the same right to give to her husband her services either in the household or in his business as she had before the passage of the Statute, and the same obligation rests upon her to discharge her duty to her husband, and upon the husband to discharge his duty and obligation to his wife, as did before its passage. We have under consideration a case not in any way affected by the Statute. The husband was engaged in the millinery business, and his wife, by reason of their marital relations, devoted her energy and services to the business for the benefit of the husband without any contract or expectation of pay for her services, and she sustained an injury on account of the negligence of the defendant, and by reason of which the husband was deprived of her services in his business, which the wife was accustomed to perform, but was prevented from performing by reason of the injury. There might be circumstances existing which would entitle the wife, in an action for damages, to recover for the value of her own services, but *prima facie* the husband is entitled to recover for such services, and especially this is true when the wife is not engaged in carrying on any trade or business on her own account, or performing labor for persons other than her husband, and, on the contrary, is voluntarily rendering service for the benefit of the husband; and he is entitled to recover as well for one class of services as another. In other words, the husband is entitled to recover for the damage sustained on account of the loss of the services of the wife, and the value of her services, and loss sustained by reason of her inability to perform them, must necessarily depend on the character and value of the services which she is capable to perform, and is accustomed to perform for the husband. *Ohio & M. R. Co. v. Cosby*, 107 Ind. 82, 4 West. Rep. 464; *Belford v. Crane*, 16 N. J. Eq. 265, 84 Am. Dec. 155, and *note*, 163; *Cramer v. Reford*, 17 N. J. Eq. 367, 90 Am. Dec. 594, and *note*, 601; *Cregin v. Brooklyn Crostonen R. Co.* 75 N. Y. 192; *Seitz v. Mitchell*, 94 U. S. 580 [24 L. ed. 179]; *Harrington v. Gies*, 45 Mich. 374; 9 Am. & Eng. Cyclop. Law, p. 817, § 8. There was no error in the rulings of the court in the admission of the evidence or instructions to the jury.

It is contended by counsel for appellee that the record is informal, and presents no question for the decision of this court; but, taking the

view we have of the only material question involved, and having to affirm the judgment, we do not deem it necessary to pass upon the

question presented by the appellee as to the sufficiency of the record.

Judgment affirmed, with costs.

WEST VIRGINIA SUPREME COURT OF APPEALS.

G. C. RICKETTS

v.

CHESAPEAKE & OHIO R. CO., *Pf. in Err.*

(...W. Va....)

***1. A railroad company chartered by a State cannot, without distinct legislative authority, by lease, or any other contract or arrangement, turn over to another company its road, and the use of its franchises, and thereby exempt itself from responsibility for the conduct and management of the road.**

***2. Where a railroad company, chartered by this State, permits a foreign railroad company to operate a part of its road in this State under a verbal arrangement, and the two railroads form a continuous line through and beyond the limits of this State, the domestic company will be liable for injuries sustained on that portion of its road so operated by the foreign company.**

***3. Upon the trial of an action for damages it is error for the court to permit the counsel for the plaintiff, over the objection of the defendant, in argument, to read to the jury, upon the question of the measure of damages, extracts from reported cases, showing large damages held not excessive.**

***4. A railroad company cannot be made responsible for exemplary damages on account of injuries done by one of its servants, even though the act was wanton and malicious, unless the act was expressly or impliedly authorized or ratified by the company.**

(January 29, 1890.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in an action to recover damages for an alleged assault committed on plaintiff by defendant's servant. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. Simms & Enslow* for plaintiff in error.

Messrs. Vinson & McDonald and *J. S. Marcum*, for defendant in error:

In arguing a damage case before a jury, counsel have a right to read from adjudicated cases both as to the law and the amount of the verdict.

Norfolk & W. R. Co. v. Harman (Va.) 8 S. E. Rep. 251.

A railroad company is liable to respond in damages to a passenger on one of its trains, for an assault and battery committed upon the passenger by a brakeman or trainman.

Shenrm. & Redf. Neg. § 518; Goddard v. Grand Trunk R. Co. 57 Me. 202, 2 Am. Rep.

*Head notes by SNYDER, P.

NOTE.—A corporation may be charged with punitive damages for injuries caused by the malicious, oppressive or reckless negligence of its servants. 7 L. R. A.

89; *Dryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 811; *Hanson v. European & N. A. R. Co.* 63 Me. 84, 16 Am. Rep. 404; *McKinley v. Chicago & N. W. R. Co.* 44 Iowa, 814, 24 Am. Rep. 748; *New Orleans, St. L. & O. R. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689; *Pittsburg & O. R. Co. v. Pillow*, 76 Pa. 510, 18 Am. Rep. 424; *Britton v. Atlanta & O. A. L. R. Co.* 88 N. C. 536, 43 Am. Rep. 749; 2 Wait, Act. and Def. p. 76.

The term "exemplary damages" is synonymous with and means the same thing as "indeterminate damages," and they can be awarded by the jury in a proper case.

Pegram v. Stortz, 81 W. Va. 220.

This is a case calling for exemplary or indeterminate damages.

The jury are the judges as to the *quantum* of damages, and unless there is something so enormous about the verdict as to suggest the idea of fraud, corruption or bias, the courts will not disturb the verdict, though the court might have found a smaller amount.

If the instructions all together properly state the law, then mere inaccuracy of statement or loose expression in a particular instruction will not warrant the appellate court in reversing the judgment of the court below, on account of such instruction.

Diamond State Iron Co. v. Giles (Del.) 9 Cent. Rep. 577; *Brown v. McCord & B. Furniture Co.* 8 West. Rep. 758, 65 Mich. 800; *Lawler v. Henderson*, 36 Kan. 754; *Clay v. Robinson*, 7 W. Va. 849; *Peterson v. Chicago, M. & St. P. R. Co.* 38 Minn. 511; *Campbell v. Holland*, 22 Neb. 587; *Louisville, N. A. & O. R. Co. v. Wright*, 15 West. Rep. 820, 115 Ind. 894; *Cowger v. Land*, 9 West. Rep. 294, 112 Ind. 263; *Roots v. Beck*, 7 West. Rep. 238, 109 Ind. 472.

Snyder, P., delivered the opinion of the court:

Action of trespass on the case, commenced on July 19, 1886, in the Circuit Court of Wayne County, by G. C. Ricketts, against the Chesapeake & Ohio Railway Company, for damages alleged to have been sustained by the plaintiff by reason of an assault committed upon him by an employé of the defendant. There was a demurrer to the declaration, which was overruled, and afterwards a trial by jury on the issue of not guilty, resulting in a verdict and judgment in favor of the plaintiff for the sum of \$5,000. During the trial the defendant excepted to certain actions and rulings of the court, and to review said actions and rulings it has brought this writ of error.

All the evidence adduced on the trial is made a part of the record, and the first error complained of is that upon the facts disclosed the defendant is not liable for the alleged injury

Quinn v. South Carolina R. Co. 1 L. R. A. 682, 30 S. C. 381.

Rule as to exemplary damages. See note, *Id.*

to the plaintiff, because the wrong, if any, was done by the Elizabethtown, Lexington & Big Sandy Railroad Company, and not by the defendant. The facts in respect to this question are as follows: The defendant is a domestic corporation, passing through this State, and connecting at the Big Sandy River, the state line, with the Elizabethtown, Lexington & Big Sandy Railroad Company, a Kentucky corporation; and by a verbal arrangement between these two companies the Elizabethtown, Lexington & Big Sandy Company operated that part of the defendant's road between the Big Sandy River and Huntington, a distance of about ten miles, in this State. These two roads, while existing under separate charters and organizations, were in fact operated as a continuous line of railroad from Newport News, in the State of Virginia, to Lexington, in the State of Kentucky, passing through Richmond, Va., Huntington, in this State, and Catlettsburg, in Kentucky. The evidence does not disclose the terms under which that part of the defendant's railroad between Huntington and the state line was operated, or how the expenses were provided for, or what division or disposition was made of the earnings. It does appear, however, that the defendant owns a large part of the rolling stock used on that part of its road; that at least some of the officers and servants in charge of that part of its line were paid by the defendant; and that the Elizabethtown, Lexington & Big Sandy Company had not complied with the provisions of the statutes of this State in such manner as to authorize it to operate a railroad in this State. The facts further show that on December 21, 1885, the plaintiff, at Catlettsburg, in Kentucky, purchased of an agent of the Elizabethtown, Lexington & Big Sandy Company a ticket from that place to Huntington; that upon said ticket he took passage upon a train to Huntington, and after passing on the train into this State he was found by the conductor in the ladies' car, smoking a cigar, and then and there a difficulty arose, which resulted in the alleged assault upon and injury to the plaintiff, for which he brought this action.

It seems to me that under this state of facts the defendant was liable to the plaintiff, if he was injured by reason of the misconduct or negligence of the officers or employes on the said train. The court, in its opinion in *York & M. L. R. Co. v. Winans*, 58 U. S. 17 How. 88, 39 [15 L. ed. 29], says: "Important franchises were conferred upon the corporation to enable it to provide the facilities for communication and intercourse required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided, as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the Legislature."

And in *Washington R. Co. v. Brown* the court says: "It is the accepted doctrine in this country that a railroad corporation cannot escape the performance of any duty or obligation imposed by its charter, or the general laws of the State, by a voluntary surrender of its road into the hands of lessees. The operation of the road by the lessees does not change the

relations of the original company to the public." 84 U. S. 17 Wall. 4:0[21 L. ed. 675]; 1 Redf. Railways, chap. 52, § 1, p. 616.

In *Naylee v. Alexandria & F. R. Co.* 88 Va. 707, the court decided that by executing a deed conveying its road, franchises, etc., to trustees selected by itself, a railroad company cannot evade its legal liabilities for injuries subsequently done to persons and property by the negligent operation of its road. We think it may be stated, as the just result of the decided cases, and on sound principle, that a railroad corporation cannot, without distinct legislative authority, by lease, or any other contract, turn over to another company its road, and the use of its franchises, and thereby exempt itself from responsibility for the conduct and management of the road. *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 809 [30 L. ed. 92]; *Grand Tower Mfg. & Transp. Co. v. Ullman*, 89 Ill. 244; *Thomas v. West Jersey R. Co.* 101 U. S. 71 [25 L. ed. 950].

In order to understand the next error complained of, which relates to the instructions to the jury, it is necessary to state that the evidence for the plaintiff tended to prove that the plaintiff was a passenger on the train, and, finding no fire in the smoking-car, he went into the ladies' car, and was there smoking a cigar, but, upon being informed by the conductor that it was a violation of the rules of the company to smoke in that car, he desisted; that soon after a brakeman on the train struck him on the face, knocked him down, and injured him very seriously. The brakeman who assaulted the plaintiff was only acting as brakeman on the passenger train for that trip, his general employment and duties being that of brakeman on freight trains; and it is not shown that he was thereafter allowed to do service on any passenger train. It is proper to state also, that the evidence of the defendant tended to show that the plaintiff persisted in smoking in the ladies' car after repeated requests to stop it, or go into the smoking-car; and that he was the aggressor, and his misconduct the prime cause of the combat which resulted in the injury of which he complains.

While arguing the case to the jury, the plaintiff's counsel was allowed by the court, against the protest and objection of the defendant, to read from the American Reports verdicts in which large damages had been found by juries in cases similar to the one on trial. At the instance of the defendant, the court afterwards instructed the jury "that in case they find for the plaintiff they are not to take into consideration, nor be influenced by, the verdicts of the juries in the cases read to them by the attorney for the plaintiff, in the argument of this case, in fixing the amount of damages the plaintiff is entitled to." The plaintiff in error insists that it was error to permit the counsel for the plaintiff to read the said verdicts to the jury, and that the instruction of the court to disregard them did not cure the error and wrong done thereby.

In 1 Thompson, Trials, § 947, the law is stated as follows: "Counsel have no right, in argument, to introduce any evidentiary matters to the jury, which have not been regularly offered and admitted in evidence, in presenting the evidence in support of the action or the defense. . . . Applying these princi-

ples, it is held, even in those jurisdictions where counsel are permitted to argue the law to the jury, that they cannot be allowed, under pretense of reading legal authorities to the jury, to read passages from such books which bear upon questions of fact which are before the jury for consideration, thus introducing to the minds of the jurors evidentiary matters which have not been regularly admitted by the presiding judge." *Phentiz Ins. Co. v. Allen*, 11 Mich. 501; *Baldwin's App.* 44 Conn. 87.

In *Evansville v. Witter*, 86 Ind. 414, which was an action against a city for damages resulting from injuries caused by a defective sidewalk, the court held: "Upon the trial, in such action, it is error to permit counsel for the plaintiff, over objection, in argument to the court in the presence of the jury, upon the question of the measure of damages, to read extracts from reported cases showing large damages held not excessive; but such error is cured by a direction of the court to the jury to the effect that the case before them must be determined upon the evidence, uninfluenced by the damages given in other cases."

It is difficult, if not impossible, to discover how, or in what way, the reading of verdicts in other cases could enlighten the court or the jury upon the principles of law involved in the discussion of the question of damages. It is also impossible to resist the conclusion that the extracts which the counsel read were not read with a view to enable the court to rightly decide upon the law as to damages, but that the purpose was to reach and influence the jury in the amount of damages they should find in the case on trial. As the reading of such extracts could not enlighten the court as to its duties, and it being clearly improper matter to be read to the jury, it was necessarily error to permit it to be read by counsel; and the court should have sustained the objection of defendant's counsel. It is unnecessary, in this case, to decide whether or not the instruction of the court to disregard said extracts in making up their verdict cured the error, because the judgment here must be reversed for another error. It may be proper to say, however, that as a general rule such error may be cured by such an instruction; but whether it will or not must depend upon the propriety of the verdict, and other facts in the particular case. The safer rule, therefore, seems to be to exclude such matters in the first instance, and not depend upon nullifying their prejudicial effects by an instruction.

From what has preceded, it sufficiently appears that the plaintiff in error was not prejudiced either by the refusal or the giving of any of the instructions, unless there was error in the giving of the following: "The court instructs the jury that if they find the defendant guilty they are, in estimating the damage, at liberty to consider the health and condition of the plaintiff before the injury complained of, as compared with his present condition, in consequence of said injuries, and whether said injury is in its nature permanent; and the reasonable expense incurred by the plaintiff, if any, in curing, or endeavoring to cure, the injuries he received;

also, the damages suffered, if any, from the loss of time and inability to attend to business, resulting from the injuries received; also, the bodily and mental pain and suffering, if any, resulting from the injuries received, and for the outrage and indignity put upon him, and to allow such damages as in the opinion of the jury will be a fair and just compensation for the injury which the plaintiff has sustained,* and that if they believe that this assault was made in a malicious, unlawful, wanton and unnecessary manner, then they will be warranted in giving the plaintiff exemplary damages."

It seems to me that there is no valid objection to all that part of said instruction which precedes the star, as above printed; but I am of opinion that the sentence following the star is erroneous. There was no evidence in this case proving, or even tending to prove, that the conduct of the brakeman in assaulting and injuring the plaintiff was either authorized or ratified by the company.

In *Downey v. Chesapeake & O. R. Co.* 28 W. Va. 732, 743, this court, after referring to the fact that there was some diversity in the decisions, says: "But the better and more reasonable doctrine seems to be, that the railway company is not to be held liable in exemplary damages for injuries caused by the negligence of its servants, unless it be shown that the servants' act was willful, and was either authorized or ratified by the company; but such authorization or ratification can be evidenced either by an express order to do the act, or an express approval of its commission, or by an antecedent retention of a servant of known incompetency, or by a subsequent retention or promotion of the negligent servant." *Patterson, Railway Acct. Law*, § 392, p. 471.

As before stated, the evidence in this case shows that the brakeman who caused the injury complained of was only acting as brakeman on the train for that trip; and there is no evidence even tending to show that his conduct was either authorized or approved, or that he was incompetent, or of known bad character. In the absence of any such authorization or approval of the act of the brakeman, even if it was wanton and malicious, the Company cannot be made responsible for exemplary damages. The extent to which it could be held liable would be for compensatory damages, such as are designated in the first part of the instruction. The character of the damages for which the defendant could be made liable having been specifically and fully covered by the first portion of the instruction, it was error to tell the jury, as the concluding sentence of the instruction in effect does, that they might, if they believed the assault was wanton and malicious, then, in addition to such damages as were characterized in the first part of the instruction, assess the defendant with exemplary or punitive damages. *Pegram v. Storts*, 81 W. Va. 220.

For this error the judgment of the Circuit Court must be reversed, and a new trial directed.

English, Brannon and Lucas, JJ., concurred.

PENNSYLVANIA SUPREME COURT.

John J. DETWILLER *et al.*, *Plffs. in Err.*,
v.

COMMONWEALTH of Pennsylvania, *ex rel.*
Ass W. DICKINSON *et al.*

Charles L. HEMINGWAY *et al.*, *Plffs. in Err.*,
v.

COMMONWEALTH OF PENNSYLVANIA,
ex rel. Thomas A. H. HAY *et al.*

(....Pa....)

1. Citizens of the United States who are neither citizens nor residents of this State may become stockholders of corporations organized under the laws of this State for the promotion of agriculture, etc., in the absence of anything in their charters denying such right; and the facts that the charter of a particular corporation would not have been granted to nonresidents, and that the application for the charter recited that it was signed by citizens, are not sufficient to take away such right.
2. Nonresident stockholders take their shares with all the rights and privileges which pertain to them in the hands of citizens, and where no other qualification than ownership of stock is required of directors, they may become such.
3. Regulations of a corporation that stockholders shall have one vote for each share held by them up to ten shares, and fixing the proportion which their votes shall bear to their shares above that number, and providing for voting by proxy, are reasonable regulations, uniform in their operation, conflict with no law, and are binding on all the shareholders.
4. A by-law of a corporation providing that when any director shall die, resign, neglect to serve or remove out of the county the board may proceed to supply the vacancy does not authorize the board to create a vacancy nor to oust a director because he is a nonresident of the Commonwealth.

(January 6, 1890.)

WRITS of error to the Court of Common Pleas of Northampton County to review judgments in favor of relators in proceedings by *quo warranto* to compel respondents to show by what authority they exercised the offices of directors of the Farmers & Mechanics Institute of Northampton County. *Affirmed.*

The first case arose out of the following state of facts:

At a regular meeting of the members of the institute, which was organized to promote agricultural and mechanical science and domestic economy by exhibitions, premiums, lectures, essays or such other lawful means as might best accomplish those objects, held January 11, 1887, the members proceeded to elect five directors to succeed five others whose terms of office expired on that date.

Fourteen of the stockholders of the institute were present at that meeting, five of whom voted for the relators and nine for the respondents. The proxies of six others of the stockholders, some of whom were nonresidents of the State, were held by one of the stockholders

present, and he cast the votes upon them for the relators. Of the individual stockholders present and voting, the majority voted for the respondents. Of the individual stockholders present in person and represented by proxy a majority voted for relators. A majority of the stock voted by stockholders actually present was voted for respondents. A majority of all the stock voted by the stockholders present and by proxy was voted for the relators.

Upon this state of facts the relators were declared elected. Relators are all residents of the State of New Jersey and were so at the time of their election, but they are all stockholders in the corporation.

On the 5th day of February, 1887, an adjourned meeting of the board of directors was held at which the president *pro tem.* announced that inasmuch as certain persons not citizens of Pennsylvania had been returned as elected to the board of directors, and inasmuch as the by-laws of said institute rendered it impossible for such persons to sit as directors, he declared the seats vacant and announced that it was in order to supply four places in the board by election. Relators thereupon withdrew from the meeting and left the room and the board proceeded to the election of four directors to fill vacancies. They elected respondents as such directors, and they have since acted as such and were so doing at the time of the issue of this writ.

Upon this state of facts the court below decided that relators were the properly elected directors and were entitled to such offices, and that respondents were intruding themselves into, and unlawfully holding and exercising, the offices of directors, and gave judgment excluding respondents from such offices and declaring relators entitled thereto. The respondents thereupon took this writ assigning for error, among other things, that the court erred in holding persons not citizens of the State entitled to vote for directors: in holding that stockholders had a right to vote by proxy; in holding that stockholders were entitled to cast one vote for each share of stock held by them, and in not deciding that the by-law which gives that right is void; in deciding that persons not citizens of the State could legally hold the office of director under the by-laws of the institution.

The second case above entitled arose out of an election which took place in the year 1888 to fill the vacancies caused by the expiration of the terms of certain directors in that year, and the questions raised upon such election were similar to those in the preceding case.

Messrs. William Fackenthal, J. W. Wilson and B. F. Fackenthal for plaintiffs in error.

Messrs. Edward J. Fox and Edward J. Fox, Jr., for defendants in error:

Where the Legislature does not provide in a charter that stockholders must be citizens of the State, citizens of other States may be stockholders.

Central R. Co. v. Pennsylvania R. Co. 31 N. J. Eq. 485; *Ward v. Maryland*, 79 U. S. 12 Wall. 430 (20 L. ed. 452); *Corfield v. Coryell*, 4

Wash. C. C. 890; *Humphreys v. Mooney*, 5 Colo. 282. See *Morawetz, Priv. Corp.* § 361; *Cooley, Const. Lim.* p. 15.

A by-law which disfranchises nonresidents is not uniform, is oppressive and cannot be enforced.

State v. Greer, 78 Mo. 188; *Ang. & A. Corp.* § 345; *Green's Buice, Ultra Vires*, p. 13.

A member cannot be disfranchised without express power in the charter.

Com. v. St. Patrick Benev. Society, 2 Binn. 441; *Sargent v. Franklin Ins. Co.* 8 Pick. 90. See *Morawetz, Priv. Corp.* §§ 122, 123, 164; *Germantown Pass. R. Co. v. Filler*, 60 Pa. 124.

The by-law under which relators' offices were declared vacant is of a penal character, and is therefore to be strictly construed.

Montgomery Co. Medical & Surgical Society v. Weatherly, 75 Ala. 245, 10 Am. & Eng. Corp. Cas. 26.

Each member had a vote for each share of stock held by him.

State v. Tudor, 5 Day, 829; *Com. v. Bringhurst*, 108 Pa. 184; *Morawetz, Priv. Corp.* § 476; *Cook, Stock and Stockholders*, § 608; *Fisher v. Essex Bank*, 5 Gray, 373.

In *Cook on Stock and Stockholders*, § 610, the writer says: "When the charter is silent the right to proxy may, in the absence of statutory provision, be conferred by a by-law."

See also *Morawetz, Priv. Corp.* § 486, citing *People v. Crossley*, 69 Ill. 195; *State v. Tudor*, *supra*.

Williams, J., delivered the opinion of the court:

The assignments of error in these cases are forty-four in number, but they have been properly treated by counsel on both sides as raising but seven questions. The first of these is stated in the words following: "Can a person not a citizen of Pennsylvania become a member of the Farmers & Mechanics Institute of Northampton County?" As applicable to these cases, the words "citizen of the United States" may properly be substituted for the word "person," in the question as stated by the plaintiff in error. Our question would then stand thus: "Can a citizen of the United States, who is not a citizen of Pennsylvania, become a member," etc. Before proceeding to answer the question, we must also know what are the requisites to membership in this corporation, as laid down in the charter or by general law. Turning to article 8 of the charter, we find the only provision which relates to this subject. This declares that "members shall severally subscribe at least one share of stock, amounting to \$25;" and in the same connection it is added, "the aggregate subscriptions of which shall constitute the capital stock of the association." A member must therefore be a stockholder, and the capital stock is made up of the shares subscribed for by the members. There is no provision in the charter which contemplates the possibility of members who are not stockholders, or of stockholders who are not members. Throughout the charter the word "members" is uniformly used where stockholders are spoken of, the only exception being found in article 7. This article declares that the association may be dissolved "by two thirds in number and value of the members and stock-

holders," and then provides that in case of such dissolution the funds shall be "divided among the members in proportion to the amount of stock held by them." This is the only place where the word "stockholders" appears in the charter, and it is very clear that it is here used in the sense of "shares of stock." The meaning of the provision is that, in order to dissolve the corporation, two thirds in number of the stockholders must agree to such action, and two thirds of the shares of stock must be represented by them. Two thirds in number of the stockholders cannot dissolve the association, nor can less than two thirds in number, representing two thirds of the shares; but there must be an agreement of two thirds in number of persons, and two thirds in number of shares held, before dissolution can be lawfully ordered. We conclude, therefore, that a member of this corporation is necessarily a stockholder, and that a stockholder is, *ipso facto*, a member.

Returning, now, to our question, which concerns the rights of a holder of shares of stock, let us substitute the word "stockholder" for the word "member," and the final form of the question will be: "Can a citizen of the United States, who is not a citizen of Pennsylvania, become a stockholder in the Farmers & Mechanics Institute of Northampton County?" We answer, first, there is nothing in the charter that forbids it. It is true that the preamble or declaration with which the charter begins sets out the fact that the persons by whom the application is signed are citizens of the Commonwealth of Pennsylvania; but it contains no engagement that they shall remain so, or that upon removal into another State their stock shall escheat to the Commonwealth, or be forfeited to the association. The charter invests the association with the powers of a corporation, including the power to issue stock, but it lays no restrictions upon the stockholders. Nor, in the second place, is there anything in the general law as it stood when this charter was granted, or as it stands now, that forbids it.

The Act of April 6, 1791, authorized the governor, and that of October 13, 1840, authorized the courts, to incorporate associations for literary and other purposes, "when any number of persons, citizens of this Commonwealth, are associated, or mean to associate," for such purposes. The power of the courts was further enlarged by the Act of February 20, 1854, so as to embrace associations for the promotion of agriculture. The charter of this association was granted by the courts of Northampton County on April 28, 1856, under the authority conferred by the Acts of 1840 and 1854. It may be conceded that a petition for incorporation, purporting to be signed by citizens of New Jersey, or of any other State except Pennsylvania, would have been refused by the court. The advantages of corporate powers provided for by the General Laws as they then stood were reserved, in the first instance, for citizens of the State; but, when granted to citizens, no restrictions were put upon their exercise that affected the negotiable character of their stock, or the rights or powers of stockholders. The corporation, once created, was clothed with the power to issue stock. In the absence of any express provision to the contrary, the stock so issued was, like the stock of other business cor-

porations, and like all varieties of personal property, freely alienable by the owner by gift or sale, by bequest or intestacy. Nothing less than an explicit provision in the charter or in the General Law could deprive the shares of their character as personal goods, or the owner of his power to dispose of his own property. As we have seen, no such restriction is to be found in either. If we now turn to the General Law as it stands at present, we shall find that non-residents may become corporators.

Section 8 of the Act of April 29, 1874, declares that "the charter of an intended corporation must be subscribed by five or more persons, three of whom, at least, must be citizens of the Commonwealth." Two, therefore, of the original corporators may be persons who are neither citizens of Pennsylvania, nor residents within its jurisdiction. In section 7 of the same Act it is made the duty of the directors to procure certificates of stock, and deliver them, duly signed and sealed, to each person entitled to receive them, according to the number of shares held by such person. The section then proceeds as follows: "Which certificates or evidences of stock shall be transferable at the pleasure of the holder; . . . and the assignee or party to whom the same shall have been so transferred shall be a member of said corporation, and have and enjoy all the immunities, privileges and franchises, and be subject to all the liabilities, conditions and penalties, incident thereto, in the same manner as the original subscriber or holder would have been."

This was a mere declaration of the law as it then stood, and not the introduction of a new rule. But the Act of April 17, 1878, is a legislative step in advance. It authorizes any corporation, authorized to hold exhibitions of natural and artificial articles and products, to mortgage its real and personal property and franchises, and provides that the purchaser or purchasers at public sale under such mortgage "shall be, and they are hereby, constituted a body politic, with all the rights, immunities and privileges of the corporation whose property and franchises may be thus sold."

From this glance at the General Law as it now stands, it is very clear that the restriction upon the rights of stockholders in this association contended for by the appellant, and which we have found wanting in the charter and the General Law as it stood when the charter was granted, has not been supplied by the statutes now in force. Our first question may, then, be answered in the affirmative. A citizen of the United States may become a stockholder in the Farmers & Mechanics Institute of Northampton County although he is not a citizen of, or resident in, this State. For the same reasons the second and third questions must be answered in the affirmative. The nonresident stockholder takes his shares with all the rights and privileges which pertain to them in the hands of a citizen, and he may vote upon them, and, where no other qualification than ownership of stock is required of the directors, he may become a director. We put the right of the stockholder, not so much on the provision of the Constitution of the United States which was discussed with so much learning by the judge of the court below, as upon the nature of stock as a personal chattel and the right of an

alien friend at the common law to deal in personal goods, embark in trade, loan money, sue and be sued for the collection of debts, and the protection of his person and personal estate.

The fourth and fifth questions relate to the right of a stockholder to cast more than one vote if he owns more than one share of stock, and his right to vote by proxy. A corporation is a voluntary association of persons engaged in a common enterprise. When the methods of voting are not fixed by General Law, the corporators may make the law for themselves, subject to the qualification that such laws and regulations as they make shall not conflict with the laws of the State or of the United States. The General Law did not touch either of the questions now raised, and for that reason the corporators or stockholders took them up, and made a law for themselves, covering both subjects. They have provided that stockholders shall have one vote for each share held by them up to ten shares, and they have fixed the proportion which his votes shall bear to his shares above that number. This is a reasonable regulation, it is uniform in its operation, it conflicts with no law, and it is binding on all the shareholders. The same thing may be said in regard to voting by proxy. It was competent for the members of this association to consider what was most convenient for themselves, and best calculated to secure the votes of all the shareholders at the annual elections. They had the power to refuse to receive votes unless offered by the voters in person, but, upon consideration, they decided that votes might be cast by proxy. This also was a reasonable regulation, uniform in its application, works no wrong to any shareholder, and conflicts with no law of the Commonwealth. It is therefore a valid and binding law, made by the shareholders for their own government.

The sixth and seventh questions may be considered together, as they relate to the power of the directors to fill vacancies. Article 1, § 7, of the by-laws is as follows: "When any director shall die, resign, neglect to serve or remove out of the county, the board may proceed to supply the vacancy," etc. How is the power thus confined to be exercised? The death of a member of the board of directors would ordinarily be a matter of sufficient notoriety to justify the prompt filling of the vacancy. A resignation made to the board affords evidence of a vacancy, upon which action may be taken at any time. Removal for neglect to serve is in the nature of a penalty, and cannot be imposed without inquiry into the facts. The alleged delinquent, if within convenient reach, should have notice that he is charged with neglecting to perform his official duties, and be heard, if he so desires, in his own defense. The only other ground on which a vacancy may be declared is the removal by one who was a resident of the county when elected a director, to another county or State. Such a removal ordinarily operates to transfer the business and social interests of the person from his old to his new home. Old forms of activity and old business relationships are discontinued, and new ones, in a new neighborhood, take their places. But a removal out of the county does not necessarily produce these results in all cases. It may not be intended to be permanent. It may not

interfere with the ability or inclination to discharge acceptably all the duties of a director. The question in each case is whether a vacancy exists in fact. If it does, when the fact is ascertained the vacancy may be filled. The subject of the section is the filling of actual vacancies happening intermediate the annual elections. The board cannot create a vacancy. They cannot oust a director because they differ from the stockholders as to his eligibility, nor because he fails to attend a called meeting, nor because he is not a citizen of the Commonwealth. Legal questions must be settled in the courts. Questions of fact, such as the existence of an actual vacancy by removal after election or neglect of duty by a member of the board, may be settled by the directors, and the resulting vacancies, if any, may be filled by them; but this is the extent of their power in the premises.

The judgment is affirmed.

COMMONWEALTH of Pennsylvania, *ex rel.*
Peter ROBINSON, *Plff. in Err.*,

v.

Charles L. HEMINGWAY *et al.*

(.....Pa.....)

One who is not a citizen of the United States, but who is and for many years has been a resident and property holder in this State, can become a stockholder, is entitled to vote at the stockholders' meetings and may be legally elected as a director, of a corporation organized under the state laws.

(January 6, 1890.)

ERROR to the Court of Common Pleas of Northampton County to review a judgment in favor of respondents in a proceeding by *quo warranto* to compel them to show by what authority they exercised the offices of directors of the Farmers & Mechanics Institute of Northampton County. *Reversed.*

Robinson was one of the original relators in the case of *Hemingway v. Com.*, *ante*, p. 857. He was not a citizen of the United States but for many years had resided in this State and had become a property owner herein. The court below decided upon that state of facts that he was ineligible to the office of director in the institute and rendered judgment against him, whereupon he took this writ.

Further facts appear in the opinion.

Messrs. Edward J. Fox and Edward J. Fox, Jr., for plaintiff in error.

Messrs. William Fackenthall, J. W. Wilson and B. F. Fackenthall for defendants in error.

Williams, J., delivered the opinion of the court:

In the case of *Detwiler v. Com.*, *ante*, p. 857, in which an opinion has been filed at the present term, we have considered the question: "Can a citizen of the United States, who is not a citizen of Pennsylvania, become a stockholder in the Farmers & Mechanics Institute of Northampton County?" We are now to push our inquiries one step further, and determine whether

one who is not a citizen of the United States, but is, and for many years has been, a resident and property holder in Pennsylvania and in Northampton County, can become a stockholder in the same association; and whether, if he may become a stockholder, he is entitled to vote as such at the stockholders' meetings; and, finally, whether he may be legally elected a director of the association. For the reasons given in *Detwiler v. Com.*, *supra*, we think he may become a stockholder. The stock being personal property, he may acquire it by gift or purchase. An alien could at common law buy personal goods, and sell them; and, except in the case of an alien enemy, there was no restriction upon trade with aliens. If he can acquire the stock, he can acquire with it all the rights and privileges which its ownership confers, among which is the right to have a voice in the control of the enterprise, and the selection of those who are to conduct its affairs. He may therefore vote in the same manner, and with the same effect, as any other stockholder may do. Why may he not become a director? The office is not a political one. If it was, he would, of course, be ineligible to it, and disqualified for voting for anyone else to fill it, because of his want of citizenship. But the charter makes but one qualification, and that is found in the 5th article: "The members of this association shall elect fifteen of their number to be a board of directors, who shall, within ten days after their election, divide themselves into three classes of five each, . . . and annually thereafter five new directors shall be elected to serve for three years." A director must be a stockholder. No other qualification is required. We are not to inquire how many shares he holds, whether he was an original incorporator, or in what manner he acquired title to his stock. The single question which the charter raises is whether he is a stockholder.

The learned judge who tried this case in the court below thought that the right of the citizens of New Jersey to become stockholders, to vote and to hold office in this association rested on the Constitution of the United States, and, logically enough, held that one who was not a citizen of the United States could not become a director; but we think the right of all persons, not alien enemies, to buy and hold, use and enjoy, personal property, whether corporate stocks or articles of merchandise, is older than the Constitution, and that citizenship of the United States is not necessary to its exercise. Even as to real estate, the distinction between a resident alien friend and a citizen has disappeared in Pennsylvania and nearly every other State in the Union. The words of our Act of 1807 are: "It shall and may be lawful for any alien or aliens, actually resident within this Commonwealth, and not being the subject or subjects of some sovereign state or power which is, or shall be at the time or times of such purchase or purchases, at war with the United States of America, to purchase lands, tenements and hereditaments within this Commonwealth, and to have and to hold the same in fee simple, or for any lesser estate, as fully, to all intents and purposes, as any natural-born citizen or citizens may or can do." The conditions annexed to this section were modified by subsequent legislation, so that now the only

limitations are that the purchase shall not exceed 5,000 acres in extent, or \$20,000 in annual value. An examination shows that in thirty-eight States resident alien friends are put upon the same footing with natural-born citizens as to the right to acquire, use and dispose of real estate. In one or two others an exception is made excluding the Chinese from the privileges conferred on other resident aliens, and in two more no provision is found upon the subject. In Pennsylvania, therefore, a resident alien friend can deal as freely in all forms of property, whether personal or real, "to all intents

and purposes, as any natural-born citizen or citizens may or can do." He may embark in business, become a stockholder in a joint-stock association or corporation, become a manager or director, when not expressly made ineligible, and use, enjoy, control and direct his property, of whatever nature or kind, in the same manner as any natural-born citizen may do.

The judgment of the court must therefore be reversed as to the appellant, and he be restored to the position to which he was regularly elected by his fellow stockholders; the costs of the appeal to be paid by the appellees.

NEW YORK COURT OF APPEALS.

Re the Judicial Settlement of the Account of George W. CHAUNCEY, as Trustee under the Will of Mary L. Kirby, Deceased.

(.....N. Y.....)

Where for a number of years the income from a decedent's estate is insufficient to pay in full a specific annuity given by his will for the support of the annuitant and made payable out of the income alone, a surplus in subsequent years, when such income is more than sufficient, should, in the absence of any manifestation in the will of a different intent, be paid to the annuitant in satisfaction of the previous deficiencies, and not to the next of kin.

(January 14, 1890.)

APPPEAL by James E. Delaney from a judgment of the General Term of the Supreme Court, Second Department, reversing a judgment of the Kings Special Term rendered upon the settlement of a trustee's account directing the payment to him of certain money. *Reversed.*

The case sufficiently appears in the opinion.

Mr. Charles H. Otis for George W. Chauncey, trustee.

Mr. Jesse Johnson for appellant.

Mr. William C. Holbrook for Mary E. Van Aulen, respondent.

Ruger, Ch. J., delivered the opinion of the court:

The question in this case regards the disposition of the surplus income arising in certain years from a trust fund created for the purpose of paying annuities. It is claimed by the annuitant that such surplus is applicable, in the first instance, to the satisfaction of deficiencies in the annuity occurring in previous years from the insufficiency of annual income to pay them in full, and by the next of kin that it goes to them as property remaining undisposed of by the will. The portion of the will under which the question arises reads as follows: "*Third. I give, devise and bequeath unto my executors hereinafter named, and to the survivor of them, all the rest, residue and remainder of the estate, real and personal, of which I may die seised and possessed, in trust, nevertheless, to and for the uses and purposes following, that is to say: To receive the rents and profits of such part thereof as shall consist of real estate, and to invest and keep invested, upon bond and mort-*

gage of real estate, or in the public funds of the United States, State or City of New York, as they may deem most safe and productive, such part thereof as shall consist of personal estate, and apply said rents and profits of real estate, and interest or income of personal estate, to the use of my said husband, William L. Kirby, during his natural life, except that they shall apply to the use of James E. Delaney, who was brought up by me, the sum of \$500 per annum thereout until he shall arrive at the age of twenty-one years, and from and after that time the sum of \$1,000 per annum thereout during the lifetime of my said husband William L. Kirby, and from and after the decease of my said husband the sum of \$2,000 per annum thereout during his natural life."

With the exception of a trivial legacy of wearing apparel and silver plate to a relative, the above contains the sole disposition of property made by the will, and the testatrix therefore died intestate as to the *corpus* of her estate, and as to so much of the income thereof as should not be needed for the satisfaction of the annuities charged thereon. So long as William L. Kirby lived, no question could arise over the disposition of surplus, as he was entitled to the whole income after payment of the annuity to Delaney. Delaney arrived at his majority before the death of the testatrix, and no payments accrued to him under the \$500 provision. William L. Kirby survived his wife only two years, and during that period Delaney received substantially the amount of his annuity, and the question in the case arises, therefore, over the payment of annuities after that period under the \$2,000 provision. For a number of years after the death of William L. Kirby, the annual income from the fund was insufficient to pay the annuity in full to Delaney; but in the course of time the income so increased that it exceeded the amount of the annuity, and the disposition of this surplus is the subject of the present controversy. Should it be first applied to the satisfaction of the deficiencies of previous years, or does it go to the next of kin as property undisposed of by the will? No such question could, of course, arise under a provision which gave the annual income, or an income not exceeding a certain amount, to one or more legatees, from a certain fund; but it is contended that under the circumstances of this case, where a fixed sum is given as an annuity for support, and there is

no language in the will showing a different intent, the legatee is entitled to have his annuity made up to its full sum by the accumulations of subsequent years.

Upon a previous appeal to this court [84 N. Y. 16], upon questions arising under this will, it was held that the legacy to Delaney was not a demonstrative legacy, and was therefore not payable from the *corpus* of the fund, in case of a deficiency of income to satisfy the full sum of the annuity. This was obviously correct, since the will plainly provided that the annuity was payable from income alone, and the intention of the testatrix could not be violated by applying the fund itself to the payment of charges which had been otherwise imposed. This decision, however, does not affect the determination of this controversy. That is to be solved by an examination of the will, and such information as to the intention of the testatrix as may be gleaned from a consideration of both its positive and negative provisions, as well as of its omissions.

We do not think much light can be derived from the particular form observed by the testatrix in creating the trust, as it was inartificially drawn, and must be construed according to its legal effect. In terms, she creates a trust in the residue of her estate for the benefit of her husband, but excepts from his bequest the payment of certain annuities to Delaney. In legal effect, the trust was intended first to provide for the payment to Delaney of the annuity given to him, and the balance of the income alone was payable to the husband. The trust was therefore to pay from the income of her estate, to Delaney, \$500 per annum during his minority, \$1,000 a year thereafter during the life of William L. Kirby, and \$2,000 a year after his death; and during William L. Kirby's life to pay to him the balance of the income beyond what was necessary to satisfy Delaney's claim. These sums were not by the will, in express terms, made payable from the annual income, but constituted a charge upon the aggregate income of the estate. It is obvious that the legacy to Delaney was distinguishable from the provision for the benefit of the husband; for in the one case the husband was to have the gross income, less the charge upon it, whatever it might be, and subject to all casualties that might affect it, and he could in no event have more than this sum. Delaney was, however, to have a fixed sum, which could not be increased beyond the allotted amount. These sums were evidently graduated for his support, as they varied according to his probable requirements, and were increased as advancing years might add to his probable wants and necessities. It was not intended as an exception from the gift to the husband, to be governed by the characteristics and conditions applying to that gift; for it was in terms to continue after his death, and to exist as a continuing and independent trust for Delaney's benefit so long as he should live. It was, in the natural course of events, contemplated that Delaney should survive the husband, and that his annuity should outlive that to Kirby. The intent clearly implied that it was given for support; implies, also, an intention that it should be payable periodically and absolutely, to meet the requirements of daily necessities.

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This intention might be temporarily defeated by the casualties affecting all financial transactions; but, so long as the property remained and yielded an income, it was the manifest intention of the testatrix to give it, to the extent indicated, to the child she had reared, and had made the object of her love and protection. Aside from her husband, she mentioned no other object of bounty in her will, except Delaney; and no intention can be derived therefrom that she intended to die intestate as to any part of the income of her estate, while the specific provisions thereof remained unsatisfied. In making these provisions she was not weighing out the payment of a debt, or the satisfaction of legal obligations, but was providing for the necessities of one whom she supposed had a moral claim upon her bounty and protection. She was endeavoring to preserve the object of her regard from future want and dependence. She could have had no intention of depriving him of the amount deemed necessary by her for his support, for the benefit of strangers, when the casualties of one year impaired the income of the fund which might, by the prosperity of another year, be rendered sufficient to meet all of the obligations which she had charged upon it. The trust was created for the sole purpose of paying the income thereof, during the lifetime of her husband, to him and her adopted child; and it cannot be supposed that she intended to scrimp them in the interest of persons whom she did not regard of sufficient consideration to be even referred to in her will. She must, in the natural course of events, have contemplated that accident, mismanagement or misfortune, might, for one or more years, through the influence of events which could not have been foreseen or guarded against, render it impossible to pay promptly the charges fixed upon the income of the trust; and it is inconsistent with the design of a provision for support to suppose that she intended, in such event, that the object of her care and affection should be left without income for the benefit of persons whom she did not know. It is impossible for the wisest and most prudent manager to place pecuniary investments entirely beyond the reach of financial hazard and casualties, but, by placing the *corpus* of her estate in trust, she doubtless hoped to preserve a principal which should, at least in the course of years, realize the sums she had charged upon it; and we can find no intent in the will that such income should be payable to strangers, so long as the fixed charges made by her should remain unsatisfied.

The contention of the next of kin would lead to the establishment by the trustees of a financial year which should be inflexible, and, whenever the year terminated, should require them to close the books, and begin a new and independent term for the receipt of income. In such event, the lapse of a year without the receipt of income would cause the loss of the annuity to the devisee, no matter how productive the fund might prove for succeeding years. This result must be worked out by reference to the intention of the testatrix, if sustainable at all; but we have heard no reasons drawn from the provisions of the will which support such a theory. It is claimed

by the next of kin that the case of *Casamajor v. Pearson*, 8 Clark & F. 100, is an authority for their contention. We do not so read that case. The facts are somewhat complicated and voluminous, but they may be summarized so as to show the principle governing the decision. The testator gave his whole estate to trustees, among other purposes, to invest a sufficient sum to pay two annuities of £400 each to F. and P. during their respective lives, if the funds should prove sufficient to pay them in full, and, if not, to divide it proportionately between them; but, if the fund proved more than sufficient, to vest the surplus, and divide it, with the capital sum set apart for the annuities, as the same should become tangible by the death of each annuitant, among residuary legatees. In this case the intention of the testator was clearly manifested, as there was an express provision that in case of insufficiency of income there should be paid to the annuitants only so much thereof as was annually realized from the fund invested; and all surplus accumulations, as well as the *corpus* of the estate, were given expressly to residuary legatees. We do not doubt the case was well decided, and in accordance with the expressed intention of the testator.

The question here involved is not new in this state, and has, as we read the authorities, been expressly decided in favor of the annuitants. *See* *Stewart v. Chambers*, 2 Sandf. Ch. 382. In that case, the testator, having a wife and two small children, and also four adult children by a former wife, after giving legacies to the latter, directed his executors to convert all the residue of his estate, and invest it in stock, or on real security, so to remain until the death or marriage of his wife, and until the youngest child became of age. Out of the interest and income they were to pay to his wife an annuity so long as she remained *sole*, and to his two infant children each an annual sum, in half-yearly payments, varying according to their age from time to time. Each was to have £1,000 on her marriage, and when the youngest became of age, and the widow's annuity ceased, the residue was to be divided equally between them. The will further provided, in the mean time, that all the surplus interest and income, after paying the annuities, should be divided among the four adult children semi-annually. The income of the residue of the estate was insufficient to pay the three annuities during ten years that the widow survived. After her death it was more than sufficient to pay the two infants' annuities. It was held

that the surplus then arising must be applied to the discharge of the three annuities which occurred prior to the widow's death before any of it could be divided among the adult children. This conclusion was reached in analogy to the principle that legacies for the support and maintenance of a wife and children do not abate with the general legacies. It was further held that the direction for half-yearly payments of annuities and distribution was a regulation, under the general intent of the will, as to the time of payment of the annuities, and for a division after they were fully paid, and that testator's intent would be violated by a division of the surplus of any half year, leaving any portion of the annuities unpaid which fell due previously. We entirely agree with the conclusions reached by the learned assistant vice-chancellor in that case, and consider them in point here. This case differs from that only in the fact that no specific disposition of the surplus is made by the will, which leaves it free from the difficulty suggested of an ulterior disposition of the fund in question. We are of the opinion that, in case there had been a surplus of income in any year after full payment of preceding annuities, it would have been competent for the trustees to have paid it over for distribution among the next of kin, as a fund would thereby have been created which was not disposed of by the will; but that no such distribution could properly be made while any part of such annuities remained unpaid.

The case of *Stewart v. Chambers* was followed by the learned surrogate of New York in *Cochrane v. Walker*, 4 Dem. 164. The views expressed are fully sustained by recent English authorities. *Bolith v. Coulton*, L. R. 5 Ch. 684, and *Pitt v. Lord Dacre*, L. R. 3 Ch. Div. 295, may be referred to as supporting the doctrine contended for.

The case of *Baker v. Baker*, 6 H. L. Cas. 616, is not in point. The question in that case was whether the annuity was a demonstrative legacy, payable out of the *corpus* of the fund, and it was held that it was not; and in that respect agrees with the view of this court upon the construction of the will under consideration. *Delaney v. Van Aulen*, 84 N. Y. 16.

In accordance with these views, the order of the General Term should be reversed, and the judgment of the Special Term affirmed, with costs of the appeal in this court and the supreme court.

All concur.

MINNESOTA SUPREME COURT.

Otto STREISSGUTH *et al.*, *Respts.*,
v.

NATIONAL GERMAN-AMERICAN
BANK, *Appt.*

(.....Minn.....)

*A bank with which a customer has left for collection his draft upon a party residing at a distant point is liable for the failure and de-

*Head note by COLLINS, J.

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fault of a correspondent to whom it forwarded the draft for collection.

(February 24, 1890.)

APPEAL by defendant from a judgment of the District Court for Ramsey County in favor of plaintiffs in an action to recover from defendant the proceeds of a draft which had been given to it for collection. *Affirmed.*

The case sufficiently appears in the opinion.

Messrs. J. B. & W. H. Sanborn, for appellant:

Numerically there is great preponderance of authority in favor of the rule that the liability of the home bank extends only to the exercise of ordinary care and prudence in the selection of its correspondent for the collection of the draft, with proper instructions to collect and remit.

Mechem, Ag. pp. 846, 849, § 514, and authorities cited.

This is the rule in Massachusetts.

Dorchester & M. Bank v. New England Bank, 1 Cush. 177; *Fabens v. Mercantile Bank*, 23 Pick. 830, 84 Am. Dec. 59; in Connecticut: *Lawrence v. Stonington Bank*, 6 Conn. 521; *East Haddam Bank v. Scovill*, 12 Conn. 308; in Maryland: *Jackern v. Union Bank*, 6 Har. & J. 146; *Citizens Bank v. Lovell*, 8 Md. 580; in Illinois: *Aitna Ins. Co. v. Alton City Bank*, 25 Ill. 243; in Wisconsin: *Stacy v. Dane Co. Bank*, 12 Wis. 629; in Iowa: *Guelich v. Nat. State Bank*, 56 Iowa, 484, 41 Am. Rep. 110; in Mississippi: *Tiernan v. Commercial Bank*, 7 How. 648; *Agricultural Bank v. Commercial Bank*, 7 Smedes & M. 592; *Bowling v. Arthur*, 84 Miss. 41; *Third Nat. Bank v. Vicksburg Bank*, 61 Miss. 112, 48 Am. Rep. 78; in Missouri: *Daly v. Butchers & Drovers Bank*, 56 Mo. 94, 17 Am. Rep. 663; in Tennessee: *Bank of Louisville v. First Nat. Bank*, 8 Baxt. 101, 35 Am. Rep. 691; in Pennsylvania: *MERCHANT'S NAT. BANK v. Goodman*, 109 Pa. 422, 58 Am. Rep. 728; *Mechanics Bank v. Earp*, 4 Rawle, 886; *Belleville v. Bank of U. S.* 4 Whart. 105, 33 Am. Dec. 46; *Wingate v. Mechanics Bank*, 10 Pa. 104; in Louisiana: *Llyde v. Planters Bank*, 17 La. 560; *Baldwin v. Bank of Louisiana*, 1 La. Ann. 13.

Messrs. Young & Lightner, for respondents:

The following authorities sustain the proposition that the defendant is liable:

Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276 [28 L. ed. 722]; *Mackerey v. Ramsays*, 9 Clark & F. 818; *Van Wart v. Woolley*, 8 Barn. & C. 439; *Simpson v. Waldby*, 6 West. Rep. 158, 63 Mich. 439, 447-454; *Allen v. Merchants Bank*, 22 Wend. 215; *Commercial Bank v. Union Bank*, 11 N. Y. 203, 212; *Ayrault v. The Pacific Bank*, 47 N. Y. 570; *Titus v. Mechanics Nat. Bank*, 35 N. J. L. 583; *Davey v. Jones*, 43 N. J. L. 28; *Reeves v. State Bank*, 8 Ohio St. 465; *Tyson v. State Bank*, 6 Blackf. 225; *American Exp. Co. v. Haire*, 21 Ind. 4; *Power v. First Nat. Bank*, 6 Mont. 251; *Taber v. Perrot*, 2 Gall. 565; *Kent v. Dawson Bank*, 18 Blatchf. 237.

Collins, J., delivered the opinion of the court:

The single question presented by this appeal is whether a bank with which a customer has left for collection his draft upon a party residing at some distant point can be held responsible for the failure and default of a correspondent to whom the bank has forwarded the draft for collection. It must be admitted that there is apparently a great conflict of precedents upon this precise question, and it is possible

that, as contended by the appellant, the weight of the authorities, numerically speaking, is with the proposition that when, under such circumstances, a bank has exercised ordinary care and prudence in the selection of a correspondent to whom it transmits a draft, bill or note for collection, and remittance of the proceeds, its liability terminates, because, as it is necessary and customary, and in the usual course of business, for banks to collect through correspondents, of which necessity, custom and course of business the owners and holders of paper have full notice and knowledge, it must be held that they have assented to and authorized the work of collection through others. The question involves a rule of general application and of commercial law. As it concerns trade between different and distant places, and, in the absence of a statute or contract or usage which has obtained the force of law, is not to be determined according to the views or interests of any particular persons, classes or localities, it should be decided according to those principles which govern and best promote the general welfare of the entire commercial community, and in accordance with the general principles which apply to all who contract to perform a service. When the appellant received the draft for collection, it entered into a contract, by implication, to perform such duties as were necessary for the protection of its customer. It agreed to collect the paper itself, not to procure the services of another to make the collection. The plaintiffs had no voice in the selection of appellant's agent or correspondent, and it is difficult to see why banks and banking houses should be excepted from the operation of a cardinal and well-established principle of law that every person is liable for the acts of such agents as may be appointed or designated by him to transact such business as he has undertaken to perform for others. The appellant, having undertaken the collection of the paper, stands in the attitude of an independent contractor who, having unrestrained liberty so to do, has designated a sub agent, and is therefore answerable for his neglect, failure or default. It is true that in the adjudicated cases cited by the appellant strong arguments are found, and cogent reasons stated, in support of its position; but we are of the opinion that the conclusion we have reached is the sounder one upon principle. It is also sustained by the Supreme Court of the United States, and the courts of last resort of several of the States, including that of the great commercial center, New York. It is also the rule in England. *Pittsburgh Exch. Nat. Bank v. New York Third Nat. Bank*, 112 U. S. 276 [28 L. ed. 722]; *Allen v. Merchants Bank*, 22 Wend. 215; *Ayrault v. Pacific Bank*, 47 N. Y. 570; *Simpson v. Waldby*, 63 Mich. 439, 6 West. Rep. 158; *Titus v. Mechanics Nat. Bank*, 35 N. J. L. 583; *Reeves v. State Bank*, 8 Ohio St. 465; *Tyson v. State Bank*, 6 Blackf. 225; *Am. Exp. Co. v. Haire*, 21 Ind. 4; *Mackerey v. Ramsays*, 9 Clark & F. 813; *Van Wart v. Woolley*, 8 Barn. & C. 439.

Judgment affirmed.

IOWA SUPREME COURT.

LEAVITT & JOHNSON

v.

Nellie GOODWIN *et al.*, and J. M. Reynolds, Jr., Intervenor, *Appf.*

(.....Iowa.....)

A provision in a mortgage that the whole sum secured shall become due on any default in payment, will not make notes which are not at that time due according to their terms, due within the meaning of the rule which gives priority to those first maturing. The priority is to be determined by the order in which they fall due according to their terms.

(February 5, 1890.)

A PPEAL by intervenor from a judgment of the District Court for Black Hawk County sustaining a demurrer to his petition of intervention by which he sought to have the proceeds of a mortgage foreclosure applied to the satisfaction of his claim *pro rata* with those of other creditors. *Affirmed.*

Statement by Given, J.:

On July 14, 1885, Nellie Goodwin and her husband executed and delivered to E. W. Burnham a mortgage for \$3,100, covering what is known as "Burnham's Opera-House," in Waterloo, Iowa, and securing the payment of three promissory notes, as follows: One for \$1,000, due August 1, 1886; one for \$1,000, due August 1, 1887; and one for \$1,100, due August 1, 1888. Mr. Burnham soon thereafter sold the two notes first named to the plaintiffs, Leavitt & Johnson, with proper indorsements, and about the same time sold the third or \$1,100 note to the intervenor, J. M. Reynolds, Jr. The first note was not paid when due, but one year's interest was paid on all of the notes. The second not being met when due, the plaintiffs in September, 1887, commenced this proceeding to foreclose said mortgage, and demanded that their lien be the first and prior lien on the mortgaged property, and that their notes be paid in full from the sale of the mortgaged premises. On October 10, 1887, the intervenor, who is the appellant herein, filed his petition of intervention, setting forth the fact that he is owner and holder of the third note, and that the same then was, by the terms and conditions of said mortgage, due and payable; it being provided in said mortgage: "But should said party of the first part fail to pay said notes or the interest when due, or fail to keep said property insured, as above provided, then the whole sum remaining unpaid shall become due, and this mortgage may be foreclosed." That by virtue of such provision said third note became due upon default made in the payment of the first notes, causing the whole debt to at once become due at the time of such default. The petition of the intervenor asks that he have judgment for

the amount due upon his note, and that upon sale of the mortgaged premises the proceeds thereof be divided *pro rata* between the holders of the several notes, and that plaintiffs' claim to priority be denied, and that the intervenor's right in the mortgaged premises be decreed equal to that of the plaintiffs. To this petition of the intervenor plaintiffs demurred. The court sustained the demurrer, and denied to intervenor the *pro rata* distribution asked in his petition, and entered judgment against him for costs of intervention. From this ruling and judgment the intervenor appeals.

Messrs. Mullan & Hoff, for appellant:

In the case at bar priority as to time of maturity of the notes secured by the mortgage is taken away and absolutely removed by the provisions of the mortgage. The moment that the first note became due and was unpaid, either as to principal or interest, every other note secured by the mortgage also became due. The holders of all are placed upon the same footing as to the time when they have the right to commence an action to subject the property to the payment of their respective notes. Consequently there can be no priority as to the lien of one note over the others upon the mortgaged property, but each holder, having at the same instant the same right to subject the property to the payment of his debt, must share *pro rata* in the security.

Granger v. Cronch, 86 N. Y. 494; *Collier v. Fuson*, 34 N. J. Eq. 38, note; *Perry's App.* 23 Pa. 43; *Wilson v. Eigenbrodt*, 80 Minn. 4; *Wilcox v. Allen*, 86 Mich. 160; *Henderson v. Herrod*, 10 Smedes & M. 631; *Campbell v. Johnston*, 4 Dana, 182; *Keyes v. Wood*, 21 Vt. 331; *Smith v. Cunningham*, 2 Tenn. Ch. 568; *Paris Exchange Bank v. Beard*, 49 Tex. 358; *Kitchin v. Grandy*, 101 N. C. 86.

Where all the notes mature at the same time, they are equal liens; and if by the terms of the notes and mortgage, default in the payment of the first note or of the interest, when due, renders all the notes due and payable, they become equal liens upon default, and are payable *pro rata* instead of *pro tanto* from the proceeds of the sale.

Wiltse, Mortg. Foreclosure, § 13, p. 24; *Jones, Mortg.* 8d ed. § 1704; *Bank of U. S. v. Covert*, 13 Ohio, 240; *Bushfield v. Meyer*, 10 Ohio St. 331; *Winters v. Franklin Bank*, 33 Ohio St. 250; *Redman v. Purrrington*, 65 Cal. 271; *Pierce v. Shaw*, 51 Wis. 316; *Marine Bank v. Internat. Bank*, 9 Wis. 57; *Lumphreys v. Morton*, 100 Ill. 592.

The notes and the mortgage constitute one contract and are inseparable and must be construed together.

Swett v. Stark, 31 Fed. Rep. 858; *Kennion v. Kelsey*, 10 Iowa, 443; *Dobbins v. Parker*, 48 Iowa, 357.

NOTE.—Several notes secured by one mortgage; priority.

Where a mortgage is given to secure several notes, but contains no stipulation as to the order in which the notes should be paid, and there is no agreement as to such order, there can be no priority of rights in favor of different assignees of such

notes, but they are entitled to participate ratably in the fund derived from the security. *Penzel v. Brookmire*, 61 Ark. 106.

Several notes maturing at different dates, secured equally by a trust deed on the same land, are entitled to share the security *pari passu*. *Sutcliffe v. Dyer*, 86 Tenn. 41.

Mr. O. C. Miller, for appellees:

It is the settled law of this State that where several notes secured by the same mortgage become due and payable at different dates, the holder of the note which matures first has the prior right to subject the mortgaged property to the payment of that part of the debt evidenced by such note.

Grapengether v. Fejervary, 9 Iowa, 172; *Rankin v. Major*, Id. 209; *Hinds v. Mooers*, 11 Iowa, 211; *Sangster v. Loe*, Id. 588; *Reederv. Carey*, 18 Iowa, 275; *Massie v. Sharpe*, Id. 543; *Isett v. Lucas*, 17 Iowa, 508; *Walker v. Schreiber*, 47 Iowa, 538.

The *pro tanto* rule is the settled rule in this State, and has for its support the decisions of the greatest number of the highest courts of this country.

Gardner v. Diederichs, 41 Ill. 158; *Sargent v. Howe*, 21 Ill. 148; *Punk v. McReynolds*, 33 Ill. 481; *Vansant v. Almon*, 23 Ill. 30; *Koster v. Burke*, 81 Ill. 436; *State Bank v. Tweedy*, 8 Blackf. 447; *Hough v. Osborne*, 7 Ind. 140; *Crouse v. Holman*, 19 Ind. 80; *Murdock v. Ford*, 17 Ind. 52; *Stanly v. Beatty*, 4 Ind. 184; *Davis v. Langsdale*, 41 Ind. 339; *Guthmey v. Ragland*, 1 Rand. (Va.) 466; *McVay v. Bloodgood*, 9 Port. (Ala.) 547; *Hunt v. Stiles*, 10 N. H. 466; *Hurck v. Erskine*, 45 Mo. 484; *Mitchell v. Ladew*, 36 Mo. 526; *Thompson v. Field*, 38 Mo. 320; *Humphreys v. Morton*, 100 Ill. 598.

Given, J., delivered the opinion of the court:

1. Different rules are observed in different States in applying the security, when several obligations falling due at different times are secured by the same mortgage. The States of New York, New Jersey, Pennsylvania, Minnesota, Kentucky and others, have adopted what is termed the "*pro rata* theory;" that is, the security is divided among the holders of the different obligations according to the sums due thereon, neither having priority over the other. In this State, and in Ohio, Indiana, Illinois, Alabama and some other States, the *pro tanto* or priority rule is followed, under which the notes first maturing are treated as prior, and to be first paid in full out of the security. *Isett v. Lucas*, 17 Iowa, 508, and cases therein cited.

There is some discussion as to the respective merits of these rules. While much can be said for and against either, we deem it of more importance that the one adopted in the State shall be continuously followed than as to which should be adopted. The *pro tanto* rule was adopted in this State as early as 9 Iowa, and has been followed ever since. See *Grapengether v. Fejervary*, 9 Iowa, 163.

The question here presented is not as to which of these rules should be adopted in this State, but whether the provision in the mortgage that default in the payment of the principal or interest, when due, shall cause the whole sum remaining unpaid to become due, renders all the notes due at one time, in case of default, so that neither is entitled to priority. Where several notes, secured by the same mortgage, fall due at the same time, neither would be entitled to priority. Appellant's contention is that, under the provision of the mortgage above quoted, the failure to pay the first and second

notes when due rendered his note due at the same time, and therefore he is entitled to a *pro rata* share of the security.

These notes were not made payable on or before, but on, the day named in each. Hence the maker could not have stopped the running of the interest by tendering payment before maturity, and the holder could not be compelled to receive payment before maturity, but had a right to stand upon his contract, and receive his interest up to the maturity of his note. Can it be said that, by defaulting the payment of the first note, the last was rendered due, so that the maker might have stopped the running of the interest by tendering payment? We think not. The evident purpose of such a provision in the mortgage is that, in case of default and foreclosure on the installment first falling due, the surplus of the security may be applied on the remaining obligations, instead of being held idle until maturity. The default in the first renders subsequent notes due or not, at the election of the holder. If he prefers, he may waive his right to the mortgage security, and stand upon the terms of the note, or he may elect to treat his note as due, and demand his share of the security. To apply the rule contended for by the appellant, in a State where the *pro tanto* rule is the established law, would add an element of uncertainty to mortgage securities that would seriously affect their value. Such a rule would render it uncertain whether, under mortgages like this, the security would be applied *pro rata* or *pro tanto*. Take a case of three notes and mortgage like those under notice, as illustration. A party knowing that, under the laws of the State, the notes are entitled to priority according to the order of their maturity, and knowing the security to be sufficient for the first two notes, but insufficient for the whole, purchases and pays for the two notes first falling due on that basis. If the maker may, by defaulting, deprive these notes of their priority, then surely they would not be purchased so readily, nor at such a price.

The rule contended for would render it possible for the mortgagor and holder of the notes last falling due to defeat the holder of the first notes of his priority, by the maker's failing to pay the interest on the last note, whereby all become due, and the holder of the last be entitled to a *pro rata* share of the security. Notes of this description, secured by mortgages and deeds of trust, enter largely into the business transactions of the State, and the courts should hesitate before pronouncing a rule that would render it uncertain whether security for such notes would be applied *pro rata* or *pro tanto*. Our conclusion is that the maturity of the notes, by reason of default in making prior payment, is not such a falling due as should change the rule for the application of the security. We are aware that in *Bank of U. S. v. Covert*, 18 Ohio, 240, and in *Pierce v. Shaw*, 51 Wis. 316, the contrary doctrine was held. We have examined these cases with care, and, with the profoundest respect to those courts, must say that we cannot concur in the conclusions. One of the grounds upon which the *pro tanto* rule is supported is that making the notes mature at different times evidences an agreement that they are to have priority in the order in which they fall due. Hence cases of

default like this are not such a falling due as expunges from the contract the agreement as to priority.

We think there was no error in sustaining

plaintiffs' demurrer to intervenor's petition, and therefore the judgment of the District Court is affirmed.

NEW YORK COURT OF APPEALS.

Re John S. WOODWARD *et al.*, Executors,
etc., of Noah S. Hunt, Deceased.

Alice GRAY *et al.*, *Appls.*,

John S. WOODWARD *et al.*, *Respts.*

(....N. Y.)

1. The words "nephews and nieces hereinbefore named," in the residuary clause of a will, do not include grand-nephews and a grand-niece who have been twice previously referred to in the will as "children" of a "deceased niece."
2. A testator must be presumed to have used words in their ordinary primary sense or meaning.

(December 17, 1880.)

APPEAL by legatees under the will of Noah S. Hunt, deceased, from a judgment of the General Term of the Supreme Court, First Department, affirming a decree of the Surrogate of New York County deciding that such legatees were not entitled to participate in the portion of the estate disposed of by the residuary clause of the will. *Affirmed.*

The facts are fully stated in the opinion.

Mr. Charles H. Johnson, for appellants:
The intention of the testator as manifested by the entire will should govern.

Crosby v. Wendell, 6 Paige, 548; *Hoppeck v. Tucker*, 59 N. Y. 209; *Silcox v. Bell*, 1 Sim. & Stu. 801; *Mayott v. Mayott*, 2 Bro. Ch. 125; *Weeds v. Bristow*, L. R. 2 Eq. 233; *Ontler v. Doughty*, 23 Wend. 518, reversed, 7 Hill, 305; *Irvine v. De Kay*, 9 Paige, 528; *Parks v. Parks*, Id. 117; *Sheets's App.* 82 Pa. 213; *Anshute v. Miller*, 81 Pa. 212; *Diamond v. Diamond*, 9 Phila. 215; *Seibert v. Wise*, 70 Pa. 147; *Bond v. Bergh*, 10 Paige, 152.

The intention, however, should not be ascertained by considering the language of the particular devise only, which is sought to be construed, but should be gathered from the whole instrument.

Middlewarth v. Blackmore, 74 Pa. 414.

For similar cases to the one at bar, see *Cromer v. Pinckney*, 8 Barb. Ch. 466; *Brouer v. Bowers*,

1 Abb. App. Dec. 214, 9 N. Y. Legal Obs. 197.

The death of his niece was present to testator's mind and her three children formed a class to take her share.

Ferrer v. Pyne, 81 N. Y. 282; *Re Verplanck*, 91 N. Y. 444; *Raymond v. Hillhouse*, 45 Conn. 467, 19 Alb. L. J. 523; *Minter's App.* 40 Pa. 111; *Lockhart v. Lockhart*, 3 Jones, Eq. 205.

Mr. Charles H. Knox for Henry E. Woodward, respondent.

Mr. Charles P. Buckley for John S. Woodward *et al.*, respondents.

Messrs. Livingston & Olcott for Edwin H. Rogers, respondent.

Danforth, J., delivered the opinion of the court:

Noah S. Hunt, who died in the City of New York November 12, 1886, by his will, made in 1879, after providing for the necessities of some of his brothers and sisters during their lives, out of the income of specific sums, gave the principal of those sums to certain persons described by him as his nephews and nieces, naming the brother or sister from whom they descended, and in the tenth clause said: "I give and bequeath unto Alice, Thomas and Frederick, the three children of my deceased niece, Mary Jane Gray, late wife of the Reverend Thomas M. Gray, each the sum of two thousand dollars: provided, always, nevertheless, and it is my will, that if my sister Jane Noe shall survive me, then, and in such case, at least one-half part, and more if she shall need or require it, of the interest or income of the legacies hereinbefore given to her said grandchildren Alice, Thomas and Frederick Gray, shall be paid by my executors, their survivors or survivor, to my said sister Jane, or be applied to her use during the residue of the term of her natural life; and that the residue, if any, of such interest or income of such legacies, respectively, be paid to the said children of my deceased niece, Mary Jane Gray, respectively, to whom the principal thereof is hereinbefore given. . . . And, in the event of the

NOTE—Will; legacy to nephews and nieces.

A residuary legacy to testator's nephews and nieces, providing that "in case any one or more of the children of my deceased brothers and sisters mentioned in this clause of my will shall die or have died before me, leaving lawful issue surviving at the time of my death, then and in that case such issue of my deceased nephew or niece shall receive the share which his or her ancestor would have received,"—gives to the issue of a nephew or niece who had died before the making of the will the share which the parent would have taken if living. *Hayward v. Barker*, 118 N. Y. 366.

A devise of land to testator's nephew, as trustee for one B, "to her use during her natural life; after her decease to the use of the lawful begotten heirs of her body, each one to share and share alike; . . . in case of the death of B and all her children, all the property willed to her to revert to my nephew,"—

7 L. R. A.

gives the land to the nephew upon the death of B after the decease of all her children, although one of them leaves children who survived B. *Lookman v. Hobbs*, 98 N. C. 541.

If the testator uses legal or technical phrases only, his intentions should be construed by legal rules; but if he uses common words his intentions will be regulated according to the common understanding thereof. *Wallace v. Minor* (Va.) 10 S. E. Rep. 423.

The question in expounding a will is not what the testator meant, but what is the meaning of his words. *Hancock's App.* 8 Cent. Rep. 529, 112 Pa. 532; *Weidman's App.* 42 Leg. Int. 83.

The words "all the children of my brother," though used as if to designate the class, mean the nephews and nieces enumerated in another part of the will, and will not let in children born after the testator's death. *Chapeau's Estate*, 1 Tuck. 420.

As to the construction of a will, see *note* to *Wales v. Bowditch* (Vt.) 4 L. R. A. 819.

death of any of them, the said Alice, Thomas and Frederick Gray, before my decease, leaving no issue her or him or them surviving, who shall be living at the time of my death, then, and in any and every such case, I do give and bequeath the legacy aforesaid of such decedent unto the survivors or survivor of them, the said Alice, Thomas and Frederick, if more than one, in equal shares. But in case any such decedent shall leave surviving him or her any issue who shall be living at the time of my death, such issue of the deceased shall be entitled to take the legacy of the deceased parent of such issue, if more than one, in equal shares." The eleventh clause is not material here, and the twelfth clause is in these words: "All the rest, residue and remainder of my estates and property, of every name, nature and description, including the principal sums to be invested for the payment of interest or income thereof unto my nephews James H. Cory and Samuel H. Clark, and my niece Sarah Jane Bradford, as they shall severally, by the death of either of them, fall into my said residuary estate, I do give and devise and bequeath unto my nephews and nieces hereinbefore named, except the said James H. Cory, Samuel H. Clark and Sarah Jane Bradford, in such proportionate shares as the legacies hereinbefore given and bequeathed to them, respectively, shall bear to each other."

He appointed executors, who entered upon the duties of their office, and in due time applied to the Surrogate's Court of the County of New York for a judicial settlement of their account. It was found that, after complying with the earlier provisions of the will, a surplus remained for distribution under the twelfth or residuary clause, and as to that the surrogate determined that "Frederick F. Gray, Thomas M. Gray and Alice Gray, the children of testator's deceased niece Mary Jane Gray, are not nephews and niece of the testator, within the meaning and intent of the testator as expressed in the twelfth clause of his will, and are not entitled to participate in the distribution of his residuary estate" thereunder. From that determination the three persons named appealed to the supreme court, where the judgment or determination was affirmed.

We are of opinion, both upon principle and authority, that in so doing no error was committed. There is no doubt that the intention of the testator, as manifested by the entire will, should govern. This is the appellants' contention, and it is a sound canon of construction. In a will, as in a statute, the spirit is to prevail, and the letter is not to be adhered to if a different signification can be gathered from the whole context of the instrument. But where the language of the testator is clear, intelligible and unambiguous, there is no room for its application. That is the case here. From a variety of beneficiaries the testator selects a certain class, described by him as "nephews and nieces," and not all of that class, but only those "before named;" and, giving to those words the natural and ordinary signification, they include only the children mentioned in the preceding clauses of the will, and described as nephews and nieces. The record shows that he left a brother, Isaac J. Hunt, who had several children, all of whom were, of course,

"nephews and nieces" of the testator, yet one only of these seems named in the will; and it might, I think, with equal plausibility, be said that those not named should be included as that persons, although relatives, but not answering the description adopted by the testator, be held to be entitled. As to the appellants, they are called by the testator, not "nephews" or "nieces," but "children" of his "deceased niece," and in the same clause are twice referred to in that manner,—a discrimination in language and a choice of words of description which indicate no intention to include the persons named with nephews and nieces, but the contrary. It is obvious the testator had in his mind the different degrees of relationship of his various beneficiaries, and the selection of different words to describe them cannot be attributed to mistake or inadvertence. To hold otherwise would not preserve his intent, but defeat it.

The authorities are also the same way.

In *Falkner v. Butler*, Amb. 514, the testator empowered his wife to appoint his estate to be paid to his sisters and their children. The court held that "the power was confined to nephews and nieces, and could not be extended to great nephews and great nieces."

In *Shelley v. Bryer*, Jac. 207, the residuum of the estate of the testator was "to be divided equally between his nephews and nieces who might be then living." Some doubt was created by the codicil, but it was held that the terms "nephews and nieces" were not ambiguous, and unless extended by some peculiarities, could not include great-nephews or great-nieces; and so upon the will alone there was no ambiguity, and, notwithstanding the doubt raised by the codicil, it was so decided in view of both instruments. To the same effect is *Crook v. Whitley*, 7 DeG. M. & G. 490.

In *Cromer v. Pinckney*, 8 Barb. Ch. 466, the general rule is repeated that the testator must be presumed to have used words in their ordinary primary sense or meaning, and that the words "nephews and nieces," in their primary sense, mean the immediate descendants of the brother or sister of the person named, and do not include grand-nephews and grand-nieces or more remote descendants.

The principle of construction applied by this court in *Low v. Harmony*, 72 N. Y. 408, leads to the same conclusion. The testator in that case had in one clause made provision for the appellant, describing her as the daughter of his late daughter Sarah Ann, and in a later clause gave his residuary estate to his "wife and living children." It was held that this language manifested an intention not to include the representatives of a deceased child. These cases are applicable here.

It follows that whether we take the plain language of the tenth and twelfth clauses, or search for the intention of the testator in the context of the will, the result is the same. From neither source can it be implied that the testator intended the children "of his deceased niece" to share in the bounty bestowed upon the nephews and nieces theretofore named by him.

The judgment of this court below should be affirmed, with costs.

All concur.

PENNSYLVANIA SUPREME COURT.

Burgess, etc., of the BOROUGH OF
MILLVALE, Appts.,
v.
EVERGREEN R. CO.

(....Pa....)

1. The title of an Act showing a purpose to charter a "passenger-railway company" is sufficient to support a statute which really charters a steam-railroad company for carrying both passengers and freight.
2. If the title fairly gives notice of the subject of the Act, so as reasonably to lead to an inquiry into the body of the bill, it is all that is necessary. It need not be an index to its contents.
3. The terms "railway" and "railroad" have the same meaning.
4. The title of a supplemental statute which refers to the subject matter only by reference to the title of the principal Act is sufficient if the legislation in the supplement is germane to the subject of the original bill.
5. The adoption by a railroad company, having the powers conferred by the General Railroad Law, of a narrow gauge at the time it builds its road, will not prevent it from thereafter adopting any gauge in ordinary use, or which any company can adopt under the General Railroad Law, where there is no limit as to gauge in its charter.
6. Power given to a railroad company by the Legislature to construct and operate its road in the streets of a town or city is altogether independent of the municipality.

(January 6, 1890.)

CERTIORARI *sur* appeal by plaintiffs from a decree of the Court of Common Pleas, No. 1, of Allegheny County dismissing a bill filed to enjoin defendants from extending its tracks, and from changing the gauge of the same, and also to compel the removal of tracks from certain streets. *Affirmed.*

An Act of the Assembly was approved May 18, 1871, entitled "An Act to Incorporate the Lawrenceville & Evergreen Passenger Railway Company." The company was authorized among other things to construct a railway commencing at a certain point in the City of Pittsburgh, and thence along a designated route to Evergreen Hamlet, in Rose Township in the County of Allegheny, and the company was given power to use steam as a motive power over any portion of its road outside the limits of the City of Pittsburgh, and with the consent of certain persons named to use such motive power within the city. It was also given power to carry freight and passengers, and to extend

its road by consent of a majority of the stockholders to Perryville.

Subsequently an Act was approved March 9, 1872, entitled "A Supplement to An Act to Incorporate the Lawrenceville and Evergreen Railway Company, Approved May 18, 1871."

By such supplement the company was authorized to extend its road to the coal fields of Butler County, and it was provided that the company should have all the powers and privileges in locating, constructing and operating its road as were contained in the Act regulating railway companies, approved April 19, 1841, and the several supplements thereto.

Some time in 1872, the company built a narrow-gauge steam railroad commencing at a point in the Borough of Millvale, and thence along certain streets of said Borough to Evergreen Hamlet.

Subsequently the company began to construct its road in the direction of the City of Pittsburgh in order to reach the terminus provided in its original Act of Incorporation and undertook to change the gauge of its entire road to the ordinary broad-gauge in use by railroad companies.

The complainants filed this bill to restrain such action upon the ground that the acts under which the railway company undertook to act were both unconstitutional, and also upon the ground that the company was not authorized by the terms of such acts to operate its road or to extend or alter the gauge thereof in the manner contemplated.

The rights of the Lawrenceville & Evergreen Railway Company have all become vested in the Evergreen Railway Company.

The case was referred to a master, who reported that the bill should be dismissed. Exceptions filed to the master's report were dismissed by the court and a decree entered dismissing the bill.

The complainants thereupon took this appeal.

The further facts appear in the opinion.

Messrs. Lyon & Shoemaker, for appellants:

In the legislation and in the opinions of the courts in Pennsylvania, "railroads" and "passenger railways" are recognized as different and distinct classes.

See Const. art. 17, § 9; Act Authorizing the Incorporation of Passenger Railways, May 23, 1878; *State Line & J. R. Co's App.* 77 Pa. 429; *Com. v. Central Pass. R. Co.* 52 Pa. 519; *Western Pennsylvania R. Co's App.* 104 Pa. 406; *Louisville & P. R. Co. v. Louisville City R. Co.* 2 Duv. 175.

The "Lawrenceville & Evergreen Passenger

NOTE—Construction of railroad in streets of town or city.

The legislative power may authorize the building of a railroad on a street or other public highway, but such power must be given by the Legislature. *Com. v. Erie & N. E. R. Co.* 27 Pa. 339.

A street is a public franchise, and cannot be invaded except by direct legislative grant. *Pennsylvania R. Co's App.* 93 Pa. 150.

Although a highway is devoted to one public use the Legislature may devote it, concurrently, to 7 L. R. A.

another public use, so far as declaring a necessity for that other use is concerned. *Re Prospect Park & C. I. R. Co.* 67 N. Y. 371, 8 Hun. 30.

Title of Act; constitutional provisions as to.

See *Titusville Iron Works v. Keystone Oil Co.* 1 L. R. A. 361, 122 Pa. 627; *People v. McElroy* (Mich.) 2 L. R. A. 609; *Astor v. New York Arcade R. Co.* 2 L. R. A. 789, 113 N. Y. 93; *Winona v. School Dist. No. 82*, 3 L. R. A. 46, 40 Minn. 13; *Evansville v. State*, 4 L. R. A. 38, 118 Ind. 423.

Railway Company" was originally incorporated as a "passenger railway" company.

A supplement to an Act of Assembly must be germane to the Act. And the Act of March 9, 1872, having no new or distinct title, but being entitled merely as "a supplement," and being for an object foreign to the original Act, is not germane to it and hence cannot stand.

State Line & J. R. Co's App. 77 Pa. 429; *Craig v. First Presbyterian Church*, 88 Pa. 42.

The object of this supplement was to clothe this Passenger Railway Company with all the powers of an ordinary "railroad company" incorporated under the General Railroad Law of 1849. It is therefore not germane to the original Act, hence cannot stand.

Western Pennsylvania R. Co's App. supra.

The Act contains more than one subject, to wit: passenger railway and railroad, and, only one of these subjects (passenger railway) being expressed in its title, so much of the Act as relates to other subjects is in conflict with the Constitution.

If it be contended that the only subject of the original Act and its supplement is "railroad," the subject then is different from and not clearly expressed in the title, and the title is misleading and not in conformity with the Constitution.

Second Amend. Const. adopted in 1864, art. 11, § 8. See *Dorsey's App.* 72 Pa. 192; *Re Road in Phantioville*, 109 Pa. 44; *Union Pass. R. Co's App.* 81* Pa. 91; *Beckert v. Allegheny*, 85 Pa. 191.

Corporate franchises can only be plainly and unequivocally conferred; and where a doubt exists as to the powers claimed by a corporation against the public, the construction is most strongly against the corporation in favor of the public.

Pennsylvania R. Co. v. Canal Comrs. 21 Pa. 22; *Com. v. Erie & N. E. R. Co.* 27 Pa. 839; *Com. v. Central Pass. R. Co.* 52 Pa. 516.

Mr. Johns McCleave, for appellee:

If the title fairly gives notice of the subject of the Act so as reasonably to lead to inquiry into the body of the bill, it is all that is necessary.

Allegheny Co. Home's App. 77 Pa. 77. See *Heronville M. & F. Pass. R. Co. v. Philadelphia*, 89 Pa. 210.

It is difficult to find any powers in the Act of February 19, 1849, which the Company did not already have under the Act of 1871, except the right of eminent domain. The supplement is therefore clearly germane to the contents of the original Act, and, if so, is valid.

See *State Line & J. R. Co's App.* 77 Pa. 481; *Graff v. Evergreen R. Co.* 2 County Ct. Rep. 502.

Green, J., delivered the opinion of the court:

Notwithstanding the very ingenious and elaborate argument of the learned counsel for the appellant, we feel constrained to concur with the master and court below in their view of the contention between these parties.

It is very earnestly argued for the appellant that both the original Act of Incorporation of the defendant Company, and the supplement thereto, are in hostility with the provisions of the Constitution, and therefore void. The

basis of the argument as to the Act of Incorporation is that the title of the Act conveys a purpose to charter a passenger railway company, whereas the text of the Act really charters a steam-railroad company, and the two are so inconsistent that the text must fall. If it were true that a passenger railway could only be a railway laid upon the streets of a municipality, of a very limited extent, propelled only by horse power, without authority to carry anything but passengers and limited to the use of a particular kind of rail upon which steam cars and engines could not be propelled, there would be considerable force in the argument. But there is no such definition of a passenger railway, and there never was. It is true that when passenger railways located upon the streets of cities and towns were first built and used, they were, in point of fact, usually characterized by some of the above qualifications. But that circumstance proves nothing as to the extent or kind of the corporate franchises in any particular case. There was no general law at that time under which this class of railroad companies could be incorporated, and hence, there were no means of determining what the corporate franchises were, except by an examination of the Act of Incorporation in each instance. These were altogether without uniformity. The language of the learned master in his report in this case describes them correctly when he says: "They all, like the defendant Company, existed and held their franchises under, and by virtue of, special Acts of Incorporation, and while usually confined by the terms of their charters to the streets of a particular town or city, such limitation was neither necessary nor universal, while the powers conferred differed in scope in almost every instance; some companies, for example, being confined to the transportation of passengers only, and the use of horse power as a motor, while others were permitted to carry freight as well as persons, and also to use steam as a motive power."

An inspection of some of the numerous charters for this kind of roads, granted about the years 1837 to 1860, will show the greatest possible variety of conditions annexed to the grant of corporate powers in different charters. There being, then, no specific definition of the term "passenger railway," either prescribed by statute or existing in the common understanding, it follows that no necessary inference of a restricted franchise flows from the use of the term in the title of an Act.

In the case of *Allegheny County Home's App.* 77 Pa. 77, we said: "It will not do, therefore, to impale the legislation of the State upon the sharp points of criticism, but we must give each title as it comes before us a reasonable interpretation, *ut res magis valeat quam pereat*. If the title fairly gives notice of the subject of the Act so as reasonably to lead to an inquiry into the body of the bill, it is all that is necessary. It need not be an index to the contents, as has often been said."

The title to the present Act of Incorporation gave notice that a company bearing the name of the "Lawrenceville & Evergreen Passenger Railway Company" was to be incorporated. It was only the name of the company and not its purpose or object that was described.

The terms "railway" and "railroad" company have no different signification. They are defined synonymously in the dictionaries, and are used in the same sense in the common language of men. In the General Act of 23d May, 1878 (Pub. Laws, 111), authorizing the incorporation of street railway companies, the terms "railway" and "railroad" are used indiscriminately as representing the same thing. Thus in the title it is "railway companies" that are mentioned. In the second section it is provided that \$2,000 of stock for every mile of "railroad" shall be subscribed. The sixth section provides that the president and directors of any "railroad" company organized under the Act shall have power to borrow money. The seventh section directs notice to be given for payment of installments by publication in one or more newspapers published in the county where such "railroad" shall be located. This form of expression is repeated in the twelfth section and in the thirteenth the corporation created under the Act is called "railroad corporation." In the fifteenth section it is referred to as "passenger railway company," and, in the seventeenth, as "street passenger railway," when the structure itself is described. It is perfectly clear, therefore, that in the legislative sense these several modes of expression are used to designate the same thing.

So far as the judicial sense of the community of meaning of these terms is concerned, it is strongly expressed in the case of *Hestonville, M. & P. Pass. R. Co. v. Philadelphia*, 89 Pa. 210, in which we expressly held that city passenger railways were included within the term "railroads" employed in the Act of May 18, 1861, and that the provisions of said Act relating to the merger apply to said railways.

The Act of 1861 is entitled "An Act Relating to Railroad Companies." It was argued then as now that this title did not embrace street or passenger railway companies, and hence there could be no merger of such under the provisions of the Act. But we held differently. Mr. Justice Trunkay, in delivering the opinion of this court, said: "In 1861 all railroads were incorporated by special laws, and in so far as each law did not prescribe specially, reference was made to the provisions of the Act of February 19, 1849. This was common in charters for passenger railroads as well as others. In the statutes one class was generally styled railroads, and the other more frequently, but not always, railways. These words are popularly used as synonymous, and Webster defines both alike, but this matters little. A slight examination will show that the Legislature did not use the words in a distinctive sense." After referring to several charters which combine both classes of roads into one corporation the opinion proceeds: "These instances sufficiently indicate that the Legislature indiscriminately used the words in their popular sense. It is true that railroads were used in the country prior to their use on the streets of towns, and that many differences necessarily exist in their regulation and management. It is useless to name points of likeness and unlikeness, for there are many of each, and these vary in the same road when one part is in the country and the other in a city. Recently narrow-gauge railroads have been introduced, not laid on

streets of cities, nor tunnelled through hills and mountains, but running over the latter. All three kinds are railways—are railroads. Then as respects the title of the Act of 1861, it embraces railways on streets as well as those through or over hills and mountains."

The foregoing expressions must be regarded as qualifying certain remarks contained in the opinion of this court in the case of *Com. v. Central Pass. R. Co.* 52 Pa. 506, in which a distinction between passenger railway companies and railroads generally was apparently asserted, of such a character as that legislation intended for one class could not, or would not, embrace the other. We say "apparently" because such was not the real meaning of the court, as the learned counsel for the appellant seem to think. Our brother Strong, who delivered the opinion, was simply interpreting the actual character of a passenger railway company, in which there was nothing that gave it the right to use steam as a motor, or the right to carry freight as well as passengers, or, by consequence, the right to use the heavy, high rails used on steam roads for running locomotives and heavy freight trains. All this was literally true, and those conclusions were strictly correct, but what was said on this subject was said exclusively with reference to the facts of that case, and by way of illustration, the difference between the heavy rails, which rise several inches above the surface of the street, and do constitute a material obstruction to the travel, and the rail in ordinary use on passenger roads was selected and emphasized, but that was all. It was never intended to say or to intimate that there might not be different kinds of rails for passenger railway tracks, or that one kind of rail might not be used even though it were in a slight degree more obstructive than another, if in other respects it were a suitable rail for such use. We think the learned counsel for the appellant over-estimate the meaning of the language quoted in their argument from the opinion in the case referred to.

If now we turn to the language of the Act of Incorporation of the appellee in this case we find it does, in the most express and emphatic manner, confer upon the appellee the right to use steam, as a motor power, on and over any part of their road outside the limits of the City of Pittsburgh, and within those limits if certain consents are obtained. We find also that express power is given to carry freight as well as passengers over the road, and to construct such turn-outs and switches as may be necessary, and pass over and across any other railroad at grade. In all these respects the grant of powers differs from that of the Central Passenger Railway Company, and it is seen at once that there is an absence of analogy between that case and the present. It is true that in this case as in that there is no provision as to the kind of rails that may be used, but as the powers conferred are those of steam railroads, both as to the motive force and the kind of traffic to be transported, there is a perfectly legitimate inference that such rails may be used as are ordinarily used in the transportation of freight as well as passengers, in cars moved by steam power. No such inference was legitimate in the *Central Passenger Railway Case* because there were no such powers expressly granted,

Railway Company" was originally incorporated as a "passenger railway" company.

A supplement to an Act of Assembly must be germane to the Act. And the Act of March 9, 1872, having no new or distinct title, but being entitled merely as "a supplement," and being for an object foreign to the original Act, is not germane to it and hence cannot stand.

State Line & J. R. Co's App. 77 Pa. 429; *Craig v. First Presbyterian Church*, 88 Pa. 42.

The object of this supplement was to clothe this Passenger Railway Company with all the powers of an ordinary "railroad company" incorporated under the General Railroad Law of 1849. It is therefore not germane to the original Act, hence cannot stand.

Western Pennsylvania R. Co's App. supra.

The Act contains more than one subject, to wit: passenger railway and railroad, and, only one of these subjects (passenger railway) being expressed in its title, so much of the Act as relates to other subjects is in conflict with the Constitution.

If it be contended that the only subject of the original Act and its supplement is "railroad," the subject then is different from and not clearly expressed in the title, and the title is misleading and not in conformity with the Constitution.

Second Amend. Const. adopted in 1864, 11, § 8. See *Dorsey's App.* 72 Pa. 192; *R. in Phoenixville*, 109 Pa. 44; *Union Pass. App.* 81* Pa. 91; *Beckert v. Allegheny*, 191.

Corporate franchises can only be plenequivocally conferred; and when it exists as to the powers claimed by a corporation against the public, the construction is strongly against the corporation in favor of the public.

Pennsylvania R. Co. v. Canal 22; *Com. v. Erie & N. E. R.* 10; *Com. v. Central Pass. R. Co.* 10.

Mr. Johns McCleave, 10.

If the title fairly gives notice of the Act so as reasonably to inform the public into the body of the bill, it is not necessary.

Allegheny Co. Home's Hes'onville M. & F. Pass. 89 Pa. 210.

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See *State Line & J. R. Co's App.*

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basis of the corporation is the purpose to a steam-railway, inconsistent with the true that a railway is of a very horse power thing but a part and can be considered there way will structure and a part of the

The [redacted] to travel, is equal-
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[redacted] they necessarily carry
[redacted] modes in which
[redacted] used. So, too, it is urged
[redacted] to change the gauge
[redacted] narrow gauge of three feet
[redacted] ordinary use. But as all
[redacted] upon railroad companies
[redacted] of February 19, 1849, are
[redacted] defendant Company by these
[redacted] Supplement there is no force
[redacted] on. There is no limit to the
[redacted] company's road in the charter or
[redacted] they would necessarily have
[redacted] to adopt any gauge in ordinary
[redacted] might desire, which any rail-
[redacted] would have under the General
[redacted] of the State.

[redacted] that the defendant adopted the
[redacted] at the time its road was built and
[redacted] since until now, as is alleged
[redacted] reply is at once manifest, that it
[redacted] concluded by such original adop-
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[redacted] or the character of its rail, which
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[redacted] building might suggest, always, of
[redacted] within the limits of its chartered rights.
[redacted] as well be argued against the proposed
[redacted] gauge, that because a particular kind
[redacted] is in vogue and was actually adopted
[redacted] by a railroad company at and after
[redacted] of the construction of its road, it could
[redacted] adopt another, but was concluded by its
[redacted] choice, upon the theory of an exhaustion
[redacted] power. It will be seen at once that such
[redacted] argument is entirely fallacious and unten-
[redacted] Instead of such being the law, we have
[redacted] says held that railroad companies not only
[redacted] the right, but are by law bound, to make
[redacted] of the latest and best inventions and appli-
[redacted] ces tending to promote the comfort and safe-
[redacted] of the public. This is notably the case in the
[redacted] charter of spark-arresters, and is equally appli-
[redacted] cable to couplings and other contrivances.
[redacted] The writer remembers when strap rails, laid
[redacted] upon longitudinal stringers and fastened down
[redacted] with spikes, were in common use on steam rail-
[redacted] roads, and he also remembers that snakeheads
[redacted] at the ends of the rails resulted from this
[redacted] method occasioning frequent accidents and loss
[redacted] of life. When the T-rails came into use it be-
[redacted] came the undoubted legal duty of the old com-
[redacted] panies to abandon the flat rail and use the new

T. L. R. A

one, and any company failing to perform this duty would very quickly have received forcible and emphatic admonition to that effect, both from juries and courts.

It is also alleged in the plaintiff's bill that all the acts of the defendant both in laying its original track, and in operating the same, and now in the proposed change of gauge, and extension of its road, were and are done without the consent of the plaintiff, and against its earnest protest, and that the construction and operation of the road upon the streets of the Borough is a great public nuisance, and dangerous to the lives of the citizens, and a hindrance to business in the streets. Of course if by the terms of the charter it were necessary to obtain the consent of the borough authorities to construct and operate the road of the defendant upon the streets of the Borough, this point would be well taken, and would prevail. But no rule is better settled than that the power of the Commonwealth over the streets and roads within its territory, including those of its cities and towns, is paramount to that of the local authorities, and that right when granted to a railroad company is altogether independent of the municipality within which it is to be exercised.

Said Black, *Ch. J.*, in *Com. v. Erie & N. E. R. Co.* 27 Pa. 354: "The right of the supreme legislative power to authorize the building of a railroad on a street or other public highway is not now to be doubted. . . . If such conversion of a public street to purposes for which it was not originally designed does operate severely upon a portion of the people, the injury must be borne for the sake of the far greater good which results to the public from the cheap, easy and rapid conveyance of persons and property by railway. . . . The right of a company thereupon to build a railroad on the street of a city depends, like the lawfulness of all its other acts, upon the terms of its charter. Of course when the power is given in express words there can be no dispute about it. It may also be given by implication."

In the leading case upon this subject, viz., *Philadelphia & T. B. Co's Case*, 6 Whart. 25, Gibson, *Ch. J.*, said: "It would be strange, therefore, were the streets of an incorporated town not public highways, subject perhaps to corporate regulation for purposes of grading, curbing and paving, but subject also to the paramount authority of the Legislature in the regulation of their use by carriages, rail-cars or means of locomotion yet to be invented, and this without distinction between the inhabitants and their fellow-citizens elsewhere."

In *Williamsport Pass. R. Co. v. Williamsport*, 120 Pa. 1, 12 Cent. Rep. 289, the present *Chief Justice* said: "It is not denied that the charter of the appellant company gives it the power to lay its tracks upon the streets in question, and if it were denied it would not matter, as such power is expressly conferred. . . . There is nothing in the company's charter which makes the consent of councils a prerequisite to the exercise of its corporate powers in the extension of its road;" and we therefore held that the company was at liberty to extend its road without obtaining such consent.

In the present case the right to lay the track upon any public road then opened or thereafter to be opened is expressly given without any

and they could not be inferred from a charter which conferred only the power to carry passengers, and upon a passenger railway to be laid upon the streets of a city. It was therefore properly held that the right to lay a heavy T-rail, such as is used on steam roads authorized to carry freight as well as passengers, did not exist. In the present case the road is authorized to be built in the country, as well as in the city and town, and by the nearest practicable route between terminal points, with a right to occupy any public road then or hereafter to be opened, and in this respect also it differs from the *Central Passenger Railway Case*, and more nearly resembles the *Hestonville Case*. We are clearly of the opinion that the title of the Act of 1871 sufficiently expresses a purpose to charter a railroad company, and that there is nothing contrary to the Constitution in the text of the law.

But the Supplement of 1872 is also attacked for a similar reason, because the title contains no reference to the subject matter of the Act, other than by reference to the title of the principal Act. But the answer to this objection is that the rule governing such cases is, "that where the legislation in the Supplement is germane to the subject of the original bill, the object of such Supplement is sufficiently expressed in the title." *State Line & J. R. Co's App.* 77 Pa. 481.

This makes it necessary to consider only the character of the legislation contained in the Supplement. That legislation is all contained in two sections, the first of which authorizes the company by name to extend its road to the coal fields of Butler County, and the second confers upon the company all the powers and privileges of the Act of February 19, 1849. All this relates to the Lawrenceville & Evergreen Passenger Railway Company, and as that is the name of the company chartered by the Act of 1871, to which it is expressly declared to be a Supplement, and as the powers conferred are properly those which pertain to railroad companies, it cannot be doubted that the legislation of the Supplement is germane to the subject of the original Act of 1871.

In the case of *Craig v. First Presbyterian Church*, 88 Pa. 42, we held that, where an Act of Assembly is entitled a supplement to a former Act, and the subject thereof is germane to the subject of the original Act, its subject is sufficiently expressed to meet the requirements of art. 8, § 8, of the Constitution.

In view of these considerations and decisions, we are clearly of opinion that both the Act of 1871 and the Supplement of 1872 are lawful exercises of the legislative power not prohibited by the Constitution. It only remains to consider whether the matters complained of in the bill are authorized by the charter and its supplement. These matters are the construction of the road itself as a steam railroad, the change of gauge from a narrow gauge to the full width of the ordinary steam railroad, and the proposed extension of the road beyond its original limits. The road was built and run as a narrow-gauge steam railroad upon certain streets of the Borough of Millvale for a number of years prior to the filing of the present bill. A former bill for an injunction to restrain the construction of the road seems to

have been filed and proceeded with to a final decision favorable to the Company, and adverse to the Borough. From that decision it seems no appeal was taken, and the occasion of the present bill appears to be the proposed widening of the gauge and extension of the road under the authority of the Supplement. As the authority to use steam as a motive power, and to carry freight as well as passengers, is clearly given by the charter, we think there is no merit in the objection to the right of the Company to construct and maintain the steam railroad which it has built and operated thus far. In point of fact the defendant Company has only exercised the powers expressly given to it, when it made use of steam as a motor, and when it carried freight as well as passengers. These powers carry with them the right to construct and to use the appliances ordinarily employed for those purposes. It is true no express power is given to use locomotive engines, or the heavy passenger and freight cars commonly used for the carriage of freight and passengers, nor is any express authority given to lay the T-rails which are also in common use in steam railroads. But as these are methods which experience has established as appropriate, and indeed essential, in the carriage of freight and passengers upon railroads, or railways, with steam as the motive power, they must be regarded as authorized by plain implication from the grant of the powers in question.

It is argued with much earnestness and force by the learned counsel for the appellant, that "corporate franchises can only be plainly and unequivocally conferred, and where a doubt exists as to the powers claimed by a corporation against the public the contention is most strongly against the corporation in favor of the public." In support of this contention the customary citations are submitted in the paper-book from *Com. v. Erie & N. E. R. Co.*, 27 Pa. 339, that, "a doubtful charter does not exist; because whatever is doubtful is decisively certain against the corporation," and, "If you assert that a corporation had certain privileges show us the words of the Legislature conferring them."

Other citations from that and other cases are also presented. They are entirely correct, and when appropriate they are of controlling force. But they must not be misused. That each individual act done or proposed to be done by a corporation must be authorized by the express letter of its charter is sheer nonsense. Powers are conferred, and of course there must be no doubt as to them, but the means of carrying those powers into operation follow the grant of the powers, and do not require express mention. Take the present case as an illustration. The right to use steam as a motive power is expressly given, but no power is given to use locomotive engines; nevertheless it is too plain for argument that the right to use locomotive engines undoubtedly exists under the defendant's charter. For the right to carry freight and passengers over a railroad, or railway, is given, and to use steam as motive power, and in order to exercise that right with that motive power, locomotive engines are essential, probably indispensable. So, too, the right to lay a T-rail for such a railroad, while not expressly given,

and while it is an obstruction to travel, is equally clear because they are in common use for such railroads. Yet it may be, perhaps is, possible to carry both freight and passengers over a flat rail bolted to longitudinal stringers, or the ordinary flange rail used in street passenger railroads. But that possibility will not take away the right to use the more obstructive rail, because the latter is the one in general use for the exercise of the power, which is conferred by the letter of the Statute.

It is true also that in the title of the defendant's charter it is named as a passenger railway company, and an inference is sought to be drawn that its powers of carriage must be subordinated or limited to those ordinarily exercised by that kind of companies. This would be certainly so if there were no other powers expressly conferred, but as such other powers are expressly conferred they necessarily carry with them all the customary modes in which such powers are exercised. So, too, it is urged that there was no power to change the gauge of the road from a narrow gauge of three feet to the wider one in ordinary use. But as all the powers conferred upon railroad companies generally by the Act of February 19, 1849, are extended to the defendant Company by the second section of its Supplement there is no force in the contention. There is no limit to the gauge of this Company's road in the charter or Supplement, and they would necessarily have the same right to adopt any gauge in ordinary use, or that they might desire, which any railroad company would have under the General Railroad Law of the State.

If it be said that the defendant adopted the narrow gauge at the time its road was built and has used it ever since until now, as is alleged in the bill, the reply is at once manifest, that it is not at all concluded by such original adoption and continuous use. It parted with no right thereby to make any change in the gauge of its track, or the character of its rail, which its own interests or the advance in the science of railroad building might suggest, always, of course, within the limits of its chartered rights. It might as well be argued against the proposed change of gauge, that because a particular kind of rail was in vogue and was actually adopted and used by a railroad company at and after the time of the construction of its road, it could never adopt another, but was concluded by its first choice, upon the theory of an exhaustion of its power. It will be seen at once that such an argument is entirely fallacious and untenable. Instead of such being the law, we have always held that railroad companies not only have the right, but are by law bound, to make use of the latest and best inventions and appliances tending to promote the comfort and safety of the public. This is notably the case in the matter of spark-arresters, and is equally applicable to couplings and other contrivances. The writer remembers when strap rails, laid upon longitudinal stringers and fastened down with spikes, were in common use on steam railroads, and he also remembers that snakeheads at the ends of the rails resulted from this method occasioning frequent accidents and loss of life. When the T-rails came into use it became the undoubted legal duty of the old companies to abandon the flat rail and use the new

one, and any company failing to perform this duty would very quickly have received forcible and emphatic admonition to that effect, both from juries and courts.

It is also alleged in the plaintiff's bill that all the acts of the defendant both in laying its original track, and in operating the same, and now in the proposed change of gauge, and extension of its road, were and are done without the consent of the plaintiff, and against its earnest protest, and that the construction and operation of the road upon the streets of the Borough is a great public nuisance, and dangerous to the lives of the citizens, and a hindrance to business in the streets. Of course if by the terms of the charter it were necessary to obtain the consent of the borough authorities to construct and operate the road of the defendant upon the streets of the Borough, this point would be well taken, and would prevail. But no rule is better settled than that the power of the Commonwealth over the streets and roads within its territory, including those of its cities and towns, is paramount to that of the local authorities, and that right when granted to a railroad company is altogether independent of the municipality within which it is to be exercised.

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In *Williamsport Pass. R. Co. v. Williamsport*, 120 Pa. 1, 12 Cent. Rep. 289, the present Chief Justice said: "It is not denied that the charter of the appellant company gives it the power to lay its tracks upon the streets in question, and if it were denied it would not matter, as such power is expressly conferred. . . . There is nothing in the company's charter which makes the consent of councils a prerequisite to the exercise of its corporate powers in the extension of its road;" and we therefore held that the company was at liberty to extend its road without obtaining such consent.

In the present case the right to lay the track upon any public road then opened or thereafter to be opened is expressly given without any

qualification, and hence the consent of the Borough of Millvale to the construction and operation of the road over its streets need not be obtained and is a matter of indifference. But the charter does require that in order to cross the Ewalt Street Bridge the consent of the bridge company must be obtained, and the right to use steam power in the City of Pittsburgh also requires the consent of the bridge company, a majority of the property owners on Ewalt Street, and the councils of the city. The necessity of obtaining consent in these special instances intensifies the force of the proposition that consent is unnecessary for all the other purposes of the defendant in the exercise of its franchise; this being so, it will be seen at once that the Borough has no control over the construction or operation of the road within its limits. The power of the defendant in the ex-

ercise of its franchise is altogether independent of the Borough and is of just as high and authoritative origin as the right of the Borough to exist at all. The rights of both are derived from the same source, to wit, the legislative power of the Commonwealth, and the Company is not subject to the slightest obligation to go to the Borough for consent to exercise any part of its corporate franchise. Any other doctrine would subordinate the corporate franchise of the defendant to the will of the borough councils, and cannot be sanctioned for a moment.

Upon a careful consideration of the merits of the case we are persuaded that there was no error in the action of the learned court below, and we must therefore sustain its decree.

Decree affirmed, and appeal dismissed at the appellant's cost.

ARKANSAS SUPREME COURT.

ST. LOUIS, IRON MOUNTAIN &
SOUTHERN R. CO., *Appl.*,

v.

R. W. WORTHEN, Collector, etc., *et al.*

(.....Ark.....)

1. **The separate classification of railroad property** for purposes of taxation, and the provision of a tribunal for the valuation and assessment of such property different from that provided in the case of other classes of property, is not prohibited by the constitutional provision requiring the valuation of property for purposes of taxation to be equal and uniform.
2. **A provision for intervals** between the times for making the successive assessments upon the various classes of property which are different as to the respective classes, does not violate the constitutional requirement as to uniformity in the valuation of property for taxation.
3. **That notice of the meeting** of a board of commissioners for the purpose of assessing railroad property for taxation is not given to the railroad company will not render the assessment void as a taking of property without due process of law, where the time and place for the meeting of the board are fixed by statute; the notice contained in the statute is all that can be required.
4. **The failure to provide for an appeal** from the decision of commissioners placing a valuation upon railroad property for purposes of taxation will not render a Revenue Act void as violating the constitutional provision securing the equal protection of the laws, although the right to appeal in such cases is accorded to the owners of other property.
5. **A mere discrepancy in judgment** between the members of a board of assessment and the chancellor to whom application is made to enjoin the collection of the tax, as to the value of the property taxed, will not warrant an interference on the part of the latter.

(February 15, 1890.)

APPPEAL by plaintiff from a decree of the Chancery Court for Pulaski County in favor of defendants in a proceeding to enjoin the collection of certain taxes. *Affirmed.*

7 L. R. A.

The case sufficiently appears in the opinion. *Messrs. Dodge & Johnson*, for appellant: There must be uniformity in the mode of assessment, as well as equality in the rate of taxation.

Cooley, Const. Lim. 8d ed. p. 622; *Railroad Tax Cases*, 13 Fed. Rep. 733; *Woodbridge v. Detroit*, 8 Mich. 301; Burroughs, Taxn. chap. 5. See also *Lexington v. McQuillan*, 9 Dana, 513; *Columbus Exch. Bank v. Ilincz*, 3 Ohio St. 1; *People v. Whyler*, 41 Cal. 335.

Taxing by a uniform rule means by one and the same unvarying standard,—uniformity not only in the rate of taxation, but uniformity in the mode of assessment, by which the value is ascertained.

Fletcher v. Oliver, 25 Ark. 205; *Peay v. Little Rock*, 32 Ark. 81; *Stevens v. State*, 2 Ark. 299; *Nike v. State*, 5 Ark. 205.

Equal protection is denied when a party is made liable to other and greater burdens than such as are laid upon others.

Neal v. Delaware, 103 U. S. 408 (26 L. ed. 578); *Bowman v. Lewis*, 101 U. S. 22 (25 L. ed. 989); 2 Kent, Com. 331. See also *Com. v. People's 5 Cent Sav. Bank*, 5 Allen, 436; *Dorgan v. Boston*, 12 Allen, 237; *Atlantic & N. O. R. Co. v. Carteret Co.* 75 N. C. 474; *Cheshire Co. v. Berkshire Co. Comrs.* 118 Mass. 349; *State v. Newark*, 81 N. J. L. 415, 18 Am. L. Reg. N. S. 443; *State v. Township Committee of Readington*, 36 N. J. L. 70.

Denial of appeal from the assessment, as made by the board of railroad commissioners, renders the Act void.

Fletcher v. Peck, 10 U. S. 6 Cranch, 133-135 (3 L. ed. 177); Const. art. 7, § 15, p. 24, §§ 83, 25, p. 28, § 87, p. 29, § 42, p. 30, §§ 52, 61, p. 32; *Ex parte Anthony*, 5 Ark. 362.

The right to a hearing is a constituent of due process of law in matters of taxation.

Stuart v. Palmer, 74 N. Y. 133; *Baird v. Williams*, 49 Ark. 518.

Messrs. W. E. Atkinson, Atty-Gen., and T. D. Crawford, for appellees:

Similar acts to the one here assailed have been adopted in the following States and Territories:

Ill. Rev. Stat. 1888, chap. 120, §§ 42, 44, 48, 105, 109; Mo. Rev. Stat. 1879, §§ 8868, 6871, 6863, p. 1352; Neb. Rev. Stat. 1887, chap. 77, §§ 39, 40, p. 592; Ind. Rev. Stat. 1881, §§ 6367-6369, 6402, 6410, p. 1373; Cal. Pol. Code, §§ 3664, 3665; N. J. Supp. to Rev. 1877-1883, p. 1003; Ky. Gen. Stat. 1887, chap. 42, §§ 1, 3; Kan. Dassel's Comp. Laws. 1879, chap. 107, §§ 26-29, 32; Idaho Rev. Stat. 1877, § 1463; Colo. Gen. Stat. 1888, § 2847; Conn. Gen. Stat. 1884, §§ 3919, 3930; N. H. Gen. Laws 1878, p. 160; Miss. Laws 1880, p. 81 *et seq.*, §§ 128-139; Tenn. Code 1884, p. 140, chap. 5, § 669 *et seq.*; Ala. Civ. Code 1885, § 494, *et seq.*; 1 Ohio Rev. Stat. 1880, § 2770 *et seq.*; Iowa Code 1878, §§ 810, 834, 1317-1323.

A few States tax railroads a certain percentage upon the gross receipts:

2 N. Y. Rev. Stat. p. 1044 (Banks & Bros. ed.); Minn. Acts 1887, p. 67; 2 Md. Pub. Gen. Laws, p. 1261; Maine Rev. Stat. 1883, p. 135 *et seq.*; Va. Code 1878, p. 350.

States have the right to classify property for purposes of assessment.

Cummings v. Merchants Nat. Bank, 101 U. S. 160 (25 L. ed. 906); Acts 1871, § 81, p. 135; Acts 1879, § 2, p. 40; *Plumer v. Marathon Co.* Supra. 46 Wis. 176; *San Francisco & N. P. R. Co. v. State Board of Equalization*, 60 Cal. 12; *State Railroad Tax Cases*, 92 U. S. 601 (23 L. ed. 669); *Kentucky Railroad Tax Cases*, 115 U. S. 331 (29 L. ed. 417); *Cincinnati, N. O. & T. P. R. Co. v. Com.* 81 Ky. 495; *Central Iowa R. Co. v. Wright Co.* 67 Iowa, 199.

The term "due process of law," as applied to proceedings for the levy and collection of taxes, does not imply or require the right to such notice and hearing as are considered essential to the validity of the proceedings and judgments of judicial tribunals.

State Railroad Tax Cases, 92 U. S. 575-618 (23 L. ed. 663-675); *Cincinnati, N. O. & T. P. R. Co. v. Com.* 81 Ky. 511-513; *Kentucky Railroad Tax Cases*, 115 U. S. 331-333 (29 L. ed. 416, 417); *Porter v. Rockford, R. I. & St. L. R. Co.* 76 Ill. 698; *Adair v. Lieb*, Id. 201; *State Board of Assessors v. Central R. Co.* 4 Cent. Rep. 426, 48 N. J. L. 146; *State Auditor v. Jackson Co.* 65 Ala. 142; *East St. Louis Con. R. Co. v. People*, 8 West. Rep. 842, 119 Ill. 182; *State v. New Lindell Hotel Co.* 9 Mo. App. 457; *La Salle & P. H. & D. R. Co. v. Donoghue*, 127 Ill. 27; *St. Louis R. & T. R. Co. v. People*, Id. 627; *Santa Clara Co. v. Southern Pac. R. Co.* 118 U. S. 394 (30 L. ed. 118).

Cockrill, *Ch. J.*, delivered the opinion of the court:

This appeal raises the question of the constitutionality of the provisions of the Revenue Act of 1883, creating the state board of railroad commissioners for the assessment of railway property for taxation. Mansf. Dig. § 5647 *et seq.*

It is an attempt to enjoin the collection of the taxes on account of the alleged invalidity or nullity of the assessment.

The legality of the proceedings of the board in assessing railway property was affirmed by this court in the case of *Little Rock & Ft. S. R. Co. v. Worthen*, 46 Ark. 312, and by the Supreme Court of the United States in *Huntington v. Worthen*, 120 U. S. 97 (30 L. ed. 583), 7 L. R. A.

and thus the constitutionality of the Act creating the board was impliedly recognized by both tribunals; but the question was not argued in either case, and we are now asked to overthrow the Act because, (1) it authorizes the assessment of railways by a different instrumentality from that employed to assess other property; because (2) it authorizes the assessment of railway tracks, a term which includes the right of way, annually, whereas other real estate is assessed biennially; because, (3) it is said, the board meets without notice to the railway; and because (4) no appeal is provided from the assessment of the board, whereas that privilege is accorded to the owners of all other property.

Similar statutory provisions exist in many States of the Union, and numerous decisions are reported from various States and from the Supreme Court of the United States affirming the validity of the Acts, in some one of which every question here raised has been pressed upon the attention of the court, but no case is cited denying their legality.

The Constitution of this State provides that the value of property for taxation shall be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform. § 5, art. 16.

There is nothing in this or any other provision of the Constitution which either expressly or by necessary implication denies the Legislature the power to classify property for the purpose of taxation (*Little Rock & Ft. S. R. Co. v. Worthen*, 46 Ark. 330); and, that classification is not prohibited by the Federal Constitution, so long as the law operates equally and uniformly upon all property of like kind, is definitely settled by the Supreme Court of the United States. *State Railroad Tax Cases*, 92 U. S. 601 (23 L. ed. 669); *Cummings v. Merchants Nat. Bank*, 101 U. S. 160 (25 L. ed. 905); *Kentucky Railroad Tax Cases*, 115 U. S. 331 (29 L. ed. 416).

From the peculiar nature of railroad property, its dissimilarity in use and value from the mass of other property, and its continuous extent through different localities, it is commonly regarded by the States that it cannot in justice to the owners be as fairly and uniformly valued by the numerous local instrumentalities provided for assessing other property as by a state board created for the purpose. The industry of the attorney-general has furnished us references to the Statutes of a large number of States showing that the practice of assessment of railways as units by state boards is almost universal.

In considering a statute of the State of Kentucky, which pursued this system, the Supreme Court of the United States, in the case cited, says: "There is nothing in the Constitution of Kentucky that requires taxes to be levied by a uniform method upon all descriptions of property. The whole matter is left to the discretion of the legislative power, and there is nothing to forbid the classification of property for purposes of taxation, and the valuation of different classes by different methods. The rule of equality in respect to the subject only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and

uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the method and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination, in this respect, which the discretion of the Legislature has seen fit to impose."

In a like case in California it was said: "The Constitution of the State requires all property to be assessed at its actual value. We are unable to see how the fact that the value of one kind of property is to be ascertained by one officer or board, and the value of another kind of property by another officer or board—each clothed with the duty and responsibility of ascertaining the actual value—can be held to operate a deprivation of legal protection to the owners of either kind of property. The state board in the one case, the assessors and county boards in the other, are but different instrumentalities through which the same result is reached, the fair and just valuation by reference to the same standard—and therefore the equal and uniform valuation—of property for purposes of taxation." *San Francisco & N. P. R. Co. v. State Board of Equalization*, 80 Cal. 80.

Authorities might be multiplied to the same effect.

The objection of the railways to being placed in a class to be dealt with separately by the Legislature is thus seen to be without foundation in reason or authority. But the power thus to classify makes it competent for the Legislature to provide the periods for the assessment of each class as well as the mode. It is competent to provide that one kind of property shall be assessed every year, while the requirement reaches another only once in two years. Such a distinction between real and personal property is made without objection; but the difference between a railway with its equipments and real estate is perhaps not greater than that between real estate and some species of personality. The fact that this Statute denominates railway tracks as real estate does not obliterate the difference between them and ordinary farm lands, any more than it would in fact convert railroads into personality to call them so, as was done for the purpose of taxation by the Acts of 1871 and 1879,—Acts 1871, p. 185; Acts 1879, p. 40.

The nature of the property justifies classification and separation from the body of the real estate upon the grounds that justify the separate classification of realty and personality. The requirement of an annual assessment of railways affords, therefore, no greater cause for complaint than does the like requirement for personal property, and the complaint of discrimination is groundless. *Central Iowa R. Co. v. Wright Co.* 87 Iowa, 199.

More baseless than either of these objections is the argument that the Company's property is taken without due process of law, because no notice is given the Company and no opportunity to be heard before the assessment becomes fixed. The time and place for the meeting of the board is fixed by the Statute, and notice by statute is practically sufficient, and

all that can be required in such proceedings. *Pulaski Co. Equalization Board Cases*, 49 Ark. 518.

As was said in *State Railroad Tax Cases*, *supra*: "This board has its time of sitting, fixed by law. Its sessions are not secret. No obstruction exists to the appearance of anyone before it to assert a right or redress a wrong; and in the business of assessing taxes this is all that can be reasonably asked."

The objection urged here to the failure to provide for an appeal from the valuation fixed by the state board was disposed of in *Kentucky Railroad Tax Cases*, cited above; and what is there said of the relative rights of the owners of railways and of the owners of other property, and of the power of the tribunals which fix the values of the several classes of property for taxation, is so nearly applicable under the laws of this State that we quote the language as disposing of the question: "The final point of objection seems to be reduced to this: In the case of ordinary real estate, it is said, when the assessor has made his valuation, it is submitted to a board of supervisors, who may change the valuation, but not so as to increase it without notice to the taxpayer, and an opportunity for a formal hearing, upon testimony to be adduced under oath, and with a right of appeal on his part, first, to a county judge, and, again, if the amount of the tax is equal to \$50, to the circuit court. This is contrasted with the proceedings in the case of railroad property before the board of railroad commissioners, in which it is alleged there is no notice of an intended change in the valuation returned by the company, and no appeal allowed if it is increased.

"The discrimination, however, is apparent rather than real. An examination of the Statutes shows that the original valuation of the assessor, in case of ordinary real estate, is conclusive upon the taxpayer, no matter how unsatisfactory; and the appeal allowed is only from the action of the board of supervisors, in case they undertake to increase the valuation made by the assessor. But in the case of railroad property, no board has the authority to increase the original assessment made by the railroad commissioners, and there is therefore no case for an appeal similar to that of the owner of ordinary real estate.

"But were it otherwise, the objection would not be tenable. We have already decided that the mode of valuing railroad property for taxation under this Statute is due process of law. That being so, the provision securing the equal protection of the laws does not require, in any case, an appeal, although it may be allowed in respect to other persons, differently situated. This was expressly decided by this court in the case of *Bowman v. Lewis*, 101 U. S. 22, 30 [25 L. ed. 989, 992]. It was there said by Mr. Justice Bradley, delivering the opinion of the court, and speaking to this point, that 'the last restriction, as to the legal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to the subject matter, amount or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress.' The right to classify

railroad property, as a separate class, for purposes of taxation, grows out of the inherent nature of the property, and the discretion vested by the Constitution of the State in its Legislature necessarily involves the right, on its part, to devise and carry into effect a distinct scheme with different tribunals in the proceeding to value it. If such a scheme is due process of law, the details in which it differs from the mode of valuing other descriptions and classes of property cannot be considered as a denial of the equal protection of the laws."

The provision contained in the Kentucky Act for the enforcement of the tax by proceeding in an ordinary court of justice does not alter the case as to the questions presented, for in such proceedings the valuation fixed by the board is conclusive in the absence of a statutory provision authorizing inquiry into their finding, and it could not be assailed unless for fraud or want of jurisdiction (*East St. Louis Cons. R. Co. v. People*, 119 Ill. 182, 8 West. Rep. 842), grounds upon which the court of equity could have acted in this case as readily as could the Kentucky tribunal in the case instanced. *La Salle & P. H. & D. R. Co. v. Donoghue*, 127 Ill. 27; *St. Louis, B. & T. R. Co. v. People*, Id. 627.

Much complaint is made in the abstract and brief of appellant over the fact that having the same mileage in 1885 and 1886 the board nearly doubled the assessment of the former year in the latter. No fraud is charged; and it is notable in this case, as in those of the individuals who complained, in the cases reported in *Pulaski Co. Board of Equalization Cases*, 49 Ark. 518, that the Board of Equalization had greatly increased their assessment, that there is not even a charge of over-valuation of property. The only inference to be deduced from the increase in the assessment, standing alone, as was said in the case of *St. Louis B. & T. R. Co. v. People*, *supra*, would be, that the assessment for the first year was too low or that the property had since increased in value, or that both facts existed.

A mere discrepancy in judgment, however, between the members of the board and the chancellor to whom the application may be made for injunction, would not warrant interference on the part of the latter.

The chancellor was right in declining to interfere with the collection of the taxes, and the decree is affirmed.

MICHIGAN SUPREME COURT.

Alice F. BENNETT, *Appl.*,

v.

Edward C. CHAPIN, *Admr.*, etc.

(.....Mich.....)

1. When a person is, by the terms of an instrument, entitled absolutely to property, any provision therein postponing its transfer or payment to him is void.
2. Under a will providing that a daughter of testatrix shall receive from the executors a certain sum for her support until she arrives at the age of thirty-five years, at which time they shall transfer to her the entire estate, real and personal, but in case of her death before arriving at that age leaving no lawful issue her father shall take the property, but with no devise over except to the father if then living, she is entitled on her father's death to the immediate enjoyment of the entire estate although she has not yet reached the age of thirty-five years.

(November 8, 1889.)

APPEAL by plaintiff from a decree of the Circuit Court for Ingham County dismissing the bill in a suit brought for the construction of a will and to obtain the payment of certain money thereunder, and if necessary for the sale of certain real estate. *Reversed*.

The case is fully stated in the opinion.

Mr. Frank E. Robson, for complainant, appellant:

The clause prohibiting the sale unless for a specified sum, comes within the rule laid down in *Mandelsbaum v. McDonell*, 29 Mich. 78; and such restriction is void and of no effect except as a mere expression of the desire of the testatrix, but not binding on the executors.

7 L. R. A.

An administrator *de bonis non* with the will annexed succeeds to all the powers of executor; and if the executor has been given authority outside of those special functions, he will succeed to them if authority of the will is commensurate.

Schouler, *Exrs.* § 418, and cases cited; 2 Redf. Wills, pp. 123, 124.

How. Stat., § 5844, provides: "And administrators with the will annexed shall have the same authority to perform every act, and discharge every trust, as the executor named in the will would have had," etc.

Where the powers conferred are not personal (that is, where from the language used it will not be held that the trust was conferred upon the individual named as executor), and make a trust incident to the performance of and execution of the duties of executor, etc., the powers will be held to be conferred upon the office, and not the individual as a personal trust.

King v. Tubert, 36 Miss. 387; *Olivine's App.* 4 Watts & S. 492; *Mathews v. Meek*, 23 Ohio St. 272; *Trigg v. Daniel*, 2 Bibb. 301; *Blake v. Dexter*, 12 Cush. 559; *Ingle v. Jones*, 76 U. S. 9 Wall. 486 (19 L. ed. 621); *Putnam v. Story*, 182 Mass. 206; *Chandler v. Hider*, 102 Mass. 268.

Mr. Jay P. Lee, for defendant, appellee:

Where a personal trust is conferred upon an executor named in the will, the power will not pass to an administrator with the will annexed. And the administrator *de bonis non* with the will annexed does not succeed to powers and duties which lie outside the ordinary scope of an executor's functions, unless the testatrix has clearly granted commensurate authority.

Schouler, *Exrs.* and *Admr.* par. 418; Redf. Wills, pt. 2, p. 222; *Ingle v. Jones*, 76 U. S. 9 Wall. 486 (19 L. ed. 621).

The powers conferred by § 5844, How. Stat., upon an administrator *de bonis non*, are such only as can be exercised by the executor as such, and a personal power or trust which might be exercised or performed by the executors independently of his office as executor will not pass by devolution to the administrator.

Conklin v. Egerton, 21 Wend. 480; *Ross v. Barclay*, 18 Pa. 179; *Evans v. Chew*, 71 Pa. 47.

The plain and unambiguous words of the will must prevail, and are not to be controlled or qualified by any conjectural or doubtful constructions growing out of the situation, circumstances or condition, either of the testator, his property or his family.

1 Redf. Wills, p. 480.

Long, J., delivered the opinion of the court:

The complainant, who is now about thirty-one years of age, is the only child and heir-at-law of Eliza J. Bennett, deceased, who departed this life in September, 1879, leaving a last will and testament. The main provisions of the will are as follows: "I, Eliza J. Bennett, of the City of Lansing, County of Ingham and State of Michigan, do make and publish this my last will and testament. *First*. I direct that my executors shall, during the minority of my daughter, Alice Florence, provide for her education, clothing and maintenance in a suitable manner, and that they shall thereafter pay to her the sum of \$1,000 per annum until she shall have attained the age of thirty-five years: provided, that, in case she shall receive any funds from any other source at any time, my executors shall pay to her only such sum as may be necessary to make her total annual income \$1,000: provided, further, that, if any portion of said yearly allowance shall not be expended within any one year, for the purposes aforesaid, the difference between the sum actually expended in such year and the sum of \$1,000 shall in no case or in any event be subject to the order or control of my said daughter, but any such sum shall be treated in the same manner as any other funds that may remain in the hands of my executor. *Second*. If the executors shall at any time find it necessary, or shall deem it for the best interest of my estate, to sell any of the realty, I desire sale to be made in the following order: First, my property at Grand Ledge, Michigan; second, lot No. ten (10), block sixty-six (66), in the City of Lansing; third, the southeast quarter of the southeast quarter of section thirty-six (36), in the Township of DeWitt, Michigan; fourth, lots two and three (2 & 3), of block sixty-seven (67), in the City of Lansing. And in no case shall said last-named lots be sold before my said daughter shall attain the age of thirty-five years, unless she shall become incompetent, from any cause, to earn a livelihood, and in no event for less than the sum of \$15,000, by my executors. *Third*. My estate shall remain in the hands of my executors until my said daughter shall attain the age of thirty-five years, and whatever surplus there may be from year to year, after the payment of said \$1,000, together with the taxes and other liabilities of said estate, shall be by them invested in first-mortgage securities on well improved farming lands. *Fourth*. If my said daughter, Alice, shall live

to attain the age of thirty-five years I direct that my executors shall then transfer to her absolutely my entire estate both real and personal. *Fifth*. If my said daughter, Alice, shall die before attaining the age of thirty-five years, leaving such lawful issue, and such issue die, I give my entire estate to my well-beloved husband, Jacob B. Bennett, if he survive her or her issue as aforesaid. *Sixth*. If my said daughter, Alice, shall die before attaining the age of thirty-five years, leaving lawful issue, such issue shall take said property at the time my said daughter should have taken it had she lived. *Seventh*. I do hereby constitute and appoint Jacob B. Bennett and Schuyler F. Seager, of the City of Lansing aforesaid, executors of this my last will and testament."

This will was duly executed on May 30, 1876. Afterwards, and on July 19, 1879, the testatrix added the following codicil: "(1) I don't wish the property on Washington Avenue sold until such time as it will bring not less than \$100 per foot front. (2) It is my wish that my daughter, Alice, should have such preparation as would enable her in any reverses of fortune to support herself by her own exertions. I therefore direct my executors to set apart from my estate a sum sufficient to give her a thorough course of kindergarten training; the money necessary for that purpose to be by them realized from the sale of properties other than the Washington Avenue lots."

This will and codicil were duly proved and allowed in the Probate Court for Ingham County on December 5, 1881.

Jacob B. Bennett, one of the executors named in the will, is the father of the complainant, but he and Mr. Seager, the other executor, are now both deceased. At the time of the probate of the will both executors refused to accept the trust, and thereupon the complainant was appointed administratrix with the will annexed, accepted the trust, and gave the requisite bond. She continued to execute the trust until November 16, 1888, when she filed her resignation with her final account in the probate court, and was duly released and discharged, and the defendant, Edward C. Chapin, duly appointed administrator *de bonis non* with the will annexed, and now continues to execute the trust. The complainant claims by her bill that up to about the month of September, 1884, she has heretofore been able to support herself by her own exertions, and by means derived from sources outside of said estate, and a small sum from said estate, to wit, the sum of \$589.19, but that since said time, and for the year last past, she has been in ill health, and unable to earn her own support, and has been obliged at times to appeal to the kindness of friends for support and assistance, so that at the present time she is indebted in personal obligations to friends that have assisted her in about the sum of \$1,500, and further says that the major portion of said indebtedness was incurred in fitting herself for the position of a teacher of kindergarten, and that she so fitted herself for such work, and has a portion of the time been able to pursue such employment, but, owing to her ill health, is no longer able to do such work; and further says that she no longer has any source of income from outside sources, and is wholly unable to

support herself by her own exertions. That, under and by the terms of the first paragraph of said last will and testament, she is entitled to have paid to her from said estate, as she believes, the sum of \$1,000 per annum until she shall have attained the age of thirty-five years, or such sum as with any funds or support received from outside sources will make her annual income \$1,000. That there is no personalty belonging to said estate other than a small sum, not exceeding the sum of \$250 per annum, arising from the rents of certain of the real estate mentioned in said last will and testament and codicil of said deceased, which said sum is not sufficient to meet the items of insurance and the taxes on said property. That of the real estate described in the second paragraph of the last will and testament of said deceased, the Grand Ledge property and lot No. 10, of block 68, of the City of Lansing, were disposed of by said testatrix in her lifetime, thus leaving as the real estate belonging to said estate the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 36 of De Witt Township, in the County of Clinton, and lots 2 and 3 of block 67, in the City of Lansing; and says that said forty acres in the Township of De Witt are worth, as she is informed and believes, not to exceed the sum of \$40, being wholly swampy and marsh, and covered with water the greater part of each year, lying in what is known as the "Big Marsh," in the said County of Clinton. That lots 2 and 3 of block 67 of the City of Lansing are located on Washington Avenue in said city and near the business portion of said city, and are worth about the sum of \$10,000. That she has at various times requested the defendant, as such administrator, to pay her the sum of \$1,000, or such portion thereof as is necessary for her support, which defendant refuses to do. The prayer of the bill is that the will may be construed and the rights of complainant and others thereunder may be determined and settled; that the powers and duties of the administrator *de bonis non* may be determined and he decreed to pay over to complainant a sum sufficient to pay her debts incurred in her support, and in educating and fitting her for a teacher of kindergarten, and such further sums from time to time as shall make her income the sum of \$1,000 per annum; and, if it shall appear that he has not sufficient funds wherewith to meet such payments, that he shall be directed to sell real estate as shall be necessary therefor. The bill also contains the general prayer for relief. The main facts stated in the bill are admitted by the answer, and the testimony of the complainant, which was taken in the cause, also supports the allegation of the bill. It is admitted that the complainant has only received from her mother's estate for her support the sum of \$599.19; also that the lots on Washington Avenue, described in the will, have a frontage of ten rods, and that the complainant is the sole heir of Jacob B. and Eliza J. Bennett. On the hearing in the court below the court dismissed the bill, with costs. Complainant appeals.

It is conceded that a power of sale was conferred upon the executors named in the will; that this power was general as to all the real estate, and limited only by the condition as to the price to be obtained for the Washington-

Avenue lots. It is contended, however, that this power was a personal one, conferred upon the husband of the testatrix and Schuyler F. Seager, the executors named in the will. In this contention there may be no doubt that counsel is correct. The language of the will is: "If the executors shall at any time find it necessary, or shall deem it for the best interest of my estate, I desire a sale to be made," etc. This language implies a personal confidence and trust in the judgment and honesty of the parties named, and it cannot be said that the testatrix intended by this provision to confer such discretionary power upon anyone whom the probate court might appoint, should the persons named fail to qualify or refuse to accept the trust. The administrator *de bonis non* with the will annexed does not execute the powers and duties which lie outside the ordinary scope of an executor's functions, unless, by the terms of the will, such authority is clearly granted. Schouler, Extra. § 413; Redf. Wills, pt. 2, pp. 90, 222; *Ingle v. Jones*, 76 U. S. 9 Wall. 486 [19 L. ed. 621].

Neither do we think such power is given to the administrator *de bonis non* by the provisions of § 5844, How. Stat., under circumstances where it clearly appears that the power is a personal one to the executors named in the will. This section provides: "When all the executors appointed in any will shall not be authorized according to the provisions of this chapter to act as such, such as are authorized shall have the same authority to perform every act and discharge every trust required and allowed by the will, and their acts shall be as valid and effectual for every purpose as if all were authorized and should act together; and administrators with the will annexed shall have the same authority to perform every act and discharge every trust, as the executor named in the will would have had, and their acts shall be as valid and effectual for every purpose."

The powers conferred by this section of the statute upon the administrator *de bonis non* with the will annexed are such only as can be exercised by the executor as such, and a personal power or trust which might be exercised or performed by an executor independently of his office as executor will not pass by devolution to the administrator. *Cinklin v. Egerton*, 21 Wend. 430; *Ross v. Barclay*, 18 Pa. 179; *Evans v. Chew*, 71 Pa. 47.

The will was executed on May 20, 1876, and Mrs. Bennett died in September, 1879. Before her death she had sold and disposed of all the property mentioned in the will except the forty acres of land in Clinton County and the Washington Avenue lots. These Clinton-County lands are of but little value. The only property remaining having any value are the lots in the City of Lansing, which are claimed to be worth the sum of \$10,000. After providing for a sale of the property in the second paragraph of the will and the order of sale the testatrix proceeds as follows: "And in no case shall said last-named lots be sold [the Washington-Avenue lots] before my said daughter shall attain the age of thirty-five years, unless she shall become incompetent from any cause to earn a livelihood, and in no event for less than the sum of fifteen thousand dollars."

The codicil was added to the will on July 19, 1879. In this the testatrix refers again to these lots as follows: "I don't wish the property on Washington Avenue sold until such time as it will bring not less than \$100 per foot front." Again, in the codicil, the testatrix refers to these Washington-Avenue lots. By the codicil she expresses a wish that her daughter may have a course of kindergarten training to enable her, in any reverses of fortune, to support herself by her own exertions. Her directions as to the training are as follows: "I therefore direct my executors to set apart from my estate a sum sufficient to give her a thorough course of kindergarten training, the money necessary for that purpose to be by them realized from the sale of properties other than the Washington-Avenue lots." These Washington-Avenue lots, it is conceded, have a frontage of 10 rods, or 165 feet, which, by the provisions of the codicil, were to be sold at the sum of \$100 per foot, or at the sum of \$16,500. The evidence shows the lots now to be worth only the sum of \$10,000. What the lots may possibly be worth at the time the complainant reaches the age of thirty-five years (four years hence), it is of course impossible for any person now to determine. It was evidently the intent of the testatrix to preserve at least this portion of her estate until her daughter should attain the age of thirty-five years, and that, if then living, she should come into the possession and enjoyment of it. But the executors named in the will were given power to sell even this portion if her daughter should from any cause become incompetent to earn a livelihood, provided the sum of \$15,000 could then be obtained therefor, or, under the codicil, the sum of \$16,500. These conditions, upon which the executors named were empowered to make sale of these lots, may or may not have been impossible. From the evidence in the case the contingency has now arisen which was provided for in the will. The daughter has become incompetent to earn a livelihood, but the executors named refused to assume the trust, and they are both now deceased. The power was a personal one to them, and the administrator *de bonis non*, by the terms of the will, cannot exercise it, and the Statute itself confers upon him no such power. Neither can the lots be sold for the price fixed by the testatrix in the will. The claim of the defendant is that, under these circumstances, the lands known as the "Washington-Avenue lots" cannot be sold until the complainant arrives at the age of thirty-five years; that the administrator *de bonis non* cannot be empowered by the probate court to make the sale, and that a court of chancery giving this construction to the will cannot authorize the sale by the administrator; that in fact there is no power vested in the administrator to make sale to relieve the complainant in her distress until she shall attain the age of thirty-five years. This construction of the will is undoubtedly correct, there being no debts or legacies to be paid; yet, by the prayer of the bill, we are called upon to construe the will, and to determine the rights and interests of the complainant in the premises.

It is made apparent by the will that the complainant was the sole object of the testatrix's care and bounty, aside from her husband, who

is now deceased. The executors named had a mere naked power of sale, coupled with no interest whatever in the estate. At the death of the testatrix the estate vested in the complainant in fee, the possession and enjoyment only being delayed until the complainant should arrive at the age of thirty-five years, and contingent at her death before arriving at that age that her father should take, if he survived her, provided complainant left no lawful issue, or, leaving such lawful issue, such issue dies. The father is deceased, and the complainant is the only heir-at-law of the testatrix. There was no devise over, should the complainant die before reaching the age of thirty-five, except to the father, if then living, and, the father being now deceased, no contingency can arise by which the complainant and her lawful heirs could be divested of the estate. Under these circumstances, what rule of law prevents the complainant taking possession? She has the absolute title in fee, and only waits the arrival of her thirty-fifth birthday to take possession. When she can sell and dispose of the whole estate, why should the administrator control it? There is no one interested in it except the complainant, and at her death the estate would only be cast upon her heirs-at-law, or the person whom she might designate by will to take after her death. The terms of the will, it is contended, place restraint upon the alienation. If the lands had been sold by the executors, the complainant, as devised under the will, would have been entitled to the proceeds. No one but the complainant had a right to insist upon the performance of this trust by the executors, and no one else could complain of the breach. The devise is not made to the executors for the benefit of the devisee, but directly to the devisee. The estate devised is not a conditional one to be forfeited, except by a condition which cannot now happen, or to revert to the heirs of the testator, or go over to others on any condition; nor is it one which is to vest at some future day, but is an absolute vested estate in fee which the complainant is entitled to take in possession at the age of thirty-five years. The restraint upon the alienation evidently was made solely for the benefit of the devisee. Why may she not now forego or release its performance? It may be contended that the executors named in the will, had they accepted the trust, and assumed control of the estate, might have insisted on holding the estate in possession until the period when the complainant, by the terms of the will, was to take in possession. This, however, was a mere naked trust, and one personal to the parties named. This trust they refused to accept, and the trustees are now dead. Who can complain if the devisee now takes in possession and sells and disposes of the entire estate? It is well settled that when a bare power of sale is given to the executors merely to sell the lands for the purpose of paying over the proceeds to devisees, whose right under the will to such proceeds is an absolute and vested right, all such devisees may collectively, before the power of sale is exercised, elect to take the land instead of the proceeds, and thus prevent a sale. But we are satisfied that restraint upon the alienation contained in this will is void. Such restraints are not favored in the law. It is true that many restrictions or qual-

fications upon the rights of the devisee or grantee may be made effectual by making the estate itself dependent upon such condition; but where the estate granted is absolute, such restriction can impose no legal obligation upon the devisees, or limit their power over the estate, when the observance or violation of the restriction can neither promote nor prejudice any interest but their own. This rule was very fully discussed by this court in *Mandlebaum v. McDonell*, 29 Mich. 87, and in support of this principle the court cited *Hall v. Tufts*, 18 Pick. 459; *Blackstone Bank v. Davis*, 21 Pick. 42; *Brandon v. Robinson*, 18 Ves. Jr. 429; *Doebler's App.* 64 Pa. 9; *Craig v. Wells*, 11 N. Y. 315.

Aside from these reasons, however, we think the restrictions upon the sale cannot be upheld. No such restrictions are valid. When a restriction in a conveyance of a vested estate in fee simple in possession or remainder is against selling for a particular time, such a restriction is invalid. When a person is entitled absolutely to property, any provision postponing its transfer or payment to him is void. Gray, in his rules against perpetuities, thus states the rule: "Suppose property is given to trustees in trust to pay the principal to A when he reaches the age of thirty. When any other person than A is interested in the property, when, for instance, there is a gift over to B if A dies under thirty, the trustees will retain the property for the benefit of B; but when no one but A is interested in the property should he die before thirty, his heirs or representatives would be entitled to it. When, in short, the direction for postponement has been made for A's supposed benefit, such direction is void, in pursuance of the general doctrine that it is

against public policy to restrain a man in the use or disposition of the property in which no one but himself has any interest." The principle is generally held to be that all rights of property are alienable, and that a condition or restriction which would suspend all power of alienation for any length of time is inconsistent with the estate granted, and void. The husband of the testatrix died in 1884. There has been no period of time since then in which the complainant did not have the right to the immediate enjoyment of the estate, and to mortgage, sell or dispose of it as she saw fit, and appropriate the whole proceeds thereof, subject only to the debts of the testatrix, if any there be, and the expenses of administration, as during the life of her father they could, by their joint act, have conveyed it. *The decree of the court below must be set aside*, and a decree entered in this court in accordance with this opinion. No costs will be allowed, as the administrator seems to have acted in good faith and under what he believed to be the true construction of this clause in the will.

Morse, J., concurred with **Long, J.**

Champlin, J.:

I concur with *Mr. Justice Long* upon the ground that the will is void as contravening § 5581 of How. Stat.

Campbell, J.:

I think that, inasmuch as complainant is the only person interested in the land, the other questions are not important, and I concur in the result.

Sherwood, Ch. J., concurred with **Campbell, J.**

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK.

METROPOLITAN EXHIBITION CO.

v.

William EWING.

(....Fed. Rep....)

1. Although equity will not ordinarily attempt to enforce contracts which cannot be carried out by the machinery of a court, it may nevertheless practically accomplish the same end by enjoining the breach of a negative promise; and this will be done whenever the contract is one of which the court would decree specific performance if by such decree its observance by the party refusing to perform could be practically enforced.
2. If it appears that an ambiguous term in a contract has an established meaning among those engaged in the business to which the contract has reference, and unless it is given that meaning it is indefinite and equivocal, it should be treated in interpreting the contract as used according to that understanding.
3. There is no necessity to particularize, in a contract for the services of a ball player which gives the employer the right to "reserve" such player for the season next ensuing, the conditions or characteristics of the option, if when

the contract is made the term has a well-understood definition.

4. The contract giving base-ball clubs the right to "reserve" their players for another season simply gives the clubs the right as against other clubs to secure the services of such players if the parties can agree, but places no obligation upon the players to enter into a contract for such season; hence the players cannot be compelled to enter into such future contracts by a decree of specific performance, and consequently they cannot be enjoined from entering into contracts with other clubs.

(March 25, 1890.)

SUIT to enjoin the breach of an alleged contract for the performance of personal services requiring special aptitude, skill and experience. *Injunction denied.*

The facts are sufficiently stated in the opinion.

Messrs. George F. Duysters and Joseph F. Choate, for complainant:

In a case on which the court would decree specific performance but for impracticability it will do what it may towards that end, by enjoining the party from doing some other act, whereby he may be compelled to do what he agreed to do.

Lumley v. Wagner, 1 DeG. M. & G. 604;

NOTE.—See note to *Cort v. Lassard* (Or.) 6 L. R. A. 663.

7 L. R. A.

Daly v. Smith, 49 How. Pr. 150; *W. U. Teleg. Co. v. St. Joseph & W. R. Co.* 1 McCrary, 565; *Singer Sewing-Mach. Co. v. Union B. H. & Embroidery Co.* 1 Holmes, 258.

When invoked, a court of equity will compel every person *sui juris* to the extent its resources will permit to perform just what he has promised another and in the particular way promised, in every case of a legal contract where a failure to perform would occasion such legal injury to the other person as may not be ascertained so as to be compensated in money, unless it shall appear that it is impossible, or that, at the time it was entered into, the contract was so unequal in its burdens and benefits and so unfair to the defendant as to suggest fraudulent practice.

Lawrality v. Warren, 18 N. J. Eq. 124; *Pomeroy, Cont.* 246, note, pp. 47, 59, 60, 287; *King v. Hamilton*, 29 U. S. 4 Pet. 811 (7 L. ed. 869); *Johnson v. Tripps*, 33 Fed. Rep. 530; *Van Doren v. Robinson*, 16 N. J. Eq. 256; *Tilley v. Thomas*, L. R. 3 Ch. 61; *Wilson v. Northampton & B. J. R. Co.* L. R. 9 Ch. 279.

A contract entered into between parties *sui juris* is never relieved against or refused enforcement without some elements of legal fraud present to poison it.

Rutland Marble Co. v. Ripley, 77 U. S. 10 Wall. 339 (19 L. ed. 955); *German v. Machin*, 6 Paige, 288; *Woodward v. Harris*, 2 Barb. 439; *Singer Sewing-Mach. Co. v. Union B. H. & Embroidery Co.* 1 Holmes, 258; *Gally v. Colt's Patent Fire Arm Co.* 30 Fed. Rep. 118; *Bickford v. Davis*, 11 Fed. Rep. 549.

The contract in this case was a contract to render services for a period of two years and not for one year only.

Metropolitan Exhibition Co. v. Ward (N. Y.) Jan. 29, 1890.

Mr. Henry Bacon, for defendant:

To sustain this action, the plaintiff must establish beyond question a contract entitling it to the services of the defendant for the season of 1890. If the contract is denied or is invalid, or if there are disputes as to the terms of the contract, a preliminary injunction will not be granted.

High, *Inf.* 2d ed. § 1120; *Fredericks v. Mayer*, 1 Bosw. 227.

From the beginning until the adoption of the present form of the players' contract the word "reserve" was, by the application made of it by the parties who invented the use of it in connection with base ball, restricted to the right of employment between the players and the parties to the National Agreement, and the word was carried into the present contract with precisely the same meaning.

To authorize the court to issue an injunction in this case it is required that the contract alleged by the complainant should be definite and certain as to what services are to be rendered. That by its terms the obligation of the complainant should be so certainly ascertained and stated as to be enforceable against him.

Rutland Marble Co. v. Ripley, 77 U. S. 10 Wall. 339 (19 L. ed. 955); *Woodward v. Harris*, 2 Barb. 439; *German v. Machin*, 6 Paige, 288; *McKibben v. Brown*, 14 N. J. Eq. 18; *Agate v. Lowenbein*, 4 Daly, 62.

A court of equity will not specifically en-

force a contract unless it is mutually fair and just.

Rutland Marble Co. v. Ripley, *supra*; *Barnea v. McAllister*, 18 How. Pr. 534; *Wonslow v. Fenno*, 129 Mass. 405; *King v. Hamilton*, 29 U. S. 4 Pet. 811 (7 L. ed. 869); *Shrewsbury & B. R. Co. v. Northwestern R. Co.* 6 H. L. Cas. 113.

The injunction can only be granted in this case to prevent irreparable damages. Where no damage or damages which may be ascertained and compensated for in money will be occasioned by the defendant's action, no injunction will lie.

De Pol v. Sohlske, 7 Robt. 280; *Mapleson v. Del Puente*, 18 Abb. N. C. 141; *Mapleson v. Labache*, 18 Abb. N. C. 147, note.

The contract alleged in the complainant's bill cannot be enforced specifically and a preliminary injunction should not be granted.

Allegheny Base Ball Club v. Bennett, 14 Fed. Rep. 257; *Metropolitan Exhibition Co. v. Ward* (N. Y.) Jan. 29, 1890.

Wallace, J., delivered the following opinion:

This action is brought to restrain a threatened breach of contract for the performance of personal services which require special aptitude, skill and experience. It is a case in which an action at law would not afford the plaintiff an adequate remedy for the breach and in which the power of the court should be exercised by preventive interposition if it is found that the contract is such as the plaintiff claims it to be. The circumstances are such that unless a preliminary injunction is granted the plaintiff will obtain no effectual remedy, because before the cause can be brought to final hearing the time will have passed within which the relief sought would be practically useful, and if it be then adjudged that the plaintiff is entitled to a permanent injunction the judgment will be declaratory merely. Although preliminary relief is not to be granted in a case in which it is doubtful whether the plaintiff will be finally successful, yet where the questions are such that they can be fully considered and as safely decided upon a motion for a preliminary injunction as at final hearing, it is the duty of the court to consider and determine them and not defer the party invoking its assistance to a time when a decree, if awarded, would be too late.

The contract upon which the plaintiff founds its claim for relief is in form between the New York Base Ball Club as party of the first part and the defendant as party of the second part; but there is no reason to doubt that the New York Base-Ball Club was the agent of the plaintiff in entering into the contract, that the plaintiff is the real principal, that the contract was intended to inure for the benefit of the plaintiff, and that the plaintiff is entitled to enforce it against the defendant to the extent that the New York Base-Ball Club could do so.

The doctrine is now generally recognized that while a court of equity will not ordinarily attempt to enforce contracts which cannot be carried out by the machinery of a court, like that involved in the present case, it may nevertheless practically accomplish the same end by enjoining the breach of a negative promise, and

this power will be exercised whenever the contract is one of which the court would direct specific performance if it could practically compel its observance by the party refusing to perform through a decree for specific performance. It is indispensable, where the contract does not relate to realty, that it be one for the breach of which damages would not afford an adequate compensation to the plaintiff. It must be one in which the plaintiff comes into court with clean hands, and which is not so oppressive as to render it unjust to the defendant to enforce it. It must be one in which there are mutual promises, or which is founded on a sufficient consideration. It must be one the terms of which are certain, and in respect to which the minds of the parties have distinctly met so that there can be no misunderstanding of their rights and obligations.

The contract is executed as of the date of April 29, 1890. It is a formal document, consisting of twenty articles by which the New York Base Ball Club employs the defendant and the defendant undertakes to perform professional services as a base-ball player for the club for the season (specified in article 2) beginning April 1, 1890, and ending October 31, 1890. Article 20 provides that the salary to be paid the defendant shall be \$2,000 payable semi-monthly. Among other things the contract provides by different articles that the club may at any time terminate the contract on ten days' notice to the defendant, whereupon the obligations of both parties are to cease; that the club shall provide the defendant while "abroad" with proper board and lodging and pay all necessary traveling expenses; that if the defendant during the term of his employment be guilty of any excessive indulgence in liquor, or of gambling, or of insubordination, he shall be liable to certain specified penalties; and that if the club ceases to be a member of the National League of Professional Base-Ball Clubs either compulsorily or voluntarily the "defendant shall, if the right of reservation be transferred" by the club to any other club, receive from that club at least the same amount in salary that he receives by the present contract. It contains also the following provision: "Article 18. It is further understood and agreed that the party of the first part shall have the right to 'reserve' the said party of the second part for the season next ensuing the term mentioned in paragraph 2, herein provided, and that said right and privilege is hereby accorded to said party of the first part upon the following conditions, which are to be taken and construed as conditions precedent to the exercise of such extraordinary rights or privileges, viz.: 1. That the said party of the second part shall not be reserved at a salary less than that mentioned in the twentieth paragraph herein, except by the consent of the party of the second part. 2. That the said party of the second part, if he be reserved by the said party of the first part for the next ensuing season, shall not be one of more than fourteen players then under contract; that is, that the right of reservation shall be limited to that number of players and no more."

The plaintiff alleges that the defendant was one of fourteen players and no more so reserved under said contract; that on the 22d day of

October, 1890, plaintiff exercised its option to reserve the defendant for the season of 1890 by giving the defendant due and timely notice in writing of its intention to do so; and that notwithstanding the exercise of this option the defendant has engaged his services for the season of 1890 to another organization to act for it as a base-ball player during that season. The plaintiff insists that by the terms of the contract it is entitled to the services of the defendant as a base-ball player for the season of 1890 upon the terms and conditions of the contract for the season of 1889, except the condition giving a right to reserve him for a subsequent season.

The case turns upon the meaning and effect of the clause and contract which gives the club the right to "reserve" the defendant for the season next ensuing. It is plain enough that the option is a right of reservation for the next ensuing season, only the season ensuing the term mentioned in article 2, and does not extend beyond the term from April 1, 1890, to October 31, 1890. It is equally plain that the salary for the ensuing season is to be the same as that for the season of 1889 unless the parties mutually consent to a change. But what is the character of the option which the plaintiff is permitted to exercise? What is the right to "reserve" the defendant? If it is the right to retain and have his services as a base-ball player for the season of 1890 when is the right of election to be manifested, and upon what terms are these services to be rendered? Can the club wait until April 1, 1890, before it manifests its intention to exercise the option? Is the club to pay the defendant's board and lodging while he is "abroad" serving the club during the season of 1890? Can the club discharge him at any time during that season on ten days' notice? Are the penalties for intoxication, gambling or insubordination enforceable during the season of 1890? In short does the contract embody the definite understanding of the parties to it in respect to their reciprocal rights and obligations after the season of 1889 shall have ended?

If the term "the right to reserve" has no defined meaning, and there were no extrinsic sources by which to ascertain the sense in which it is used by the parties, it would be an ambiguous phrase. As applied to a contract for personal services the right to reserve would convey a very unintelligible conception of the conditions and incidents of the service to be rendered or enjoyed. A contract by which one party agrees for an equivalent to reserve himself for another for a stated period, or to reserve himself as a lawyer, or doctor, or artist or laborer for a specified term, would very inadequately express a promise to devote his professional or manual services exclusively to the other during that period; and the promise of a base-ball player to reserve himself for a particular club for a given season would hardly, without more, convey any definite meaning of the understanding of the parties. It certainly would not bind him to submit to any special rules or regulations respecting the performance of his services not expressly consented to, or not to be necessarily implied from the nature of the employment and the situation of the contracting parties. If it had been

the meaning of the contract to allow the club to renew the engagement of the defendant for a second season upon the same conditions as those for the first season, that intention could have been easily and unequivocally expressed. As it is, it is left wholly to implication, unless the "right to reserve" is a term having a defined and specific signification. This ambiguity suggests such grave doubt as to the meaning of the clause that in two adjudged cases in which it has been considered by the courts, the judges have thought it too indefinite to be enforceable.

In *Metropolitan Exhibition Co. v. Ward*, in the Supreme Court of this State, *Mr. Justice O'Brien* was of the opinion that the failure to provide for the terms and conditions of the contract for the second season rendered the clause so indefinite and uncertain that it could not be the basis of equitable relief, or that it meant that every player is bound for the ensuing season upon the same terms and conditions as those of the first season, including the signing of a new contract containing the option to reserve.

In *Philadelphia Ball Club v. Hallan*, in the Court of Common Pleas of Philadelphia, *Judge Thayer* was of the opinion that the failure to designate the terms and conditions of the new engagement under which the player is to be reserved rendered the contract of reservation wholly uncertain and therefore incapable of enforcement.

Where the terms employed to express some particular condition of a contract are ambiguous and cannot be satisfactorily explained by reference to other parts of the contract, and the parties have made other contracts in respect to the same subject matter, and apparently in pursuance of the same general purpose, it is always permissible to examine all of them together in aid of the interpretation of the particular condition; and if it is found that the ambiguous term has a plain meaning by a comparison of the several contracts and an examination of their provisions, that meaning should be attributed to it in the particular condition. So also if it appears that the term used has an established meaning among those engaged in the business to which the contract has reference, and unless it is given that meaning is indefinite and equivocal, it should be treated in interpreting the contract as used according to that understanding. And in construing a contract the court is always at liberty to look at the surrounding and antecedent circumstances, and avail itself of the light of any extrinsic facts which will enable it to view the contract from the standpoint of the parties at the time when it was made. In the present case it will satisfactorily appear by resort to these sources of interpretation that the term "right to reserve" is used in the contract in the sense that obtains in base ball nomenclature; and that it is intended to signify an option the character of which was well understood by base-ball clubs and professional players when the present contract was made. Obviously the right to reserve, given by the eighteenth clause of the contract, is the same thing as the right of reservation mentioned in that part of the contract which provides that

the present club may disband and transfer its right of reservation to some other club.

The agreement is in a form common to all contracts between base-ball clubs organized under what is known as the "National Agreement" and professional players, a form which is prescribed by the National Agreement. The National Agreement is a compact between the various base-ball associations constituting the National League Base-Ball Clubs and the American Association of Base-Ball Clubs, made with a view to regulate the rights and obligations of the members as respects one another. One of its paramount features consists of provisions regulating the privilege of clubs to "reserve" a stated number of players. The provisions are framed to prevent any club of the National League or the American Association from engaging a player already reserved by another, and to render the player so reserved ineligible for employment by any other club. They require each club on the 10th day of October, in each year, to transmit to all the other clubs a reserved list of players, not exceeding fourteen in number, then under contract, and of such players reserved in any prior list who have refused to contract for another year; and declare such players ineligible to contract with any other club. Inasmuch as the parties to the National Agreement comprise all, or substantially all, the clubs in the country which employ professional players, this National Agreement by indirection, but practically, affects every professional player, and subordinates his privilege of engaging as he chooses to the option of the club by which he is under reservation. As is stated in a recent publication, edited by a prominent professional player, "the most important feature of the National Agreement unquestionably is the provision according to the club members the privilege of reserving a stated number of players. No other club of any association under the agreement dare engage any player so reserved. To this rule more than any other thing, does base ball, as a business, owe its present substantial standing. By preserving intact the strength of the team from year to year it places the business of base ball on a permanent basis and thus offers security to the investment of capital. The reserve rule itself is a usurpation of the players' rights, but it is perhaps made necessary by the peculiar nature of the ball business, and the player is indirectly compensated by the improved standing of the game. The reserve rule takes a manager by the throat and compels him to keep his hands off his neighbor's enterprise."

In the contracts between clubs and players as framed prior to November, 1837, there was no provision by which the player consented to the option for reserve on the part of the club. But the contracts did contain a condition that the player should conform to and be governed by the constitution and provisions of the National Agreement, and the player thereby assented to become ineligible for engagement by any other club of the league during the season of his engagement by a particular club, or while the option of re-engaging him for an ensuing year on the part of that club remained in force. Changes were made from time to time in various features of the National

Agreement. The players were obliged to inform themselves of the latest changes in order to understand the precise terms of their contract with the clubs. They became unwilling to consent to a form of contract by which they were to be subjected to conditions not mentioned in the contract itself. In November, 1887, a committee representing the professional players met a committee representing the parties to the National Agreement for the purpose of agreeing upon certain changes to be made in the form of the contract. The committees finally agreed that the obnoxious clause in the contract should be omitted, and the clause now found in the eighteenth article should be inserted. This was the origin of the clause giving to the club by the contract itself the option of reserve. The clause was manifestly inserted in order to give by an express condition the right of reservation to the clubs which theretofore the players had only given by agreeing to be bound by the terms of the National Agreement. By ascertaining what that right of reservation was it can be plainly seen what the parties had in mind in using the term in the present contract. If when the contract was made the term had a well-understood definition there was no necessity to particularize in the contract the conditions or characteristics of the option.

Reference has already been made to the provision of the National Agreement requiring each club on the 10th day of October in each year to transmit to all the other clubs a reserved list of players, and declaring such players ineligible to contract with any other club. This provision is to be read in connection with another provision of the National Agreement which provides that no contract shall be made "for the services of any player by any club for a longer period than seven months, beginning April 1, and terminating October 31; and no such contract for services to be rendered after the expiration of the current year shall be made prior to the 20th day of October of such year." The two provisions, read together, allow a period of ten days to intervene between the time when a club can exercise the privilege of placing a player upon its reserved list and the time when it can make a contract with him for services to be rendered in an ensuing year, thus emphasizing a distinction between the right to treat the player as reserved and the contract which is to fix the terms upon which the reservation is to be complete. The effect of these provisions is that when the club has exercised its privilege of reservation no other club is permitted to negotiate with the player, but the club which has placed him upon the reserved list, and no other, is then at liberty to enter into a contract with him to obtain his services for an ensuing year. Consequently the right of reservation is nothing more or less than a prior and exclusive right, as against the

other clubs, to enter into a contract securing the player's services for another season. Until the contract is made which fixes the compensation of the player, and the other conditions of his service, there is no definite or complete obligation upon his part to engage with the club; he agrees that he will not negotiate with any other club, but enjoys the privilege of engaging with the reserving club or not as he sees fit. Read with this understanding, the clause in question by which the privilege of reserving the defendant is given to the club, expresses definitely the terms of the option. If the club exercises the right of reservation it agrees in advance that the player shall receive at least as large a salary as he has received during the current year, and leaves it open to him to contract on that basis for the next season or to insist on a larger salary. All the other terms of the engagement are matters of negotiation between the club and the player. The law implies that the option of reservation is to be exercised within a reasonable time, but when this has been done the right to reserve the player becomes the privilege, and the exclusive privilege as between the reserving club and the other clubs, to obtain his services for another year if the parties can agree upon the terms. As a coercive condition which places the player practically, or at least measurably, in a situation where he must contract with the club that has reserved him or face the probability of losing any engagement for the ensuing season, it is operative and valuable to the club. But as the basis for an action for damages if the player fails to contract, or for an action to enforce specific performance, it is wholly nugatory. In a legal sense it is merely a contract to make a contract if the parties can agree. It may be that heretofore the clubs have generally insisted upon treating the option to reserve as a contract by which they were entitled to have the services of the player for the next season upon the terms and conditions of the first season, and even requiring him to enter into a new contract containing the option for reservation; and it may be that the players have generally acquiesced in the claims of the clubs. However this may be, the players were not in a position to act independently, and if they had refused to consent to the terms proposed by the clubs they would have done so at the peril of losing any engagement. The facts therefore are not such as to permit any weight to be given to the acts of the parties as evincing their own construction of the contract.

It follows that the act of the defendant in refusing to negotiate with the club for an engagement for the season of 1890, while a breach of contract, is not the breach of one which the plaintiff can enforce.

The motion for an injunction is denied.

RHODE ISLAND SUPREME COURT.

CHURCH
v.
CHURCH.

(....R.L....)

Cruelty, which is a statutory ground of
7 L. R. A.

divorce, may be set up by a plea of recrimination as a bar to a bill for divorce on the ground of adultery.

(January 12, 1890.)

PETITION for a divorce upon the ground of adultery. *Dismissed.*

The case sufficiently appears in the opinion.

Messrs. Stephen A. Cooke and Louis L. Angell for petitioner.

Mr. George J. West for respondent.

Tillinghast, J., delivered the opinion of the court:

We are satisfied from the evidence adduced in this case that the respondent has been guilty of adultery, as charged in the petition. We are also satisfied that the petitioner has, as is alleged in the recriminatory answer filed by the respondent, been guilty of extreme cruelty to the respondent, by profane and insulting language habitually used towards her, and by abusive physical violence upon her. In these circumstances should the petition be granted?

The English rule, prior to the passage of Stat. 20 and 21 Vict., chap. 85, § 81, doubtless was that cruelty could not be pleaded in bar to a charge of adultery. *Harris v. Harris*, 2 Hagg. Eccl. 376; *Cocksaedge v. Cocksaedge*, 1 Robt. Eccl. 90; *Eldred v. Eldred*, 2 Curt. Eccl. 376.

But this was at a time when there was no judicial dissolution of valid marriage, and divorces from bed and board were only for the two causes of adultery and cruelty. Now, by virtue of the Statute referred to, the divorce and matrimonial court has a discretionary power to allow or disallow the recriminatory defense of cruelty, in cases where the petitioner proves adultery. *Pearman v. Pearman*, 1 Swab. & T. 601, 602.

Ordinarily, however, it seems that even under this Statute, a divorce from the bond of matrimony for adultery will not be granted where the party complaining has been guilty of the less offense of cruelty. *Ratcliff v. Ratcliff*, 1 Swab. & T. 467-473; 2 Bishop, Mar. and Div. § 82.

In this country, while the decisions are not entirely in harmony as to the doctrine of recrimination, we think the decided weight of authority is to the effect that the court cannot distinguish between different matrimonial offenses to which the law attaches the same consequence. Says 2 Bishop, Marriage and Divorce, § 87: "The matrimonial relation is one of mutual dependence and duty; and it would seem to be within all legal analogies, and all sound canons of morality, to refuse to hear a plaintiff complaining of the defendant's infraction of one of the links of this common chain, when he had equally broken another. Moreover the law is for the assistance of those who obey it, not those who violate it; and when two parties are both in the same wrong, the court helps neither." See also § 93 of same volume.

In this State the Statute has specified certain acts of conduct which shall constitute grounds of divorce, among which is extreme cruelty; and, so far as the matrimonial contract is concerned, we do not think the court can distinguish between them, whatever difference there may be in a moral point of view. See *Conant v. Conant*, 10 Cal. 249; *Nagel v. Nagel*, 12 Mo. 58; *Christianberry v. Christianberry*, 3 Blackf. 202; *Mattoz v. Mattoz*, 2 Ohio, 233; *Hall v. Hall*, 4 Allen, 39; *Clapp v. Clapp*, 97 Mass. 581; *Handy v. Handy*, 124 Mass. 394. See also the unreported opinion of this court 7 L. R. A.

on file in *Goodell v. Goodell*, Providence County, October Term, 1886 (Divorce, No. 7,487).

We therefore decide that the plea of recrimination, being fully sustained by the evidence, is a bar to the petitioner's suit for divorce.

Petition dismissed.

Ellen K. BUFFUM

v.

TOWN COUNCIL OF TIVERTON, Petitioner.

(.....R. L.....)

A general devise to testator's widow, subject to the payment of debts, funeral charges and the expenses of administration, in full confidence that she will make every needful provision for his children, will not include a trust estate.

(November 23, 1889.)

PETITION by appellee for a new trial in the Court of Common Pleas for Newport County, of an appeal from the laying out and extending of a certain highway, upon which judgment had been entered quashing such proceedings. *Judgment set aside.*

The facts are fully stated in the opinion.

NOTE.—Recent decisions; devise to wife.

A testator by his will gave his entire estate to his wife, "to be disposed of by will" or in any manner she might deem best. The wife died, leaving the property undisposed of. It was held that, under the will, she acquired an absolute estate in the property, and at her death it descended to her heirs and distributees. *Bass v. Bass*, 73 N. C. 374.

A testator by will gave all of his property, real and personal, to his wife, giving her full power and authority to sell the whole or any part of the real estate, with provision for division of any of the estate left after her death. The wife rented and sold the real estate, but did not consume the proceeds. On her death the estate was distributed under the will. Exceptions by the next of kin of the widow were dismissed. *Brookley's App. (Pa.)* 8 Cent. Rep. 327.

A will giving a testator's wife whatever property he may have at the time of his death, both real and personal, gives her an estate in fee simple which is not reduced to a life estate by clauses in which he says: "I charge my wife with the raising and education of my children, such education to be the best her means will afford; and, "If any of our children should voluntarily refuse, they are not to receive any advantage in property in consequence of such refusal;" and, "My wife may give to any of our children, at any time and in a form and manner she may think best, any portion of property she may think proper, provided those to whom she had given shall be charged the full amount in the settlement of the estate." *Howze v. Barber*, 29 S. C. 466.

Testator used this language: "I give to my wife . . . the entire control and use of my property of every nature during her life, after paying any debts I may owe, to be by her controlled, used and disposed of as she may think best, as fully as I could do the same were I living." It was held that the will conferred upon the widow the absolute ownership of the property, and that subsequent bequests made in the same instrument were void, because repugnant to the absolute gift to the wife. *Re Will of Burbank*, 69 Iowa, 373.

Messrs. James F. Jackson and Walter F. Angell, for petitioner:

Trust property does not pass by a will which devises the testator's property subject to the payment of his debts.

Hill, Trustees, 285, note 3; *Silvester v. Jarman*, 10 Price, 78; *Roe v. Roade*, 8 T. R. 118.

Messrs. William P. Sheffield, Jr., and Francis B. Peckham, for appellant, *contra*.

The property in question was devised to the appellant by Buffum's will.

Hill, Trustees, 283 *et seq.*; *Taylor v. Benham*, 46 U. S. 5 How. 270 (12 L. ed. 130), and cases cited; *Jackson v. Delancy*, 13 Johns. 537; *Heath v. Knapp*, 4 Pa. 228; 1 Jur. N. S. (pt. 2) 509; *Re Brown & Sibly's Contract*, L. R. 8 Ch. Div. 156, 168; *Ex parte Barber*, 5 Sim. 451; *Mather v. Thomas*, 6 Sim. 115; *Re Stevens' Will*, L. R. 6 Eq. 597.

Durfee, Ch. J., delivered the opinion of the court:

This is a petition for the new trial, in the court of common pleas, of an appeal taken to said court from the doings and decree of the town council of the Town of Tiverton, laying out and extending a highway in said Town. The appeal was taken by Ellen K. Buffum, as owner of the land over which the highway was laid. The reasons of appeal alleged by her are that the highway was unnecessary; that the three men appointed to make it out did not attempt to agree with her in regard to her damages; that no notice was given to her of the doings of said council or three men; and that no damages were awarded to her for the land taken. The appeal came on for trial in the Court of Common Pleas at the November Term, 1888, and thereupon the appellant moved to quash the proceeding, because no notice had been given her as required by Pub. Stat. R. I., chap. 64, § 6. The appellee admitted that the notice had not been given, and claimed that the appellant had no interest in the land taken, and was therefore not entitled to notice. The appellant, to support her claim, put in evidence a deed from one Benjamin Barker, formerly an owner of the land, to one Benjamin Buffum, made and duly recorded in 1874, conveying the land to said Buffum in trust for the uses and purposes set forth in a declaration of trust of eyen date therewith (which declaration was not recorded), and also the will of said Buffum of later date than said deed, he having deceased.

The provision of the will, under which the appellant, who is the widow of said Buffum, claimed, was as follows, to wit: "I give, devise and bequeath, subject to the payment of my just debts, funeral charges and expenses of settling my estate, all my property and estate of every name and nature, wherever situate, to my wife, Ellen K. Buffum, her heirs and assigns, forever, in full confidence that she in her wisdom will make every needful provision for my children." The appellee contended that no title to the land in question passed by the will, and offered to prove that Barker had continued to occupy it ever since the trust deed was executed. The court, being of opinion that the legal title was in the appellant by virtue of said deed and will, and that she was there-

fore entitled to notice, quashed the proceedings, in compliance with the appellant's motion, and gave her judgment for costs. The appellee excepted.

It seems to be well settled now, both in England and in this country, that trust estates will pass under a general devise, unless it can be gathered from the expressions of the will, or from the purposes of the testator, or from the limitations imposed, that the testators did not intend to have them pass. 2 Jarman, Wills, *695; 1 Lewin, Tr. *227; *Hill, Trustees*, *283; *Perry*, Tr. §§ 836, 837.

The devise here was general, but was made subject to the payment of debts, funeral charges and the expenses of administration. What effect has such a charge on the construction of the devise?

In *Re Bellis' Trusts*, L. R. 5 Ch. Div. 504, decided 1877, the question was examined by Jessel, *M. R.*, with characteristic fullness and ability, and he gave it as his conclusion that, according to English authority, trust estates will not pass under a general devise, where there is a charge of debts or of legacies, or of debts and legacies, citing *Roe v. Roade*, 8 T. R. 118; *Re Horsfall*, McClel. & Y. 292; *Doe v. Lightfoot*, 8 Mees. & W. 553; *Hope v. Liddell*, 21 Beav. 183, and dissenting decidedly from a different decision by *Vice-Chancellor Malins* in *Re Brown & Sibly's Contract*, L. R. 8 Ch. Div. 156.

We do not think there can be any doubt of the correctness of Jessel's decision on English authority. Under that decision, if we are warranted in following it, the trust estate in question here did not pass by the will of Benjamin Buffum. We see no reason why we should not follow it, since it commends itself, and we know of no American decision which is in conflict with it. And see *Merritt v. Farmers F. Ins. & Loan Co.* 2 Edw. Ch. 547.

Here, moreover, the property is devised by the testator to his widow, "in full confidence that she, in her wisdom, will make every needful provision for his children;" which clearly imports that he devises it to her in full confidence that out of it she will provide, so far as needful, for his children as well as for herself. The inference is that the devise was not intended to include the trust estate.

Ordered that the judgment of the Court of Common Pleas, quashing the proceeding appealed from, be, and the same is hereby, set aside and reversed, and that a trial of said appeal be, and the same is hereby, quashed in the Court of Common Pleas.

Henry K. HOPKINS, *Exr.*, etc., of Robert W. S. Hopkins, Deceased,

v.
Henry MANCHESTER and Wife.

(..... R. I.)

1. A promissory note will pass by delivery without indorsement as a gift *inter vivos*.
2. A woman cannot, of her own motion, testify to declarations made by her father as to a gift by him to her in a suit against her by the executor to recover possession of the alleged gift.

(December 22, 1889.)

ON exceptions by defendants to a judgment of the Court of Common Pleas for Providence County in favor of plaintiff in an action to recover possession of a certain promissory note alleged to have been wrongfully converted by defendants to their own use. *Sustained.*

The case sufficiently appears in the opinion.

Mr. Dexter B. Potter, for defendants:

A promissory note drawn to the order of the payee can be the subject of a gift *inter vivos* without indorsement.

Tillinghast v. Wheaton, 8 R. I. 536; 2 Kent, Com. 11th ed. *447; *Bradley v. Hunt*, 5 Gill & J. 54, 23 Am. Dec. 601, *note*; *Borneman v. Sidinger*, 15 Me. 429, 33 Am. Dec. 626; *Druke v. Heiken*, 61 Cal. 846, 44 Am. Rep. 553; *Reed v. Copeland*, 50 Conn. 472, 47 Am. Rep. 668; *Grover v. Grover*, 24 Pick. 261, 35 Am. Dec. 819.

That the declarations of a donor are evidence, upon the question of whether a gift was made, is too familiar law to need the citation of cases.

Messrs. Charles H. Page and Franklin P. Owen for plaintiff.

Per Curiam:

The plaintiff, as executor of the last will and testament of Robert W. S. Hopkins, sues the defendants in trover for the conversion, by the defendant wife, of a negotiable promissory note which belonged to the testator in his lifetime. The note was payable to the testator or order, and was put by him, without indorsement, into the possession of the female defendant, who was his daughter. The plaintiff, after his appointment as executor, demanded it of her, and she refused to give it up, claiming that her father had given it to her to keep as her own. On trial in the court of common pleas, after testimony had been put in on both sides, the court ruled that such a note would not pass by delivery, without indorsement, as a gift *inter vivos*, though it might as a gift *causa mortis*, and directed a verdict for the plaintiff. The defendants excepted, and have petitioned this court for a new trial. We think the court below erred. The modern cases hold that such a note, or, at least, the beneficial interest in such a note, will pass by gift, without indorsement, so as to entitle the donee to collect the money due on it for himself, and, if need be, to sue on it for himself; in the name of the donor, or of the donor's legal representative. We do not find that the cases distinguish in this respect between gifts *inter vivos* and gifts *causa mortis*, though it may be that, in a doubtful case, the jury would regard the want of an indorsement with more suspicion if the gift were *inter vivos* than if it were *causa mortis*. We refer for our authority to the following cases: *Snellgrove v. Bailey*, 3 Atk. 214; *Duffield v. Eluces*, 1 Bligh (N. R.) 497; *Roberts v. Roberts*, 15 Week. Rep. 117; *Grover v. Grover*, 24 Pick. 261; *Seasons v. Moseley*, 4 Cush. 87; *Bates v. Kempton*, 7 Gray, 382; *Hale v. Rice*, 124 Mass. 293; *Brown v. Brown*, 18 Conn. 410; *Bedell v. Carll*, 33 N. Y. 581; *Westerlo v. De Witt*, 36 N. Y. 340; *Young v. Young*, 85 N. Y. 422, 430; *Crittenden v. Phoenix Mut. L. Ins. Co.* 41 Mich. 442; *Elam v. Keen*, 4 Leigh, 333. And see *note* by Jno. F. Kelly to *Flanders v. Blandy*, 26 Am. L. Reg. N. S. 590, 591.

In the course of the trial the female defend-

ant offered herself as a witness to testify to declarations made by the testator in regard to the note. The testimony was objected to, and ruled out, the defendants excepting to the ruling. The defendants contend that the testimony should have been admitted, because the action is for a conversion committed, not in the lifetime of the testator, but since his decease. We think the ruling was right. Our Statute enabling parties to testify on their own offer does not extend to cases where an executor or administrator is on one side, and the party offering to testify is on the other, except when the cause of action is a contract originally made with a person still living and competent to testify, or when the testimony offered relates to matters occurring after the death of the testator or intestate. The second exception is therefore overruled.

The third exception is also overruled, and the first exception is sustained, and the case remitted to the Court of Common Pleas for a new trial.

SPAIGHT

v.

McGOVERN.

(...R. L....)

1. The right to kill a dog, given by Pub. Stat., chap. 93, § 6, to a person whom the dog had suddenly assaulted, need not be exercised instantly, but the person has a right to go for a weapon and return and kill the dog.
2. The fact that a person assaulted by a dog followed it into the shop of a third person, where the dog was kept for the owner at his request, and killed it there does not make him liable to the owner of the dog, where the Statute gave him a right to kill it.
3. A man bitten in consequence of his interference between two fighting dogs to separate them is not suddenly assaulted within the meaning of Pub. Stat., chap. 93, § 6, so as to give him the right to kill the dog.

(December 7, 1899.)

PETITION by plaintiff for a new trial of an action to recover damages for the alleged wrongful killing of his dog by defendant, in which judgment in favor of defendant had been entered upon a verdict directed by the Court of Common Pleas for Providence County. *Granted.*

The facts sufficiently appear in the opinion.

Messrs. William W. Douglas and Samuel T. Douglas for plaintiff.

Messrs. Francis Colwell, Walter K. Barney and Albert A. Baker for defendant.

Durfee, Ch. J., delivered the opinion of the court:

This is a petition for the new trial of an action which the plaintiff brought against the defendant for killing his dog. The action was brought and tried in the court of common pleas. The defendant, on trial in that court, did not deny killing the dog, but set up in defense that the dog had previously attacked and bit him. He testified that September 14, 1897,

he was going through East Street, in the City of Providence, in the early evening, with his own dog, a small spaniel, when the plaintiff's dog, a bull terrier larger than the spaniel, attacked it; that he separated the two dogs, and held the plaintiff's dog until his own could get away; that he then let the plaintiff's dog go, whereupon said dog jumped at him and bit his hand quite severely. At the time this occurred the plaintiff's dog was kept for the plaintiff, at his request, by one Andrew L. Carroll, at his shop near by. The defendant, after receiving the bite, went home, got a pistol, returned to Carroll's shop, where the dog then was, and shot it. The defendant contended that he had a right to shoot it, under R. I. Pub. Stat., chap. 93, § 6, which provides that "any person may kill any dog that may suddenly assault him, or any person of his family or in his company, while the person so assaulted is out of the inclosure of the owner or keeper of such dog." The plaintiff did not seriously deny that the dog bit the defendant, but he submitted testimony to show that the dog did not bite him at the time and in the manner as the defendant testified. Carroll testified that he helped separate the dogs, and that the defendant got bitten in separating them; that he took the plaintiff's dog by the collar while the two were engaged, and held it so until he got it into his shop, and chained it there, so that it could not have jumped at the defendant and bit him after the separation. Another witness of the occurrence testified that he did not see the plaintiff's dog spring at the defendant. The court ruled that the defendant had a right, under the Statute, to kill the dog; that the dog had forfeited its life by biting him; that he had a right to go for his pistol, get it, return and shoot the dog; and that it did not matter, so far as the plaintiff was concerned, that the dog was in Carroll's shop when shot. The court then directed a verdict for the defendant. The plaintiff excepted, and now asks for a new trial for error in said rulings and direction.

The plaintiff contends that the defendant, if bitten as he testified, should have killed the dog instantly, in order to have the protection of the Statute. We see nothing in the Statute which so limits the right to kill which is given by it. Men do not ordinarily, when they walk the streets, carry with them a weapon which would make it safe for them to attempt to kill a dog which had attacked them, especially if it were powerful and ferocious. The right given by the Statute is given to any person, not only in case he is himself assaulted, but also in case any member of his family is assaulted. Suppose a child on his way to or from school is assaulted by an ugly dog and bitten. Is it reasonable to hold that in such a case the Statute does not enable a father to kill the dog, unless he happens to be where he can do it instantly? It does not seem so to us. The Statute, so construed, would scarcely go further than the common law in any respect, and in some respects not so far. *Woolf v. Chalker*, 81 Conn. 121; *Credit v. Brown*, 10 Johns. 365; *Putnam v. Payne*, 18 Johns. 312; *Maxwell v. Palmerton*, 21 Wend. 407.

The plaintiff contends that, even if the de-

fendant had a right to kill the dog, he had no right to enter Carroll's shop and kill it there, and he is therefore liable in this action. We do not think the argument is tenable. If it be meant, as we suppose it is, that the defendant committed a trespass on Carroll's shop by entering it and killing the dog there, he is liable to Carroll, not to the plaintiff, for it, and we do not see how the plaintiff can take advantage of it. If a boy, having committed some act of filial disobedience, should take refuge in a neighbor's house or barn, and his father, following, should administer the merited chastisement there, we do not think the father would be any more liable to his son therefor than if he had administered it at home, whatever action his neighbor might have against him. Nor do we see that it helps the matter any for the plaintiff that, when the dog was shot, Carroll was the keeper of it for him.

The plaintiff contends that the defendant fails to justify himself under the Statute, because he was bitten in consequence of his interference between the two dogs to separate them. As we have seen, the testimony on this point was contradictory. According to the defendant's testimony, the conflict between the dogs had ceased, his own dog having run home, when he was bitten; the plaintiff's dog turning upon him to inflict the bite, after he had let go its collar. If this was so, it seems to us that the defendant was "suddenly assaulted," within the Statute. The plaintiff's testimony goes to show that the defendant received the bite while he was endeavoring to separate the dogs, before their struggle was over. The defendant attempted to effect the separation with his hands, and a bite from one dog or the other would be so likely to occur that it might well have been anticipated as a probable result of the attempt. The question is, then, whether, if the defendant was bitten in such circumstances, he can be said to have been suddenly assaulted, within the meaning of the Statute. We think not. In such circumstances, the bite may have been the result of the mutual animosity of the two dogs, or of one of them towards the other, without animosity towards the person receiving it. The suddenness of assault required by the Statute would be wanting. At any rate, if there were circumstances which would bring the case within the Statute, notwithstanding that the bite occurred from such an attempt, it would, in our opinion, be incumbent on the defendant to show them. We think, therefore, that, in view of the testimony given by the plaintiff's witnesses, the case should have been left, under proper instructions, to the jury, and that the court erred in *peremptorily directing a verdict for the defendant*.

To prevent any possible misapprehension, we will add that, in so deciding, our purpose is not to question in the least the defendant's right to interfere for the protection or rescue of his own dog, or to recover damages for injuries received while so interfering, but only to determine, as best we can, the limit of his right under the Statute to kill the offending dog.

MASSACHUSETTS SUPREME JUDICIAL COURT.

TRUSTEES OF UNITARIAN SOCIETY
in Harvard

v.

Larkin T. TUFTS, Exr. etc., of Mary E.
Pearson, Deceased:

(....Mass....)

1. A legacy of a certain number of shares of certain stock is specific where another clause of the will disposes of certain other shares of the same stock, and both bequests dispose of the exact number of shares of such stock standing in the name of the testator, and a subsequent clause gives "the balance of my stock as per my stock book, my furniture and all other property not otherwise disposed of by me," and the general course adopted by the testator in making the will was to take up different items of his property as it then stood and dispose of them.
2. A specific legacy of stock standing in the name of the testator is adeemed by a sale of the stock subsequently to the making of the will, and the fact that the will is republished by a codicil afterwards executed is immaterial.

(February 26, 1880.)

ON report from the Superior Court for Worcester County (Staples, J.) of an action to recover a certain legacy in which judgment had been ordered for plaintiff. *Judgment for defendant.*

The material portions of the will are as follows:

"Item 4. I give to the Trustees of the Unitarian Society of Harvard, Massachusetts, ten shares of the stock of the Worcester & Nashua Railroad Company, the income thereof to be applied to the payment of the salary of the pastor of said Society, for the time being, with the provision that said Trustees shall out of said income keep the cemetery lot belonging to the Pearson family in said town, in order, and keep the shrubbery from over-topping the monument in said lot, and paint the lettering on

said monument once in ten years, to them and their successors.

"Item 5. I give to the Universalist Society of Skowhegan, Maine, ten shares of the stock of the Worcester & Nashua Railroad Company, the income thereof to be applied towards the payment of the minister's salary for the time being, to them and their successors."

"Item 8. The balance of my stock as per my stock book, my furniture and all other property not otherwise disposed of by me, I would have sold and the proceeds thereof disposed of as follows:" giving specific directions.

Then followed a number of clauses disposing of specific items of property belonging to the testatrix, such as portraits, jewelry, clothing, books, furniture, etc.

Subsequently to the publication of her will testatrix sold her Worcester & Nashua Railroad stock and invested the bulk of the proceeds in Kansas school bonds and western land mortgages.

Subsequently she executed a codicil in which she stated: "I make this codicil to my last will heretofore made and published by me and dated October 21, 1882, which will I hereby ratify and confirm in all respects save as the same may be changed by this instrument."

This suit was brought by the Trustees of the Unitarian Society in Harvard to recover the legacy given to them by the fourth clause of the will.

At the trial in the superior court the judge ruled that the legacy was not adeemed by the sale of the stock, and ordered judgment for plaintiffs, and at defendant's request reported the case for the determination of this court; if the ruling was right the judgment was to stand, otherwise such ruling to be made as the court should deem just and proper.

Messrs. Verry & Gaskill, for plaintiffs:

There is no case in Massachusetts where a legacy of stock has been held specific, unless just the number of shares which the testator possessed at the time was given to the partic-

NOTE.—Legacies, specific and general, distinguished.

Whether a legacy is specific or general depends on the intention of the testator, to be derived from the language used in the bequest, construed in the light of all the provisions of the will. *Davis v. Crandall*, 2 Cent. Rep. 143, 101 N. Y. 811.

The character of a legacy depends upon whether the testator intended that the legatee should have the legacy, although the fund designated for the payment thereof should fail. If he did, it is general; if he did not, it is specific. *Tichenor v. Tichenor*, 8 Cent. Rep. 71, 41 N. J. Eq. 39.

Directing that a certain sum be kept invested and when the legatee reaches the age of twenty-five that it be equally divided between her and another is a general legacy. *Langstroth v. Golding*, 3 Cent. Rep. 104, 41 N. J. Eq. 48; 1 Roper, Leg. 356; *Brown v. Knapp*, 79 N. Y. 136; *Gillaume v. Adderley*, 15 Ves. Jr. 384; *Le Grice v. Finch*, 3 Meriv. 50; *Sparrow v. Josselyn*, 16 Beav. 185; *Mytton v. Mytton*, L. R. 19 Eq. 80; *Bevan v. Atty-Gen.* 4 Giff. 361.

A clause in a will bequeathing "the sum of \$18,000 first to be taken out of the proceeds of the sale of realty" is not a specific legacy. *Hutchinson v. Fuller*, 75 Ga. 83.

7 L. R. A.

In case of specific legacies in a will, with a residuary clause providing for a distribution among heirs, children of brothers and sisters take *per capita*, not *per stirpes*. *McKelvey v. McKelvey*, 1 West. Rep. 68, 43 Ohio, 218.

A legacy of a portion of a debt secured by note of the debtor is specific. *Davis v. Crandall*, *supra*.

A specific legacy can be taken into possession only by assent of the executor; but this may be either express or implied. An assent to the interest of the tenant for life in a chattel will inure to vest the interest of the remainder, as both constitute but one estate. *McClanahan v. Davis*, 49 U. S. 8 How. 170 (12 L. ed. 1038).

Whether a legacy is demonstrative or specific must be decided by the intent of testator; and where a legacy is held demonstrative, the general intent is shown to have it paid without reference to the fund on which it is primarily charged. *Stevens v. Fisher*, 3 New Eng. Rep. 803, 144 Mass. 114.

The term "legacies" *prima facie* comprehends annuities. *Hawk, Wills*, 228.

A gift of the profits and dividends of stock for life will not be held to carry dividends declared after the death of the beneficiary, although made from profits accruing during his lifetime. *Re Kernochan*, 7 Cent. Rep. 90, 104 N. Y. 618.

ular legatee, or unless some other facts appeared to aid that construction.

White v. Winchester, 6 Pick. 48; *Metcalf v. Framingham*, 128 Mass. 373.

English cases do not seem to adopt that principle.

Robinson v. Addison, 2 Beav. 515; *Harvey v. Lloyd*, 17 Week. Rep. 990; *Jackson v. Hurlock*, 2 Eden, 263; *Bronsdon v. Winter*, 1 Amb. 57. So, too, *Tyft v. Porter*, 8 N. Y. 516.

But even if so, the effect of it is overcome in this case:

1. By the nature and purposes of the gift.

Johnson v. Goss, 128 Mass. 433.

2. By the ratification and republication of the will by her codicil.

Ilaven v. Foster, 14 Pick. 543; *Brimmer v. Solier*, 1 Cush. 118.

Even if the republication cannot revive a specific legacy, yet it is evidence bearing upon the intent of the testator.

Roome v. Roome, 3 Atk. 181; *Ravenscroft v. Jones*, 4 De G. J. & S. 223.

Mr. J. H. Butler, for defendant:

The bequests to the plaintiff and the society in Skowhegan were special, and by sale of the stock so bequeathed said legacies were adeemed, and the proceeds of such sale, so far as not used by testatrix, belong to the residue which is claimed by the residuary legatees.

Redfield & Williams, Exrs. 4th ed. 142; *Pub. Stat. chap. 127*, § 8; *White v. Winchester*, 6 Pick. 48; *Richards v. Humphrey*, 15 Pick. 135; *Foot v. Worthington*, 22 Pick. 299; *Pollard v. Pollard*, 1 Allen, 490; *Richardson v. Hill*, 124 Mass. 228; *Metcalf v. First Parish in Framingham*, 128 Mass. 370; *Ashburner v. Macquire*, 2 White & T. Lead. Cas. (part 1)* 267, 4th Am. ed. 600; 1 Jarman, Wills, pp. 42-45, 130-150; *Booley v. Wyatt*, 55 U. S. 14 How. 390 (14 L. ed. 463); *Pickering v. Langdon*, 22 Me. 418; *Kip v. Van Cortland*, 7 Hill, 346; *Vandemark v. Vandemark*, 26 Barb. 416; *Walton v. Walton*, 7 Johns. Ch. 253; *Ford v. Ford*, 23 N. H. 212.

That testatrix provided for care of a tomb, requiring a trifling expense, does not make the bequest general, any more than the provision for paying the minister's salary.

White v. Winchester, 6 Pick. 48.

Bequest of stock.

Bequest of stock "now standing in my name" gives the stock as standing on the books at the date of executing the will, rather than at that of testator's death. *Fidelity Ins. Co's App.* 1 Cent. Rep. 61, 108 Pa. 339.

Such a bequest is a specific legacy, as being a particular thing, specified and separated from all other things constituting the testator's estate. *Walker's Estate*, 3 Rawle, 220; *Blackstone v. Blackstone*, 8 Watts, 335; *Ludlam's Estate*, 13 Pa. 183, 3 Clark, 276; *Walton v. Walton*, 7 Johns. Ch. 253.

To constitute a specific legacy it is sufficient if it can be specified and distinguished from the rest of the testator's estate, at the time of his decease (*Fontaine v. Tyler*, 9 Price, 94; *Stephenson v. Dowson*, 3 Beav. 342; 2 Redf. Wills, 133); and legacies which would have been specific before the statutes are specific still. *Bothamley v. Sherson*, L. R. 20 Eq. 304.

In *Heppburn v. Skirving*, 4 Jur. N. S. 651, the bequests were of "all the shares which I now possess in the G. Bank," of "the shares I am possessed of in the A. Bank," and of "the money I possess in the company's fund."

In *Langdale v. Briggs*, 8 DeG. M. & G. 301, the be-

The language of the codicil in confirmation of the will of Mrs. Pearson is in the usual form, and confirmed the will as it then stood, with the bequest to plaintiff and the other society adeemed. These legacies were at that time as effectually revoked by the sale as they would have been had she on the day of sale revoked them by codicils. And confirmation of a will by a codicil does not re-enact bequests revoked by former codicils.

Schouler, Admrs. and Exrs. §§ 381, 461, 476; *Brimmer v. Solier*, 1 Cush. 118; *Hosea v. Jacobs*, 98 Mass. 65.

Holmes, J., delivered the opinion of the court:

We must hold the legacy in the fourth clause of the will specific, although we cannot but fear that if the testatrix had been fully advised of the consequences of making a legacy specific, she would have changed her will.

The legacy is of "ten shares of the stock of the Worcester & Nashua Railroad Company." By the fifth clause of the will the testatrix gives ten shares to another legatee, and she gives none of it to anyone else. At the time of making her will, she owned twenty shares of the stock. We will assume, for the purposes of our decision, that the mere coincidence between the amount given and the amount owned would not make the legacy specific, both being round numbers. See *Tyft v. Porter*, 8 N. Y. 516; *Bronsdon v. Winter*, 1 Amb. 57; *Purss v. Snaphin*, 1 Atk. 414; *Robinson v. Addison*, 2 Beav. 515, 520.

This might be admitted, perhaps, without at all questioning *White v. Winchester*, 6 Pick. 48. But *White v. Winchester*, and *Metcalf v. First Parish in Framingham*, 128 Mass. 370, 373, show that such a coincidence is an important fact to be considered in connection with the language of the will. See *Johnson v. Goss*, 128 Mass. 433, 436.

Turning to the language, we find nothing conclusive in the fourth clause. The word "the" preceding "stock" is ambiguous and may as well refer to the stock of the company in general as to the stock owned by the testatrix. But if "my" were used instead of "the," the

quests were of "the estates of which I am seised;" in *Lilford v. Keck*, 30 Beav. 300, "all lands of or to which I am seised or entitled in fee simple;" in *Trinder v. Trinder*, L. R. 1 Eq. 665, "my shares in the Great Western Railway;" in *Wagstaff v. Wagstaff*, L. R. 8 Eq. 229, "all my ready money, bank and other shares, and any other property, that I may now possess;" in *York v. Brown*, cited in *Everett v. Everett*, L. R. 7 Ch. Div. 421, "all his messuages, farms, lands and hereditaments situate in the parish of Great Bowden;" in *Bothamley v. Sherson*, L. R. 20 Eq. 304, "all my stock in the Midland Railway Company."

The several bequests in all these cases have, under the Wills Act, been construed to have reference to the death of the testators, although the words employed were in the present tense, qualified even by the word "now."

In other cases the qualifying word "now" served merely as descriptive of the subject matter of a bequest. *Re Midland R. Co.* 34 Beav. 525; *Saxton v. Saxton*, L. R. 13 Ch. Div. 359; *Miles v. Miles*, L. R. 1 Eq. 462; *Castle v. Fox*, L. R. 11 Eq. 542; *Garrison v. Garrison*, 29 N. J. L. 154; *Struthers v. Struthers*, 5 Week. Rep. 303.

legacy would be specific. *Metcalf v. First Parish in Framingham*, 128 Mass. 370, 378; *Foots, Appellant*, 22 Pick. 299, 303. See *Johnson v. Goss*, 128 Mass. 433, 435.

The same principle applies upon equally strong grounds when a testator, after giving legacies of stock generally, gives the rest of the stock "standing in my name." *Sleece v. Thornton*, 2 Ves. Sr. 560. See *Metcalf v. First Parish in Framingham*, 128 Mass. 370, 372; *Millard v. Bailey*, L. R. 1 Eq. 378; *Theobald, Wills*, 8d ed. 100.

In this case the eighth clause of the will gives "the balance of my stock as per my stock book, my furniture and all other property not otherwise disposed of by me." This language, taken with the facts, makes it pretty plain that the stock disposed of by the testatrix in the fourth clause was stock then belonging to her, and the conclusion is fortified by the other clauses which show that the general course which she adopted in making her will was to take up different items of her property as it then stood and to dispose of them. The words used describe a specific legacy too clearly to be controlled by the fact that the proviso discloses a motive which might be conjectured to be independent of the form in which the property was invested.

The republication of the will by the codicil does not change or enlarge the meaning of the words of the will on which the plaintiff must rely in order to recover the legacy. It follows that the legacy was adeemed by the sale of the stock. *Pattison v. Pattison*, 1 Myl. & K. 12; *Macdonald v. Irvine*, L. R. 8 Ch. Div. 101, 108. See *Sidney v. Sidney*, L. R. 17 Eq. 65, 68.

Judgment for defendant.

E. A. GAY

v.

John R. ROOKE.

(....Mass....)

1. That an instrument may be a promissory note it must contain on its face an express promise to pay money; hence an instrument in the following form: "I. O. U. the sum of \$17.06 for value received," signed by the maker, is not a promissory note.

2. Interest will be allowed in a suit to recover the amount due under an instrument which is a mere acknowledgment of debt only from the service of the writ, if there was neither prior demand made, nor stipulated time for payment, nor contract or usage requiring payment of interest, and if defendant was not a wrongdoer in acquiring or retaining the money.

(February 23, 1890.)

ON plaintiff's exceptions to a judgment of the Superior Court of Middlesex County disallowing his claim to interest upon a certain instrument in writing in the form of a due bill. *Overruled.*

The action was of contract on the following instrument:

Marlboro', Sept. 23, 1881.

I. O. U., E. A. Gay, the sum of seventeen dollars $\frac{17}{100}$ for value received.

John R. Rooke.

7 L. R. A.

At the trial the only contention was as to the amount of interest due thereon. The court allowed interest from time of demand only and plaintiff alleged exceptions.

Mr. Heman S. Fay, for plaintiff:

The instrument in suit was a promissory note.

1 Wait, Act. and Def. p. 543; *Kimball v. Huntington*, 10 Wend. 675; *Russell v. Whipple*, 2 Cow. 536; *Almy v. Winslow*, 126 Mass. 342; *Lincoln v. Butler*, 14 Gray, 129; *Daggett v. Daggett*, 124 Mass. 149; *Currier v. Davis*, 111 Mass. 480; *Franklin v. March*, 6 N. H. 884; *Carver v. Hayes*, 47 Me. 257; *Brooks v. Elkins*, 2 Mees. & W. 74, 2 Gale, 200; *Harrow v. Dugan*, 6 Dana (Ky.) 341.

The plaintiff was entitled to interest on the note from its date.

Foots v. Blanchard, 6 Allen, 231; 4 Wait, Act. and Def. pp. 129, 130, 132; *Oriental Bank v. Tremont Ins. Co.* 4 Met. 1-7; *Dodge v. Perkins*, 9 Pick. 388-398; *Haven v. Grand Junction R. & Depot Co.* 109 Mass. 88-99.

A note or bond payable without any time specified is in law payable immediately.

4 Wait, Act. and Def. p. 185; 1 Wait, Act. and Def. p. 543; *Sheehy v. Mandeville*, 11 U. S. 7 Cranch, 208-217 (8 L. ed. 317-320); *Thompson v. Ketcham*, 8 Johns. 189-192; *Herriek v. Bennett*, 8 Johns. 374; *Cornell v. Moulton*, 3 Denio, 12; *Francis v. Castleman*, 4 Bibb, 282, 283; *Farguhar v. Morris*, 7 T. R. 124; *Osborne v. Fulton*, 1 Blackf. 233; *Bailey v. Clay*, 4 Rand. (Va.) 846-850; *Holmes v. West*, 17 Cal. 623-625; *Jones v. Brown*, 11 Ohio St. 601; *Payne v. Mattoz*, 1 Bibb, 164; *Mason v. Patton*, 1 Mo. 279.

When such a note is held to be due "immediately" interest runs from its date.

Rogers v. Colt, 21 N. J. L. 19-24; *Selleck v. French*, 1 Conn. 32, 1 Am. Lead. Cas. 618, note; *Gaylord v. Van Loan*, 15 Wend. 308; *Thompson v. Ketcham*, 8 Johns. 189. See also *Francis v. Castleman* and *Farguhar v. Morris*, *supra*; *Edgmon v. Ashelby*, 76 Ill. 161-163; *Purdy v. Phillips*, 11 N. Y. 408; *Collier v. Gray*, 1 Over. (Tenn.) 110; 1 Daniel, Neg. Inst. 3d ed. § 88, note 5.

Creditors shall be allowed to receive at the rate of 6 per cent per annum for all moneys, after they become due on any bond, bill, promissory note or other instrument in writing.

Edgmon v. Ashelby, *supra*; *Currier v. Davis*, 111 Mass. 480; *Lincoln v. Butler*, 14 Gray, 129; *Ordway v. Colcord*, 14 Allen, 59.

Mr. Ira B. Forbes, for defendant:

Plaintiff declares upon the I. O. U. as a promissory note; therefore for purposes of this action it should be treated as such.

Cummings v. Freeman, 2 Humph. 143; *Marrigan v. Page*, 4 Humph. 247.

A note silent as to time of payment is payable on demand.

Bacon v. Page, 1 Conn. 404; *Daniel, Neg. Inst.* § 7; *Pub. Stat. chap. 77, § 11*; *Colt v. Barnard*, 18 Pick. 260; *Berry v. Robinson*, 9 Johns. 121; *Dwight v. Emerson*, 2 N. H. 159; *Sanborn v. Southard*, 25 Me. 409.

Interest runs only after demand on a note payable on demand and silent as to interest.

Suffolk Bank v. Worcester Bank, 5 Pick. 107; *Hubbard v. Charlestown Branch R. Co.* 11 Met. 124; *Hunt v. Nevins*, 15 Pick. 500; *Brewer v.*

Tyringham, 12 Pick. 547; *Bayley*, Bills, 2d Am. ed. note 36, p. 875.

Devens, J., delivered the opinion of the court:

In order to constitute a good promissory note there should be an express promise on the face of the instrument to pay the money. A mere promise implied by law founded on an acknowledged indebtedness will not be sufficient. *Story*, Prom. Notes, 14; *Brown v. Gilman*, 18 Mass. 158.

While such promise need not be expressed in any particular form of words the language used must be such that the written undertaking to pay may fairly be deduced therefrom. *Commonwealth Ins. Co. v. Whitney*, 1 Met. 21.

In this view the instrument sued on cannot be considered a promissory note. It is an acknowledgment of a debt only, and although from such an acknowledgment a promise to pay may be legally implied, it is an implication from the existence of the debt and not from any promissory language. Something more than this is necessary to establish a written promise to pay money. It was therefore held in *Gray v. Bowden*, 23 Pick. 282, that a memorandum on the back of a promissory note in these words: "I acknowledge the within note to be just and due," signed by the maker and attested by a witness, was not a promissory note signed in the presence of an attesting witness within the meaning of the Statute of Limitations.

In England an I. O. U., there being no promise to pay embraced therein, is treated as a due bill only. The cases which arose principally under the Stamp Act are very numerous and they have held that such a paper did not require a stamp as it was only evidence of a debt. 1 Daniel, Neg. Inst. § 85; 1 Randolph, Com. Paper, § 88; *Fesenmayer v. Adcock*, 16 Mees. & W. 449; *Melanotte v. Teasdale*, 13 Mees. & W. 216; *Smith v. Smith*, 1 Post. & F. 539; *Gould v. Coombe*, 1 C. B. 543; *Fisher v. Leslie*, 1 Esp. 426; *Israel v. Israel*, 1 Campb. 499; *Childers v. Boulnois*, Dow. & Ry. N. P. 8; *Beeching v. Westbrook*, 8 Mees. & W. 411.

While in a few States it has been held otherwise, the law as generally understood in the country is that in the absence of any statute a mere acknowledgment of a debt is not a promissory note, and such is we think the law of this Commonwealth. *Gray v. Bowden* and *Commonwealth Ins. Co. v. Whitney*, *supra*; *Daggett v. Daggett*, 124 Mass. 149; *Almy v. Winslow*, 126 Mass. 342; *Carson v. Lucas*, 13 B. Mon. 213; *Garland v. Scott*, 15 La. Ann. 143; *Ourier v. Lockwood*, 40 Conn. 349; *Brenzer v. Wightman*, 7 Watts & S. 284; *Biskup v. Oberle*, 6 Mo. App. 583.

Some States have by statute extended the law of bills and promissory notes to all instruments in writing and whereby any person acknowledges any sum of money to be due to any other person. 1 Randolph, Com. Paper, § 88; Ill. Rev. Stat. 1880; Colo. Gen. Laws, 1877; Ind. Rev. Stat. 1876; Iowa Rev. Code 1850; Miss. Rev. Code 1823.

We have no occasion to comment upon those instruments in which words have been used or superadded from which an intention to accompany the acknowledgment with a promise to

pay has been gathered, or where the form of the instrument fairly led to that conclusion. *Daggett v. Daggett* and *Almy v. Winslow*, *supra*.

No such words exist in the instrument sued, nor is it in form anything but an acknowledgment. The words "for value received" recite, indeed, the consideration, but they add nothing which can be interpreted as a promise to pay. It is therefore unnecessary to consider whether, if the paper were a promissory note, interest should be calculated from its date. Upon this point we express no opinion. If it is to be treated as an acknowledgment of debt only, as we think it must be, the plaintiff is not entitled to interest except from the date of the writ. Even if it were the duty of the defendant to have paid the debt on demand, yet, if no demand was made, if no time was stipulated for its payment, if there was no contract or usage requiring the payment of interest and if the defendant was not a wrong-doer in acquiring or detaining the money, interest should be computed only from the demand made by the service of the writ. *Dodge v. Perkins*, 9 Pick. 868; *Hunt v. Nevers*, 15 Pick. 500.

"In general," says Chief Justice Shaw, "where there is a loan without any stipulation to pay interest, and where one has the money of another, having been guilty of no wrong in obtaining it and no default in retaining it, interest is not chargeable." *Hubbard v. Charles-town Branch R. Co.* 11 Met. 124; *Calton v. Bragg*, 15 East, 223; *Shaw v. Picton*, 4 Barn. & C. 728; *Moses v. Macferlan*, 2 Burr. 1005; *Walker v. Constable*, 1 Bos. & P. 806.

Exceptions overruled.

Maria L. SLATTERY

v.

Alice S. WASON et al.

(...Mass....)

1. The donor of the income of a trust fund to a person for life may qualify the gift by a provision that the right to receive the income shall be inalienable; such qualification need not be in express terms, but it will suffice if the intention to make it can be clearly gathered from the

NOTE.—Devise of income of trust fund; late cases.

An absolute devise of principal to be held in trust for the children of the testatrix, and also a distinct direction that the income shall be paid to them; but in case of their death during the lifetime of the husband of the testatrix, the income to be paid to her husband during his life,—is an absolute gift of the principal for the benefit of the children, subject only to the gift of the income to the husband during the remainder of his life in case he survived the children. *Thomae v. Thomae* (N. J.) 18 Atl. Rep. 365.

A will gave \$1,000 to the testator's wife; also "the whole interest and income of \$5,000 to be paid to her each and every year during her life," and so much of the \$5,000 itself as should be required to support her in a manner becoming her station in life, if the "said interest or income" should prove insufficient to effect that purpose; and then provided that the personal estate should be sold or rented "to raise funds to pay debts, legacies and expenses." It was held that the widow was entitled to the

instrument of grant when construed in the light of the circumstances.

2. When so much of the income of a trust fund is given to a person as shall be necessary for his support his right thereto is in its nature inalienable and the intention of the donor that it shall not be alienated is presumed; hence, such income cannot be reached by a creditor of the donee, and the court will not for his benefit fix the amounts and times of future payments and decree that they shall be fixed sums which can be reached by him.
3. Where a fund is given to a person absolutely, subject to a charge for the support of another during life, the court will not interfere at the suit of a third person to change the relation of the parties or the character of the fund.

(February 23, 1890.)

ON reservation from the Supreme Judicial Court for Suffolk County (Devens, J.) upon bill and demurrer of a suit brought by a creditor of Alice S. Wason to reach funds alleged to belong to her and to be in the hands of the other defendants, and to have the same applied in satisfaction of her debt. *Demurrer sustained.*

The bill alleged that Thomas W. Wason, deceased, left a will which was duly admitted to probate by which he gave to his son the income of certain stock during his life, the principal of which was to be held by the executors during the life of the son, and, at his decease, the same was to go to whatever child or children of his should survive him, provided that if such son should leave a widow she should be entitled to support out of the income so long as she should remain his widow. That the son died leaving a wife surviving him, who still remained his widow and was the Alice S. Wason made a party to this bill. The probate court ap-

pointed trustees to execute the provisions of the will, who were also made parties to the suit. The son left one child, for whom guardians were appointed, who, together with the son, were also made parties to the suit.

The bill further alleged that the money accrued as income on the trust property to which Alice S. Wason was already entitled under the will, would not be sufficient to pay her indebtedness to the complainant. The bill contained interrogatories as to the character and amount of the income which was, or which might become, due to Mrs. Wason, and contained a prayer that the court would direct the trustees to pay over such sums of money as had already accrued for the settlement of complainant's debt, and that they should retain what might thereafter accrue, and apply it in the same way until the said indebtedness was satisfied; and that the trustees might be enjoined from applying any part of the income in any other way until such indebtedness, interest and cost should be paid in full and satisfied.

Demurrers were filed to this bill and the case was thereupon reserved by assent of the parties for the consideration of the full court.

Messrs. Champlin, Ryther & Wentworth and Edward I. Baker, for plaintiff:

Under the will of Thomas W. Wason, Alice S. Wason is a beneficiary, and thereunder acquired either a valuable equitable interest in the fund bequeathed to the child or children of George W. Wason, out of which she is entitled to her support, or a valuable right against the legatees, which, if denied her, "she could enforce by a proper bill in equity."

Hyde v. Wason, 131 Mass. 450.

This equitable interest of said Alice, in the absence of peculiar circumstances taking the case out of the general rule, may be reached by

whole of the income and interest, without deduction of taxes or expenses. *Re Cushing's Will*, 2 New Eng. Rep. 471, 58 Vt. 393.

Where one clause of a will created a trust for three persons in equal shares in all the property covered by a power possessed by testatrix; and another clause provided that the share "allotted" to one of them should be held in trust for her during life to receive the net income; and a clause following provided that the trustee should have power to make division of the property, receive the interest, income, rents and profits, pay taxes, etc.,—although the power to make division could apply only to the first trust, the other enumerated powers were given in respect to both of them. *Jenks v. Lyman*, 127 Ill. 341.

Where a will provided that \$1,000 of the annual income from testatrix's estate should be devoted to the maintenance and education of her five children, and that any excess should be applied to the payment of incumbrances, etc., and it appeared that testatrix never contemplated that the income would be less than \$1,000, and made no provision for supplying any possible deficiency,—it was held that a shortage or deficiency of income in any one year could not be paid out of a surplus arising in after years. *Brewster's App.* (Pa.) 11 Cent. Rep. 102.

A devise to a son of a share to be retained by a trustee for and during the son's natural life, the interest thereof to be paid to the son yearly, and after his death his share to be equally divided among his children if he should have any, or to their issue, creates only a life estate in the son. *McDevitt's App.* 4 Cent. Rep. 33, 113 Pa. 103.

7 L. R. A.

Precatory words in will.

It is perfectly well settled that what are denominated precatory words, expressive of a wish or desire, may, in given instances, create a trust or impose a charge. *Phillips v. Phillips*, 112 N. Y. 304; *Jones v. Jones*, 18 West. Rep. 537, 124 Ill. 254. See note to *Knob's App.* (Pa.) 6 L. R. A. 353.

Words of recommendation, request, entreaty, wish or expectation will impose a binding duty upon the devisee, by way of trust, provided the testator has pointed out with clearness and certainty both the subject matter and the object of the trust. Authorities cited in *Noe v. Kern*, 12 West. Rep. 234, 93 Mo. 367.

The words "wish" and "desire," used as expressing a desire for an act to be done by some person named, may be held to be precatory; but when used to express the intention of the testator, they are mandatory. *Taylor v. Martin* (Pa.) 8 Cent. Rep. 139.

A will stating it to be the desire of the testatrix that the remainder of her estate be equally divided between her children, and that the executor will dispose of all her real estate as soon as it can be done without loss to the estate, does not operate by its own force to convert the land into money, and thus place it beyond the lien of a judgment against the land, recovered before a sale by the executor. *Eneberg v. Carter*, 98 Mo. 647.

A will in which testator says: "I desire the residue of my estate, real and personal, to be sold by my executors . . . at such time as they may deem best," and the proceeds to be divided, etc.,—makes an equitable conversion of the real estate. *Carr v. Branch* (Va.) 13 Va. L. J. 70, 8 S. E. Rep. 473.

her creditors by bill in equity, and applied to their debts.

Sparhawk v. Cloon, 125 Mass. 263.

Messrs. A. A. Ranney and Fletcher Ranney, for defendant Alice S. Wason:

The founder of a trust can secure the enjoyment of it to other persons if his intention is shown that it shall not be alienable nor subject to be taken by their creditors.

Broadway Nat. Bank v. Adams, 183 Mass. 170.

Where the paramount object and purpose of a bequest in trust is to provide for the support of the beneficiary, the power of alienation by anticipation is inconsistent with, and would directly defeat, this paramount purpose. The rights of the beneficiary and her creditors are limited by the will.

Perkins v. Hays, 8 Gray, 405; *Pope v. Elliott*, 8 B. Mon. 56; *Holdship v. Patterson*, 7 Watts, 547, cited in *Nichols v. Eaton*, 91 U. S. 727 (23 L. ed. 257), and in *Broadway Nat. Bank v. Adams*, *supra*; *Anthracite Ins. Co. v. Sears*, 109 Mass. 533; *Pacific Nat. Bank v. Windram*, 133 Mass. 175, 176; *Baker v. Brown*, 5 New Eng. Rep. 904, 146 Mass. 369.

A court of equity ordinarily will not interfere with the discretion of a trustee. The discretion is destroyed, and the purpose of the testator defeated, if creditors can fix and control the manner and amount of the support.

Hall v. Williams, 120 Mass. 844; *Hill, Trustees*, *486; *Sparhawk v. Cloon*, 125 Mass. 263, 267; *Nichols v. Eaton*, 91 U. S. 724, 725 (23 L. ed. 256); *Russell v. Grinnell*, 105 Mass. 425.

If any income had accrued generally on the property in the guardians' hands, the same objections to Alice S. Wason's support therefrom, being reached by creditors, exist as already discussed.

Phanix Ins. Co. v. Abbott, 127 Mass. 560.

Messrs. Harding & Wigglesworth, for the defendants, the guardians and trustees:

The beneficiary has no right to the income of the devised estate which she can control.

Baker v. Brown, 5 New Eng. Rep. 904, 146 Mass. 369; *Chambers v. Smith*, L. R. 3 App. Cas. 795.

A court of equity will not put a valuation upon her necessary support and order it paid over to creditors.

Perkins v. Hays, 8 Gray, 405; *Holdship v. Patterson*, 7 Watts, 551; *Braman v. Stiles*, 2 Pick. 461.

Mrs. Wason's rights in the property are limited to what is needed for a reasonable support after her husband's death, and it nowhere appears that the items of plaintiff's bill were furnished for Mrs. Wason's support.

Clark v. Holbrook, 6 New Eng. Rep. 41, 146 Mass. 366, 369; *Broadway Nat. Bank v. Adams*, 133 Mass. 170; *Foster v. Foster*, 133 Mass. 179; *Hall v. Williams*, 120 Mass. 844.

The interest of the defendant is too uncertain and contingent to be reached by a bill in equity.

Baker v. Brown, 5 New Eng. Rep. 904, 146 Mass. 369, 372; *Russell v. Milton*, 133 Mass. 180; *Bartholomew v. Weld*, 127 Mass. 210.

W. Allen, J., delivered the opinion of the court:

It was decided in *Broadway Nat. Bank v. T. L. R. A.*

Adams, 183 Mass. 170, that the donor of the income of a trust fund to one for his lifetime qualify the gift by a provision that the right to receive the income should not be alienable. The language of the court in *Baker v. Brown*, 146 Mass. 369, 5 New Eng. Rep. 904, referring to that case, is applicable to the case at bar,—"Such provision need not be in express terms, but it is sufficient if the intention is clearly to be gathered from the instrument, when construed in the light of the circumstances. The only question in the present case is whether enough appears to show such intention."

The intention that the right given in the instrument under consideration should not be alienable, is obvious from the nature of the gift. There is no gift of the whole income, as in *Broadway Nat. Bank v. Adams*, nor even of the whole income for the support of the beneficiary, as in *Maynard v. Cleaves*, 149 Mass. 307, and in many other cases, but, at most, a right to so much of the fund as shall be needed for her support. When the whole income or a definite sum is given to the beneficiary for his support, the whole belongs to him, and is to be applied by him at his discretion, and the expression of the purpose for which it is given is not deemed to be the expression of an intention that the right to secure it shall not be alienable but when the right given is for a support out of a fund which is given to another, the right is in its nature inalienable, and the intention of the donor that it shall not be alienated is presumed. The right may be extinguished but it cannot be aliened, because a payment to an alienee cannot be a payment for the support of the beneficiary, and no payments are required to be made by the owner of the fund, except such as are for that purpose. The only escape from this conclusion is to hold that the court, on this bill by a creditor, will fix the amounts and times of future payments for support, and decree that they shall be fixed sums, due but not payable to the beneficiary, the right to which she can alien.

One answer to this is, that the court will not interfere to change the relations of the parties at the request of a stranger. The owner of the fund is not a trustee, and his mother is not a *cestui que trust*, who and whose representatives can call him to account as a trustee. He is the absolute owner of the fund subject to the charge of his mother's support. He owes a duty to his mother, and she has a right against him. So long as the parties are satisfied, there is no occasion for any court to interfere with them. If he fails to perform his duty, the court on her application will in some way protect her rights. It may require him to give security, or it may organize a trust fund and make him or some other person trustee, and thus change the relation of the parties and the character of the fund; but the court ought to thus interfere and act only at the instance of the party in interest and to protect her rights under the will, by carrying out the intention of the testator. It will not, without her complaint, and against her wishes, interfere at the suit of a third party to institute a trust and to change the character of the fund and the relation of the parties to it in order to defeat the intention of the testator, not only as to his daughter-in-law but also as to his grandson.

The whole fund is given to the grandson charged only with the support of his mother. Whatever is not required for her support is his to enjoy. What is paid to her creditors is not used for her support although it is paid by him. If the court should attempt to recoup his loss by limiting the amount which he should be liable to pay for his mother's support to the amount he is to pay to her creditors, while this would deprive her of a right of support under the will, it could not relieve him from his statutory obligation to support her. If, however, the relations of the parties, and the circumstances, were such that the court would fix and secure to Mrs. Wason the amount which should be paid to her for her support, it would take care that by so doing it did not change the condition of the property so as to defeat instead of carrying out the intention of the testator. If such action was sought by Mrs. Wason to protect her rights, the decree should be so framed as not to render the right alienable. When the parties do not desire the aid of the court, it will not interfere at the suit of a creditor to change the condition of the property and thereby give him rights which the will alone does not give him, and which the testator did not mean that he should have.

In accordance with the opinion of a majority of the court, the entry is—

Demurrer sustained.

William MOORE, *Appl.*,

v.

Julia VALDA.

(...Mass....)

A writ of *ne exeat* will not be issued to aid in the collection of a judgment which has been recovered at law against a woman.

NOTE.—Writ of *ne exeat*.

A writ of *ne exeat* cannot be granted for a debt due and recoverable at law. It applies only to equitable demands. *Seymour v. Hazard*, 1 Johns. Ch. 1, 1 N. Y. Ch. L. ed. 87; *Smedberg v. Mark*, 6 Johns. Ch. 138, 2 N. Y. Ch. L. ed. 79; *Mitchell v. Bunch*, 2 Paige, 617, 2 N. Y. Ch. L. ed. 1055; *Porter v. Spencer*, 2 Johns. Ch. 169, 1 N. Y. Ch. L. ed. 335; *Bonesteel v. Bonesteel*, 28 Wis. 249; *Nixon v. Richardson*, 4 Deaues. Eq. 108.

The bill must have been previously filed. *Mattocks v. Tremain*, 3 Johns. Ch. 75, 1 N. Y. Ch. L. ed. 547; *Smedberg v. Mark*, *supra*.

To sustain the writ, sufficient equity must appear on the face of the bill. Mere apprehension that defendant will misapply funds in his hands, or abuse his trust, is not sufficient. *Woodward v. Schatzell*, 3 Johns. Ch. 412, 1 N. Y. Ch. L. ed. 668.

A suit in this court, by a judgment and execution creditor, to reach equitable interests, things in action and effects, is an equitable and not a legal demand; and the defendant may be arrested on a *ne exeat* thereon. *Ellingwood v. Stevenson*, 4 Sandf. Ch. 368.

The facts charged must bring the case clearly within the rules which from time immemorial have governed the courts exercising equitable jurisdiction in the application of the writ. *Bushnell v. Bushnell*, 15 Barb. 400; *Denton v. Denton*, 1 Johns. Ch. 441; *Porter v. Spencer*, 2 Johns. Ch. 169; *Brown v. Hafl*, 5 Paige, 285.

The New York Code of Civil Procedure, § 550, subd. 4, was intended as a substitute for the writ 7 L. R. A.

(April 12, 1890.)

APPEAL by petitioner from a decree of the Superior Court for Suffolk County (Mason, J.) dismissing a petition for a writ of *ne exeat* to aid in the collection of a judgment at law against a woman. *Affirmed*.

The case sufficiently appears in the opinion.

Mr. J. J. Feeley for appellant.

No appearance for appellee.

Per Curiam:

If we assume that this appeal is properly before us, the decree of the superior court dismissing the petition must be affirmed. It appears that the petitioner has obtained in the superior court a judgment against the respondent in an action at law, that this judgment remains unsatisfied, and that the respondent, who is a woman, intends to come within the Commonwealth, and after remaining a few days to depart from it. The complaint of the petitioner is, that the statutes which prescribe the proceedings which can be taken against the person of a woman, in order to compel her to satisfy an execution issued on a judgment at law, do not afford an adequate remedy, and he asks that the chancery writ of *ne exeat* may issue that she may be arrested and compelled to give bail or security that she will pay the judgment. See Pub. Stat. chap. 162, §§ 3, 6-17.

The Statutes must be considered as providing the only remedies which the Legislature intended that a plaintiff should have to enforce an execution at law against the person of a woman, and the writ of *ne exeat* has never been issued in aid of legal, as distinguished from equitable, process, or for the purpose of obtaining security from a defendant in an action at law. 3 Dan. Ch. Pr. 8d Am. ed. 1800 *et seq*.

The decree dismissing the petition is affirmed.

and governs the procedure in such cases. *Boucault v. Boucault*, 59 How. Pr. 124; *Bushnell v. Bushnell*, 15 Barb. 399.

Not a prerogative writ.

It is not here a prerogative writ. *Gilbert v. Colt*, Hopk. Ch. 490, 2 N. Y. Ch. L. ed. 500; *Gleason v. Bisby*, Clarke, Ch. 551, 7 N. Y. Ch. L. ed. 197.

But in a proper case it is a writ of right and not discretionary. *Ibid.*; 2 Story, Eq. § 1469; Act of Congress Mar. 2, 1793, chap. 22, § 5.

The allowance of the writ is essential to justice. *Forrest v. Forrest*, 5 How. Pr. 130, 10 Barb. 51; *Cable v. Alvord*, 27 Ohio St. 667; *Story v. Story*, Walk. Ch. (Mich.) 422.

Though originally a prerogative writ, it is now resorted to merely for the purpose of obtaining equitable bail. *Mitchell v. Bunch*, 2 Paige, 606, 2 N. Y. Ch. L. ed. 1050; *Cable v. Alvord*, 27 Ohio St. 666; *Cox v. Scott*, 5 Har. & J. (Md.) 384; *Seymour v. Hazard*, 1 Johns. Ch. 1, note; *Johnston v. Johnston*, 25 How. Pr. 185, 16 Abb. Pr. 45, 1 Robt. 645; *Smedberg v. Mark*, 6 Johns. Ch. 138; *Dick v. Swinton*, 1 Ves. & B. 372; *Stewart v. Graham*, 19 Ves. Jr. 313; *Goodman v. Sayers*, 5 Madd. 471; *Shearman v. Shearman*, 3 Bro. Ch. 370; *De Rivañoli v. Corsetti*, 4 Paige, 264, 3 N. Y. Ch. L. ed. 429.

Nature of the writ.

It is a process to hold defendant in custody until he shall give bail to abide the decree of the court. *Gresham v. Peterson*, 25 Ark. 377; *Cox v. Scott*, 5 Har. & J. 383; *Cable v. Alvord*, 27 Ohio St. 666; *Smed-*

berg v. Mark, 6 Johns. Ch. 122; Mitchell v. Bunch, 2 Paige, 617.

If the party against whom a final decree is made intends to remove beyond the jurisdiction of the court before the decree can be enforced by execution, the writ will be granted. Dunham v. Jackson, 1 Paige, 629, 2 N. Y. Ch. L. ed. 778; Dean v. Smith, 23 Wis. 426; Neville v. Neville, 23 How. Pr. 500; Fuller v. Emerio, 2 Sandf. 626; Johnston v. Johnston, 25 How. Pr. 181.

It will only issue where the defendant is removing, or about to remove, himself or his property, or the specific property to which complainant claims title or in which he claims an interest. Old Hickory Distilling Co. v. Bleyer, 74 Ga. 201; Mitchell v. Bunch, 2 Paige, 600, 2 N. Y. Ch. L. ed. 1060.

It is issued to prevent the debtor from removing out of the jurisdiction of the court. Johnson v. Clendenin, 5 Gill & J. 468.

It must appear that no adequate remedy is afforded at law, and the bill must be verified by one or more of the complainants. An affidavit by an agent or attorney, or by complainants themselves, that the allegations are true to the best of affiant's knowledge and belief, is insufficient. Old Hickory Distilling Co. v. Bleyer, *supra*; Orme v. McPherson, 36 Ga. 673; Hannahan v. Nichols, 17 Ga. 78; Hunter v. Nelson, 5 Blackf. 203; MacDonough v. Gaynor, 18 N. J. Eq. 249; Edwards v. Massey, 1 Hawks, 350; Ramsay v. Joyce, 1 McMull. Eq. 236.

A person cannot be prevented from going beyond the State's jurisdiction by injunction. Bleyer v. Blum, 70 Ga. 568.

In what cases will issue.

It will issue when the peculiar circumstances of the case bring it within the jurisdiction of the court of equity as in matters of account (Porter v. Spencer, 2 Johns. Ch. 169, 1 N. Y. Ch. L. ed. 835), or divorce (Bushnell v. Bushnell, 15 Barb. 400); or where courts of law and equity have concurrent jurisdiction, it will be granted in aid of the action at law. Lucas v. Hickman, 2 Stew. (Ala.) 113, 19 Am. Dec. 44, 45; Rhodes v. Cousins, 8 Rand. 188, 18 Am. Dec. 719; Gilbert v. Colt, Hopk. Ch. 496, 14 Am. Dec. 600.

Where the original bill was sustainable, as to the issuing of the writ of *ne exeat*, the court, having gained jurisdiction, may retain it generally. Candler v. Pettit, 1 Paige, 109; Rathbone v. Warren, 10 Johns. 596.

An action for an account is an equitable demand for which it will issue. MacDonough v. Gaynor, 18 N. J. Eq. 260; Allen v. Smith, 16 N. Y. 418, 419; Story, Eq. Jur. §§ 1470-1473.

Such account must be one having items on one side and set-off on the other, and must be a series of transactions on both sides. Durant v. Einstein 35 How. Pr. 241, 5 Robt. 437; Baker v. Biddle, Bald, 420; Bellamy v. Hawkins, 16 Fla. 738; McMartin v. Bingham, 27 Iowa, 237, 1 Am. Rep. 266; Phillips v. Phillips, 9 Hare, 471.

Where there are mutual accounts between the plaintiff and the defendant, or where each has received and paid on account of the other, and the legal remedies are inadequate, equity will exercise jurisdiction. 3 Pom. Eq. Jur. 472; Van Wyok v. Alliger, 6 Barb. 514; Dickinson v. Lewis, 84 Ala. 638; Avery v. Ware, 55 Ala. 473; Garner v. Reis, 25 Minn. 475; Wilson v. Mallett, 4 Sandf. 112; Satter v. Ham, 81 N. Y. 321; Walker v. Cheever, 85 N. H. 330; Gloninger v. Hazard, 42 Pa. 329; Passyunk Bldg. Ass'n Appeal, 83 Pa. 441; Carter v. Bailey, 64 Me. 458; McKinnon v. McLean, 2 Dev. & B. L. 52; Hay v. Marshall, 3 Humph. 623; Smith v. Marks, 3 Rand. 449; Hickman v. Stout, 2 Leigh, 6; Haywood v. Hutchins, 65 N. C. 674; Allison v. Herring, 9 Sim. 583; Phillips v. Phillips, 9 Hare, 471; Padwick v. Hurst, 18 Beav. 575; Fluker v. Taylor, 3 Drew. 183.

7 L. R. A.

Under what circumstances.

It can properly be issued only where the debtor could be touched by attachment, or on execution (Adams v. Whitcomb, 46 Vt. 713; Gleason v. Bisby, Clarke, Ch. 551); and will not lie where debt is due by an executor of decedent's estate (Brownell v. Akin, 6 Hun, 379), nor where bail can be demanded. Rhodes v. Cousins, 6 Hand 188.

There must be a present debt or duty or some existing right to relief, either at law or in equity. De Rivafron v. Corsetti, 4 Paige, 264, 8 N. Y. Ch. L. ed. 429; Gresham v. Peterson, 25 Ark. 377; Fredricks v. Mayer, 18 How. Pr. 568, 1 Bosw. 231; Gleason v. Bisby, Clarke, Ch. 551, 7 N. Y. Ch. L. ed. 197.

To entitle complainant to a writ of *ne exeat* he must show a demand actually due at the time the writ issues. Cable v. Alvord, 27 Ohio St. 666; Palmer v. Van Doren, 2 Edw. Ch. 425; Samuel v. Wiley, 50 N. H. 353; Porter v. Spencer, 2 Johns. Ch. 169.

The demand must be a pecuniary demand. Cowdin v. Cram, 8 Edw. Ch. 231, 6 N. Y. Ch. L. ed. 638; Graham v. Stucken, 4 Blatchf. 50.

The debt must be so far due that payment or performance can be rightfully demanded. Hayes v. Willio, 11 Abb. Pr. N. S. 170; Cox v. Scott, 5 Har. & J. 384.

There must be a precise amount due not suable at law (Brownell v. Akin, 6 Hun, 379), except in cases of account or of alimony. Rhodes v. Cousins, 6 Hand 188, 18 Am. Dec. 715.

Against foreigners.

It may issue against a foreigner, or resident of a sister State (Mitchell v. Bunch, 2 Paige, 617; Monamara v. Dwyer, 7 Paige, 239; Woodward v. Schatzell, 3 Johns. Ch. 415; Forrest v. Forrest, 2 Edm. Sel. Cas. 175, 5 How. Pr. 129, 10 Barb. 50); and even where the subject of the action is situated in a foreign State. Barry v. Mutual L. Ins. Co. 2 Thomp. & C. 17; De Klyn v. Watkins, 3 Sandf. Ch. 185; Williams v. Fitzhugh, 37 N. Y. 450; Parker v. Parker, 12 N. J. Eq. 105.

It is not necessary that it should appear he is about to depart to avoid the jurisdiction, if his departure will defeat the suit. MacDonough v. Gaynor, 18 N. J. Eq. 250; Parker v. Parker, 12 N. J. Eq. 105; Yule v. Yule, 10 N. J. Eq. 138; Atkinson v. Leonard, 3 Bro. Ch. 218; Howden v. Rogers, 1 Ves. & B. 129.

The abolition by the Code of distinctions between actions at law and suits in equity does not affect the operation of the writ. Burnsides v. Blythe, 11 B. Mon. 6; Victor Scale Co. v. Shurtleff, 11 Ill. 312; Gresham v. Peterson, 25 Ark. 377.

Application for writ.

The writ may be applied for at any stage of the proceedings. Dunham v. Jackson, 1 Paige, 629; Samuel v. Wiley, 50 N. H. 355.

No notice of motion for the writ is required. Samuel v. Wiley, 50 N. H. 355.

In view of the settled policy of our laws against imprisonment for debt, every application for a writ of *ne exeat* should be closely scrutinized, and promptly rejected where the complaint is not clearly within the spirit of the law. Gresham v. Peterson, 25 Ark. 380; Wallace v. Duncan, 13 Ga. 41; Tomlinson v. Harrison, 3 Ves. Jr. 83; Burnsides v. Blythe, 11 B. Mon. 12; Russel v. Aaby, 5 Ves. Jr. 96. The prayer need not be inserted in the bill. Colinson v. —, 18 Ves. Jr. 353.

The defendant need not be actually in the State where the writ is applied for. Parker v. Parker, 12 N. J. Eq. 105; Gilbert v. Colt, 1 Hopk. Ch. 496.

The petition is not fatal because all jointly liable are not joined. Fitzgerald v. Gray, 59 Ind. 254.

It must show defendant to be guilty of fraud or

that there is a strong presumption of fraud. *Malcolm v. Andrews*, 68 Ill. 100.

Bond given by defendant.

On the hearing of a bill which prayed both an injunction and writ of *ne exeat*, an order refusing the latter writ, provided the defendant would give a bond, with security, to make good any judgment found in favor of the complainant, was error. *Old Hickory Distilling Co. v. Bleyer*, 74 Ga. 201.

The affidavit its foundation.

A positive affidavit of an existing debt is the foundation of the writ. *Cable v. Alvord*, 27 Ohio St. 686; *De Carriere v. De Calonne*, 4 Ves. Jr. 677; *Dawson v. Dawson*, 7 Ves. Jr. 173.

The petitioner must swear positively to the debt or the balance due, yet he need not swear to a certain amount; it is sufficient in the affidavit to swear according to his belief that a certain sum is due. *Thorne v. Halsey*, 7 Johns. Ch. 189, 2 N. Y. Ch. L. ed. 284.

The affidavit of the wife suing for divorce in her own name is sufficient foundation for its issuance. *Denton v. Denton*, 1 Johns. Ch. 364, 441, 1 N. Y. Ch. L. ed. 173, 202; *Forrest v. Forrest*, *supra*; *Mattocks v. Tremain*, 3 Johns. Ch. 75, 1 N. Y. Ch. L. ed. 647; *Boucicault v. Boucicault*, 59 How. Pr. 134, 21 Hun, 435.

This doctrine, however, has been repudiated in England. *Bailey v. Cadwell*, 51 Mich. 220.

The affidavit must set out that defendant has disposed of or is about to remove his property (*Dean v. Smith*, 23 Wis. 433; *Fitzgerald v. Gray*, 59 Ind. 254); and that the property is not exempt from execution. *Jones v. Kennicott*, 38 Ill. 484.

It must show that defendant is about to leave the State (*Gresham v. Peterson*, 25 Ark. 377; *Houseworth v. Hendrickson*, 27 N. J. Eq. 60; *Yule v. Yule*, 10 N. J. Eq. 138); and is sufficient if it is positive as to defendant's intention to leave, although upon information and belief only. *Moore v. Gleason*, 23 Ga. 142.

But mere apprehension that defendant is about to leave the State will not warrant its issuance. *Rhodes v. Cousins*, 6 Hand. 188; *Williams v. Williams*, 8 N. J. Eq. 180.

Where the affidavit refers to the facts set out in the petition, it is sufficient without repeating them. *Clayton v. Mitchell*, 1 Del. Ch. 32. See generally *Woodward v. Schatzell*, 3 Johns. Ch. 412; *Gibert v. Colt*, 1 Hopk. Ch. 496; *Dunham v. Jackson*, 1 Paige, 629; *Mitchell v. Bunch*, 2 Paige, 617; *McNamara v. Dwyer*, 7 Paige, 239.

Issuance and service of writ.

The writ of *ne exeat* is not issuable in Michigan by a circuit court commissioner or injunction master as a matter of interlocutory chancery practice as in divorce suit. *Bailey v. Cadwell*, 51 Mich. 217.

It can in no case be allowed except by the judge himself. *Bailey v. Cadwell*, *supra*.

A writ signed by the judge in chambers, but not signed nor sealed by the clerk, is void. *Bonesteel v. Bonesteel*, 23 Wis. 245.

So it is void if served on Sunday. *Jewett v. Bowman*, 27 N. J. Eq. 275.

The Act to abolish imprisonment for debt has not deprived the court of chancery of the power to issue the writ of *ne exeat* in cases of equitable cognizance. *Brown v. Raff*, 5 Paige, 235, 8 N. Y. Ch. L. ed. 699; *Neville v. Neville*, 22 How. Pr. 503; *McNamara v. Dwyer*, 7 Paige, 241.

The court in making the writ will exercise a 7 L. R. A.

sound discretion under the special circumstances of the case so as to prevent oppression and extortion. *Denton v. Denton*, 1 Johns. Ch. 441, 1 N. Y. Ch. L. ed. 202.

The court determines the amount in which the defendant shall be held to bail; and the sheriff must take a bond in the amount directed, as the penal sum. *Gibert v. Colt*, Hopk. Ch. 496, 2 N. Y. Ch. L. ed. 500.

It cannot issue against a female in an action founded on contract. *Adams v. Whitcomb*, 46 Vt. 708.

On an ordinary judgment creditors' bill where an answer denies property and no proof is had to show any, *ne exeat* cannot be had. *Palmer v. Van Doren*, 2 Edw. Ch. 426, 6 N. Y. Ch. L. ed. 454.

Discharge of writ.

It is a matter of course to discharge the writ, upon the party's giving security to answer the complainant's bill, where a discovery is necessary, and to abide such order and decree as may be made in the cause, and to render himself amenable to the process of the court, which may be issued to enforce the performance of the decree. *Mitchell v. Bunch*, 2 Paige, 617, 22 Am. Dec. 675; *Gibert v. Colt*, 1 Hopk. Ch. 496; *Russell v. Asby*, 5 Ves. Jr. 96; *Atkinson v. Leonard*, 3 Bro. Ch. 218; *McNamara v. Dwyer*, 7 Paige, 239, 4 N. Y. Ch. L. ed. 139; *Gleason v. Bisby*, 1 Clarke, Ch. 556. See *Haberstro v. Bedford*, 43 Hun, 204.

Defendant may be relieved from the restraint by giving a bond in double the value of the claim, under the Georgia Code, § 8223, but the court cannot impose on him conditions as the ground for relief. *Bleyer v. Blum*, 70 Ga. 558.

It will not be discharged on a counter affidavit of defendant denying his intention to depart. *Houseworth v. Hendrickson*, 27 N. J. Eq. 60.

Nor where such affidavits fail to rebut the presumption of defendant's bad faith. *Myer v. Myer*, 26 N. J. Eq. 23.

Although the writ be dissolved the court may nevertheless require security to abide the decree. *MacDonough v. Gaynor*, 18 N. J. Eq. 249.

Giving the usual security to the sheriff upon a *ne exeat* does not preclude defendant from applying for a discharge of the writ, and that the bond be given up and canceled. *Jesup v. Hill*, 7 Paige, 95, 4 N. Y. Ch. L. ed. 79; *Allen v. Hyde*, 2 Abb. N. C. 200.

But where defendant for his own convenience applies and gives the usual bond without reserving the right to apply to cancel it, his right to raise the question as to the propriety of holding him to bail will be deemed waived. *Jesup v. Hill*, 7 Paige, 95, 4 N. Y. Ch. L. ed. 79.

On motion to discharge the writ it is open to defendant by affidavit to deny the allegations on which it was granted. *Cowdin v. Cram*, 3 Edw. Ch. 231, 6 N. Y. Ch. L. ed. 633, 1 Van Santv. 174, 415, 1 Barb. Ch. Pr. 656.

A motion to set aside the writ lies where any of the essential formalities are wanting, but objection must be raised at the earliest opportunity. *Harris v. Hardy*, 3 Hill, 393; *Miller v. Miller*, 1 N. J. Eq. 336.

Where there is an adequate remedy at law, the writ will be dissolved. *Hawthorn v. Kelly*, 30 Ga. 365.

A defect or informality cannot be availed of by either of the obligors to defeat an action upon the bond. *Hazard v. Griswold*, 21 Fed. Rep. 181; *Petition of Griswold*, 13 R. L. 125.

INDIANA SUPREME COURT.

LOUISVILLE UNDERWRITERS, *Appts.*,v.
Albert O. DURLAND *et al.*

(.....Ind.....)

1. The violation by the insured of warranties or exceptions to the insurer's liability which are contained in the policy need not be negated in the complaint in a suit on a marine insurance policy. If the loss is within a warranty or an exception, it is a matter of defense to be set up affirmatively by defendant.

2. Where the insurer of a vessel assumes by express covenant all risk of damages thereto by fires, with the one exception of those caused by explosion of boilers, a subsequent clause in the policy in which the insured warrants in general terms that the insurer shall be free from any claims for loss or damage occasioned, *inter alia*, "by the collapsing of flues" will not relieve the insurer from liability for loss by fire occasioned by the collapsing of a flue.

3. Where the defendant in a suit on an insurance policy sets up a special defense, and offers evidence to support it after plaintiff has shown his loss and the cause that occasioned it and rested, plaintiff may rebut by offering affirmative evidence to meet that introduced in support of the special defense.

(March 1, 1890.)

APPEAL by defendants from a judgment of the Superior Court for Vanderburgh County in favor of plaintiffs in an action upon a policy of marine insurance issued on the steamer *La Mascotte*, which was wholly destroyed by fire during the life of the policy. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs. Iglehart & Taylor and T. D. Lincoln*, for appellants:

The warranty is in this case restrictive, and the plaintiff must aver and show that his loss is free from it. He must therefore allege and prove that the loss by fire was not caused by the bursting of the boiler or the collapsing of a flue, or he has shown no loss within the terms of the policy.

Craig v. U. S. Ins. Co. Pet. C. C. 410; *Murgatroyd v. Crawford*, 2 Yates, 429; *Cory v. Burr*, L. R. 8 App. Cas. 393; *Powell v. Hyde*, 5 El. & Bl. 610; *Kleinwort v. Shepard*, 1 El. & El. 458; *Neilson v. Commercial Mut. Ins. Co.* 8 Duer, 462; *Cossmann v. West*, L. R. 13 App. Cas. 180; *Marcy v. Merchants Mut. Ins. Co.* 19 La. Ann. 391.

Warranties of this character in policies of insurance are to be fully complied with, and will be fairly construed.

Phoenix Ins. Co. v. Benton, 87 Ind. 186; *Nicoll v. Am. Ins. Co.* 3 Wood. & M. 525; *Burritt v. Saratoga Co. M. Ins. Co.* 5 Hill, 193; *Trench v. Chenango Co. M. Ins. Co.* 7 Hill, 124; *Angell, F. and L. Ins. § 142*; *Glendale Woolen Mfg. Co. v. Protection Ins. Co.* 21 Conn. 19, 81; *Witherell v. Maine Ins. Co.* 49 Me. 200; *State Mut. F. Ins. Co. v. Arthur*, 80 Pa. 380; *Lycoming F. Ins. Co. v. Mitchell*, 48 Pa. 387.

Where a warranty can be called a condition 7 L. R. A.

it is undoubtedly a condition precedent, and it is put in issue by the general denial.

Craig v. U. S. Ins. Co. supra; *Murgatroyd v. Crawford*, 2 Yates, 429; *State M. F. Ins. Co. v. Arthur, supra*; *Home Ins. Co. of N. Y. v. Duke*, 48 Ind. 420; *Phoenix Ins. Co. v. Benton*, 87 Ind. 187.

A warranty is to be construed fairly, like any other contract, and its proper and legitimate effect given to it.

Wood, F. Ins. pp. 127, 128; *Angell, F. and L. Ins. §§ 141, 142*; *O'Neil v. Buffalo F. Ins. Co.* 3 N. Y. 122; *Wineland v. Security Ins. Co.* 53 Md. 284; *Foot v. Aetna L. Ins. Co.* 61 N. Y. 575; *Dwight v. Germania L. Ins. Co.* 4 Cent. Rep. 529, 108 N. Y. 846; *Home Ins. Co. of N. Y. v. Duke*, 48 Ind. 420; *Phoenix Ins. Co. v. Benton*, 87 Ind. 187.

The consequences are generally so terrific where the boilers burst and permit the fire to escape and destroy the boat that the courts are not inclined to restrict the operation of clauses of the kind, and especially where they are warranties of the assured, and conditions precedent to his recovery.

United Life, F. & M. Ins. Co. v. Foote, 22 Ohio St. 840; *St. John v. Am. Mut. F. & M. Ins. Co.* 1 Duer, 879, 11 N. Y. 523; *Strong v. Sun Mut. Ins. Co.* 81 N. Y. 108; *Marcy v. Merchants Mut. Ins. Co.* 19 La. Ann. 391; *Hayward v. Liverpool & L. F. Ins. Co.* 7 Bosw. 389; *Montgomery v. Firemen's Ins. Co.* 16 B. Mon. 449; *Neilson v. Commercial Mut. Ins. Co.* 8 Duer, 461; *Ros v. Columbus Ins. Co.* 17 Mo. 304; *Tanneret v. Merchants Mut. Ins. Co.* 34 La. Ann. 249; *Stanley v. Western Ins. Co. L. R.* 3 Exch. 73.

The insurer undertakes, for a comparatively small premium, to guarantee the insured against loss or damage, upon the exact terms and conditions agreed on, and upon no other. The party called upon to pay in case of loss may therefore justly insist upon the fulfillment of these terms; and if the plaintiffs can now bring themselves fairly within the conditions of the policy, as they insist they can, they are entitled to recover for the loss; but if they cannot, then they must admit they cannot recover, however well-meaning and upright, and however confident in their view of the terms and conditions of the policy.

Glendale Woolen Mfg. Co. v. Protection Ins. Co. 21 Conn. 31; *Little v. Eureka F. & M. Ins. Co.* 38 Ohio St. 117.

The warranty which freed the defendant from damage of every character resulting from the collapse of the flue was as much a part of the policy as any other part of it, and restricted and limited the risks and perils assumed therein. There was no room for the rule that it should be construed most strongly against the insurer.

Foot v. Aetna Ins. Co. 61 N. Y. 575; *Dwight v. Germania L. Ins. Co.* 4 Cent. Rep. 529, 108 N. Y. 847; *Shore v. Wilson*, 9 Clark & F. 565; *Wineland v. Security Ins. Co.* 53 Md. 284; *Glendale Woolen Mfg. Co. v. Protection Ins. Co.* 21 Conn. 81.

Courts of last resort do not permit a palpable abuse of the order and practice of the trial

courts evidently resorted to for the purpose of obtaining an unfair advantage of the opposite party.

Port of Clinton R. Co. v. Cleveland & T. R. Co. 13 Ohio St. 544.

But for abuse of discretion, courts of last resort give full remedy.

Buskirk, Pr. pp. 847, 848; 1 Works, Pr. § 884.

The court permitted the plaintiff, against the objection of the defendant, to offer expert testimony to show that the explosion of the flue, under the circumstances, was not the explosion of the boiler. This testimony was not admissible.

Rogers, Expert Test.; *Winans v. New York & E. R. Co.* 63 U. S. 21 How. 88 (16 L. ed. 68); *Whitaker v. Parker*, 42 Iowa, 587; *McFadden v. Murdock*, 15 Week. Rep. 1079.

Messrs. G. V. Mensies, Alexander Gilchrist and C. A. DeBruler, for appellates:

It is neither necessary nor proper for a plaintiff in his complaint to negative in express terms the breach of a warranty by the plaintiff.

Rev. Stat. § 370; May, Ins. § 156; 1 Phillips, Ins. p. 434; *Phœnix Ins. Co. v. Benton*, 87 Ind. 136; *Continental L. Ins. Co. v. Kessler*, 84 Ind. 315; Iglehart, Pr. and Pl. p. 583; 1 Estee, Pr. and Pl. 436; *Nat. Ben. Asso. v. Grauman*, 5 West. Rep. 848, 107 Ind. 288; *Northwestern M. L. Ins. Co. v. Hazelett*, 2 West. Rep. 690, 105 Ind. 212; *Piedmont & A. Ins. Co. v. Ewing*, 92 U. S. 377 (23 L. ed. 610).

The complaint need not negative prohibited acts, or that plaintiff is within the excepted risks.

May, Ins. § 597; Wood, F. Ins. pp. 824, 826; *Lounsbury v. Protection Ins. Co.* 8 Conn. 459; *Cornell v. Le Roy*, 9 Wend. 163; *Hunt v. Hudson River Ins. Co.* 2 Duer, 481; *Troy F. Ins. Co. v. Carpenter*, 4 Wis. 20.

The extent of the insurance against fires is specially defined, "except when caused by explosion of boiler." This is equivalent to saying: "We insure against all fires except when caused by explosion of boiler." If there be many things of the same class or kind, the expression of one or more of them implies the exclusion of all not expressed.

2 Parsons, Cont. 515, 516; Chitty, Cont. 90; Bacon, Abr.; 2 Rolle, Abr. 409; *Rich v. Lord*, 18 Pick. 825; *Holmes v. Hubbard*, 60 N. Y. 183; *Lyman v. Clark*, 9 Mass. 235; *McIntyre v. Williamson*, 1 Edw. Ch. 34; *Weed Sewing Mach. Co. v. Winchell*, 5 West. Rep. 824, 107 Ind. 260; *Burns v. Singer Mfg. Co.* 87 Ind. 541; *Northwestern Mut. L. Ins. Co. v. Hazelett*, 2 West. Rep. 690, 105 Ind. 216.

In the case at bar the liability of the insurer for fires is made the subject of a single clause, complete in itself and relating to fire alone. It cannot be held that the general provisions in another part of the policy, relating generally to a number of risks, can apply to fire.

Pennsylvania Mut. L. Ins. Co. v. Wiler, 100 Ind. 92; *Boatman's F. & M. Ins. Co. v. Parker*, 23 Ohio St. 85; *Commercial Ins. Co. v. Robinson*, 64 Ill. 265; *Herrman v. Merchants Ins. Co.* 81 N. Y. 184; *Buchanan v. Exchange F. Ins. Co.* 61 N. Y. 26; *Bowman v. Pacific Ins. Co.* 27 Mo. 152. See also *Western Ins. Co. v. Crop- per*, 32 Pa. 851.

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If it is to be held that fire, as one of the consequences of a collapse of the flue, is to be excepted from the risk, then the two provisions would be necessarily repugnant to each other; and if there are two repugnant clauses in a policy, the one most favorable to the insured is controlling.

Whitmarsh v. Conway F. Ins. Co. 16 Gray, 859; *Citizens Ins. Co. v. McLaughlin*, 53 Pa. 485; *Niagara F. Ins. Co. v. DeGraff*, 12 Mich. 124; *Steinbach v. La Fayette F. Ins. Co.* 54 N. Y. 90; *Barnum v. Merchants F. Ins. Co.* 97 N. Y. 188; *Harper v. Albany Mut. Ins. Co.* 17 N. Y. 194; *Allen v. St. Louis Ins. Co.* 85 N. Y. 473.

See also, as to construction of this policy, *Paul v. Travelers Ins. Co.* 3 L. R. A. 443, 112 N. Y. 472; *Clapp v. Massachusetts Ben. Asso.* 6 New Eng. Rep. 103, 146 Mass. 519.

If an insurance company does not mean to take all the risks of the perils insured against, it should declare its intention in language which does not admit of controversy.

Phœnix Ins. Co. v. Slaughter, 79 U. S. 12 Wall. 404 (20 L. ed. 444).

Of two possible constructions of the application the one most favorable to the assured is to be preferred.

Pennsylvania Mut. L. Ins. Co. v. Wiler, 100 Ind. 98; *Northwestern Mut. L. Ins. Co. v. Hazelett*, 2 West. Rep. 690, 105 Ind. 212.

Especially is this the case as to all exceptions and reservations in the policy.

Orient Mut. Ins. Co. v. Wright, 68 U. S. 1 Wall. 456 (17 L. ed. 505).

This construction obtains equally in case of a policy of marine insurance as of any other. *Allen v. St. Louis Ins. Co.* 85 N. Y. 473; *Palmer v. Warren Ins. Co.* 1 Story, 330.

Whether the warranty that the insurer is to be free from loss on account of the collapse of a flue is taken as a warranty, or as a limitation of the risk, the burden was upon the defendant to establish the breach, or that the loss came within the limitation.

John Hancock Mut. L. Ins. Co. v. Daly, 65 Ind. 6; *Northwestern Mut. L. Ins. Co. v. Hazelett*, 2 West. Rep. 680, 105 Ind. 212; *Nat. Ben. Asso. v. Grauman*, 5 West. Rep. 848, 107 Ind. 283; *Bittinger v. Providence Washington Ins. Co.* 24 Fed. Rep. 549; *Guy v. Citizens Mut. Ins. Co.* 30 Fed. Rep. 695; *Union Ins. Co. v. Smith*, 124 U. S. 405 (31 L. ed. 497).

Berkshire, J., delivered the opinion of the court:

This was an action upon a marine insurance policy. There was a trial below and a judgment rendered for the appellees.

The appellants assign two errors in this court: 1. The court erred in overruling the demurrer to the complaint. 2. The court erred in overruling the motion for a new trial.

We find no objection to the complaint. By the terms of the policy the appellants were liable for any loss occasioned to the steamer by fire, except when caused by explosion of boiler, and except as limited by certain warranties contained in the policy.

The complaint alleges that the loss was caused by fire which was not caused by the explosion of any boiler, and alleges generally

that the appellees had performed all the conditions of the contract on their part.

Appellants contend that the complaint is bad because it fails to allege in specific terms that the loss did not occur because of the breach of some one or more of the warranties contained in the policy.

Among other things covered by the warranties of the appellees is loss occasioned by the bursting of boilers, by the collapsing of flues. Perhaps we would better set out this portion of the policy, so far as material to the question under consideration:

"Warranted by the assured that this Company shall be free from all claims for loss or damage arising from or caused by theft, barratry, robbery, civil commotion, war or piracy, or during any time said vessel shall be seized and taken possession of or detained by any act of the United States Government, or other legally excluded causes, by damage that may be done by the vessel hereby insured to any other vessel or property, from any loss or damage occasioned by said vessel being improperly laden, by the bursting of boilers, by the collapsing of flues, by the explosion of gunpowder, by the derangement or breaking of the engine or machinery, or from consequences of any character resulting from either of the foregoing exceptions, unless the same be caused by unavoidable external violence."

We have the following Statute (§ 370, Rev. Stat. 1881): "In pleading the performance of a condition precedent in a contract, it shall be sufficient to allege generally that the party performed all the conditions of the contract on his part. If the allegation be denied, the facts showing a performance must be proved on the trial."

If the clauses, "by the bursting of boilers, by the collapsing of flues," are conditions precedent, then the foregoing Statute rendered it unnecessary for the appellees to allege in their complaint specifically the performance of those conditions. *Fairbanks v. Meyers*, 98 Ind. 92; *Purdue v. Noffsinger*, 15 Ind. 886.

This Statute applies to insurance policies the same as other contracts. *Continental L. Ins. Co. v. Kessler*, 84 Ind. 315; *American Ins. Co. v. Leonard*, 80 Ind. 272; *Home Ins. Co. of N. Y. v. Duke*, 43 Ind. 418; *Phenix Ins. Co. v. Pickel*, 119 Ind. 155.

If they amount to warranties, or are exceptions (and they are given both names by the appellants), it was not necessary that their violation be negated in the complaint. It is not required of the plaintiff in an action on an insurance policy, that he in his complaint negative warranties and exceptions stated in the policy. If the loss is within a warranty or exception, it is matter of defense which must be pleaded affirmatively by the defendant. *Nat. Ben. Assn. v. Grauman*, 5 West. Rep. 848, 107 Ind. 288; *Piedmont & A. Ins. Co. v. Ewing*, 92 U. S. 377 (23 L. ed. 610); *John Hancock Mut. L. Ins. Co. v. Daly*, 65 Ind. 6; *Northwestern Mut. L. Ins. Co. v. Hazlett*, 2 West. Rep. 690, 105 Ind. 212; *Phenix Ins. Co. v. Pickel*, *supra*; *May*, Ins. § 188.

In coming to a conclusion upon many of the questions involved, it becomes necessary that we construe the policy. By its terms and conditions the appellants assumed in express terms

all unavoidable dangers of the waters which the vessel was to navigate, and of fires, with one stipulated exception, which was exemption from fires caused by the explosion of boilers. Further on in the instrument the appellees obligated themselves in general terms in the nature of warranties, which it is claimed modified the express covenants of the appellants.

The covenant of the appellants being an express covenant against loss occasioned by fire, except as therein limited, the question is presented: Did not the appellants thereby become bound to the appellees for all losses caused by fire while they were running and operating the said steamer upon said waters, except fires caused by the explosion of boilers? We are inclined to the opinion that the appellants were so bound. The covenants of the warranty were general in their character, while the covenants of the appellants, and especially as to loss occasioned by fire, were express and specific.

And again, the warranties are covenants on the part of the appellees and form no part of the covenants of the appellants. The most that can be claimed for them is that, for any loss coming within their terms, they operate to release and discharge the appellants from the responsibility to which its covenants bound it.

Policies of insurance, like other contracts, are to be reasonably construed. The contract of insurance should be liberally construed to effectuate its purpose. The language of the policy and of the interrogatories and provisions of the application is carefully and deliberately pre-arranged by the insurer; in its preparation the insured has no part. Whatever there may be in the language so prepared by the insurer which has any tendency to defeat the main purpose of the contract should be strictly construed against the insurer. If there be any ambiguity in an interrogatory propounded to the applicant, or it be capable of more than one answer, it should be construed most strongly against the insurer and most favorably to the insured, in whose favor all doubt should be resolved. *Phenix Ins. Co. v. Pickel*, *supra*; *Pennsylvania Mut. L. Ins. Co. v. Wiler*, 100 Ind. 92; *Boatman's F. & M. Ins. Co. v. Parker*, 23 Ohio St. 85.

We quote the following, which seems to be in point, from Wood on Fire Insurance, p. 259: "The court further laid down the rule that it is the duty of an insurance company seeking to limit the operation of its contract of insurance by special provisions or exceptions, to make such limitations in clear terms, and not leave the insured in a condition to be misled. The insured may reasonably be held entitled to rely on a construction favorable to himself, where the terms will rationally permit it."

It is also a well-settled rule or canon of construction applicable to all contracts, that such construction will be applied as will give force and effect to all parts of the contract, if it can be done without doing violence to the language employed and the evident intention of the parties; and especially will this be done if such a construction will carry into effect the evident intention of the parties.

When appellants undertook to stipulate, and did stipulate in that part of the policy in question to which the appellees could only look for

a recovery in case of loss, as to the limitation which should relieve the appellants from responsibility in case of loss by fire, it is fair to presume that they intended thereby to fix the exact and entire liability of the appellants; if not, the inquiry arises, Why were not all of the limitations and exceptions then stated? Why were further modifications left to the warranties exacted? We can imagine no sufficient reason, and are of the opinion, as stated in the language quoted from Wood, *supra*, that the appellees "may reasonably be held entitled to rely on a construction favorable to himself (themselves) where the terms will rationally permit it."

The evident intention of the parties was that the appellants should be bound for all losses occasioned by fire, except from explosion of boilers, while the steamer was under the control of the appellees and being navigated upon the waters named in the policy. At least, it is our opinion that the appellees were entitled to so understand and construe the policy, and that the warranties relied upon referred to other casualties than loss by fire.

The bursting of a boiler and the explosion of a boiler are one and the same thing; therefore that part of the warranty quoted which refers to the bursting of a boiler is immaterial. But the collapsing of a flue is not the explosion or the bursting of a boiler. The flue is inside of and forms a part of the boiler, if a flue boiler, but it is not the boiler proper, and may collapse and the boiler proper remain intact. But the collapsing of a flue is not the explosion of a flue. Webster defines "collapse" thus: "To fall together suddenly, as the two sides of a hollow vessel; to close by falling or shrinking together; to shrink up, as a tube in a steam boiler collapses." He defines "explosion" as follows: "The act of exploding; bursting with a loud noise or detonating sound; a sudden inflaming with force and a loud report, as the explosion of gunpowder." "The shattering of a boiler by a sudden and immense pressure in distinction from rupture."

The Century Dictionary, a recent and valuable lexicon of the English language, defines "collapse" thus: "To fall together or into an irregular mass or flattened form through the loss of firm connection or rigidity and support of the parts, or loss of the contents, as a building through the falling in of its sides or an inflated bladder from escape of the air contained in it." It defines "explosion" as follows: "A sudden bursting or breaking up or in pieces from an internal or other force; a blowing up or tearing apart, as the explosion of a steam boiler."

From these definitions it will be seen that these words have almost an opposite meaning.

When the parties have put a construction upon the language employed in the contract for themselves, the court should not disregard that construction. The difference between the collapse of a flue and the explosion of a boiler is fully recognized in the policy. All parties agree that the bursting of a boiler and the explosion of a boiler are one and the same thing.

The quotation heretofore made from the warranties in the policy, and which is an important consideration in the determination of the questions involved, we will set out again:

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"By the bursting of boilers, by the collapsing of flues." With the comma between the word "boilers" and the word "by" which follows the bursting of a boiler and the collapsing of a flue are named and recognized as independent and distinct things, as much so as is "the explosion of gunpowder," which immediately follows, with a comma between, independent and distinct from the collapsing of a flue. *Burns v. Singer Mfg. Co.* 87 Ind. 541; *Weed Sewing Mach. Co. v. Winchell*, 5 West. Rep. 824, 107 Ind. 260; *Northwestern Mut. L. Ins. Co. v. Hazelett, Pennsylvania Mut. L. Ins. Co. v. Wiler* and *Boatman's F. & M. Ins. Co. v. Parker, supra*; *Commercial Ins. Co. v. Robinson*, 64 Ill. 265; *Rich v. Lord*, 18 Pick. 325; *Lyman v. Clark*, 9 Mass. 285.

Putting the construction upon the policy which we have given to it, the court did not err in refusing to give to the jury the instructions asked for by the appellants; and while we are inclined to think that the evidence of experienced steamboatmen was competent as to whether or not the collapsing of a flue was the explosion of a boiler, if the question was one about which there might be reasonable ground for controversy, we do not decide anything upon the subject of expert testimony, as the ruling of the court did not prejudice the appellants.

But the jury found that the fire which occasioned the loss did not occur from the explosion of a boiler or the collapsing of a flue.

Adopting the appellants' construction of the policy, and we are not prepared to say that the findings of the jury in answer to the interrogatories propounded to them, as well as their general verdict, are not supported by evidence; and if so, the construction given by the appellant to the policy, if adopted, would not reverse the case, in view of the well-settled rule of this court not to disturb the verdict of a jury where there is evidence to support it, though in the opinion of the court the preponderance of evidence is against the verdict.

Construing the policy as we do, the verdict of the jury is supported by abundant evidence, for if the fire emanated from any misfortune happening to the boiler, that misfortune was the collapse of a flue and not the explosion of a boiler.

We do not think there is anything in the point that the court treated the appellants unfairly during the course of the trial.

It was sufficient for the appellees to show the loss and the cause that occasioned it, and if the appellants claimed otherwise and desired to bring the case within the special defenses which they had pleaded, after the introduction of the evidence on their part, the appellees were entitled to rebut, and to introduce affirmative evidence to meet the evidence introduced in support of the answers.

We may also say that the introduction of evidence, even out of its order, is a matter very largely in the discretion of the court, and in such a case, before the court will interfere, there must be an abuse of discretion shown.

We find no error in the record for which the judgment ought to be reversed.

Judgment affirmed, with costs.

Petition for rehearing withdrawn May 14, 1890.

ARKANSAS SUPREME COURT.

GILKESON-SLOSS COMMISSION CO.,
Appt.,

Jesse E. LONDON et al., S. W. Frye, Interpleader.

(....Ark.....)

1. The delivery by an assignor for benefit of creditors to his assignee of the deed of assignment and of the key to his storehouse, and the failure of the assignor to go near, or exercise any control over, the assigned goods thereafter, is a delivery of the possession thereof within the meaning of that term as used in § 305, Manaf. Dig.

2. Such delivery of possession before the assignee has filed an inventory and executed a bond will avoid the assignment, although made in accordance with a parol agreement between the parties entered into contemporaneously with the execution of the deed of assignment, which is valid on its face, that it was for the purpose of enabling the assignee to prepare an inventory.

(March 22, 1890.)

APPEAL by plaintiff from a judgment of the Circuit Court for Crawford County discharging its attachment of certain property alleged to have been assigned for benefit of creditors. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. O. P. Brown, L. F. Sandels and U. M. & G. B. Rose*, for appellant:

When the assignors, either in their deed of assignment, or by contemporaneous agreement, delivered possession of the assigned property to the assignee, it vitiated the deed.

Thatcher v. Franklin, 37 Ark. 64; *Falconer v. Hunt*, 39 Ark. 68; *Rice v. Prayser*, 24 Fed. Rep. 460; *Aaronson v. Deutsch*, 24 Fed. Rep. 465; *Burrill*, Assignm. § 501.

The delivery of the keys is delivery of possession.

Aaronson v. Deutsch, 24 Fed. Rep. 465.

Mr. B. H. Tabor for appellees.

Battle, J., delivered the opinion of the court:

London Bros., a firm composed of Jesse and John London, were engaged in the mercantile business at Alma and Rudy, in Crawford County, in this State. On the 24th of November, 1887, they assigned to S. W. Frye all their notes, accounts and other evidences of indebtedness, and all their goods, wares, merchandise and fixtures of every kind at Alma and Rudy, for the benefit of their creditors. Thereupon the Gilkeson-Sloss Commission Company commenced an action against the assignors, and

sued out an order of attachment and caused the sheriff to execute the same by levying on the property assigned. The ground of the attachment was, the defendants had fraudulently disposed of their property, the fraud relied on being the making of the assignment. They made no defense to the action, but controverted the ground of the attachment. Frye filed a complaint and claimed the property attached under the assignment. The attachment was discharged, and the claim of Frye was sustained, and plaintiff appealed.

The deed of assignment was valid on its face. It did not authorize the assignee to take possession before the filing of an inventory and the execution and approval of his bond, as required by law. But evidence was adduced on the trial tending to prove that the assignors, contemporaneously with the execution of the deed, agreed to deliver to the assignees the keys to the storehouses containing the property assigned for the purpose of enabling him to make his inventory; that, pursuant to this agreement, the deed of assignment and one of the keys to the Alma store were delivered to the assignee at the same time, and, within a very short time thereafter, the only key to the Rudy store; that Jesse London retained the only other key to the Alma store; and that he admitted that he did not go near the store or exercise any control over the property after the delivery of the deed. Upon this evidence the appellant asked an instruction in the following words: "The court instructs the jury that under the law the assignee is entitled to access to the property assigned for the purpose of making an inventory and bond; but he is not entitled to possession until he has filed his inventory and bond in the clerk's office. If upon the face of a deed of assignment the assignor directs or authorizes the assignee to take possession of the property assigned before he has filed his inventory and bond, this renders the deed fraudulent and void as to creditors. And if the assignee or his agent, before the filing of the bond and inventory, by direction or with the consent of the assignors, in consummation of an agreement, oral or written, extraneous to the deed, takes the keys of the storehouse and thus has possession of the property assigned, it renders the deed fraudulent and void as to creditors, just as though such agreement was set forth in the face of the deed."

And the court refused to give it, but gave the following: "The court instructs you that, under the law, the assignee is entitled to access to the property assigned for the purpose of making an inventory and bond; but he is not entitled to possession until he has filed his inventory and bond in the clerk's office. If,

NOTE.—Assignment for benefit of creditors; statute of Arkansas construed.

The statute of Arkansas provides that before the assignee shall be entitled to the possession and control of the assigned property, he shall file a full and complete inventory and execute a bond to the State conditioned for a faithful performance of his duties according to law. Ark. Stat. 1884, chap. 8, § 305.

Title to the assigned property vests in the assignee 7 L. R. A.

upon execution and delivery of the deed, and cannot be defeated by an execution against the assignor coming to the hands of the officer—after such delivery and before filing of the schedule and bond. *Clayton v. Johnson*, 38 Ark. 406.

While it entitles him to "access" to the property for the purpose of making the inventory, it does not entitle him to the possession and control of the property until he gives bond and files the inventory. *Ibid.*

upon the face of the deed of assignment, the assignors direct or authorize the assignee to take possession of the property assigned before he has filed his inventory and bond, this would render the deed fraudulent and void as to creditors. And if the assignors, or their agents, by their direction, or with their consent, in consummation of an agreement, oral or written, extraneous to the deed and made at or before the execution of the deed, agree to put the assignee in possession of the property assigned before the making and filing of the inventory and bond, as provided by law, and such assignee was put in possession of the property before the filing of the bond, this would render the deed fraudulent and void as to creditors. And if you find from the evidence that a key or keys to the storehouse, or houses, were delivered to the assignee at the time of the delivery of the deed, or afterwards, in consummation of a contemporaneous agreement, together with the possession of the property, this would render the deed fraudulent and void. But, if the key or keys were delivered to the assignee for the purpose only of giving access to the goods to enable him to make an inventory, the assignors retaining to themselves the possession and control of the assigned property, this would not render the deed void."

By "access," as used in the instruction, is meant "liberty to approach and inspect the property." By "possession" is meant, "that condition under which one can exercise his power over property at his pleasure to the exclusion of all others."

Under this state of facts arises the question, Did the agreement and the delivery of the keys avoid the deed? Section 805 of Mansfield's Digest provides: "In all cases in which any person shall make an assignment of any property, whether real, personal, mixed or choses in action, for the payment of debts, before the assignee thereof shall be entitled to take possession, sell or in any way manage or control any property so assigned, he shall be required to file in the office of the clerk of the court exercising equity jurisdiction a full and complete inventory and description of such property, and also make and execute a bond to the State of Arkansas in double the estimated value of the property in said assignment, with good and sufficient security, to be approved by the clerk of said court, conditioned that such assignee shall execute the trust confided to him, sell the property to the best advantage and pay the proceeds thereof to the creditors mentioned in said assignment according to the terms thereof, and faithfully perform the duties according to law."

The intention of this Statute is manifest. Before the assignee can lawfully take possession of the property assigned he must file an inventory of the property conveyed to him and execute a bond, with good and sufficient sureties, to faithfully perform his duties. The object of this provision is the protection of creditors and the prevention of fraud. The inventory is to show the property assigned and the bond to secure all parties concerned against loss on account of the failure of the assignee to perform his duties, and both are required to be filed before the assignee can lawfully have

an opportunity to make a fraudulent disposition of the property. Until they are filed it is the duty of the assignors to retain possession and control and take care of and protect the property. The delivery of possession to the assignee for any purpose, prior to the time fixed by law, which would enable him to do what the Statute intended to prevent, would be clearly unlawful. The purpose can avail nothing if the possession given afforded the assignee the opportunity to commit the frauds that the Statute intended to prevent by requiring the bond and inventory to be first filed. If the evidence adduced, as stated, be true, possession was delivered to the assignee in this case in violation of the Statute. *Bartlett v. Teah*, 1 McCrary, 176, 179.

But the question recurs: Did the agreement and the delivery of the keys in pursuance thereof avoid the assignment? This court has repeatedly held that provisions in a deed, which were in contravention of the Statute, rendered the deed void.

In *Teah v. Roth*, 89 Ark. 66, an attachment was sued out on the ground that the defendant had fraudulently disposed of her property, the fraud relied on being the making of an assignment for the benefit of creditors. In speaking of the deed of assignment in that case the court said: "The deed empowered the assignees to retail the goods privately for twelve months, and then to sell the remainder by public auction. This is in contravention of our Statute of Assignments, which directs a public sale within one hundred and twenty days after the assignee takes upon himself the execution of the trusts of the assignment. And the legal effect is to avoid the deed, as against non-assenting creditors;" and the court held the assignment fraudulent. See *Raleigh v. Griffith*, 87 Ark. 150; *Rice v. Frayser*, 24 Fed. Rep. 460.

In *Aaronson v. Deutsch*, 24 Fed. Rep. 465, the question under consideration was presented and decided. The court said: "It was the understanding of the parties to the deed that possession of the assigned property should be delivered to the assignee upon the execution and delivery of the deed, and before the assignee had qualified by giving bond and filing an inventory. Accordingly, immediately after the execution of the deed the assignor put the assignee in possession of the property. The key to the storehouse containing the property, and the property itself, was delivered to the assignee; the assignor withdrew from the place and abandoned all watch or care over the property, leaving the assignee to exercise absolute and unrestricted dominion over it. The assignee had not given bond and filed the inventory up to the time the goods were attached. The contention of the learned counsel for the defendant is that, because this illegal understanding and actions of the parties were not in terms provided for in the deed, the validity of the assignment is not affected thereby; and that the wrongful possession of the assignee was a matter occurring subsequent to the execution of the deed, and cannot affect its validity. The mere act of taking possession was subsequent to the execution of the deed; but it was done in pursuance of an understanding had at the time of the execution of

the deed, and when that fact is shown its legal effect is the same as if the deed had provided for it. When the parties to the deed enter into an agreement to do an act in violation of the requirements of the Statute of Assignments, and that agreement finds expression in the deed, the instrument is fraudulent and void in law upon its face. When such an agreement is made, but is not disclosed on the face of the deed, it must be proved; and when it is proved, and it is also shown that the parties are carrying out their illegal purpose, the effect upon the validity of the assignment is precisely the same as if the illegal purpose had been declared on the face of the deed. . . . And a deliberate agreement, in or out of the deed, made at the time and carried into effect, to violate the Statute, is a fraud upon the Statute, and a fraud upon the legal rights of creditors, which the law will redress by removing the fraudulent barrier to the assertion of their legal rights against their debtor." *Wheabee v. Stewart*, 40 Md. 414, 424.

Upon the evidence adduced the instructions asked for by appellant should have been given. For reasons indicated the instruction given was erroneous and misleading.

Other questions are presented for our consideration, but we do not deem it necessary to decide them.

Reversed.

CARRUTH-BYRNES HARDWARE CO.
et al., Appts.,
DEERE, MANSUR & CO.
(....Ark....)

1. Although a surety may bring suit under § 6396, Manaf. Dig., against his principal to

NOTE.—Surety seeking indemnity; Arkansas Act construed.

The failure of an obligee to sue the principal debtor within the time prescribed will not release the surety, where notice was served on the attorney who has the note for collection, and not on the principal obligor. *Cummins v. Garretson*, 15 Ark. 132.

An executor who seeks to remove out of the State without leaving property to indemnify his sureties against loss may be arrested and held to bail, under § 6396, Ark. Stat. 1884, relating to sureties. *Ruddell v. Childress*, 31 Ark. 511.

Any person bound as surety may at any time after action hath accrued on the bond, by notice in writing, require the person having the right of action forthwith to commence suit thereon (Ark. Stat. 1884, § 6396); and where he has given the holder of the bond notice and he fails to sue within thirty days, the surety may plead his exoneration in bar of an action on the bond (*State Bank v. Watkins*, 6 Ark. 123); or he may elect to suffer judgment by default, and apply to equity for relief. *Hempstead v. Watkins*, 6 Ark. 317.

Principal and agent; effect of ratification of acts of agent.

Ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. The retroactive efficacy of the ratification is subject to this qualification. The inter-

tain indemnity against the debt or liability for which he is bound, he cannot sue in the name of the creditor.

2. The ratification of the act of an attorney in bringing an unauthorized attachment suit will not relate back to the time of the commencement of the suit so as to give the attachment lien priority over the liens of third parties which have been acquired in good faith during the interval between the bringing of the suit and the ratification.

(April 12, 1890.)

A PPEAL by intervenors from a judgment of the Circuit Court for Crawford County in favor of plaintiffs upon a petition by intervenors filed in plaintiffs' attachment suit, seeking to have plaintiffs' lien declared to be subsequent to liens held by intervenors. *Reversed.*

Deere, Mansur & Co. held certain promissory notes made by Reynolds Bros. upon which one William Reynolds was surety.

William Reynolds' attorneys brought suit upon the notes on June 14, 1888, in the names of Deere, Mansur & Co., and sued out a writ of attachment. They thereupon notified Deere, Mansur & Co. of their action and the same was subsequently ratified.

On the same day that suit was commenced the Carruth-Byrnes Hardware Co. and other creditors commenced suits against Reynolds Bros. and sued out writs of attachment thereon.

All the parties subsequently obtained judgments, and the Hardware Company and other creditors filed petitions in the cause of *Deere, Mansur & Co. v. Reynolds Bros.* asking to intervene, and that Deere, Mansur & Co.'s claim be deferred and declared subsequent to them, on the following among other grounds: (1) that the suit was instituted without authority; (2) that the attachment was collusively obtained.

vening rights of third persons cannot be defeated by the ratification. In other words, it is essential that the party ratifying should be able, not merely to do the act ratified at the time the act was done, but also at the time the ratification was made. *Cook v. Tullis*, 35 U. S. 18 Wall. 332 (21 L. ed. 963).

The civil-law maxim, *omnis ratihabito retrotrahitur et mandato priori æquiparatur*, has been adopted by the common law, recognizing as a qualification, however, that the thing done and which is ratified must have been done in a representative character, and not in the name of the unauthorized person as principal; and also that such a ratification has no effect upon the rights of third persons acquired between the time of the unauthorized act and the ratification of the act. There must be some mutuality between the ratifying principal and the third party who is to be affected by his ratification, else the ratification will not have a retrospective effect as against the interests of such third party. *Johnson v. Johnson*, 31 Fed. Rep. 700; *Wilson v. Tumman*, 6 Man. & Gr. 236; *Walker v. Hunter*, 2 C. B. 324.

Liens by attachment or judgment upon the property of a debtor are not affected by his subsequent ratification of a previous unauthorized transfer of the property. *Taylor v. Robinson*, 14 Cal. 336; *Wood v. McCain*, 7 Ala. 306; *Bird v. Brown*, 4 Exch. 799.

Ratification of acts of agent: general discussion. See note to *Wheeler v. McGuire* (Ala.) 3 L. A. R. 303; *Story*, Ag. 203.

The court held, *inter alia*, that William Reynolds, being surety on the notes due Deere, Mansur & Co., had a right to institute the suit without authority from them, and that the subsequent ratification dated back to the time of filing the complaint and affidavit for attachment; that the evidence did not show such fraud and collusion as would render the lien void as to subsequent attaching creditors; and rendered judgment against intervenors, and they appealed to this court.

Messrs. O. P. Brown and Sandels & Warner, for appellants:

The affidavit, not having been made by one who was the agent or attorney of Deere, Mansur & Co., was no affidavit. There being no statutory affidavit, no lien was created thereby.

See Drake, *Attachm.* §§ 88, 86, 93, 131; Waples, *Attachm.* pp. 76-82; *Pool v. Webster*, 8 Met. (Ky.) 278; *Manley v. Hcadley*, 10 Kan. 88; *Miller v. Chicago, M. & St. P. R. Co.* 58 Wis. 810.

The ratification by the principal of the act of an unauthorized agent does not relate back to the time of the original act so as to give the principal priority of lien over subsequent lienors.

Messrs. J. E. Joiner and Cohn & Cohn, for appellees:

The presumption is that the agent had authority to make the affidavit for attachment.

Leake v. Sutherland, 25 Ark. 219, 221, 222; *Webster v. Stewart*, 6 Iowa, 401.

It is not presumed that one in no wise interested in the suit would make such an affidavit, without it was done by him as the agent of the party in interest, or done for him, for accommodation.

Mandel v. Peet, 18 Ark. 236.

The surety could have brought the suit on the chancery side of the court to compel payment, without regard to any statute, and upon general principles of equity.

Brandt, Sur. §§ 192, 193.

The selection of a law tribunal instead of an equity tribunal did not oust the court of jurisdiction.

Organ v. Memphis & L. R. R. Co. 51 Ark. 235, 259; *Catchings v. Harcrow*, 49 Ark. 20, 22; *Jones v. Moody*, 59 Miss. 327.

If the principal recognize and affirm the existence and acts of an agent, a mere stranger will not be permitted to controvert either.

Scott v. Detroit Young Men's Society, 1 Doug. (Mich.) 119, 149; *Craig v. Twomey*, 14 Gray, 486.

A person may ratify an action brought in his name, but without his knowledge or authority, by another professing to act as his agent and in his behalf, and the subsequent ratification is equivalent to a prior authority.

Ancona v. Marks, 7 Hurlst. & N. 686; *Irons v. Reyburn*, 11 Ark. 378; *Wharton*, Ag. § 80.

Hemingway, J., delivered the opinion of the court:

Assuming that the attachment sued out in the name of the appellees was not vitiated by fraud or collusion, we must decide (1) if it was their attachment, and if so (2) When was the lien fixed in their favor?

The right of attachment is incident to a civil action and dependent upon it. *Mansf. Dig.* § 809.

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An action is a formal demand of one's rights from another person in a court of justice.

The plaintiff may bring an action either directly, in person, or indirectly, through an agent, but his assent in one way or the other is essential, and unless his mind does thus enter into it, it is not his action. Section 6396, *Mansfield's Digest*, authorizes a surety to bring an action against his principal to obtain indemnity against the debt or liability for which he is bound, but it does not authorize him to sue in the creditor's name. The surety failed to do what he might have done, and did what he had no authority to do.

In *Jones v. Moody*, 59 Miss. 327, a junior attaching creditor sought by bill in chancery to vacate a senior attachment on the grounds that it was founded on no debt and was a fraud. The attachment assailed was in favor of a party who had owned the note sued on, but assigned it as collateral; the court held that although not the proper party to sue, he had an interest in the note and that the attachment in his favor was not a fraud. It did not hold that he could sue for his assignee without authority. The attorneys who filed the complaint were not authorized to collect the debt for Deere, Mansur & Co., or in any way to act for them; in fact it is not contended that there was any authority of any kind to institute the action in their favor, and it follows that it was not in fact their action. But they were notified of its institution by the attorneys who had assumed to act for them and expressly ratified the unauthorized act.

That a party may adopt a suit brought in his name without his consent was ruled in the case of *Craig v. Twomey*, 14 Gray, 486, and seems to follow from the general rules applicable to the relation of principal and agent. Of this we entertain no doubt, but the difficulty arises in considering the effect of the ratification in this case.

The appellees contend that "every ratification of an act already done has a retrospective effect, and is equal to a previous request to do it." This is a rule applicable to the subject, and, if given in this case the broad meaning it conveys, the effect is to give to every act done in this action, including the attachment proceeding, the same effect as if they had been originally authorized.

But the rule has its exceptions as well recognized and as generally approved as the rule itself. Without attempting to indicate to what extent the rule applies or to specify the exceptions that are recognized, we hold that where, prior to the ratification, third persons have in good faith acquired substantial rights or have been placed in such position in reference to the transaction that they will be prejudiced by such retroactive effect, the ratification will not be allowed to cut out or prejudice those rights. The benefit of this exception has been extended to protect the rights of intervening purchasers and lienors, by attachment or otherwise. *Mechem*, Ag. § 168; *Wharton*, Ag. § 78; *Wood v. McCain*, 7 Ala. 800; *Taylor v. Robinson*, 14 Cal. 396; *Johnson v. Johnson*, 81 Fed. Rep. 700.

Mr. Wharton, by way of illustrating the rule and its exceptions, puts a state of case as an exception which is a counterpart of the case at bar.

The Supreme Court of Massachusetts in the case of *Baird v. Williams*, 19 Pick. 381, which involved the same questions upon the same fact, said: "If it be argued that the subsequent assent of the creditors relates back to the making of the note, and makes the transaction valid *ab initio*, the plaintiffs are met by the well-known rule, that this principle of relation, equitable in itself between the parties, is not to be construed as overreaching means liens and rights accrued to others before the consent and ratification."

It may be that there are certain kinds of acts done for another without authority, so manifestly for his benefit that all parties dealing in relation to the matter would be held to know, and the law would presume, their ratification. Be that as it may, no such presumption exists as to attachments and their incident liabilities.

As the intervenors had acquired their liens before the appellees had adopted this action, it follows that the lien of the latter became fixed

as against the former at the time of the ratification, and is subsequent to theirs.

The appellees contend that appellants cannot question the validity of their lien, and cite to sustain them, the case of *Sannoner v. Jacobson*, 47 Ark. 81. The objection urged by appellants in this case did not go to the grounds of the attachment or the irregularities of the proceeding, but denies the validity of the attachment and attacks the ground-work of the lien. A prior lien would be of little value if the lienor could not assert it, but the law affords him the opportunity. Mansf. Dig. § 856.

Without considering the question of fraudulent and collusive attachments pressed by counsel for the appellants, we conclude that the record shows that their liens are prior to the lien of appellees.

The judgment will be reversed, and the cause remanded with directions to the Circuit Court to render judgment in accordance with the law as herein announced.

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *ex rel.* William DARROW *et al.*, as Trustees for Harriet Ivison,

v.

Michael COLEMAN *et al.*, Comrs. of Taxes, etc., of the City and County of New York.

(....N. Y.....)

Securities in the actual possession and control of one of three trustees, who is a nonresident, the beneficiaries also being nonresidents, are not "due or owing to persons residing within the State" so as to be subject to taxation therein although the other two trustees are residents thereof.

(January 21, 1890.)

CROSS appeals from an order of the General Term of the Supreme Court, First Department, reversing an order of the New York Special Term vacating and setting aside a certain tax assessment. *Reversed.*

Relators were, as trustees for Harriet Ivison, a resident of California, under the will of Henry Ivison, deceased, assessed for taxation on personal estate for 1887 in the City of New York, in the sum of \$60,000.

They appeared before the tax commissioners and stated that the sum vested in them as trustees was \$87,000; that the securities were kept in New Jersey by their co-trustee, who was a resident of that State and who had principal charge and management of the trust estate and securities; that \$46,600 was invested in the stock of corporations liable to taxation and paying their own taxes, and \$40,400 in western land mortgages.

The commissioners thereupon reduced the assessment from \$60,000 to \$45,000.

The relators brought certiorari proceedings to review the assessment and the Special Term decided that it should be stricken from the roll. The General Term reversed this judgment, but reduced and modified the assessment by de-

ducting \$4,600 as an over-valuation, and \$18,466.67, representing one third of the valuation of the estate, which the General Term decided was not assessable in New York for the reason that one of the trustees resided in New Jersey.

The relators appeal from that part of the order which affirms the original assessment as reduced and modified.

The commissioners appeal from that part of the order which provides for a reduction of the one third of the valuation of the estate.

Messrs. Brownell & Lathrop, for relators:

Prior to the Act of 1883, chap. 392, p. 568, no tax could have been assessed upon any of the trustees in respect to the mortgages upon property in Illinois and Iowa.

People v. Comrs. of Taxes, 23 N. Y. 228; *People v. Smith*, 88 N. Y. 576; *People v. Gardner*, 51 Barb. 352; *People v. Comrs. of Taxes*, 4 Hun, 595, 62 N. Y. 630; *Graham v. Norfolk First Nat. Bank*, 84 N. Y. 393; *Lord v. Arnold*, 18 Barb. 104; *Boardman v. Tompkins Co. Supra*, 85 N. Y. 359.

The Statute of 1883 does not authorize any taxation of them because they are not within its terms. This Statute is to be strictly construed; taxation is not to be extended or authorized by construction. Nor should the court stretch the Statute as the Tax Commissioners and prevailing opinion at general term have done.

Strauss v. Coleman, 44 Hun, 20; *People v. Comrs. of Taxes*, 17 Hun, 293.

The two trustees taxed have no means of indemnifying themselves against the tax. The property is not in their possession nor under their control and so not taxable to them.

People v. Coleman, 42 Hun, 581; *People v. Comrs. of Taxes*, 23 N. Y. 224.

The Act does not include under the term "owners" or "owner," executors, trustees and agents. It requires a stretch of judicial construction to insert in the Statute the word "trustee."

People v. Coleman, supra; Perry, Trustees, §§ 411, 412.

Messrs. David J. Dean and George S. Coleman, with Mr. William H. Clark, for respondents:

The assessment against the two resident co-trustees was correct in form.

People v. Coleman, 42 Hun, 581.

The Act of 1888, chap. 892, authorized such taxation and plainly declared that the debt and not the security was the thing to be considered. The mortgagors could discharge their indebtedness only through the trustees. The trustees alone could pass title to the property—the debt (or credit) owned by the estate. In this sense, which is the practical and legal sense, the trustees did and do control the property, and it is not susceptible of and does not require physical possession.

The obvious purpose of the Act (chap. 892 of the Laws of 1888), was to make the tax fall, as it should, on the actual property—the valuable credit—whether the debtor had or had not given the resident creditor a proper paper to evidence and secure the loan, and whether or not the written instrument was within the State.

The owner of property, for the purposes of taxation, is the person having the legal title or estate thereto or therein.

Tracy v. Read, 88 Fed. Rep. 69; Baldwin v. Shine, 84 Ky. 502.

The right to tax personal property held in trust “has not been rendered dependent either upon the residence of the person creating the trust, or that of the person to be benefited by the performance of it.”

People v. Albany Assessors, 40 N. Y. 160.

Peckham, J., delivered the opinion of the court:

It is substantially conceded, and it is in any event very plain, that prior to the Act (chap. 898, Laws 1888) the assessment in question could not be sustained. *People v. Smith, 88 N. Y. 576.*

That Act provides that “all debts and obligations for the payment of money due or owing to persons residing within this State, however secured, or wherever such securities shall be held, shall be deemed, for the purposes of taxation, personal estate within the State, and shall be assessed as such to the owner or owners thereof in the town, village or ward in which such owner or owners shall reside at the time such assessment shall be made.”

This Statute was passed the year subsequent to the decision of the case of *People v. Smith, supra*, and the inference is not a labored one which concludes that the law was enacted to meet the decision. In that case the relator, a resident of the Village of Warsaw, in this State, was the absolute owner of the securities which the assessors had attempted to reach for the purposes of taxation, but such securities were in the possession of agents residing without the State, and by the laws of the States where the agents resided the securities were liable to be taxed in those States. It was held by this court that the relator was not liable to be assessed for such securities.

The idea that personal property follows the *situs* or residence of the owner, while in some cases a perfectly proper legal fiction, to be in-
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cluded in for purposes of justice, was held not to apply in such a case for the purpose of imposing a tax upon a security not within the State, and not protected by our laws. The case here presented is one where the persons assessed are not the absolute owners of the property, but are trustees, and have only a representative or official interest therein, and but two out of the three are residents within the State, while a third resides in another State, and also has custody and control of the property, and the beneficiaries are also non-residents. Does the Act of 1888 meet such a case? We think not. It is not a debt due and owing to persons residing within this State, for it is one which is due or owing to them in connection with another who is a joint owner, and who is not a resident within this State, and such other has the securities. The Statute means that the debt must be one which is solely due or owing to residents of this State. If the trustee residing here has possession of the securities, he can be assessed for them under the old law as a trustee in possession, even though there be other trustees nonresidents. Nor do we think that the Statute meant to include as owners persons who were trustees only, and thus assess them for property not held by them, and not within this State.

Generally, a man is not spoken of as the owner of property who merely holds it as a trustee and in a representative capacity. He has the legal title, and he is to be assessed for it when it is within the State; but this is by express provision of statute, and such provision is not mentioned in the case of a trustee whose trust property is outside of the State, and not in his possession. The contention of the counsel for the tax commissioners would render property liable to double, or even treble, or still greater taxation, if the laws of other States were like ours, and there were three or more trustees living in as many different States. The Statute, as it is, may lead to injustice in the double taxation of personal property,—once to its absolute owner in this State, and again in the hands of his agents in the shape of securities in their custody and control in other States. It is not for courts to widen the possible injustice which may be perpetrated under a Statute, by giving it a construction not only not called for by its language, but forced and unnatural under the circumstances. It is unnecessary to go over the argument arising from an examination of the whole law of assessment for the purpose of showing that the construction adopted by us is the correct one. We think it plainly appears that the construction adopted by the learned general term may lead to such a perversion of justice that no court ought to adopt it unless constrained by the plainest language of the statute. We are of the opinion that such is not the language of this one. This case is a good illustration of the inequitable consequences arising from the construction of the court below. The real, acting trustee lives in New Jersey. He has possession and control of the securities, which are bonds and mortgages upon lands in other States, and the beneficiaries are all nonresidents of this State. And yet, by the action of the Tax Commissioners, because two of the trustees are residents of this

State, although they have neither possession nor control of the property, and none of it is in this State, the trust estate must pay tribute to us. We think not.

The order of the General Term should be re-

versed, and that of the Special Term, setting aside and vacating the assessment, should be affirmed, with costs.

All concur, except Earl, J., absent.

PENNSYLVANIA SUPREME COURT.

SCHUYLKILL RIVER EAST SIDE R.
CO., *Plff. in Err.*,
v.
John J. KERSEY.

(...Pa....)

1. In proceedings to assess damages for the taking of property for railroad purposes, whatever injuriously affects the owner's adjoining property as the direct and necessary result of the location of the road may be considered by the jury in making their assessment.
2. Where the location of a railroad across property leased as a coal yard makes necessary new appliances for the continuation of the coal business and increases the cost of raising and storing the coal as well as the breakage and waste in handling it, the additional expense and loss, together with the cost of the new appliances, may properly be received in evidence in a proceeding by the lessee to recover damages for such location, not as specific items of claim, but as affecting the market value of the leasehold.

(March 17, 1890.)

ERROR to the Court of Common Pleas, No. 2, of Philadelphia County to review a

judgment in favor of plaintiff in a proceeding to recover damages for the taking by defendant for railroad purposes of a portion of property in which he had a leasehold interest. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs. Thad. L. Vanderslice and Lewis C. Cassidy*, for plaintiff in error:

The question for the jury was, What was the value of the leasehold interest before the railroad affected it at all?

It was worth to plaintiff the same sum it was worth for sale and transfer, and the mode of ascertaining the sum is by the testimony of witnesses upon its market value.

Pennsylvania R. Co. v. Eby, 107 Pa. 166.

A tenant's damage is to be measured by the same rule that is applied to the owner of the fee—What was his estate worth before and after? What injury was done to his property?

Philadelphia & R. R. Co. v. Getz, 118 Pa. 214.

The price which, upon full consideration of the matters stated, the judgment of well-informed and reasonable men will approve, may be regarded as the market value.

Pittsburgh & W. R. Co. v. Patterson, 107 Pa. 464.

The jurors are to value the injury to the property, without reference to the person of the

NOTE—*Compensation for land taken for railroad purposes.*

In condemnation proceedings the land owner is entitled to full compensation for the land actually taken, and for such damages to the residue as are equivalent to the diminution in value, general benefits not considered. *Fremont, E. & M. V. R. Co. v. Meeker* (Neb.), 44 N. W. Rep. 79.

The damages include what is necessary to make good all that results, directly or indirectly, to the injury of the owners in the whole premises and interests affected, and not merely the strip taken. *Grand Rapids, L. & D. R. Co. v. Chesebro* (Mich.), 42 N. W. Rep. 66.

In determining the question of damages, advantages and disadvantages from the appropriation are considered, and are to be estimated upon the land as a whole. *Baltimore & P. R. Co. v. Springer* (Pa.), 11 Cent. Rep. 685.

Where the tract taken is part of a larger connected body of land, the owner may recover for the injury done to the tract as a whole, and is not restricted simply to the part described. *Fayetteville & L. R. R. Co. v. Hunt*, 51 Ark. 330.

The full value of land actually condemned for a railroad must be allowed as damages, although the company does not acquire the fee. *Ibid.*

Just compensation for land taken consists in making the owner good, by an equivalent in money, for the loss he actually sustains in the value of his property by being deprived of a portion of it. It includes, not only the value of the land taken, but also the diminution in the value of that from which it is severed. *Lafin v. Chicago, W. & N. R. Co.* 33 Fed. Rep. 415. See *Each v. Chicago, M. & St. P. R. Co.* 72 Wis. 220.

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It is proper to consider, in estimating the damages for a right of way for a railway, the manner in which the road cuts the land, the excavations and embankments, and the exposure of the property to particular injuries from the proximity of the road. *Fremont, E. & M. V. R. Co. v. Meeker* (Neb.), 44 N. W. Rep. 79.

The compensation is the difference between the value of the land as it existed before, and of the remaining portion after, the construction of the railroad. *Re Scott*, 6 Manitoba L. Rep. 193.

It is the difference between its value before and after the construction of the road, without taking into consideration any of the benefits to be derived from the railroad. *Wichita & W. R. Co. v. Kuhn*, 38 Kan. 104; *Baltimore & P. R. Co. v. Springer* (Pa.), 11 Cent. Rep. 685; *Hartman v. Reading & P. R. Co.* (Pa.), 12 Cent. Rep. 447; *Chicago, B. & N. R. Co. v. Bowman*, 11 West. Rep. 598, 123 Ill. 595; *Concordia Cem. Asso. v. Minnesota & N. W. R. Co.* 10 West. Rep. 573, 121 Ill. 199.

In determining the damages to a farm, caused by the construction of a railroad, it is proper to take into consideration every element of damage that might be reasonably anticipated before the road is built, and what really does exist and is apparent after the road is constructed. This includes the inconvenience of crossing, the raising of embankments, the digging of ditches, pools of stagnant water, and the obstruction to surface water by throwing it into the channels or by damming it up. *Wichita & W. R. Co. v. Kuhn*, *supra*; *Weyer v. Chicago, W. & N. R. Co.* 68 Wis. 180. See, generally, *San Diego L. & T. Co. v. Neale*, 3 L. R. A. 83, 78 Cal. 63.

owner, or the actual state of his business; and in doing that the only safe rule is to inquire, What would the property unaffected by the obstruction have sold for at the time the injury was committed? What would it have sold for as affected by the injury? The difference is the true measure of compensation.

Schuykill Nav. Co. v. Thoburn, 7 Serg. & R. 411.

Plaintiff should not have been permitted to prove his loss by breakage of coal, or the increased cost of handling it to the end of his term, as specific items of damage.

Reading & P. E. Co. v. Balihaser, 119 Pa. 482.

Mr. Joseph L. Caven, for defendant in error:

If by reason of the taking of the property, or its destruction, the plaintiff was specially injured, he is entitled to compensation for such injury.

Pennsylvania R. Co. v. Eby, 107 Pa. 106; *Philadelphia & R. R. Co. v. Getz*, 113 Pa. 214.

The plaintiff's damages will be the value to him of the leasehold for the uses to which he is to devote it, viz., a coal wharf and yard.

Chicago, E. & L. S. R. Co. v. Catholic Bishop, 119 Ill. 525.

Where one is compelled by the entry of a railroad to remove and re-establish the same business elsewhere, he must be allowed the expense of such removal and re-establishment.

Philadelphia & R. R. Co. v. Getz and Pennsylvania R. Co. v. Eby, *supra*; *Chicago, M. & St. P. R. Co. v. Hock*, 118 Ill. 587; *St. Louis, V. & T. H. R. Co. v. Capps*, 67 Ill. 607.

Plaintiff must be allowed the reasonable and necessary expense for putting his property in the same condition as it was before.

Price v. Milwaukee & St. P. R. Co. 27 Wis. 98; *Chase v. Worcester*, 108 Mass. 60; *Walter v. Post*, 4 Abb. Pr. 382.

Evidence to show the increased cost of storing and handling coal, and the increased breakage and wastage to the end of the term, necessarily resulting from these new appliances, was admissible.

Pennsylvania R. Co. v. Eby, *supra*; *Pittsburgh Junction R. Co. v. McOutcheon* (Pa.) 5 Cent. Rep. 759; *Pittsburgh, V. & C. R. Co. v. Vance*, 115 Pa. 325; *Tucker v. Massachusetts Cent. R. Co.* 118 Mass. 546.

McCollum, J., delivered the opinion of the court:

No complaint is made by the defendant Company of the instructions to the jury on the question of damages, and our inquiry is limited to alleged error in the admission of evidence.

The plaintiff was the lessee of a wharf property on the Schuylkill River in Philadelphia, extending from the river to Twenty-Fourth Street. It was leased to him as a coal wharf and yard. Upon it he carried on the business of receiving, storing and delivering coal for other parties, and of receiving, storing and selling coal and sand on his own account. The appliances used in the business and necessary to carry it on belonged to him.

In January, 1886, the defendant Company entered, and located its road upon the demised premises, appropriating for that purpose a strip of land sixty feet in width, and dividing the 7 L. R. A.

property into two parts. The sheds, runs and other appliances indispensable to the business for which the property was leased were partially destroyed by this addition of the Company, and the construction of new ones adapted to the changed condition became necessary in order to continue the business. A bridge with a single span of sixty-eight feet and an elevation of twenty-one feet above the railroad tracks, and a derrick, sheds and runs of a corresponding height were required. The Company recognized the necessity for these appliances as the direct consequence of the location of its railroad, and admits that it promised the plaintiff to construct them, but excuses its non-performance on the ground that it could not agree with him as to the details of the work. In other words, the plaintiff wanted better structures than the Company was willing to build, or considered necessary, in view of the probable duration of his leasehold. It was contemplated by the parties that the business should be continued by the plaintiff, and that he should have as far as practicable the same facilities for carrying it on that he had before enjoyed. It was the only business which his lease allowed him to establish there, and if he abandoned it his leasehold was worthless, because he could not sublet or sell it without the consent of his lessor. The Company failing to provide the facilities it conceded he was entitled to and had promised he should have, he constructed such appliances as were necessary for the continuance of the business as it existed before the location of the railroad. The increased height of the structures increased the cost of raising the coal, and the breakage and waste in handling it. This additional expense and loss, together with the cost of the new appliances, he was allowed to show and prove on the trial of this issue. The Company objected to this evidence and now contends that the court erred in admitting it.

It is well settled that the proper measure of damages is the depreciation in the market value of the property, caused by the location and construction of the railroad. But the elements to be considered in the ascertainment of this depreciation are as varied as the properties affected and the uses to which they were applied. A specification of all these elements is impossible, because they cannot be anticipated, and many of them remain to be developed in the course of the litigation consequent upon the taking of property by eminent domain. In the ordinary case of the appropriation of land for railroad purposes the opinions of witnesses who are conversant with the property and the general selling price of lands in the vicinity are received on the question of its value unaffected by the road and its value as affected by it. But this is not exclusive of other, and in some cases, better, methods of proof. It may be stated as a general principle, applicable to cases of this sort, that whatever injuriously affects the property, as the direct and necessary result of the location of the road upon it, may be considered in the assessment of damages.

In this case the estate of the plaintiff was limited to a particular use. Its enjoyment in accordance with the terms of its creation required that the appliances which had been rendered useless by the entry of the defendant

Company should be reconstructed at an elevation which increased the cost of raising and storing the coal, and increased the breakage and waste in handling it. We think these matters were properly received in evidence as descriptive of the injury inflicted and the burden imposed on the property by the occupation of it for railroad purposes, and that they were for the consideration of the jury, not as specific items of claim, but as affecting market value. The specifications of error are dismissed, and

The judgment is affirmed.
Paxson, Ch. J., not sitting.

ROYAL INSURANCE CO., of Liverpool,
Pff. in Err.,
 v.
Marietta HELLER.

(.....Pa.....)

1. An entry by a landlord to rebuild a burned building, under an agreement with the tenant that the latter shall continue to pay rent during the time of rebuilding, in consideration of the landlord's promise to grant a new lease of the improved property on more favorable terms, will relieve an insurance company of its contract to indemnify the tenant for any loss accruing to him by reason of having to pay rent for the insured building during such time as it should be untenable by reason of fire.
2. No stipulation between third persons can continue upon one an obligation from which the law relieves him.
3. An insurance company's letter stating that it could not, by reason of the landlord entering for the purpose of rebuilding, be discharged from liability on a policy insuring a tenant against liability for rent in case the leased buildings are burned, and that such defense would not be raised, will not estop the company from asserting its discharge from further liability by reason of an entry by the landlord under an agreement with the tenant to continue the payment of rent.

(March 10, 1890.)

ERROR to the Court of Common Pleas, No. 4, of Philadelphia County to review a judgment in favor of plaintiff in an action upon a policy insuring plaintiff against liability to pay rent for certain leased property in case the buildings thereon were destroyed by fire. *Reversed.*

During the negotiations for a settlement of the rights of the parties and permission to have the buildings rebuilt, the attorney of the insurance company wrote the following letter:

M. Hampton Todd, Esq., Attorney for Mrs. Heller.

Dear Sir:—The Royal Insurance Company could not be discharged from liability on Mrs. Heller's policy, by reason of the landlord entering for the purpose of rebuilding, nor will such a defense be raised.

But they decline to be parties to any agreement that the landlord shall be permitted with their consent to rebuild, the only effect of 7 L. R. A.

which would be to prevent a suspension of the rent during the time of rebuilding. . . .

Truly yours,

Morton P. Henry,

Attorney for the Royal Insurance Company.
 April 17, 1888.

The other material facts sufficiently appear in the opinion.

Mr. Morton P. Henry, for plaintiff in error:

Fire insurance is a contract of indemnity.

1 Phillips, Ins. § 4; Porter, Ins. p. 6; Marshall, Ins. 1; Wood, Fire Ins. note 2, p. 4; *Hull v. Nashville & C. R. Co.* 80 U. S. 13 Wall, 867 (20 L. ed. 594); *Darrell v. Tibbitts*, L. R. 5 Q. B. Div. 560; *Friemansdorf v. Watertown Ins. Co.* 1 Fed. Rep. 68.

After a loss has occurred to the subject of insurance the insured not only cannot by any act of his own increase the liability of his insurer or indemnifier, but he must do everything in his power to mitigate and reduce the loss.

Wood, Fire Ins. p. 776; *Atlantic Ins. Co. v. Storrow*, 5 Paige, 285; *Niagara F. Ins. Co. v. Fidelity Title & Trust Co.* 123 Pa. 516; *Ins. Co. of N. A. v. Fidelity Title & Trust Co.* 2 L. R. A. 586, 123 Pa. 523; *Carstairs v. Mechanics & T. Ins. Co.* 18 Fed. Rep. 478.

The liability of the insurer, like that of a surety, cannot be enlarged without his consent after the obligation has been entered into.

Crawley v. Com. 123 Pa. 275.

If the landlord enters on the premises for the purpose of rebuilding, either with or without the consent of his tenant, the liability of the tenant for rent ceases.

Magaw v. Lambert, 8 Pa. 444; *Horveler v. Fleming*, 91 Pa. 823; *Ex parte Vitale*, 47 L. T. N. S. 450; Platt, Covenants, 197.

When Mrs. Heller agreed to continue to pay the rent it was a voluntary assumption of a continuing liability for rent after the time when the law relieved her, and the company thereby became exonerated in full from further loss under their policy.

Darrell v. Tibbitts, L. R. 5 Q. B. Div. 560; *Castellain v. Preston*, L. R. 11 Q. B. Div. 380; *Friemansdorf v. Watertown Ins. Co.* *supra*.

Mr. M. Hampton Todd, for defendant in error:

No one was discharged from liability, no injury of any kind done to the defendant. The plaintiff agreed with her landlord that he should rebuild, and that the entry for that purpose should not be construed as an eviction or surrender.

Niagara F. Ins. Co. v. Fidelity Title & Trust Co. 123 Pa. 516.

Mitchell, J., delivered the opinion of the court:

The facts in this case as they appear in the affidavit of defense and the plaintiff's statement are practically undisputed, and they establish a complete defense. Defendant by its policy agreed to indemnify plaintiff for "any loss accruing to her by reason of having to pay rent for the (therein) described building such time or times as the building may be untenable by reason of fire or fires occurring during the continuance of this policy." A fire occurred in January, 1888, and the landlord entered to

rebuild, in July. That as a legal consequence would have suspended the payment of rent. It was a rescission *pro tanto* of the lease. *Maggaw v. Lambert*, 8 Pa. 444; *Hoveler v. Fleming*, 91 Pa. 323.

Defendant was liable under its policy for the rent from January to July, and that amount it paid. But the plaintiff and her landlord entered into an agreement by which the former agreed to continue to pay rent during the rebuilding of the store, and in consideration therefor the latter agreed to rebuild with certain improvements and to give a new lease on more favorable terms. This agreement discharged the defendant. The payment of rent under it by plaintiff was a voluntary undertaking, not a legal obligation under the first lease, against which alone the policy undertook to indemnify her. It is set out in the pleadings that the landlord was insured as to his rent in the Pennsylvania Fire Insurance Company, and that that Company, asserting a right of subrogation to the landlord's claim for rent against the tenant, procured the landlord not to re-enter until the plaintiff made the agreement in question, and that by that agreement it was expressly stipulated that the rights and liabilities as to rent, and as to claims under their respective insurance policies, should not be affected. But these facts are entirely immaterial. If true, they showed a fraudulent attempt on part of the plaintiff, the landlord and the Pennsylvania Fire Insurance Company to shift a burden which belonged on them to the defendant. But even if there was no such fraudulent purpose, the effect of the agreement was to continue upon the defendant an obligation from which the law relieved it, and no stipulation between the other parties without its consent could accomplish such a result.

It is said that the hardship of plaintiff's situation forced her to make the agreement, and that without it the landlord would not have re-entered, and the defendant would then have been liable for an entire year's rent. Perhaps so, perhaps not. What the landlord would have done there are no means of ascertaining, but what it was his interest to do is clear enough. He might have lain by and collected his rent from plaintiff till the end of her lease, but then he would have had to lose rent while he rebuilt. Or he might have rebuilt during her lease, and looked to his insurance for indemnity while the rent was suspended by the rebuilding. It was manifestly his interest, therefore, to enter and rebuild during the running of plaintiff's lease and his own policy in the Pennsylvania Company. He had nothing to gain and something to lose by delay. The hardship in plaintiff's situation was in having an insufficient insurance. She was bound to pay rent for three years and only indemnified for one. It was her interest, therefore, to have the rebuilding done as soon as possible. The honest and proper course for all parties would have been to rebuild at the earliest convenient time. The plaintiff would then have paid rent until the rebuilding commenced, and would have been indemnified by the defendant. The rent would have been suspended during the rebuilding, and the landlord would have been indemnified by the Pennsylvania Company. No one had anything to gain by de-

parting from this plain course except the Pennsylvania Company, which, if the scheme had succeeded, would have transferred its own proper loss to the defendant. But when the parties undertook to vary the defendant's contract liability from that which the law imposed, their action was ineffective for such purpose, and as to the defendant totally void.

Reference was made during the argument to the correspondence and a claim suggested that the present defense had been waived. But such a view is untenable. The meaning of the letter of defendant's counsel, dated April 17, 1888, is entirely clear. The defense which it says will not be raised is that defendant will be "discharged from liability by reason of the landlord entering for the purpose of rebuilding." Of course not. The fire had taken place in the preceding January, and nearly three months' rent was due at the date of the letter. From liability for this rent and such other as should accrue up to the entry of the landlord, such entry would not be a discharge, and the letter says that such a defense will not be raised. But then, to make certain that its meaning is not more than this, it goes on to say explicitly that defendant will not consent to anything which will vary the legal effect of the landlord's entry, to wit, the suspension of the rent during the rebuilding. There is here no waiver of any of defendant's rights.

Judgment reversed, and procedendo awarded.
Clark, J., not sitting.

Jacob M. DUNCAN, Impleaded, etc., *Pf.*
in Err.,

v.

Stephen FLANAGAN.

(....Pa.....)

In a suit by a judgment debtor against one jointly liable with him on the demand for which the judgment was recovered, but who during the pendency of the action had been discharged in bankruptcy, for contribution towards payment of the judgment, an affidavit of defense which impugns the good faith of plaintiff by setting out that, defendant having been notified that the former suit had been abandoned, his co-defendant, the present plaintiff, had the proceedings renewed and carried to judgment without notifying the present defendant and thereby prevented him from pleading his discharge in bankruptcy, and that such co-defendant, although assuming to conduct the defense for the benefit of all parties concerned, and, knowing of such discharge, neglected to set it up as a defense, is sufficient.

(March 24, 1890.)

ERROR to the Court of Common Pleas, No. 2, of Philadelphia County to review a judgment in favor of plaintiff for want of a sufficient affidavit of defense in an action against

NOTE.—"He who comes into equity must come with clean hands." See note to *Medford v. Levy* (W. Va.) 2 L. R. A. 868.

his joint debtor for contribution towards payment of the judgment recovered on the debt. *Reversed.*

On September 20, 1872, Duncan and Flanagan and others entered into a contract by which they agreed to procure and ship a cargo of beef from Galveston, Texas, to Philadelphia, on joint account. The steamer Francis Wright was chartered for the adventure. In 1874 suit was brought in New York on the charter-party by the owners of the Francis Wright and a judgment recovered in favor of plaintiffs. Flanagan paid this judgment and brought suit to recover contribution from his co-defendants.

Further facts appear in the opinion.

Messrs. A. A. Hirst and J. Howard Gendell for plaintiff in error.

Mr. George P. Rich, for defendant in error:

This action will lie to recover from Duncan his proportion of the joint expenses.

Kutz v. Dreidelbis, 126 Pa. 335; *Brubacker v. Robinson*, 3 Penr. & W. 295; *Galbreath v. Moore*, 2 Watts, 86; *Wright v. Cumpsey*, 41 Pa. 102; *Finlay v. Stewart*, 56 Pa. 183; *Meason v. Kaine*, 63 Pa. 835.

The adventurers are joint debtors, who, as between themselves and their creditors, were each liable for the whole debt; but, as between themselves, each is liable for his proportion only, and as to the rest is surety for the others.

Ackerman's App. 106 Pa. 1.

The doctrine of subrogation does not depend on privity, nor is it confined to cases of strict suretyship; it is a mode which equity adopts to compel the ultimate discharge of the debt by him who, in good conscience, ought to pay it; and to relieve him whom none but the creditor could ask to pay.

McCormick v. Irwin, 85 Pa. 111; *Bender v. George*, 92 Pa. 36; *Ackerman's App. supra*.

Even if the judgment has been marked "satisfied" on the record, equity will keep the debt alive, and the surety paying is entitled to be subrogated as against all but intervening creditors.

Wright v. Grover, 82 Pa. 80; *Bailey v. Brownfeld*, 20 Pa. 41.

If a demand is not provable, it is not barred by the certificate of discharge in bankruptcy.

Murray v. De Rottenham, 6 Johns. Ch. 52.

As to demands not barred, see

Large v. Bosler, 3 Pa. L. J. 246; *Kingsley v. Prentiss*, 6 Pa. L. J. 479; *United States v. The Rob Roy*, 13 Nat. Bankr. Reg. 235; *Loring v. Kendall*, 1 Gray, 305; *Fowler v. Kendall*, 44 Me. 448; *Eastman v. Hubbard*, 13 Nat. Bankr. Reg. 360; *Pike v. McDonald*, 82 Me. 418; *Leighton v. Atkins*, 35 Me. 118.

The right to plead his discharge in bar of an action pending against him is exclusively the bankrupt's personal right. If he fails to avail himself of it, judgment may be rendered against him.

Manwarring v. Kouns, 85 Tex. 171; *Park v. Casey*, 35 Tex. 636; *Fellows v. Hall*, 8 McLean, 487; *Steward v. Green*, 11 Paige, 535; *Freeman v. Warren*, 3 Barb. Ch. 635; *Seymour v. Brown*, 17 Ohio, 362; *Taylor v. Renn*, 8 Chic. Leg. News, 410; *Horne v. Spelman*, 73 Ill. 206.

Notwithstanding the defendant's bankruptcy, a valid judgment can be rendered against

him, unless he avails himself of the proceedings in bankruptcy.

Palmer v. Merrill, 57 Me. 26; *Re Leibenstein*, 4 Chic. Leg. News, 309.

Green, J., delivered the opinion of the court:

The liability upon which the judgment in the State of New York was recovered against the plaintiff and the defendant jointly grew directly out of the original article of agreement made on September 20, 1872. The plaintiff, the defendant and several others were parties to that agreement, and in it they all agreed that the charter of the steamship Francis Wright was accepted and was "for the account and risk of all concerned in the joint venture." The owners of the Francis Wright brought the action in New York in 1874 against the plaintiff, the defendant and some of the other parties to the agreement, claiming the sum of \$6,966.86 as a balance due for the charter and hire of the vessel during the joint venture mentioned in the agreement. For some unexplained reason the case seems to have slumbered for nine years and it was not until 1883 that the action was tried and resulted in a verdict and judgment for the plaintiffs, and against four of the defendants, including the plaintiff and defendant in the present suit. The liability upon which that action was founded, and for which the judgment was recovered, arose exclusively from the agreement of 1872. It was therefore in existence at the time Duncan's proceeding in bankruptcy was commenced and at the time of the adjudication in 1878, and the discharge in 1881. We know of no reason why that liability could not have been proved against Duncan. It was at least a claim for unliquidated damages arising out of a contract which is provided for by section 5067 of the Bankrupt Act. In the affidavit of defense it is alleged that the defendant was informed that the New York suit had been abandoned, and that nearly nine years after the suit was commenced a supplemental complaint was filed to which Flanagan made answer but never notified Duncan of it, and that he, Duncan, had no knowledge of it; and also that the suit was tried practically on the supplemental complaint and answer. The affidavit also alleges that Flanagan was represented in that suit by Benedict, Taft & Benedict, New York lawyers, who undertook to appear for all the defendants, and who were aware that Duncan had been adjudged a bankrupt, that subsequently to his discharge Flanagan and the lawyers ignored him and undertook the conduct of the case, and that it was the duty of the lawyers to have pleaded Duncan's discharge while assuming to act for him. The affidavit further charges Flanagan with having renewed the proceedings in 1883 without notice to, or knowledge by, Duncan, and without having given him an opportunity to plead his discharge.

As Flanagan now seeks to recover in this action against Duncan upon the equitable principle of contribution, it is necessary that his hands should be clean. His good faith is impugned by the facts alleged in the affidavits of defense which we must assume to be true; and as those facts tend to show that he acted in bad faith in so conducting the defense in the New

York suit that a judgment was recovered against Duncan, which might have been prevented by pleading the discharge of the latter, and by giving Duncan no opportunity to plead the discharge himself, he is certainly not entitled to judgment in this action for want of a sufficient affidavit of defense.

The defendant has a right to be heard by a

jury upon his allegations of fact. Whether the defendant can plead his discharge against the present claim of the plaintiff is a question which can be determined on the trial after all the facts on both sides are brought out.

Judgment reversed, and record remitted for further proceedings.

KANSAS SUPREME COURT.

ATCHISON, TOPEKA & SANTA FÉ
R. CO., *Plff. in Err.*,

v.

Joel COCHRAN, Admr., etc., of John M.
Gibson, Deceased.

(....Kan....)

- *1. A stockholder of a railroad company is not liable for the negligence of the officers, agents or employes of the company in the operation of its road.
2. Under the laws of Kansas, a railroad company has the lawful right to purchase and hold stock of any other railroad company, the line of whose railroad, constructed or being constructed, connects with its own.
3. Where the rights and powers of a railroad company are those of a stockholder only, in a connecting railroad, the railroad company, on account of being a stockholder, is not liable for the negligence of the connecting railroad.
4. Where two connecting railroad companies use a station jointly, or hire one person to discharge the duties of ticket agent for both, and such person sells a ticket for carriage over one of the roads, the other company is not responsible for the road over which the ticket carries the passenger.

(February 8, 1890.)

ERROR to the District Court for Johnson County to review a judgment in favor of plaintiff in an action to recover damages for personal injuries resulting in death, and alleged to have been caused by the negligence of defendant's agents and servants. *Reversed.*

Statement by Horton, Ch. J.:

On the 31st day of May, 1887, Joel Cochran, administrator of the estate of John M. Gibson, deceased, filed his petition in the District Court of Johnson County, Kan., against the Atchison, Topeka & Santa Fé Railroad Company, alleging that "The said plaintiff herein complains of the said defendant herein for that, on the 30th day of May, 1887, he was duly appointed and qualified, and letters of administration of the estate of John M. Gibson, deceased, were issued to him by the Probate Court of Johnson County, State of Kansas, as the administrator of said estate. And the said plaintiff further states that the said defendant herein is now, and was at the date hereinafter first mentioned, a railroad corporation, duly organized under and by virtue of the laws of the State of Kansas, and then owned and op-

erated, and now owns and operates, a railroad known as the Atchison, Topeka & Santa Fé Railroad Company, and as such corporation and railroad company was then, and is now, operating, and exclusively managing and controlling, the Southern Kansas Railroad Company, a corporation duly organized under the laws of the State of Kansas; that the Atchison, Topeka & Santa Fé Railroad Company was then, and still is, a common carrier of passengers for hire upon its trains into and through Douglas and Johnson Counties, Kan., and that the said Southern Kansas Railroad Company, so operated, managed and controlled by the said Atchison, Topeka & Santa Fé Railroad Company, was then, and still is, a common carrier of passengers for hire upon its trains of cars into and through Johnson County, Kan., and then run its trains of cars over and used defendant's tracks from Kansas City, Mo., to Holliday, Kan.; and that the Town or Village of Holliday was then a regular station and depot in Johnson County, Kan., of the said Atchison, Topeka & Santa Fé Railroad Company, on the main line of its said railroad; and that said Town or Village of Holliday and the City of Olathe, in Johnson County, Kan., were then regular stations or depots on the line of the Southern Kansas Railroad.

"Plaintiff further states: On the 21st day of March, 1887, the plaintiff's intestate, John M. Gibson, had ridden, as a passenger on a regular passenger train of cars of the defendant Company, from Lawrence and Eudora, Kan.; to said station, Holliday, and that upon said day at Holliday, aforesaid, the said John M. Gibson, now deceased, purchased from said defendant Company's ticket agent at Holliday Depot, aforesaid, a ticket entitling him to be transported on that day, as a passenger, thence to Olathe, Kan., by and upon a regular passenger train of cars of—and then used by the defendant in the name of—the said Southern Kansas Railroad Company; and that in order for the said John M. Gibson, now deceased, to get upon said regular passenger train of cars, so then being operated, managed and controlled by said defendant Company, to be carried from Holliday to Olathe, aforesaid, it became and was necessary for the said John M. Gibson, now deceased, to walk across the interjacent railroad tracks belonging to said defendant Company, and then being used by said defendant Company and said Southern Kansas Railroad Company with their locomotive engines and passenger and freight trains of cars,—there being no other way for said decedent to get to and upon said train,—and that while the said decedent was in the act of walk-

*Head notes by Horton, Ch. J.

7 L. R. A.

ing across said interjacent railroad tracks, aforesaid, at the station, and upon the invitation of said defendant Company, and for the sole purpose of boarding the regular passenger train of cars of the Southern Kansas Railroad Company, as aforesaid, to be carried thence to Olathe, aforesaid, upon said train of cars, which was then at rest, about two or three tracks remote from the platform of the said defendant's depot or ticket office, which said Southern Kansas train of cars did not then come to, nor did it intend to then come to, the platform of said depot, and which train was then about ready to start for Olathe, aforesaid, and there then being no regular crossing across said interjacent tracks, and no person there to warn him of danger, the said defendant Company then and there, to wit, on the 21st day of March, 1887, at Holliday, aforesaid, carelessly, grossly, negligently, wantonly and recklessly, by and through its said servants and employes then in charge of, and operating and running, one of its freight trains of cars, with a locomotive engine attached thereto and in motion, on one of said interjacent tracks of said defendant Company, permitted the locomotive so attached to said freight train of cars last aforesaid, without any warning of any character to said decedent of danger, to run against, strike, come in contact with and knock down, and drag in a violent and forcible manner, the said John M. Gibson, now deceased, without any fault, negligence or want of care on the part of the said decedent; and that by reason of said locomotive engine so striking him, and so knocking him down, and dragging him, the said decedent was greatly bruised, cut and mangled in and about his head, back, legs, arms and body, internally, and his right leg was broken, and in consequence thereof the said decedent became sick, sore and lame, and in consequence of said injuries, so received as aforesaid, he was confined to his bed, and suffered much mental and bodily pain and agony, from the said 21st day of March, 1887, until on or about the 30th day of March, 1887, when he died, intestate, at Olathe, Kan., and that said injuries, all and singular, so received by him as aforesaid, were the cause of the death of the said John M. Gibson, without any fault, negligence or want of care on the part of said decedent contributing thereto.

"Plaintiff further states that the said John M. Gibson, now deceased, left Mary E. Cochran, *née* Gibson, and Elizabeth J. Adams, *née* Gibson, his only children, him surviving, who are his only next of kin him surviving; and that by reason of the premises, all and singular, the said Mary E. Cochran and Elizabeth J. Adams, sole surviving children and sole next of kin, aforesaid, have been greatly damaged by the death of the said John M. Gibson, now deceased, in and to the amount of ten thousand (\$10,000) dollars, no part of which hath been paid. Plaintiff therefore, as such administrator, demands judgment against the defendant Company herein for the sum of ten thousand (\$10,000) dollars, so as aforesaid sustained, with costs of suit and equitable relief."

Trial had at the September Term of the court for 1887, before the court with a jury. The court, among other things, charged the jury as follows:

7 L. R. A.

"1. In this case the plaintiff charges the defendant Company as being the owner, or operator, controller and manager of the Southern Kansas Railroad Company, at the time his intestate, Gibson, received his alleged injuries, and therefore I charge you that the question of liability and responsibility of the defendant Company is one of fact, to be determined by you from all the testimony in the case.

"2. In determining the liability of the defendant Company, the true test is, What company had the control, direction and management of said Southern Kansas Railroad, and of the men then operating the engines and passenger trains on said road, and especially the engine and passenger train on which the plaintiff's intestate was endeavoring to take passage, if any? And in determining these questions it is your duty to take into consideration all the facts and circumstances proven by the evidence.

"3. The fact that the officials of one railroad company are officials of another railroad company, standing alone, would not make the one responsible for the negligence or default of the other; neither would the mere fact of the one railroad owning stock or bonds of another railroad company make the former company responsible for the acts of the latter. But if you find from the evidence that the Southern Kansas Railroad Company, for all practical purposes, was, at the time alleged, managed, controlled and operated by the defendant Company, being used as an auxiliary and a part of the defendant Company's system of railroads, then and in that event the defendant Company would ordinarily be responsible for the negligence, default or miscarriage of the Southern Kansas Railroad Company, its agents and employes.

"4. If in fact the defendant Company exercised and assumed the actual control of the management and operation of said Southern Kansas Railroad at the time of the alleged injuries, it would be liable for the negligence, if any, of the men in operating and managing the engines and passenger trains of the Southern Kansas Railroad Company, in failing to bring its passenger trains to the platform of the depot to receive passengers, if they did so fail, even though the men were at the time engaged in the business of another railroad company, namely, the Southern Kansas Railroad Company.

"5. If the jury find that the general management of both roads is under the control of the same officials; that the boards of directors of both roads are substantially the same persons; that a majority of the said stock of said Southern Kansas Railroad Company is owned by the Kansas City, Topeka & Western Railroad Company, which latter company is leased and operated by said defendant Company for its use and benefit, and that the balance of the stock of the said Southern Kansas Railroad Company is owned by the defendant Company; that both the defendant and the Southern Kansas Company use and occupy the same line of track from Kansas City, Mo., to Holliday, Kan.; that the same person is agent and ticket seller for both companies at said station, Holliday; that the treasurer of said Southern Kansas Railroad Company is also treasurer of the defendant Company, and that the clerical work

for said treasurer, pertaining to the Southern Kansas Company, is performed by the employees of the defendant Company; and that the general officers and offices of both companies are both one and the same,—you have a right to give such facts and circumstances due weight and consideration in arriving at your verdict.

"18. If you believe from the evidence that the defendant Company was managing and operating and controlling the Southern Kansas Railroad Company on March 21, 1887, and that said defendant Company caused the said Southern Kansas Railway Company's passenger train to stop at Holliday to receive passengers, on said day, to be carried for hire to Olathe, and that said defendant Company then had a depot building, and platform therewith connected, at Holliday, aforesaid, for the purpose of receiving and discharging passengers to and from its own passenger trains, and for the sale of tickets, and did then sell over said several railroads, then I charge you that it was the lawful duty of the defendant Company to provide or furnish reasonably safe and convenient approaches to their several passenger coaches owned and managed, operated and controlled, by said Company, and it was the duty of said Company to also use such approaches with care and due regard for the safety of passengers who were attempting to get upon such coaches by means of such approaches; and if, upon the said Company failing to do so, an injury ensued to such passenger, then the said Company will be held liable for injuries resulting therefrom, provided such injured person was not guilty of any fault, or want of ordinary care, or of any negligence contributing thereto.

"19. If the jury believe from the evidence that the deceased, on the 21st day of March, 1887, was a passenger on the defendant Company's passenger train from Eudora to Holliday, and that on reaching Holliday the deceased immediately purchased a ticket from the defendant Company's ticket agent at Holliday entitling the deceased to be carried as a passenger on the Southern Kansas Railroad passenger train from Holliday to Olathe on said day, then managed, operated and controlled by said defendant Company, and that said deceased on said day attempted to reach the Southern Kansas passenger train, bound for Olathe, in the only way provided by the Company to reach said train, which was then in waiting on a track at Holliday for passengers to Olathe, then I charge you that the deceased was a passenger at the time, and entitled to all the rights of such.

"20. I charge you that a person who has a railroad ticket, and who is present to take the train at the ordinary or usual point of departure designated by the railroad company, is a passenger, though he has not entered the car of the particular train, and in the duties towards him directly involving his safety the company is bound to extraordinary diligence, and in these duties touching his convenience or accommodation the company is bound to ordinary diligence, and this rule of extraordinary diligence applies to the receiving of passengers.

"21. When a carrier of passengers for hire by railway does not receive passengers into the car at the platform erected for that purpose, and either directs or impliedly invites passen-

gers to enter the car at an out-of-the-way place, or at a place remote some distance from such platform, it is the bounden duty of such company to use the utmost care in preventing injuries to passengers while so approaching to enter such car; and if you find, in this case, that the defendant Company was negligent, within the meaning of this instruction, and that the deceased was injured thereby; that the deceased did not contribute to such injury by his negligence,—then the plaintiff is entitled to recover.

"23. When the arrangement of a passenger railroad station or depot, whether permanent or temporary, is such that a passenger has to cross a track before entering, then such passenger has a lawful right to assume that such track may be crossed safely and that the company will not expose him to unnecessary danger; and, while the passenger himself must exercise reasonable care and prudence, his watchfulness may be naturally diminished by his reliance upon the discharge by the company of its duty to passengers to provide them with a safe passage to the train of cars."

The jury returned a verdict against the Railroad Company for \$900, and also found, among others, the following special findings of fact:

"1. Was John M. Gibson, now deceased, carried by the defendant Company, on one of its passenger trains, as a passenger, from Eudora, Kan., to Holliday, Kan., on March 21, 1887? A. Yes.

"2. Did the deceased, on reaching Holliday, purchase a ticket from the defendant's ticket agent at Holliday entitling him to be carried on said day from Holliday to Olathe on a passenger train of the Southern Kansas Railway Company? A. Yes.

"3. Had the defendant Company the control, direction and management of the Southern Kansas Railroad, and of the men then operating the engines and passenger trains of the Southern Kansas Company, and especially the engine and passenger train upon which the deceased then intended to take passage? A. Yes. . . .

"6. Was a majority of the stock of said Southern Kansas Railroad Company then owned by the Kansas City, Topeka & Western Railroad Company? A. Yes.

"7. Was the said Kansas City, Topeka & Western Railroad Company then leased and operated by the Atchison, Topeka & Santa Fé Railroad Company, for its use and benefit? A. Yes.

"8. Was the balance of the stock of the Southern Kansas Railroad Company then owned by the Atchison, Topeka & Santa Fé Railroad Company? A. Yes. . . .

"26. Was it negligence on the part of the defendant Company, when considered with all the other circumstances, in not bringing the said Southern Kansas train up to the platform so that passengers might get upon it at the time referred to? A. Yes.

"27. At the time the passengers, including the deceased, left the platform to cross the tracks to get upon said Southern Kansas train, did any person connected with either the defendant Company or the Southern Kansas Railroad Company forbid or warn passengers not to cross the tracks? A. No. . . .

"30. Did the deceased then leave the plat-

form of the depot building, and attempt to cross the track intervening the platform and the Southern Kansas passenger train referred to, for the purpose of getting upon said train to be carried from Holliday to Olathe as a passenger? A. Yes."

Judgment was entered upon the verdict of the jury. The Railroad Company excepted, and brings the case here.

Messrs. George R. Peck, A. A. Hurd and Robert Dunlap, for plaintiff in error:

The line of railway of the Southern Kansas Railway Company as constructed connected with the Atchison, Topeka & Santa Fé Railroad at Holliday, and therefore, this relation existing, the Atchison, Topeka & Santa Fé Railroad Company cannot be held liable for the negligence or the torts committed by either the Southern Kansas Railway Company or its agents or servants.

See *Atchison, T. & S. F. R. Co. v. Davis*, 84 Kan. 209, 210.

The fact that some of the officers of the two companies are the same individuals does not alter the case at all, because these individuals necessarily act in different capacities.

From this relation, the Atchison, Topeka & Santa Fé Railroad Company does not control or manage the Southern Kansas Railway, or that company.

Pullman Palace Car Co. v. Missouri Pac. R. Co. 115 U. S. 596, 597 (29 L. ed. 501, 503).

Mr. A. Smith Devenney, for defendant in error:

The Atchison, Topeka & Santa Fé Railroad Company is liable. Even if it is not as between the deceased and said Company a question of privity of contract, it is a question or matter of obligation under which the owners of the track lie to all who are induced by the Company to come there to purchase tickets for Southern Kansas Railroad Company trains, or for the transaction of business; and the Company in such case is held to the strictest care.

Campbell v. Portland Sugar Co. 62 Me. 552, 16 Am. Rep. 503; *Wibash, St. L. & P. R. Co. v. Wolff*, 13 Ill. App. 437; *Pittsburgh v. Grier*, 22 Pa. 54; *White v. Fitchburg R. Co.* 136 Mass. 331; *Johnson v. West Chester & P. R. Co.* 70 Pa. 357; *Thomp. Carr.* p. 417, § 4, note 4, pp. 419, 422, 435; 1 Rorer, Railroads, p. 639; 2 Rorer, Railroads, pp. 967, 1089, 1090, 1113, 1114; *Eaton v. Boston & L. R. Co.* 11 Allen. 500.

The first and second tracks next to the depot platform are the property of the Atchison, Topeka & Santa Fé Railroad Company; it permitted the Southern Kansas Railroad Company to use them. In such case the Atchison Company is liable for the injury which grew out of the negligence of the Southern Kansas Company in using such tracks.

Maron & A. R. Co. v. Mayes, 49 Ga. 355, 15 Am. Rep. 674; *Washington, A. & G. R. Co. v. Brown*, 84 U. S. 17 Wall. 45 (21 L. ed. 675); *Mahoney v. Atlantic & St. L. R. Co.* 63 Me. 68; *Nash v. Minneapolis Mill Co.* 24 Minn. 501, 17 Alb. L. J. 435; *Abbott v. Johnston, G. & K. H. R. Co.* 80 N. Y. 27; *Ne'ron v. Vermont & C. R. Co.* 26 Vt. 717; *Ohio & M. R. Co. v. Dunbar*, 20 Ill. 623; *Pennsylvania Co. v. Gallagher*, 40 Ohio St. 637.

An act wrongfully done by the joint agency or co-operation of several railroad companies,

or done contemporaneously by them without concert, renders them liable either jointly or severally.

The New Philadelphia, 66 U. S. 1 Black, 62 (17 L. ed. 84); *Cuddy v. Horn*, 46 Mich. 596; 2 Rorer, Railroads, p. 1039, § 3; *Vary v. Burlington, C. R. & M. R. Co.* 42 Iowa, 246; *Hannibal & St. J. R. Co. v. Martin*, 11 Ill. App. 336; *Johnson v. West Chester & P. R. Co. supra*; *Bissell v. Michigan S. & N. I. R. Co.* 23 N. Y. 258.

The Atchison, Topeka & Santa Fé Railroad Company is liable because it was legally and morally bound to furnish those passengers to whom it sold tickets for the Southern Kansas train a convenient and reasonably safe means or way of egress by which they could depart from the Company's premises and right of way without injury.

Warren v. Fitchburg R. Co. 8 Allen, 227; *Hulbert v. New York Cent. R. Co.* 40 N. Y. 145; *McDonald v. Chicago & N. W. R. Co.* 26 Iowa, 124; *Hoffman v. New York Cent. & H. R. R. Co.* 75 N. Y. 605; *Stewart v. Internat. & G. N. R. Co.* 53 Tex. 239, 2 Am. & Eng. R. R. Cas. 497; *Stafford v. Hannibal & St. J. R. Co.* 22 Mo. App. 333; *Delamater v. Milwaukee & P. R. Co.* 24 Wis. 578; *Patten v. Chicago & N. W. R. Co.* 82 Wis. 533; *Gaynor v. Old Colony & N. R. Co.* 100 Mass. 211; *Hartwig v. Chicago & N. W. R. Co.* 49 Wis. 362; *Lake Shore & M. S. R. Co. v. Rosenzweig*, 4 Cent. Rep. 712, 113 Pa. 519, 26 Am. & Eng. R. R. Cas. 489; 1 Rorer, Railroads, p. 479, § 3; *Hutch. Carr.* §§ 516-519; *Shearm. & Reif. Neg.* 3d ed. § 275, and cases cited.

The Railroad Company must run its trains with reference to the passengers who may be rightfully crossing its track.

Kansas Pac. R. Co. v. Pointer, 9 Kan. 620; *Hicks v. Pacific R. Co.* 64 Mo. 430.

Horton, Ch. J., delivered the opinion of the court:

This was an action brought by Joel Cochran, administrator of John M. Gibson, deceased, against the Atchison, Topeka & Santa Fé Railroad Company, to recover damages for the killing of Mr. Gibson at Holliday in this State. At the time of his death, Mr. Gibson was a widower with two married daughters, and no other children. He was the owner of a farm in Douglas County, which was occupied by a tenant. One daughter resided at Eudora, and the other at Olathe. He sometimes made his home with one, and at other times with the other, daughter. He was about sixty-five years of age. About 8 o'clock A. M. on the 2d day of March, 1887, he left Eudora, and took passage on a regular passenger train of the Atchison Road for Holliday. The latter is a junction of the Atchison Road and the Southern Kansas Railroad in Johnson County. Mr. Gibson left the train at Holliday, and at once purchased a ticket at the office there, over the Southern Kansas Railroad, for Olathe. He was compelled to wait the coming of the Southern Kansas train from Kansas City, Mo., from about 9:30 A. M. until 11:30 A. M. The Southern Kansas train pulled into Holliday, on the second track, about 11:30 A. M.; and at this time there were six or seven passengers for Olathe and the southwest waiting. When the South-

ern Kansas came up, some of the passengers were on the south side of the platform, next to the first or main track. Among them were Mr. Gibson, the deceased, Johnson and Owens. Just as the Southern Kansas train had come to a rest, one passenger crossed the first track, and the mail carrier crossed and got over; and he was followed by Mr. Gibson. As he got upon the track, a freight train of the Atchison Road came in from the west, in front of the platform, and on the main track. The engine struck Mr. Gibson, knocked him down, and dragged him some distance between the north rail and the platform. His head was badly cut, his leg was broken in two places, and he was greatly bruised about the body, internally and externally. His daughter Mrs. Cochran came to Holliday, took him to her house at Olathe, where he died, intestate, on the 30th day of March, 1887.

It is clearly apparent from the instructions of the court and the findings of the jury that the recovery for the plaintiff below against the Railroad Company was upon the theory that Mr. Gibson, at the time of his injury, was entitled to the rights and privileges of a passenger of the Atchison Company. This, upon the claim that the Atchison Company controlled, directed and managed the Southern Kansas Railroad. The testimony in the record will not sustain a verdict upon this ground. The ticket which Gibson purchased at the station read: "Southern Kansas Ry. Co. 1st class ticket. Holliday to Olathe. (When stamped by agent at first named station.) S. B. Haynes, G. P. A. (2832.) [Reversed side stamped:] A., T. & S. F. R. R. Co. Holliday, Mar. 21, 1887. Ex. I, A. P. R."

At the station of Holliday, the second track south of the depot was used by the Southern Kansas Railway Company for its passenger trains, and the main track next to the depot, and south thereof, was used by the Atchison, Topeka & Santa Fé Railroad Company. The jury found that the majority of the stock of the Southern Kansas Railroad Company was owned by the Kansas City, Topeka & Western Railroad Company; that the balance of the stock of the company was owned by the Atchison Company; and that the Atchison Company leased and operated the Kansas City, Topeka & Western Railroad Company. The two companies, according to the testimony, are separate and independent corporations. The Atchison Company, by virtue of controlling the stock of the Southern Kansas Railway Company, was enabled to elect directors of that company. These directors elected several persons who were also officials of the Atchison Company.

In *Atchison, T. & S. F. R. Co. v. Davis*, 34 Kan. 209, 210, it is said: "That corporation had the power to purchase and hold the stock and bonds of the Wichita & Western Railroad Company, or to guarantee the payment of the principal and interest of the bonds of that company, and thereby, as a stockholder or bondholder, or as a guarantor of the bonds, to aid that company to construct its road; but, by so doing, the Santa Fé Company did not make the Wichita & Western Company its servant or agent, and did not thereby make itself responsible for the negligence or other default of the Wichita & Western Company. Laws 1873,

chap. 105; Const. Kan. art. 12, § 2; Comp. Laws 1879, chap. 23, § 82. . . . Where a parent company, operating a long line of road in the State, takes the necessary steps to construct an auxiliary railroad for the purpose of a local line in the name of another company, and, in strictly pursuing the provisions of the statute, merely furnishes aid as a stockholder or bondholder, or a guarantor of bonds, to the auxiliary company, and such auxiliary company constructs its road in its own name, it is not the servant or agent, in such construction of its road, of the parent company; and the parent company is not, on account of being a stockholder or bondholder, or guarantor of bonds of the auxiliary company, responsible for the negligence or other default of the auxiliary company in constructing its road in its own name."

In the case of *Pullman Palace Car Co. v. Missouri Pac. R. Co.* 115 U. S. 587 [29 L. ed. 499], the former company claimed that the St. Louis, Iron Mountain & Southern Railway Company was controlled by the Missouri Pacific Company, and therefore that the Missouri Pacific Company was bound, under its contract, to haul the palace cars over it. In that case, as in this, it was shown that the Missouri Pacific Company owned stock in the railway company, and in that way selected its directors. The court, however, decided that this did not give it the control of the road. Chief Justice Waite, in delivering the opinion of the court, said, among other things: "The Missouri Pacific Company has bought the stock of the St. Louis, Iron Mountain & Southern Company, and has effected a satisfactory election of directors; but this is all. It has all the advantages of a control of the road, but that is not in law the control itself. Practically, it may control the company; but the company alone controls its road. In a sense, the stockholders of a corporation own its property; but they are not the managers of its business, or in the immediate control of its affairs. Ordinarily, they elect the governing body of the corporation, and that body controls its property. Such is the case here. The Missouri Pacific Company owns enough of the stock of the St. Louis, Iron Mountain & Southern to control the election of directors; and this it has done. The directors now control the road through their own agents and executive officers, and these agents and officers are in no way under the direction of the Missouri Pacific Company. If they or the directors act contrary to the wishes of the Missouri Pacific Company, that company has no power to prevent it except by the election, at the proper time and in the proper way, of other directors, or by some judicial proceeding for the protection of its interest as a stockholder. Its rights and its powers are those of a stockholder only. It is not the corporation, in the sense of that term as applied to the management of the corporate business, or the control of the corporate property."

There is no testimony in the record tending to show that the Atchison Road leased the Southern Kansas Road, or that it was the owner of the road. The rights and powers of the Atchison Road were those of a stockholder only. Therefore the Atchison Road was not the Southern Kansas corporation, in the sense

of that term as applied to the management of the corporate business, or the control of the corporate property, of the Southern Kansas.

Under the laws of this State, a railroad company has a lawful right to purchase and hold stock of any other railroad company, the line of whose railroad, constructed or being constructed connects with its own. *Atchison, T. & S. F. R. Co. v. Fletcher*, 35 Kan. 236.

The stockholders of a railroad company may be said, in a certain sense, to control, direct and manage the road; but an action for the negligence of the officers, agents or employes of the railroad company must be brought against the company, not against the stockholders. Therefore, as the rights and powers of the Atchison Road in the Southern Kansas Railroad Company were those of a stockholder only, the Atchison Company is not responsible for the wrongful acts of omission or commission of the Southern Kansas Road. As the rights and powers of the Atchison Road in the Southern Kansas were those of a stockholder only, the instructions of the court that the jury might find from the testimony that the Southern Kansas Railroad Company, for all practical purposes, was managed, controlled and operated by the Atchison Company, was misleading. The finding of a verdict upon this and similar instructions cannot be sustained. The fact that Mr. Gibson purchased a ticket to ride over the Southern Kansas Road at the station of the Atchison Road at Holliday did not

make him a passenger of the Atchison Road, or make the Atchison Road responsible for the negligence of the Southern Kansas Road.

The jury found that the person in charge of the ticket office at the station of Holliday was agent both for the Atchison Company and the Southern Kansas Company; but even if the ticket agent at Holliday acted for the Atchison Road, and the Atchison Road sold the ticket for the Southern Kansas Road, this would not make the Atchison Road liable for the negligence of the Southern Kansas. The ticket purchased by Mr. Gibson shows that the contract of carriage was made on behalf of the Southern Kansas Railroad Company.

Upon a retrial, unless different testimony is presented, the case should not go to the jury upon the theory that the Atchison Company controlled, directed and managed the Southern Kansas Railroad. If the Southern Kansas Road was guilty of negligence in not running its passenger trains close or near to the station, that company is responsible, not the Atchison. If the Atchison Road operated its freight train negligently, and, without any contributory negligence on his part, Mr. Gibson was killed thereby, then the Atchison Company is liable, not the Southern Kansas. They were two separate corporations, and the one is not responsible for the negligence of the other.

The judgment of the District Court will be reversed, and the cause remanded.

All the Justices concur.

CONNECTICUT SUPREME COURT OF ERRORS.

William Frank PECKHAM, Exr., etc. of
Mary Yemmans, Deceased,

v.

John LEGO *et al.*

(....Conn.....)

1. A bequest of the use and improvement of testator's estate to certain persons "dur-

ing their natural lives" gives them a life estate only; and such estate will not be enlarged by the addition of the further clause: "Should it be necessary for their personal comfort to use any portion of said property, it is my will that they do so, exercising good judgment and saving as much as possible for the children born to them."

2. Permission to persons to whom the use of an estate is devised for life, to use

NOTE.—Recent decisions; devise and bequest of use of estate.

A devise of the use and occupation of land during life gives a life estate; and a further provision against alienation, and that it shall not be subject to attachment or levy, is inconsistent with the life estate, and void against judgment creditors. *McCormick Harvesting Mach. Co. v. Gates*, 75 Iowa, 343.

A widow given the use of realty during life, with the right to sell the same for her support, is vested with the life estate and power of sale to convey for her maintenance and support. *Griffin v. Griffin*, 15 West. Rep. 51, 125 Ill. 430.

A will devising to testator's wife the use of his property, real and personal, "for and during her natural life," vests in her merely the life estate; and a limitation over to remaindermen of all property which "shall not have been used up by her, or be dead or destroyed," will not operate by implication to enlarge her estate into an absolute title. *Pendley v. Madison*, 33 Ala. 484.

A will giving a testator's widow an absolute devise, followed by a provision that after her death the property, both real and personal, shall be sold, his debts paid, and the remainder shared among his 7 L. R. A.

children, gives her only an estate for life. *Geiger's App.* (Pa.) 24 W. N. C. 264.

Under a will giving testator's wife, as residuary legatee, real, personal and mixed estate for life, with the right and power to use and dispose of the income, rents, profits and interest, and to apply to her use, if needed, any part of the principal of the personal property, making her the sole judge of the need of so doing, and giving to others what should be left unapplied and unconsumed,—she may be given the possession and control of the property. *Pierce v. Sildworthy*, 81 Me. 50.

Under a will giving testator's wife all his property of every kind, to use and dispose of for her maintenance during her natural life, a conveyance of the real estate is valid if the parties act in good faith; and the purchaser is not obliged to show that there was any emergency requiring a sale. *Richardson v. Richardson*, 80 Me. 535.

Under a will giving to testator's wife the use and improvement of his whole estate, with power to use, in addition to the income, as much as she may deem necessary for her comfort and support, and to sell or dispose of the whole or any part of it at her discretion, without the necessity of a license or of pursuing any of the forms of law, and disposing of whatever remains unexpended at her death, the widow

so much of the bulk of the estate as is necessary for their comfort will give them the right to use what is necessary for their support. The determination as to the existence of such necessity is subject to the supervision of the court, and the amount to be used will be fixed at what is needed in reference to the situation and condition in life of the devisees.

3. Where the use of an estate is devised to certain persons for life with power to use the bulk of the estate if necessary for their comfort, "exercising good judgment and saving as much as possible for the children born to them," such children will take under the will the remainder after the life estate to the exclusion of the heirs-at-law of the testator.

(September 2, 1889.)

ON reservation from the Superior Court for New Haven County of a suit to obtain a construction of the will of Mary Yemmans, deceased.

The facts are fully stated in the opinion.

Mr. Samuel A. York, for Grace A. Peckham and her children, legatees under the will:

The intention of the testator is to be sought after and carried into effect. This intention is to be collected from the whole will, and not from detached portions of it.

Matthewson v. Saunders, 11 Conn. 144; *Allyn v. Mather*, 9 Conn. 125; *Kurtz v. Hibner*, 55 Ill. 514; *Reitfeld, Am. Cas.* on Wills, 540; *Bills v. Putnam*, 6 New Eng. Rep. 898, 64 N. H. 554; *Greene v. Dennis*, 6 Conn. 299.

When a person executes a will, there is a strong presumption that the testator intends to dispose of all his property.

Warner v. Willard, 4 New Eng. Rep. 467, 54 Conn. 470.

The result of leaving the estate intestate is "to be avoided if possible."

State v. Smith, 52 Conn. 533.

Mr. George P. Ingersoll, of Pigott, Pardee & Ingersoll, for the heirs-at-law:

has the right to use her best judgment and discretion in disposing of the property with a view to obtain from it her maintenance and support, without any particular regard for the interests of the heirs, if done with no purpose to defraud them. *Hoxie v. Finney*, 147 Mass. 616.

Where testator devised to his wife, during her natural life, "our homestead, with all our farm land," and in the same item subsequent words dispose of "what will not be consumed of real and personal estate at my wife's decease," and in other following items the devisees named are limited to property "not herein otherwise appropriated," the widow has authority to convey the fee of the land devised to her. *Silvers v. Canary*, 7 West. Rep. 359, 109 Ind. 237.

Bequest giving life estates only.

A will giving to testator's wife his house and lot during the term of her natural life does not give anything more than a life estate by reason of the fact that she, in another clause, is referred to as residuary legatee. *Mixter v. Woodcock*, 147 Mass. 613.

The legatee for life of chattels devised without limitation over in remainder has the absolute property in such chattels as are limited in their use. *Bartlett v. Patton* (W. Va.) 5 L. R. A. 523.

The legatee for life of chattels given by will, 7 L. R. A.

Where the intention to give a life estate is clearly expressed a power of disposal of the principal does not convert it into a fee.

2 Jarman, Wills, chap. 38, § 1; *Lewis v. Palmer*, 46 Conn. 458; *Glover v. Stillson*, 56 Conn. 316; *Stuart v. Walker*, 79 Me. 145; *Welsh v. Woodbury*, 144 Mass. 543.

The word "comfort" in this connection means support.

Webster, Dict.; *Hull v. Oliver*, 84 Conn. 405.

Upon the termination of the life estate the residuary estate should be distributed among the heirs-at-law. The courts have in some instances allowed of a devise by implication where it has been very apparent, in order to support and effectuate the intention of the testator; but in cases of this kind the implication must be a plain and not merely a possible or probable one, for, the title of the heir-at-law being plain and obvious, no words in a will ought to be construed in such a manner as to defeat it, if they can have any other significance.

Cruise, Dig. Devise, chap. 10, § 18; *Coffman v. Coffman* (Va.) 39 Alb. L. J. 265; *Schouler, Wills*, § 479.

An heir-at-law can only be disinherited by express devise or necessary implication, and that implication has been defined to be such a strong probability that an intention to the contrary cannot be supposed.

2 Jarman, Wills, 112, * 523.

Loomis, J., delivered the opinion of the court:

This suit was brought to obtain a judicial construction of the last will of Mary Yemmans, which is as follows:

"I give and bequeath to my brother, John Lero, five hundred dollars.

"I give and bequeath to W. Frank and his wife, Grace A. Peckham, the use and improvement of the whole of the remainder of the estate

without limitation over in remainder, does not take the absolute property in such chattels, but his estate is accountable to the estate of the testator for all chattels converted by him or his administrator to his use or the use of his estate. *Ibid.*

A will giving testator's wife the right to dispose of the personality "as her necessities may require and as her judgment may dictate to be right and expedient," and directing that any part of it that may remain unexpended by her shall go to the residuary legatee, gives her an absolute right of disposition of the personality, at least so far as to authorize her to give it to another person under an arrangement by which she shall be provided with an annuity and the privilege of living in the family of the other if she chooses to do so. *Schreiner v. Smith*, 33 Fed. Rep. 397.

A bequest giving to testator's wife all his property, to use to her own use and benefit as she shall deem best for herself and their daughter, is absolute to the wife, and the daughter has no recoverable interest in the property or its proceeds. *Bulfer v. Willigrod*, 71 Iowa, 620.

The phrases "such property as shall then be in her possession," and "such of said property as shall be left," do not authorize the inference that testator intended to give the wife the absolute disposal of the property devised, where part of the personality devised was of a perishable nature. *Munro v. Collins*, 13 West. Rep. 633, 95 Mo. 33.

of which I may die possessed, both real and personal, during their natural lives. Should it be necessary for their personal comfort to use any portion of said property, it is my will that they do so, exercising good judgment, and saving as much of it as is possible for the children born to them.

"I appoint W. Frank and Grace A. Peckham executors of this my last will and testament."

The following facts are found by the court: The heirs at-law in this case are John Lego, a brother of the testatrix, and the children of deceased brothers and sisters. Grace A. Peckham, one of the defendants, is a niece of the testatrix, and lived with and was brought up by her as a member of her family. After the marriage of W. Frank Peckham with said Grace, she and her husband and the testatrix lived together, with occasional intermissions, until the death of the testatrix. About the time of the execution of the will the testatrix went to live with Mr. Peckham and his wife, and continued to reside with them to the time of her death. The other heirs-at-law, though not intimate, were on friendly terms with the testatrix. The property and estate of the testatrix came to her by the will of her late husband, Joseph Yemmans. A few days after the death of her husband the testatrix made and executed the will, it having been drawn by Rev. E. E. Beardsley of New Haven.

The first question is, whether, under the second section of the will, Mr. and Mrs. Peckham take a fee or a life estate.

The intention of the testatrix, which is to control, must here be ascertained from the language employed by her in making the gift. In the first section she employed direct and fitting words in making an absolute gift to her brother, and had she intended a similar gift of the residue to the Peckhams similar language most naturally would have been employed, being already in her mind. Instead of that, however, we find language of a contrary import; language which is irreconcilable with the idea that she intended to give other than a life estate.

The language is doubly restrictive. In the first place the bequest is guarded by the words "use and improvement," which alone would distinguish the gift from a fee, but to put it beyond all controversy, the tenure of the holding is expressly given as "during their natural lives." If the section stopped here it is conceded that a doubt as to the meaning would be impossible; but the words which follow: "Should it be necessary for their personal comfort to use any portion of said property, it is my will that they do so, exercising good judgment, and saving as much as possible for the children born to them,"—it is contended remove the restriction twice applied in the preceding language, and enlarge what was plainly only a life estate and convert it into a fee. We fail to discover any such intention. The language necessarily implies a consciousness on the part of the testatrix that she had given only a life estate; but it occurs to her that the income may be so limited, and their circumstances so reduced, that they may lack the means of comfortable support, and she adds the clause under consideration to meet such an emergency, but this clause was never in-

tended to sweep away the life estate. It was only to be called into play by an emergency—by the needs of her beneficiaries. The right to resort to the principal was founded on necessity and restricted by necessity. The words are "should it be necessary." If it should not be necessary it is all a mere life estate; if it is, then the restriction is that all except the necessary portion so taken remains a mere life estate. It is said that the words "necessary for their personal comfort," are indefinite in meaning and practically unrestricted, add therefore inconsistent with any remaining life estate. We cannot accept this view.

One of the definitions of "comfort" given in Webster's Dictionary, as applied particularly in law, as well as in some other things, is "support." The language therefore must be held to mean "necessary for their support."

But it is said that it is again rendered indefinite by being all left to the judgment and discretion of the legatees as to the kind and extent of the support needed; that they may use the principal to gratify their mere whims and fancies. We do not think any such authority is given. For the time being they exercise their judgment, but are not the ultimate judges of what is necessary, but the superior court, as a court of equity, and perhaps in some cases the probate court, will review and revise their judgment, and determine whether the exigency had arisen to give them any right to resort to the principal, and if so whether they have exceeded the liberty given them.

But our attention has been called particularly to the concluding words enjoining the exercise of good judgment on their part. We do not think the question of necessity is to be so determined. But the good judgment enjoined is to be exercised in saving as much as possible for the children within the field given of what is necessary. What is necessary in law does not always, nor often, mean a strict absolute necessity. It is a relative term and variable according to circumstances. It means here, as in the case of the obligation of a husband to furnish necessities for his wife, what is needed in reference to the situation and condition in life, and within those limits much may be saved by the exercise of good judgment.

If they act within the legal limits of a necessity in law they may not be responsible, but are if they appropriate a portion of the principal when not needed for their support.

If now we have discovered the intention of the testatrix as evidenced by the language of her will, a reference to artificial rules of interpretation would seem unnecessary; but as some of these rules were referred to in the discussion of this case as being opposed to the construction we have adopted, a brief discussion of the matter may seem desirable.

Hall v. Culver, 84 Conn. 404, was referred to as indorsing the principle that "where an estate for life is given, with power in the devisee to sell and dispose of it at his own discretion and for his own use, he takes a fee."

In *Lewis v. Palmer*, 46 Conn. 453, Carpenter, J., in giving the opinion of this court, very properly calls attention to the fact that the above proposition was stated as one which the counsel on both sides conceded, and that the court without discussing it immediately

passed to the consideration of another question regarded as controlling, namely, whether the power of sale as there given was absolute or contingent. The language to be interpreted was as follows: "I give all my estate to my beloved husband, Ransom Culver, to use and improve during his natural life, and if he should want for his support to sell any part or the whole of it for his maintenance, my will is that it shall be at his disposal." In construing this language the court said: "The great object is of course to ascertain the intention of the deviser. If she had designed to give her husband the entire estate, it would have been very easy and very natural for her to say it in short and direct terms, or to place the disposal of it at his discretion, without imposing a condition. But she gives him the disposal only 'if he should want for his support to sell any part or the whole of it for his maintenance.' This language very clearly implies a limitation or restriction of the power to a case of necessity. The sale is to be proportioned to the extent of the necessity."

It will be seen that the court construed the authority to sell substantially as we do in the present case. So that even if the proposition referred to is a sound one, it would not apply to this case any more than to that one. But the proposition has been materially modified by the later utterances and decisions of this court.

In *Lewis v. Palmer*, *supra*, the words of the will were: "I do give and devise unto my said sister, Sarah Palmer, the use of all the rest of my real estate that I may have or leave at my death, during her natural life, and for her to dispose of as she may think proper, right or just." Here was plainly an unrestricted power of disposal at discretion, and yet the court did not hold that the legatee took a fee. The question, it is true, was left open, as the case could be disposed of upon another ground, yet the discussion plainly showed that the court was prepared to hold that a life estate created by express words would not be enlarged to a fee by the power of sale.

Afterwards, in *Glover v. Stillson*, 56 Conn. 316, the court was called upon to construe a will where the words were: "I give the residue of my estate, both real and personal, unto my sisters Polly A. Stillson and Mary B. Stillson, for the term of their natural lives, hereby empowering my said sisters to dispose of any portion of my estate, either real or personal, if they should so desire." The court held that the sisters took only a life estate notwithstanding their unrestricted power of disposal, and in giving the opinion of the court, Carpenter, J., said: "We are asked to say that the power of sale enlarges an express life estate to a fee. If we do so, what becomes of the intention of the testator? His intention to give pecuniary legacies to the parties named, and the residue to the orphan asylum, is just as certain, and, we may add, just as provident, as the intention to provide for his sisters; and that intention by the construction contended for is wholly defeated. The power of sale may, in doubtful cases, aid in ascertaining the intention; but to give it an artificial and technical force and thereby defeat the manifest intention of the testator is wholly inadmissible."

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These utterances we think are in accord with the decided preponderance of judicial authority in the United States.

Chancellor Kent, in volume 4, side page 536, seventh edition of his Commentaries, summarizes the settled doctrine as follows: "If an estate be given to a person generally, or indefinitely, with a power of disposition, it carries a fee; unless the testator gives to the first taker an estate for life only, and annexes to it a power of disposition of the reversion. In that case the express limitation for life will control the operation of the power, and prevent it from enlarging the estate to a fee."

It remains for us to consider a still more difficult question in regard to the disposition of the reversion—whether it belongs to all the heirs of the testatrix as intestate property, or whether the will takes hold of it and sufficiently designates the persons who are to take.

The language of the will is so unusual and so doubtful that, at the outset, we feel embarrassed by two independent principles of law operating in different directions at the same time. One requires the court to avoid if possible any construction which would result in partial intestacy. *State v. Smith*, 52 Conn. 563; *Warner v. Willard*, 54 Conn. 472, 4 New Eng. Rep. 467.

The other cautions us not to disinherit the heirs-at-law unless on so strong a probability that an intention to the contrary cannot reasonably be supposed. *Wigram, Wills*, 167; *Wilkinson v. Adams*, 1 Ves. & B. 456.

The residuary estate, it is conceded, is not expressly disposed of by the terms of the will, but there are words evincing, we think, an intention and desire on the part of the testator as to the disposition. We refer to the closing words of section 2. The testatrix, having in mind the life estate she has given, adds a conditional and restricted permission to use a portion of the principal or residuary estate, but in that connection enjoins the life tenants, in availing themselves of the permission, "to use good judgment, saving as much as possible for the children born to them." This implies that the children of the life tenants are to take the remainder—all of it.

But does it imply that they are to take it under the will or simply as her heirs-at-law? Her heirs are numerous; the record gives the names of eight besides the Peckhams, and the portion which the latter could inherit by right of representation would be insignificant as compared with the whole. If she referred at all to her own heirs she would have so stated, and would not have restricted the benefit of the saving to children born to them, the Peckhams.

We do not think the language can be satisfied at all with any such reference as suggested, but that the words imply that the Peckham children are to take the remainder under the will, and not because they may become her heirs-at-law with many others. The question of implied gifts is in every case one of intention.

There are several instances where a devise by implication has received the sanction of this court. We will mention only two. The first is the case of *Minor v. Ferris*, 23 Conn. 371. A testator, after devising his real estate for the

benefit of his wife and directing his executor to sell it within one year and to invest the proceeds in some safe property to remain a fund for her support during life, gave to his sister, if living at the decease of his wife, and if not to her children, whatever of the property might be left. He then bequeathed to his sister, in general and unrestricted terms, all his personal estate. In a subsequent clause he authorized his executors, if they deemed it advisable, to extend the time of selling the real estate for eighteen months, and expressed his opinion that if the property was well sold and invested the interest would support his wife; then he repeated his bequest to his sister, or if deceased to her children, of all his personal property; adding "if my wife has sufficient to support her." Counsel for the sister contended that the last clause must either be rejected as without meaning, or, as explained by the context, it must be construed to mean "as my wife has sufficient to support her," the testator having just expressed an opinion to that effect; but the court did not accept this view, but upon the ground of a prevailing intention apparent on the face of the will to provide for his wife ample support during life, and that the last clause was a qualification of preceding bequests, held that all the personal property was by implication given for the benefit of the wife during her life, upon the same terms as those upon which the real estate had been devised.

The other case is that of *Holbrook v. Bentley*, 32 Conn. 502, where a testator bequeathed to his wife the use of \$3,000 and also gave her absolutely all his household furniture with a few exceptions mentioned, and then added a clause in this form: "What follows is after the death of my executrix" (his wife). "I do will and bequeath all the remainder of my estate indiscriminately, be it money or household furniture, equally to all my grandchildren." There was thus left a considerable

amount of personal property not expressly disposed of during the life of the widow, and which would, if regarded as falling into the residuum, be left in the hands of the executrix to accumulate for the grandchildren. It was held, as this intention was improbable, and there were no words to indicate it, and no provision that the testatrix should hold the property as trustee for the grandchildren, that the will should be construed as giving by implication to the widow the use of this property for life. Here it will be seen there were no express words at all indicating a desire that the widow should have this property, and all her express bequests were precisely defined. It seems to us that in the present case there is at least as good a foundation in the will for the implication of a devise as in the cases cited.

Many similar illustrations of implied gifts might be cited from other jurisdictions, but we will refer to two cases only.

In *Edens v. Williams*, 3 Murph. 27, there was a gift of certain property to the testator's wife, and if she should prove *enccinte*, such child should be supported and educated out of the income of the property so left her, "as well as all the property I may die possessed of," with a residuary bequest to nieces. The court held that the whole estate was given by implication to the wife and child on its birth.

In *Piper's Estate*, 33 Leg. Int. 228, a direction that the mansion house should not be sold during the daughter's life, but that she might reside in it, was held to give a life estate.

The superior court is advised that under the will of Mary Yemmans, *W. Frank Peckham and his wife, Grace, take a life estate in the remainder*, with the privilege of disposing of or using any portion of the principal to the extent needed for their support and maintenance in a manner suited to their condition and circumstances in life; and that the children born to them take a vested interest in the remainder.

The other Judges concurred.

WISCONSIN SUPREME COURT.

A. G. SPAULDING & BROS., *Recept.*,
v.

Phillip BERNHARD, Garnishee of C. H.
Hammersley & Co., *Appt.*

(..... Wis.)

The approval on a legal holiday of the bond of an assignee for creditors by a court commissioner, even if it is a judicial act, is not prohibited by a statute declaring that "no court shall be opened or transact any business . . . on any legal holiday," except to instruct or discharge a jury, or receive a verdict and render judgment thereon.

(January 23, 1890.)

A PPEAL by defendant from a judgment of the Circuit Court for Ashland County in favor of plaintiff in an action to set aside an assignment for creditors for invalidity in the execution of the assignee's bond and to enforce payment of plaintiff's debt out of the assigned property. *Reversed.*

Statement by **Cassoday, J.:**

May 29, 1888, C. H. Hammersley & Co. made a general assignment to the defendant, Bernhard, for the benefit of their creditors. The assignee made and executed his bond, and the same was approved May 30, 1888. June 2, 1888, this action was commenced by the plain-

NOTE.—Holidays.

A trial of a criminal case may be had on Good Friday, a legal holiday. *Bobbitt v. State*, 87 Ala. 91.

A defendant who appears and answers to the merits in a suit begun on a legal holiday thereby
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waives the question of jurisdiction. *Williams v. Verne*, 68 Tex. 414.

There is no law of Massachusetts which forbids the transaction of business on a legal holiday. *Richardson v. Goddard*, 64 U. S. 33 How. 28 (16 L. ed. 412).

tiff, a corporation of the State of Illinois, against the assignors, and the garnishee papers were served on that day upon the assignee. July 27, 1888, judgment was entered in the principal action against the assignor. On the issues between the plaintiff and the garnishee, a trial was had by and before the court without a jury, and the court found, as matters of fact, in effect, that such assignment was made May 29, 1888, and acknowledged on that day before a notary public; that in the execution of said assignment, and the filing of the same, and the inventory, the statutes were complied with, except that the assignee's bond was, by him and his sureties, executed, and such sureties therein justified before a court commissioner on May 30, 1888; that the affidavit as to the nominal value of the assets was made before said commissioner on that day, on the reverse side of the bond; that upon said bond was indorsed in writing an approval of the same, both as to the form and the sufficiency of the sureties by said commissioner, May 30, 1888; and that the same was filed on that day with the clerk of the circuit court, by said commissioner; that the consent in writing of said assignee to take upon himself the duties of such trust was dated May 30, 1888; that the certificate of said commissioner to the copy of the assignment was made on that day; that such bond and copy of assignment, with indorsements and certificates, were filed with the clerk of the court May 30, 1888; that by virtue of said assignment the assignee took possession of the assignor's stock May 31, 1888; that said stock was inventoried at the nominal value thereof, and such inventory filed with the clerk of said court June 5, 1888; that no other bond was ever executed or relied upon except the one stated; that this action was commenced and judgment against the principal defendant taken as stated. And, as conclusions of law, the court found, in effect, that said assignment was void upon its face; that said assignee could not hold the property of the firm thereunder; that the plaintiff was entitled to judgment against the garnishee; and the same was ordered accordingly. From the judgment entered thereon the garnishee brings this appeal.

Messrs. Lennon & Sleight, for appellant:

A legal holiday is not *die non juridicus* at common law; it is such only to the extent that it is made so by a statute, and no farther.

Glenn v. Eddy, 51 N. J. L. 255; *Pfister v. State*, 84 Ala. 432; *State v. Rickette*, 74 N. C. 187; *Hamer v. Sears*, 81 Ga. 288; *Bear v. Youngman*, 1 West. Rep. 299, 19 Mo. App. 41; *Dunlap v. State*, 9 Tex. App. 179.

There is a marked distinction in this respect between legal holidays and Sundays, which should be carefully borne in mind.

"Sunday is *die non juridicus*, and, by the common law, all judicial proceedings which take place on that day are void."

Freeman, Judgm. 3d ed. § 138, citing *Chapman v. State*, 5 Blackf. 111; *Blood v. Bates*, 31 Vt. 147; *Pearce v. Atwood*, 18 Mass. 824.

That part of the statute applying to holidays is in derogation of the common law, as has been shown by the foregoing authorities, and therefore should be strictly construed. It should not be extended to anything not strictly within its purview.

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Bishop, Stat. Or. 2d ed. §§ 119, 155; *Boston Water Power Co. v. Gray*, 6 Met. 131; *Green v. Walker*, 78 Wis. 548.

Mr. Rublee A. Cole, with *Miss Kate H. Pier*, for respondent.

Cassoday, J., delivered the opinion of the court:

The only question involved in this appeal is whether the assignment was void by reason of the execution of the bond, the approval thereof by the commissioner, and the filing of the same, with a copy of the assignment, as stated, on May 30, 1888. The portion of the Statute which here requires special consideration reads: "No court shall be opened or transact any business . . . on any legal holiday, unless it be for the purpose of instructing or discharging a jury, or of receiving a verdict, and rendering a judgment thereon." Rev. Stat. § 2576, as amended by subd. 19, § 2, chap. 194, Laws 1879, and chap. 142, Laws 1885.

The 30th day of May, 1888, was a legal holiday. Rev. Stat. § 2577.

Of course there could be no valid assignment against the plaintiff as a creditor of the assignor, without the giving and filing of the requisite bond, duly approved by the court commissioner taking the same. Rev. Stat. § 1694.

It is conceded that this section of the Statute was in every respect complied with, unless the commissioner was prohibited from approving the bond, or doing the other acts named in the foregoing statement, by the provision of the Statute above quoted. The argument is, that "the circuit court, or the judge thereof in vacation," had "supervision of the proceedings in all voluntary assignments made under the provisions of" chap. 80, Rev. Stat., and could "make all necessary orders for the execution of the same;" and that the court commissioner had authority to "exercise within his county the powers of a circuit judge at chambers, in any civil action pending" therein; and hence that his approval of the bond was a judicial act, prohibited by the statutory provision quoted.

The "supervision of the proceedings" in such voluntary assignments, and the making of "orders for the execution of the same," manifestly presuppose a completed assignment, with the requisite bond, filed as required by the Statute. Assuming that the approval of the bond by the commissioner was a judicial act, still it would be an abuse of language to say that it was the transaction of any business by a court. The Statute simply prohibits any court from being open or transacting any business on any legal holiday, except as stated *supra*. The action of the commissioner in question was not the transaction of any business by any court, much less an act of the court in open court. To extend the Statute beyond its language, plainly expressed, and apply it to the action of a mere court commissioner, or even a judge at chambers, would be an attempt at judicial legislation entirely unauthorized.

There are numerous cases in the books holding, in effect, that no act will be held illegal merely by reason of being performed on such legal holiday, unless forbidden by statute. In New Jersey they have a statute prohibiting the holding of court or the exacting of compulsory labor on legal holidays. The language of

their court, in a late case, is so apposite to the case at bar that we quote: "The history of the common law and of legislation, with respect to Sunday, clearly indicates that it owes its exceptional position to a general sense of its sacred character as a holy day. To no other day—although many account other days holy—has a like distinction been accorded. When we compare the course of the common law, and legislation respecting Sunday, with the Statute now before us, a different treatment is observable. Although some of the days named are accounted holy by many, while others are national anniversaries or days when public duties are enjoined on citizens, yet there has been enacted no prohibition against the pursuit of any business or pleasure. There is no express prohibition against the service of the process of the courts. . . . The statutory declaration that these days shall be legal holidays does not indicate an intent to assimilate their status to that of Sunday. 'Holiday,' in its present conventional meaning, is scarcely applicable to Sunday. *Phillips v. Innes*, 4 Clark & F. 284. It is applicable to all and has long been applied to some of the days named. When the Statute declares them to be legal holidays, it does not permit a reference to the legal status of Sunday to discover its meaning; for it proceeds to interpret the phrase, so far as it is prohibitory, by an express enactment declaring what shall not be done thereon. What it thus expresses is prohibited; what it fails to prohibit remains lawful to be done. The plain intent of the Statute, therefore, is to free all persons, upon the days named, from compulsory labor, and from compulsory attendance upon courts, as officers, suitors or witnesses. Its true interpretation will limit the prohibition, with respect to the courts, to such actual sessions thereof as would require such attendance." *Glenn v. Eddy*, 51 N. J. L. 265.

Accordingly it was held in that case that a summons might be legally issued, tested and served on such legal holiday. To the same effect is *Smith v. Irling*, 47 Mich. 614.

In Oregon it has recently been held that although the service of process issued from a court upon a legal holiday was irregular, and might be set aside, yet that the service of notice of a contested election on that day was valid. *Whitney v. Blackburn*, 17 Or. 564.

In a case arising in this State under our statute, Judge Drummond held that, "in the absence of prohibitory legislation by the State, the docketing of a transcript of judgment on a holiday is not void, but will confer a valid lien upon the real estate of the debtor in the county where it is filed." *Re Worthington*, 16 Nat. Bankr. Reg. 54.

In that case the learned judge distinguishes *Lampe v. Manning*, 38 Wis. 673, in which the cause was tried and the judgment rendered on a legal holiday, and said: "At common law, Sunday was deemed a non-judicial day, during which no courts could transact any business or render any decree. Of course, at common law, some of the days which, under our practice, are deemed non-judicial, were unknown as such; and when they are so declared the inference would be that the prohibition extends no further than is named in the Statute."

This is in harmony with the language quoted from the New Jersey court, and there is nothing in our decisions in conflict with it. On the contrary, it has been held that our Statute "does not prohibit a justice of the peace from issuing a summons on such a holiday" (*Weil v. Geier*, 61 Wis. 414), nor "render inadmissible in evidence a deposition taken in another State on a day made a legal holiday" in this State. *Green v. Walker*, 78 Wis. 548.

We must hold that the approval of the bond in question by the court commissioner, assuming it to have been a judicial act, was, nevertheless, valid, and hence that the assignment was improperly held void for that reason.

The judgment of the Circuit Court is reversed, and the cause is remanded for further proceedings according to law.

ALABAMA SUPREME COURT.

ANONYMOUS.

(....Ala....)

1. The words "physically and incurably incapacitated from entering into the marriage state," in Code 1886, § 2222, stating a cause of divorce, mean impotency to consummate the marriage.

2. A personal examination by physicians or matrons skilled in such matters may be ordered of a woman suing for divorce on the ground of malformation or abnormal physical proportions amounting to physical inability on the part of defendant, and a similar examination of defendant may be ordered if he contests her right to relief.

(January 7, 1890.)

NOTE.—Demonstrative evidence; physical examination of party. See *Richmond & D. R. Co. v. Childrens*, 3 L. R. A. 808, 82 Ga. 719.
7 L. R. A.

APPEAL by defendant from an order of the Chancery Court for Butler County, overruling a demurrer and motion to dismiss a petition seeking a divorce upon the alleged ground of physical incapacity on the part of defendant. *Affirmed*.

The case sufficiently appears in the opinion.

Messrs. Richardson & Steiner for appellant.

Mr. Charles Wilkinson for appellee.

Stone, Ch. J., delivered the opinion of the court:

The averments of the bill in this case are too offensive to modesty to allow their publication in our reports. But, as said by *Sir William Scott* in *Briggs v. Morgan*, 8 Phillim. Eccl. 325, 1 Eng. Eccl. Rep. 408: "Courts of law are not invested with the powers of selection; they must take the law as it is imposed on them. Courts of the highest jurisdiction must

often go into cases of the most odious nature, where the proceeding is only for the punishment of the offender. Here the claim is for a remedy; and the court cannot refuse to entertain it, on any fastidious notions of its own."

Our Statute (Code 1886, § 2322) declares that either party to a marriage is entitled to a divorce from the bonds of matrimony "when the other was, at the time of the marriage, physically and incurably incapacitated from entering into the marriage state." The meaning of the words "physically incapacitated," as here used, is substantially the same as that of the word "impotent," frequently met with in divorce proceedings. It means powerless, or wanting in physical power, to consummate the marriage. Animal desire between the sexes is one of the incitements to matrimony, the lawful gratification of which is encouraged and protected alike by moral sentiment and municipal regulation. Copulation or coition, the act of gratifying sexual desire, is the consummation of marriage; inability to accomplish which, when it proceeds from incurable physical imperfection or malformation, is precisely what our Statute means and expresses by the words "physically incapacitated." "Barrenness," however, is in no sense the synonym of "impotency." We consider it unnecessary, at this stage of this case, to go further into details. 1 Bishop, on Marriage and Divorce, 6th ed. §§ 322-338 *a*, inclusive, treats the subject at length, and collates and reviews the adjudged cases. We approve his statement of the American doctrine as set forth in said section. *Devanbagh v. Devanbagh*, 5 Paige, 554, 28 Am. Dec. 443, *note*.

The chancellor overruled the defendant's demurrer, and his motion to dismiss the bill for want of equity; and the present appeal by the defendant is from his ruling. It is here contended that before seeking a divorce complainant should have submitted to a triennial test, sometimes required in the English ecclesiastical court. That being a rule of the canon, and not of the common, law, it is doubtful if it could exert any influence in our deliberations, even if uninfluenced by statute. We think, however, that our Statute forbids us to consider that rule in passing on this statutory ground of divorce.

It is contended for appellant that the averments in the present bill are not sufficiently specific. We think there is nothing in this, for very obvious reasons. We know not how the charges could be made more definite.

Questions are raised on the form of relief, and on the right to allow the amendment to the bill, which was made in the court below. There is nothing in these objections. However a sentence annulling marriage on account of impotency may have been classified or regarded under the canon law, such marriages were not absolutely void. They were only voidable at the request of the injured party. If not annulled by judicial sentence during the life of the parties, they entailed all the legal consequences of a valid marriage; and until such sentence of annulment neither party could contract other marriage. But we need not pursue this inquiry. Our Statute, in terms, makes it a ground for divorce from the bonds of L. R. A.

of matrimony; and that fixes its class and status for us.

Is the malformation or physical incapacity charged in the bill, if true, sufficient ground for divorce? Can we, as matter of law, or of indisputable fact, affirm that the charge is preposterous, and therefore untrue? Are the abnormal proportions which are charged impossible, in the nature of things? We know of no rule of law or logic by which we can reach such conclusion. We hold that the chancellor, in his decretal order overruling the demurrer and refusing to dismiss the bill, did not err.

The briefs of counsel give evidence of diligent research; and they furnish no adjudged case in which the malformation here complained of was the ground of complaint. We suppose such cases, if they exist at all, are very rare. To authorize the relief prayed, the proof should be very satisfactory, and the most direct which the nature of the question is susceptible of. The complainant must be required to submit her person to examination by physicians, or matrons skilled in such matters, to be appointed by the chancellor; and proof of such examination by the persons so appointed, showing that the fault is not with her, must be made an indispensable condition of relief. If she refuse to submit to such examination, then let her bill be dismissed. The defendant, also, should submit to skillful examination as a condition of his defense, if he contests the complainant's right of relief. But if the defense is not made as herein indicated, the chancellor should scrutinize the testimony narrowly, and have recourse to any other legal means, with a view of ascertaining if the proceedings have not become consensive and collusive. Finding such to be the case, relief should be denied, except on clear proof of the charge preferred in the bill, namely, that for the reason stated the defendant "was at the time of the marriage physically and incurably incapacitated from entering into the marriage state."

Affirmed.

STATE of Alabama, *ex rel.* ATTORNEY GENERAL,

v.

R. R. SAVAGE.

(...Ala....)

An officer is guilty of habitual drunkenness justifying his impeachment under the Constitution where he has become intoxicated six or eight times a year for more than three years last past, and his spree or fits of intoxication have lasted from one to two or more days, and once for two or more weeks.

(February 1, 1890.)

NOTE.—Impeachment *in office*.

Impeachment in office is a constitutional proceeding for punishment of an officer. *State v. O'Driscoll*, 8 Brev. (S. C.) 526.

Under a constitution providing for removal of public officers for crime, incapacity or negligence, a statute providing for removal for intoxication is valid. *McComas v. Krug*, 81 Ind. 237.

Except as provided for in the Constitution of 1875, impeachment has ceased to be a part of the

IMPEACHMENT proceedings to remove defendant from the office of Probate Judge of Cherokee County because of his alleged habitual drunkenness. *Judgment of removal.*

The facts sufficiently appear in the opinions. **Mr. W. L. Martin, Atty-Gen.,** for the State.

Messrs. Tompkins & Troy and J. A. Walden for defendant.

Stone, Ch. J., delivered the opinion of the court:

Article 7, § 1, of the Constitution (§ 4818, Code 1886), must be interpreted in the light of the object the law-making power had in view in their adoption and enactment. They pertain to official qualification and fitness, and require that the incumbents of the enumerated offices shall be free from the vices therein interdicted. In reference to habitual drunkenness, the gravamen of the present information, the purpose was to secure a calm, wise and faithful administration of the law, uninfluenced by the endangering effects of habitual intoxication. It is implied and assumed that drunkenness so clouds the intellect and inflames the passions as that official trust cannot be safely confided to those with whom excessive indulgence in intoxicating drinks has become a habit.

"Drunkenness" is that effect produced on the mind, passions or body, by intoxicants taken into the system, which so far changes the normal condition as to materially disturb and impair the capacity for healthy, rational action or conduct; which causes abnormal results, or such as would not ensue in the absence of the intoxicants,—the changed effect produced by the immoderate or excessive use of intoxicants, as contrasted with normal status and conduct.

"Habit" is customary state or disposition acquired by frequent repetition; aptitude by doing frequently the same thing; usage; established manner. When a person has repeatedly acted in a particular way at intervals, whether regular or irregular, for such length of time as that we can predicate with reasonable assurance that he will continue so to act, we may affirm that this is his habit.

The testimony, taken in its entirety, proves that the accused drank to excess—to drunkenness—six or eight times a year, and that this, with intervals of from one to two months, has, with the exception of about a year immediately succeeding his last election, in 1886, been kept up for much more than three years before

these proceedings were instituted; that his sprees or fits of intoxication lasted from one to two or more days, and once for two or more weeks, and that during his spells or sprees he frequently staggered in walking, sometimes fell to the ground, had to be led or assisted home, and was abnormally loud, if not boisterous, in his conversation. Even after the present proceedings were set on foot, he took one or more sprees. Under the definitions given above, we hold that drunkenness had become a habit with the respondent, and that at and before the commencement of this proceeding he was and is guilty of habitual drunkenness. We therefore find the charge and specification of habitual drunkenness made against respondent to be true, and that he is guilty as charged in the information. *Blaney v. Blaney*, 126 Mass. 205.

It is therefore the order and judgment of the court that the said R. R. Savage, Judge of Probate of Cherokee County, be, and he is hereby, removed from the said office of judge of probate, and that he is disqualified from holding office under the authority of this State for the term for which he was elected.

Somerville, J., concurring:

The information addressed by the grand jury of Cherokee County to this court, and filed by the Attorney-General, which is analogous to the ordinary articles of impeachment, charges the defendant, R. R. Savage, as probate judge of said county, with habitual drunkenness, as a ground of impeachment, which is one of the several causes specified in the Constitution and Statute which may be made the basis of such a proceeding.

Certain state officers, including judges of probate, are subject to impeachment and removal from office on the following grounds: Willful neglect of duty, corruption in office, habitual drunkenness, incompetency or any offense involving moral turpitude while in office, or committed under color thereof, or connected therewith. Ala. Const. 1875, §§ 1-4; Code 1886, §§ 4818, 4819.

It is not practicable, nor, so far as I know, has any court attempted, to lay down any fixed rule accurately defining what is "habitual drunkenness," or who may be deemed an "habitual drunkard."

The two phrases, "habitual drunkard" and "common drunkard," have been held in some States to be synonymous in meaning, in con-

jurisprudence of the State. It is made a criminal proceeding with no right of trial by jury. *State v. Buckley*, 54 Ala. 599.

The Law of 1876, making no provision for the accused to be confronted with witnesses, is unconstitutional. *Ibid.*

While the Constitution provides for the impeachment of certain officers, it leaves all other civil officers to be tried in such manner as the Legislature may provide. *Re Marks*, 45 Cal. 200.

A judge is liable to impeachment for misconduct. *Brodie v. Rutledge*, 2 Bay (S. C.) 60.

He cannot be tried by *quo warranto*. *State v. Gardner*, 43 Ala. 234.

A presiding judge for preventing his associate from delivering his opinion is liable to impeachment. *Addison, Trial*, 114; *Com. v. Addison*, 4 U. S. 4 Dall. 226 (1 L. ed. 810); *Porter, Trial*, 61.

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For an impeachment to be effectual the articles must be presented to the Senate, and a constitutional quorum of the entire membership must receive them. *Re Executive Communication of Nov. 9, 1868*, 12 Fla. 653.

A member of the House of Representatives voting for the prosecution of an impeachment is not thereby rendered disqualified, if subsequently elected to the Senate, from sitting on the trial thereof. *Addison, Trial*, 21; *Porter, Trial*, 53.

Where a charge is brought against a public officer which might furnish grounds for his removal or impeachment he is not bound to be a witness against himself. *United States v. Collins*, 1 Woods, 499.

Removal from office for an offense committed is a part of the judgment. *Com. v. Harris*, 1 Legal Gaz. (Pa.) 455.

struing statutes regulating the liquor traffic, relating to the subject of granting divorces, and providing for the custody of the estates of persons of this class. Either of the expressions may, in general terms, be defined as meaning one who drinks intoxicating liquors, to excess, with habitual frequency. Indulgence by a person, on the one hand, in occasional acts of drunkenness, would not be sufficient to bring him within the sphere of this definition; nor, on the other hand, need he be constantly drunk every day or week in a year. Nor would I be willing to say that the term necessarily involves the idea of the victim of the habit yielding to the temptation of drink whenever the opportunity is afforded, as has sometimes been intimated. Common observation shows that there are persons who are in the habit of getting drunk almost regularly every week, while they indulge in drink at no other time. There are others whose formed habit it is to fall into drunken debauches, lasting for days, and even weeks, and repeating from one year to another with a periodicity more or less regular, according to the peculiar temperament of the man. This form of alcoholism often becomes a disease, formerly characterized as a species of dipsomania, and more recently known in scientific nomenclature as methomania,—an irresistible craving for alcoholic or other intoxicating liquors, accompanied by peculiar symptoms, described by medical authors, the discussion of which, however, is foreign to the scope of this opinion. The victim acquires the habit of being attacked by these drunken sprees, or fits of intoxication. I can see no good reason why such a man would not properly come within the definition of an habitual drunkard, or should be exempt from being classed as a man of intemperate habits. In popular parlance, he certainly would be so classed.

The case of *Blaney v. Blaney*, 126 Mass. 205, is an authority on this point. The Massachusetts Statute makes "gross and confirmed habits of intoxication" a ground of divorce, without undertaking to define those terms. The evidence showed, using the language of the court in that case, that the defendant, "for a period of twelve or fifteen years, had as often as three or four times a year yielded to an impulse to

drink to excess; that on such occasions he became grossly intoxicated, continuing in that condition a week or ten days together; and that at such times he went, or was sent, to an asylum for inebriates; that when the desire for drink came upon him he could not resist; and that a single glass would bring on excessive drinking, and a renewal of gross intoxication. It was also shown that there had been no apparent improvement in his habits in this respect, and that any undue excitement would make him drink." Upon this state of facts, the Supreme Judicial Court of Massachusetts concurred in sustaining a judgment finding the defendant to have been a person of gross and confirmed habits of intoxication.

In this case, the phrase "habitual drunkenness" must be construed with reference to the particular mischief intended to be remedied by the law-makers. Being one of several causes of impeachment in office, it must be interpreted in connection with the other grounds associated with it, which are also made causes of impeachment and removal from office. They are: (1) willful neglect of duty; (2) corruption in office; (3) incompetency; or (4) any offense involving moral turpitude. These are causes which would seem to render the incumbent practically or morally unfit for office. They all tend more or less to reflect upon the dignity of office, to generate disrespect for the law, through the want of worth, moral or intellectual, in the officer, to create dissatisfaction among the people with their government, and to thus seriously cripple the administration of justice in all its departments. Any indulgence in excessive intoxication, with such habitual frequency as to produce this result, ought, in my judgment, to bring a given case within both the letter and spirit of the law.

The summary of the testimony in this case, as made in the opinion of the chief justice, is fully supported by the record. It satisfactorily shows that the respondent has during his present term of office been guilty of drunkenness which may properly be characterized as "habitual," within the meaning of the Constitution and Statutes of this State.

On these grounds, I concur in the judgment of impeachment rendered by the court.

UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF MISSOURI.

Garrett A. GARRETTSON *et al.*
v.
NORTH ATCHISON BANK.

(30 Fed. Rep. 163.)

A telegram stating that "Tate is good. Send on your paper," sent by a bank in reply to an inquiry as to whether or not it would pay such person's check for a certain amount, constitutes a

written acceptance of such check which will render the bank liable for its amount to a holder thereof who was shown the telegram and took the check for value in reliance thereon.

(June 17, 1892.)

ACTION at law to recover the amount due upon a bank check from the drawee and alleged acceptor on demurrer to the petition. *Overruled.*

NOTE.—Parol certification of check, not effectual to hold bank liable.

The certification of a check by a bank upon which it is drawn is analogous to the acceptance of a bill of exchange. *Bank of Springfield v. First Nat. Bank*, 30 Mo. App. 275.

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By certifying the check to be "good" the bank creates an obligation on its part to pay the same to the holder on demand. *Willetts v. Phoenix Bank*, 2 Duer, 121.

The bank thereby becomes primarily liable to the holder, until discharged by payment, release or the

The facts are fully stated in the opinion.

Messrs. Lancaster, Hall & Pike for defendant in support of the demurrer.

Messrs. Karnes, Holmes & Krauthoff, for plaintiffs, *contra*:

A check is a bill of exchange drawn on a bank payable on demand.

1 Randolph, Com. Paper, § 8; Byles, Bills, 18; 1 Edwards, Bills and Notes, § 19; *Barnet v. Smith*, 80 N. H. 256.

By the law-merchant of this country the certificate of a bank that a check is good is equivalent to acceptance.

Merchants Nat. Bank v. State Nat. Bank, 77 U. S. 10 Wall. 604 (19 L. ed. 1008); 2 Randolph, Com. Paper, § 642; *Kent Co. F. & M. Bank v. Butchers & D. Bank*, 16 N. Y. 125, 128; *Meads v. Albany Merchants Bank*, 25 N. Y. 143, 146.

When a check is accepted or certified the bank becomes unconditionally liable as on a certificate of deposit to the holder.

Mutual Nat. Bank v. Rotg, 28 La. Ann. 983; 2 Daniel, Neg. Inst. § 1603; 1 Randolph, Com. Paper, § 870; *Jarvis v. Wilson*, 46 Conn. 90.

It was necessary that the check should have been actually present at the time of its acceptance or certification.

Coolidge v. Puyson, 15 U. S. 2 Wheat. 66 (4 L. ed. 185); *Nelson v. Chicago First Nat. Bank*, 48 Ill. 36; 1 Daniel, Neg. Inst. §§ 490, 496; *Central Sav. Bank v. Richards*, 109 Mass. 418.

If the acceptance is written on a separate piece of paper, it has the same effect as if it were written formally on the face of the bill.

Whidden v. Merchants & P. Nat. Bank, 64 Ala. 1; *Smith v. Ledyard*, 49 Ala. 279.

There was an acceptance in this case.

Risley v. Phoenix Bank, 83 N. Y. 818; *Pope v. Bank of Albion*, 59 Barb. 226.

A promise to accept, under the statute, may be by telegram.

Molson's Bank v. Howard, 8 Jones & S. 15; *Johnson v. Clark*, 89 N. Y. 216; *Brinkman v. Hunter*, 73 Mo. 172; *Scudtler v. Union Nat. Bank*, 91 U. S. 406 (23 L. ed. 245).

Under the statute a promise to accept is constructively an actual acceptance.

Johnson v. Clark, *supra*.

No form of words, no particular expressions are necessary to constitute an acceptance of a bill of exchange.

Whitten v. Merchants & P. Nat. Bank, *supra*; *Kerry v. Cincinnati First Nat. Bank*, 85 U. S. 18 Wall. 604 (21 L. ed. 947); 3 Randolph, Com. Paper, § 648; *Coffman v. Campbell*, 87 Ill. 98.

An "indorsee of a check may sue on an agreement to accept even if made before it was drawn."

Sturges v. Chicago Fourth Nat. Bank, 75 Ill. 595; *Central Sav. Bank v. Richards*, 109 Mass. 418; *Wynne v. Ratkes*, 5 East, 514; *Boston M. Nat. Bank v. Boston State Nat. Bank*, 77 U. S. 10 Wall. 647 (19 L. ed. 1019); *Whidden v.*

Merchants & P. Nat. Bank, *supra*; *Molson's Bank v. Howard*, 8 Jones & S. 15; 2 Randolph, Com. Paper, § 647; 1 Daniel, Neg. Inst. § 568; 2 Daniel, Neg. Inst. §§ 1603, 1604; *Freund v. Importers & T. Nat. Bank*, 76 N. Y. 352.

These plaintiffs are holders for value, even though they took the check merely on account of the previously existing indebtedness.

Brooklyn City & N. R. Co. v. Nat. Bank of the Republic, 102 U. S. 14 (26 L. ed. 61); 2 Randolph, Com. Paper, §§ 463, 465, 995; 1 Daniel, Neg. Inst. § 184.

Phillips, J., delivered the opinion of the court:

This cause stands on demurrer to the petition. Omitting the formal matters, the petition alleges in substance that the Muscatine Cattle Company, on the 28th day of September, 1888, sold to one James Tate 1,000 head of cattle at the agreed price of \$22,000. Tate tendered in payment thereof his check drawn on the defendant Bank. The said cattle company, being indebted in a large sum at that time to plaintiffs, refused to deliver the cattle, or to accept said check from said Tate, unless plaintiffs would accept the said check in payment of said indebtedness of said cattle company to them, which plaintiffs declined to do unless defendant would certify said check to be good. Thereupon said cattle company sent or caused to be sent, from Pueblo, Colo., to defendant at Westboro, Mo., the following telegram: "Will you pay James Tate's check on you twenty-two thousand dollars? Answer." Which said telegram was received by defendant, whereupon it sent to said cattle company the following answer: "James Tate is good. Send on your paper." Upon the receipt of this answer said cattle company and Tate exhibited the same to plaintiffs, whereupon plaintiffs, in reliance upon said acceptance and certification of said check, agreed to accept the same for the purposes aforesaid; and the said cattle company, in reliance on said telegram, accepted said check, and delivered to said Tate said cattle, and, after duly indorsing said check to plaintiffs, delivered the same to them, which the plaintiffs accepted in reliance upon said acceptance or certification, and duly entered credit therefor on the indebtedness of said cattle company to them. The petition then alleges presentment for payment, and the refusal of defendant to pay the said check, and the due protest thereof. Judgment is asked for said sum, with interest and protest fees, damages and costs.

The demurrer is general that the petition does not state facts sufficient to constitute a cause of action. The argument in support of the demurrer is that there was no acceptance in writing, in contemplation of the statute; that the answer sent by telegram from defendant was at most but a promise to pay, and, the petition not averring that said Tate had any funds at the time in the Bank, the promise was wholly voluntary; that if the plaintiffs have any remedy it is against the payee named in the check,

Statute of Limitations. *Meads v. Albany Merchants Bank*, 25 N. Y. 143.

But a parol statement over the telephone, made by the agent of a bank, that a particular check in question is all right, is a mere representation of a 7 L. R. A.

present fact, and not an agreement to pay it at all events whenever presented within the period of the Statute of Limitations. *Bank of Springfield v. First Nat. Bank*, *supra*.

who might then have action against the defendant on the breach of promise.

A brief recurrence to some general principles applicable to bank checks may not be impertinent, as a due regard to these will materially aid in a proper conclusion. Many text writers liken such checks, in their substance, to inland bills of exchange, payable on demand. 1 Randolph, Com. Paper, § 8; Byles, Bills, 18; 1 Edwards, Bills and Notes, § 19.

Mr. Justice Swayne, in Boston M. Nat. Bank v. Boston State Nat. Bank, 77 U. S. 10 Wall. 647 [19 L. ed. 1019], very aptly notes the essential difference between checks and bills of exchange: "Bank checks are not inland bills of exchange, but have many of the properties of such commercial paper; and many of the rules of the law-merchant are alike applicable to both. Each is for a specific sum, payable in money. In both cases there is a drawer, a drawee and a payee. Without acceptance no action can be maintained by the holder upon either against the drawee. The chief points of difference are that a check is always drawn on a bank or banker. No days of grace are allowed. The drawer is not discharged by the laches of the holder in presentment for payment, unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, and the Statute of Limitations runs only from that time. It is by its face the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer. It is not necessary that the drawer of a bill should have funds in the hands of the drawee. A check in such case would be a fraud. . . . By the law-merchant of this country the certificate of the bank that a check is good is equivalent to acceptance."

It would therefore follow that when a check has been certified, which is but the equivalent of acceptance, by the drawee, it stands, in its commercial relation, as an accepted bill of exchange. From its acceptance the implication arises that it is drawn upon sufficient funds of the drawer in the hands of the drawee, and that such fund is set apart, appropriated, for the check whenever presented. It is not only an admission that the drawer then has in the hands of the drawee the required fund, but it imposes the obligation on the drawee to reserve and hold the fund for the redemption of the check when presented. *Boston M. Nat. Bank v. Boston State Nat. Bank*, *supra*.

Nor is it material, as between a bona fide transferee of the check and the drawee, that the drawer in fact had no money in the bank at the time of the acceptance. The certification operates, in such case, an effectual estoppel against such defense. *Cooke v. Boston State Nat. Bank*, 52 N. Y. 98; *Boston M. Nat. Bank v. Boston State Nat. Bank*, *supra*; *Jarvis v. Wilson*, 46 Conn. 90-92; 2 Daniel, Neg. Inst. § 1603.

Such accepted check, possessing the quality of commercial paper, passes by indorsement, and confers upon the indorsee the right of action, as upon any other chose in action. *Freund v. Importers & T. Nat. Bank*, 76 N. Y. 255, 256; *Central Sav. Bank v. Richards*, 109 Mass. 413; *Whilden v. Merchants & P. Nat. Bank*, 64 Ala. 29, 30.

It only remains, therefore, to be determined
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whether or not the defendant Bank did accept the payment of the check in question; and, if it did accept, what are the rights of these plaintiffs? The check being drawn on a Missouri bank, to be paid here, the state statute regulating the matter of acceptances of such paper applies.

"Sec. 533. *Acceptance of Bill of Exchange must be in Writing.* No person within this State shall be charged as an acceptor of a bill of exchange unless his acceptance shall be in writing, signed by himself or his lawful agent."

"Sec. 534. *Acceptance Written on a Separate Paper will Bind Acceptor, when.* If such acceptance be written on a paper other than the bill, it shall not bind the acceptor, except in favor of a person to whom such acceptance shall have been shown, and who upon the faith thereof shall have received the bill for a valuable consideration."

The Statute recognizes, what had already become the established common-law rule, that the acceptance may be written on a paper other than the bill, and of consequence, it may be made by letter, and, if by letter, also by telegram. *Phoenix Bank v. Bank of America*, 1 N. Y. Legal Obs. 26; *Espy v. First Nat. Bank*, 85 U. S. 18 Wall. 604 [21 L. ed. 947]; *Whilden v. Merchants & P. Nat. Bank*, 64 Ala. 32, 33.

"The Statute requires the promise to be in writing, but is silent as to the mode of communicating it to the party cashing the draft upon the faith of it. When it is in writing and thus acted upon, its mode of conveyance, whether by telegraph, mail or otherwise, affects no rights, and such effect must be given to it as manifest justice, and the exigencies of commerce, call for in this class of communications." *Molson's Bank v. Howard*, 40 N. Y. Super. Ct. (8 Jones & S.) 20.

The material facts disclosed by the petition are that the Muscatine Cattle Company had contracted to sell to one James Tate 1,000 head of cattle at the price of \$22,000. In payment, Tate tendered to the company his check for \$22,000, drawn on the defendant Bank. Before the vendor would accept said check, and part with his property, and before the plaintiffs would accept the check as payment on the indebtedness of the cattle company to them, the payee named in the check telegraphed to defendant and received from it the answer alleged in the petition. The question raised by the argument on the demurrer is as to whether this correspondence constitutes an acceptance within the meaning of the law-merchant and the Statute, or whether it amounts simply to a promise to accept or pay. Reading the two telegrams together, in the light of the ordinary understanding and acceptance of such terms among commercial men, it does seem to me that the plain meaning and purport of the answer was an acceptance of the check for the sum expressed in the first telegram. The language of the inquiry made in the first telegram clearly indicated that the check had been drawn by Tate on defendant for \$22,000; and defendant was asked if it would pay it. It would seem to be a strained construction that the check named was to be sent on merely for acceptance. The answer was that "Tate is good. Send on your paper." If the check had been presented to the Bank in the ordinary

way, and the drawee had indorsed thereon the word "Good," undersigned by its proper officer, it would by all the authorities have amounted to a certification of a check. *Kopy v. Cincinnati First Nat. Bank*, 85 U. S. 18 Wall. 604 [21 L. ed. 947]; 2 Randolph, Com. Paper, § 648.

The language "Send on your paper," taken in connection with both telegrams, clearly implies that it is to be sent on for payment, and not merely for acceptance.

In *Coolidge v. Payson*, 15 U. S. 2 Wheat. 66 [4 L. ed. 185], Chief Justice Marshall states the rule that "a letter, written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise." While in the subsequent case of *Boyce v. Edwards*, 29 U. S. 4 Pet. 111 [7 L. ed. 799], the ruling in *Coolidge v. Payson* was reviewed, the rule as stated by Chief Justice Marshall was not disturbed where the letter of acceptance applies directly to a particular bill drawn or to be drawn.

By § 535, Rev. Stat. Mo., it is provided that "an unconditional promise in writing to accept a bill before it is drawn shall be deemed an actual acceptance in favor of every person to whom such written promise shall have been shown, and who upon the faith thereof shall

have received the bill for a valuable consideration."

It would be difficult to perceive, on principle, what difference there could be in a promise to accept before drawing and the facts as disclosed in the petition. The defendant, in the very nature of such commercial transactions, must have understood that the purpose of the inquiry made of it was to have the payment of the check assured if taken by the party sending the telegram. The answer was shown to the plaintiffs, and in reliance upon the assurance it contained the plaintiffs accepted the check. As well settled in this jurisdiction, the application of the check by the plaintiffs to the indebtedness to them from the cattle company was for a valuable consideration, and constitutes them bona fide holders of the check, and as such the right of action thereon inures to them regardless of any equities between the original parties. *Brooklyn City & N. R. Co. v. Nat. Bank of the Republic*, 103 U. S. 14-22 [26 L. ed. 61-66]; *Pope v. Bank of Albion*, 59 Barb. 226; *Molson's Bank v. Howard*, supra; *Whilden v. Merchants & P. Nat. Bank*, 64 Ala. 1-30; *Freund v. Importers & T. Nat. Bank*, 76 N. Y. 858-859; *Johnson v. Clark*, 89 N. Y. 216; *Coolidge v. Payson*, 15 U. S. 2 Wheat. 66 [4 L. ed. 185].

The conclusion is that the petition does state facts sufficient to constitute a cause of action, and the demurrer is therefore overruled.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Emil E. DATZ *et al.*, *Plffs. in Err.*,

Orestes CLEVELAND, Mayor of Jersey City, *et al.*

Rs CLEVELAND.

(....N. J. L....)

***1. A statute authorizing the mayors of all the cities in the State to appoint the principal municipal officers, such Act to take effect in such cities as shall accept it at a popular election, declared to be constitutional.**

2. The fact that diverse results may flow from the execution of granted powers of local government does not render the enabling statute special or local. If the same powers are bestowed upon all municipalities of the same class, the law is general.

3. The statute authorized the respective mayors of the cities, by proclamation to call an election to decide upon the acceptance or rejection of the Act. Held, that in case the mayor was absent, and the charter, in such contingency, vested the powers of the mayoralty in a specified officer, such officer could proclaim the election.

4. A misrecital of some of the provisions of the Act in the proclamation of an election, —Held, not devoid of legal effect; the Act not requiring their insertion in the proclamation, and there being nothing to show that the error affected the result of the election.

*Head notes by VAN SYCKEL, J.]

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5. It is competent for the Legislature to provide for the speedy determination of the controversies relating to municipal offices, the statute securing to the incumbents of such offices the same rights, in substance, that they would have had if the procedure had been by quo warranto.

(Magie, J., dissents.)

(February 6, 1890.)

ERROR to the Supreme Court to review a judgment ousting from office the incumbents of certain municipal offices of Jersey City. *Affirmed.*

Orestes Cleveland, Mayor of Jersey City, filed a petition in the supreme court for the hearing and determination of a dispute and controversy which had arisen concerning the right or title of certain persons appointed to office in Jersey City under the provisions of the Act approved April 6, 1889, Concerning the Government of Cities of this State.

The case was argued at special term convened in accordance with the provisions of a supplement to said Act, approved April 19, 1889.

The court determined that the persons appointed under the provisions of that Act were the lawful incumbents of the offices, and gave judgment of ouster against the persons holding possession of such offices by force of an election or appointment under the previous law (51 N. J. L. 819), whereupon they took this writ.

The case is further stated in the opinion.

Messrs. Gilbert Collins and William Brinkerhoff, with **Mr. R. B. Seymour**, for plaintiffs in error:

The Act concerning the government of cities in this State, approved April 6, 1889, is unconstitutional as an unwarrantable delegation of legislative power.

State v. Gloucester Co. Circuit Judge, 50 N. J. L. 604.

The Act is unconstitutional *pro tanto*, if it permitted a submission to vote in Jersey City on April 9, 1889.

Paterson v. Society for Establishing Useful Mfrs. 24 N. J. L. 885; *State v. Gloucester Co. Circuit Judge*, *supra*; *Cooley*, Const. Lim. 758 (603).

The Act is special and local.

Darrow v. People, 8 Colo. 417; *Pawmnia Horse R. Co. v. Jersey City*, 45 N. J. L. 298; *State v. Mitchell*, 81 Ohio St. 592; *State v. Herrmann*, 75 Mo. 340.

There must be some characteristic or peculiarity plainly distinguishing the places included from those excluded to render a law of this character valid.

Atlantic City Water Works Co. v. Consumers Water Co. 44 N. J. Eq. 427; *State v. Hudson Co.* 9 Cent. Rep. 501, 50 N. J. L. 82; *State v. Camden*, 9 Cent. Rep. 497, 50 N. J. L. 87; *State v. Cape May*, 12 Cent. Rep. 809, 50 N. J. L. 558; *State v. Philbrick*, 50 N. J. L. 581; *State v. Winsor*, 2 Cent. Rep. 250, 48 N. J. L. 95.

The Act embraces special or local provisions.

Hammer v. State, 44 N. J. L. 667.

The Act conflicts with the design of the constitutional amendments.

See *People v. Hoffman*, 8 West. Rep. 523, 113 Ill. 587; *Appeal of City of Scranton School District*, 113 Pa. 176; *Evans v. Phillips*, 9 Cent. Rep. 691, 117 Pa. 236; *Frost v. Cherry*, 122 Pa. 417; *Re Henry Street*, 123 Pa. 846; *Reading v. Savage*, 12 Cent. Rep. 458, 120 Pa. 198, 124 Pa. 328; *Bumsted v. Govern*, 47 N. J. L. 368, affirmed in *Govern v. State*, 6 Cent. Rep. 294, 48 N. J. L. 612; *Zeigler v. Gaddis*, 44 N. J. L. 363; *Freeholders of Passaic v. Stevenson*, 46 N. J. L. 178.

Messrs. Leon Abbett and W. D. Edwards for defendants in error.

Van Syckel, J., delivered the opinion of the court:

An Act entitled "An Act Concerning the Government of Cities of this State," approved April 6, 1889, vests in the respective mayors of the cities of this State the power to appoint the chief municipal officers, in substitution for the previously existing methods of appointment. The law is made operative only in cities which elect to accept it, the provision therefore being as follows: "That the board of aldermen or common council of any city may by resolution, or the mayor of any city may by proclamation, submit the question of the acceptance or rejection of this Act to the voters of such city at any general or charter election to be held therein, whereof at least two days' notice shall be given by public advertisement in two daily newspapers circulating in such city, and, if a majority of those who shall vote for the acceptance or rejection thereof shall be in favor of the ac-

ceptance of this Act, then this Act shall go into effect immediately, and the grant of power herein made to any such city shall be deemed to be accepted by such city, and such city shall be bound by the terms of this Act; provided, however, that no election shall be held under the provisions of this Act after the first day of October, 1890."

At an election held in Jersey City, a majority of the popular vote was cast for the acceptance of this Act, and thereupon the mayor, pursuant to its provisions, filled the municipal offices. This litigation was instituted by the prior incumbents, who contest the validity of the Statute, as well as the legality of the election held under it.

That a law granting municipal powers may be enacted to take effect only on acceptance thereof by the people of the municipality has been too firmly established in this State to be a debatable question. *Paterson v. Society for Establishing Useful Mfrs.* 24 N. J. L. 885; *State v. Morris Co. Court of Common Pleas*, 36 N. J. L. 72; *State v. Hoagland*, 51 N. J. L. 62; *State v. Gloucester Co. Circuit Judge*, 50 N. J. L. 585.

In the nature and theory of local government, it seems to me that it must necessarily be so. I cannot see how, upon principle, it can make any difference whether the legislative enactment gives every city power to appoint its officers in such manner as it may elect, or provides a specific mode for appointment in every city that may choose to adopt it. The latter is as absolute a declaration of the legislative will, and as complete a law, as the former. In the one case as fully as in the other the legislative Act confers upon the people of the locality the power to select the local officials. The vote does not make the law. It adopts the mode of government which the law submits to acceptance. Whenever a legislative Act, no matter how specific or how general it be, puts it within the power of any political district to exercise a function of local government, such legislation is a complete and perfect declaration of the legislative will, and is not obnoxious to the charge that it delegates the law-making power. It is the subject to which it relates that gives it the character of valid legislation. The form in which it is presented for acceptance is wholly immaterial, so long as it does not contravene the Organic Law in respect to special or local laws.

The alleged vice in the law, mainly relied upon to overthrow it, is that it is local and special, and therefore proscribed by our constitutional provision. In this argument it is an obvious and fundamental fact, which must be ever present in mind, if we would not be misled, that the grant of powers of local government inevitably leads to diversity. The object of delegating powers is to enable local governments to make such diverse laws as they may deem expedient. The grant of such powers implies that diversity is requisite. If uniformity was to be preserved, the Legislature would establish an inflexible and uniform code for all localities, leaving nothing optional. If we hold that the fact that diversity arises out of the use or application of a Legislative Act is destructive of its validity, we must affirm that the Constitution of our State, in its

present form, absolutely forbids the delegation of powers of local government. Such a proposition, I think, no one will seriously advocate. Uniformity in results cannot co-exist with the right of local self-government until all men shall be of one mind. No one will assert that an Act is local or special which gives to all the cities of this State the right to establish by ordinance the mode in which their subordinate officers shall be elected. Under such a statute, one city might make the tenure of office a term of years; another, during good behavior; and a third, at the will of the common council. Such diverse results in the execution of the granted power obviously could not outlaw the Act of the Legislature. The authority granted to all is the same. The dissimilarity is in its use,—a dissimilarity inherent in the idea of local government. The uniformity exacted by the constitutional mandate must be sought for, not in the results which flow from the free, unhampered exercise of the granted power of local government, but in the fact that every locality is afforded a like right to adopt and exercise in its own way the same powers which are bestowed upon every other like political body. To the one no privilege must be offered for acceptance which is not extended to the other. The authority given must be the same. It may be executed in a different way or in the same way, at the option of the recipient. That is the uniformity to which the judicial declarations in the adjudged cases in this State must be referred.

One of the conspicuous evils at which this Constitutional Amendment was aimed was, in my judgment, this: That prior to the amendment a few persons could go before the Legislature, and secure the passage of a special law, to promote their own purposes, which might be obnoxious to the body of citizens. In such event, the only remedy was by an appeal to a subsequent Legislature; and that might be too late to wholly repair the mischief. Such enactments are now forestalled by the fact that they cannot be made applicable without being submitted to the approval of the entire body of voters. In this way, the people of every city are left free to select the mode in which they will regulate and conduct their local affairs; and it is this which impresses such legislation with the character of general, and not special, legislation. Gauged by this standard, there is no infirmity in the legislation which is the subject of this controversy. It applies to the entire class. There is no exception. It is held out to the free acceptance of all, and is capable of being accepted or rejected by every city in the State. In determining whether an Act is general or special, we must regard the time of its enactment. If it applies to all cities then in existence, it seems to be a contradiction in terms to say that it is special. To be special, it must exclude some. If it excludes none, and expressly embraces all, it must be general.

But it is insisted that, although the language used in the Statute is general in form, it is so framed that it can apply only to cities having a comptroller, treasurer, collector and the other officers named in the various sections of the Act. Jersey City, it is alleged, is the only city in the State which has all the officers named by the names and titles given in the Act.

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Conceding this to be so, the assumption that this legislation can apply to no other city rests upon a manifest misapprehension of its terms.

In 1878 the Legislature passed an Act repealing all Acts providing for the appointment of commissioners by the Senate and General Assembly to regulate municipal affairs. It was conceded that this Act affected Jersey City only, and for that reason its constitutionality was challenged in *Van Riper v. Parsons*, 40 N. J. L. 123. Mr. Justice Dixon, in an opinion the soundness of which has never been questioned, upheld the law, although there happened to be but one individual of the class or one place where it produced effects. The rule he formulated as applicable to this subject is this: "A law framed in general terms, restricted to no locality, and operating equally upon all of a group of objects, which, having regard to the purposes of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is not a special or local law, but a general law."

This subject was reviewed in this court in *Hammer v. State*, reported in 44 N. J. L. 667. Chancellor Runyon, who delivered the opinion of the court, draws so clearly the line of demarcation between Acts of this character which are valid, and those which are unconstitutional, that there can be little difficulty in classifying them. He says: "The evil which it was intended to remedy was the making of changes by the Legislature in the system of government of municipalities, sometimes at the instance of only a few, and perhaps to the detriment of the many,—changes which were not only frequent and disturbing, but often prejudicial to good government and the interest of taxpayers. . . . Normally, there can be, under our Constitution, no such thing as local or special legislation to regulate the internal affairs of municipalities; but all legislation to that end must be general, and applicable alike to all. Nor can any departure from the rule be justified, except where, by reason of the existence of a substantial difference between municipalities, a general law would be inappropriate to some, while it would be appropriate to and desirable for others. There it would be warranted, not only by the necessities of the situation, but by a reasonable construction of the constitutional provision."

The Act under consideration in that case applied, at most, only to three cities, namely, those "having a board of assessment and revision of taxes," and attempted to legislate the existing officers out of office. This court held that the fact that taxes are assessed by a board of assessors in one or more municipalities did not constitute such a difference between those municipalities and the others, where the taxes are assessed by individual assessors, as to warrant the Legislature in specially interfering in the affairs of the former, to such an extent as it attempted to do. All local governments have necessarily assessors of taxes, and therefore the mere name by which such officers are designated cannot constitute a substantial basis for classification.

I quote further from the opinion of Chancellor Runyon in the *Hammer Case* to show that this court rested its decision upon the specific

reason above given, and that it intended to exclude the inference that it was to have a wider application. *Chancellor Runyon* says: "To justify separate legislation for towns or counties, there must be something in the subject matter of the enactment to call for and necessitate such legislation. As, for example, there are in certain cities officers, such as superintendents of wharves, etc., who exercise functions peculiar to such cities. There, if the Legislature interferes at all in reference to such officers, or the subjects of their functions, it must be by legislation not appropriate to other towns, and therefore, in such cases and to that extent, separate legislation would be proper. But the assessment and revision of taxes is not peculiar to towns which have boards of assessment and revision. They are common to all." There can be no doubt that if the Act of April 5, 1878, had provided that all assessors, as well as members of boards of assessment and revision of taxes, should be appointed as in that Act directed, it would have been upheld in the *Hammer Case*. Its vice was found in the fact that it did not include officers who performed duties like to those of boards of assessment and revision of taxes, and did not, therefore, apply to the entire class.

If we follow the true line marked out in the case cited, I think we cannot fail to distinguish between the principal case and that of *Hammer v. State*, and the case of *McDermott v. Seymour*, 47 N. J. L. 174, *mem.* The first section of the Act of April 6, 1889, provides "that in the cities in this State the mayors thereof, respectively, shall appoint all city comptrollers, city treasurers and city collectors, in lieu of, and to be substituted for, and to act in place of, and who shall in each case, respectively, be invested with, and shall perform, all the powers and duties of, any such officers, by whatsoever title they may be designated, now authorized by law to act therein."

In the first place, it must be observed that this section does not require that a comptroller, a treasurer and a collector shall be appointed by the mayor of every city. The language used is not that in every city a comptroller shall be appointed, but in the cities of this State the mayor shall appoint all comptrollers. The meaning of it is that in every city where there was an officer invested by law with the functions of a comptroller, no matter by what title he was designated, the mayor should have the power of appointing him. So with regard to a city treasurer and a city collector. The draftsman of the Act was careful to exclude the idea that he intended to adopt as a basis of classification the mere name of the offices. He guardedly preserved the substance, by providing that in every city the mayor shall appoint the officer who exercises these functions, without regard to the title by which he is designated in the previously existing law. In the minor cities of this State there is no officer corresponding to a comptroller. There is none invested with like duties. That is an office created by statute, with special duties, and adapted only to the necessities of the larger municipalities. Under this Act a comptroller would be appointed for Jersey City and Newark, but could not be appointed for some of the lesser places. But this fact does not render the

Act special or local. A comptroller, like a superintendent of wharves, exercises functions peculiar to certain cities,—a peculiarity existing by reason of previous laws. There, in the language of the *Hammer Case*, "if the Legislature interferes at all in reference to such officers, or the subjects of their functions, it must be by legislation not appropriate to other towns, and therefore, in such cases, and to that extent, separate legislation would be proper."

The second section of the Act provides that, in lieu of the method of appointing or electing assessors or tax commissioners in any city, there shall be appointed by the mayor thereof a board of three tax commissioners. The duties and powers of these commissioners are clearly defined in the Act. This obviously takes this case out of the rule which condemned the legislation in the *Hammer Case*. Every city in the State has either assessors or tax commissioners; and in every city, therefore, the appointment can be made.

One more reference will be sufficient to show the purport and effect of the Act. Section 6 provides that in every city of this State the mayor thereof shall appoint a corporation counsel and a corporation attorney, who shall discharge the duties that now devolve upon similar officers and offices in each of such cities respectively. Looking at the entire Act, I am of opinion that this section is fairly susceptible of the construction that in cities where there was, before the passage of this Act, both a corporation counsel and a corporation attorney, both officers should be appointed by the mayor under this Act, but, where there was only a corporation attorney, that office alone was to be filled by the mayor. In such case the corporation counsel would exercise functions peculiar to certain cities, and would, like a comptroller, be the appropriate subject of special legislation. But, if this interpretation cannot be maintained, the result would be that both officers must be appointed where but one previously existed. This might impose an unnecessary burden; but that is a question of policy and does not affect the constitutionality of the Act. In my judgment, the purport and effect of this enactment is that all the cities of this State shall have the privilege of electing whether they will choose in the manner previously appointed by law, or by the appointment of their respective mayors, all those officers who perform the duties and functions of the officers specified in the said Act, by whatever name they may be called in their respective charters. The grant of power is alike to all. Nothing is conceded to one that is withheld from the other. No one would challenge the validity of an Act conferring upon all cities the right to choose their officers in such manner as might be ordained by the corporate body. A law is equally free from objection which permits an election between two specified modes of appointment. As has been shown, the test is not whether diversity arises in the use of the granted power, but whether any of the class to which the legislation applies are excluded by the Statute from the enjoyment of the powers and privileges which it grants. The fact that some cities are not in a condition to accept the Act does not arise out of any special or local character of the Act itself, but out of

the dissimilarity of the various charters which came into existence before the recent amendments to the Constitution. If the test is that every Act submitted for acceptance must be equally applicable and beneficial to all localities, it will be impossible to frame statutes to be submitted for adoption which will not be infirm. The framers of the Constitution could not have intended to apply such a test; otherwise, provision would have been made for abrogating all the then existing charters, that a uniform system for local governments might be provided by subsequent legislation. The amendments were to be applied to legislation for cities with charters of the most dissimilar character. It must have been apparent, upon the least reflection, that further legislation in the exigencies of the future would become necessary, and that precisely the same mode of executive powers could not be adapted to all cities. There appear to be but two methods of applying this amendment in accordance with any reasonable interpretation of its purpose. The one is to repeal all charters, and create strict uniformity; the other is to offer appropriate legislation to the acceptance of the entire class. Experience has demonstrated the futility of attempting to secure the adoption of the former course. The latter method is in strict accordance with the theory of local government, affording the widest range for the exercise of the popular will in all local affairs. The fact that it is left by the Statute to the discretion of the board of aldermen, or to the common council, or to the mayor of the city, to provide for an election, cannot affect the character of the legislation. That duty must be committed to some tribunal; and, so long as the like opportunity is given to all cities, the legislation is general, and not special. The local governments alone are responsible for a just exercise of discretion by their officials, and a want of it cannot be charged to the imperfection of the Statute. The necessity for submission to the expression of the popular will in every case will stand as a guard against vicious legislation under such a system. If that shall fail to be effective in some instances, the answer is that no mind has been sufficiently astute to devise a scheme by which even its promoter could hope to secure the highest wisdom in the formulation of positive laws.

During the struggle which has been going on, while the law on this subject has been in a formative state, to find the true, practical solution of a question which is surrounded by many difficulties, our adjudications have tended to the result which has been reached in the judgment of the court below. In my opinion, that construction presents the only practicable view which can, in conformity to reasonable rules of interpretation, be taken of this branch of the fundamental law, and it should be adhered to. It cannot be rejected without overturning the previous decision of this court.

With regard to the proviso in section 83 of the Act, that no election shall be held after October 1, 1890, it need only be said that the decision of this case is in no way dependent on it. It is entirely separable from the body of the Statute, and cannot taint or invalidate the main provisions, especially in view of the legislative declaration in section 28, "that in case, for any

reason, any section or provision of this Act shall be questioned in any court, or shall be held to be unconstitutional or invalid, the same shall not affect any other section or provision of this Act." All that is decided in this case is that the mayor had power to fill the municipal offices, in virtue of the Act of April 6, 1889.

I agree to the view taken in the court below as to the various objections which have been urged against the legality of the proceedings taken in Jersey City under this Act, and also with regard to the supplemental Act of April 19, 1889. The view of the supreme court on those questions is summarized as follows: (1) The Statute of April 6, 1889, authorized the respective mayors of the cities of this State, by proclamation, to call an election to decide upon the acceptance or rejection of the Act. *Held*, that in case the mayor was absent, and the charter, in such contingency, vested the powers of the mayoralty in a specified officer, such officer could proclaim the election. (2) A misrecital of some of the provisions of the Act in the proclamation of an election held not devoid of legal effect, the Act not requiring their insertion in the proclamation, and there being nothing to show that the error affected the election. (3) It is competent for the Legislature to provide for the speedy determination of the controversies relating to the title of municipal offices, the Statute securing to the incumbents of such offices the same rights, in substance, that they would have had if the procedure had been by *quo warranto*.

In my opinion, the judgment below should be affirmed.

Magie, J., dissents.

DELAWARE, LACKAWANNA & WESTERN R. CO., *Plff. in Err.*,

vs.
Emma TRAUTWEIN.

(.....N. J. L.....)

***1. The duty of common carriers, with respect to the transportation of persons or property, is a duty independent of contract, arising by implication of law from the fact that persons or property are received in the course of the business of such employments.**

2. The plaintiff, a passenger on the defendant's railway train, received an injury in leaving the depot grounds at the place of her destination, through the defendant's negligence. In a suit to recover damages for this injury.—*Held*, that the fact that the plaintiff was traveling on Sunday, in violation of the Act concerning vice and immorality (Rev. 1227), did not preclude her from maintaining the action.

3. The duty of a railroad company, as a carrier of passengers, does not end when the passenger is safely carried to the place of his destination. The company must also provide safe means of access to and from its stations for the use of passengers, and passengers have a right to

***Head notes by DUNN, J.**

NOTE.—Neglect of duty to furnish safe stations and platforms. See note to Walker v. Vicksburg, S. & P. R. Co. (La. Ann.) 7 L. R. A. 111; Pennsylvania Co. v. Marien, post, —, and note.

assume that the means of access provided are reasonably safe.

1. At the station at which the plaintiff alighted from the cars the track was upon an embankment above the public road, over which the railroad was carried by a bridge. The Company had a depot building for passengers on the north side, on a level with the track, at the end of which there were steps for the accommodation of passengers, leading down to the public road. On the other side of the track there was another stairway resting on the embankment of the railroad, and on the Company's grounds, leading also to the street. This stairway was built and kept in repair by private persons residing in the neighborhood, for their own convenience, as a means of access to and from the station. This stairway had been in use by passengers generally. In use as well as appearance this passageway appeared to have been provided as a means of access to and from the depot grounds. The train reached the depot at 9:35, on a dark and stormy night. There were no lights in the depot, and no person there to direct passengers the way to leave the depot grounds. The plaintiff, in endeavoring to go to this stairway for the purpose of getting to the public road, fell over some timbers, and was injured. *Held:*

(a) That the way of passage taken by the plaintiff being there by the recognition and assent of the Company, and held out by it as one of the passageways for the entrance and exit of passengers to the public street, the plaintiff was justified in using it. As against a passenger injured in using the passageway, it is immaterial at whose expense the stairway was built and kept in repair.

(b) That the Company was not absolved from the duty to keep this passageway reasonably safe by the fact that it had provided another passageway, which the plaintiff might have taken.

(February 20, 1890.)

ERROR to the Supreme Court to review a judgment in favor of plaintiff in an action to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Bedle, Muirheid & McGee for plaintiff in error.

Mr. Leon Abbett, with *Mr. William F. Abbett*, for defendant in error:

That plaintiff received the injuries while traveling on Sunday is no defense to this action.

Bucher v. Cheahire R. Co. 125 U. S. 555 (81 L. ed. 795); *Johnson v. Irasburg*, 47 Vt. 28; *McClary v. Lowell*, 44 Vt. 116; *Parker v. Latner*, 60 Me. 528; *Carroll v. Staten Island R. Co.* 58 N. Y. 126; *Mohney v. Cook*, 26 Pa. 842; *Schmid v. Humphrey*, 48 Iowa, 652; *Philadelphia, W. & B. R. Co. v. Huore de Grace Steam Tow-Boat Co.* 64 U. S. 23 How. 209 (16 L. ed. 433); *Shearm. & Redf. Neg.* 4th ed. § 104, p. 175; *Smith v. New York S. & W. R. Co.* 46 N. J. L. 7.

A railroad company must exercise particular care in cases where it furnishes a passageway or invites persons to use a particular passageway, or permits them to do so.

New Jersey R. & Transp. Co. v. West, 82 N. J. L. 91; *Vanderberck v. Hendry*, 84 N. J. L. 467; *Gaynor v. Old Colony & N. R. Co.* 160 Mass. 208; *Brassell v. New York Cent. & H. R. R. Co.* 94 N. Y. 241; 2 *Shearm. & Redf. Neg.* 7 L. R. A.

§ 406, 4th ed. p. 136; *Hulbert v. New York Cent. R. Co.* 40 N. Y. 145; *Klein v. Jewett*, 26 N. J. Eq. 475, 27 N. J. Eq. 550; *New York, L. E. & W. R. Co. v. Randel*, 47 N. J. L. 144; *Pennsylvania R. Co. v. Matthews*, 86 N. J. L. 531.

Depue, J., delivered the opinion of the court:

Einma Trautwein, the defendant in error, on Sunday, the 11th of September, 1887, was a passenger on a train of the Delaware, Lackawanna & Western Railroad Company from New York City to Lyndhurst, N. J. She took passage in the Company's train, leaving New York at 9 o'clock in the evening, and reached Lyndhurst about 9:35 P. M. She alighted from the train, and in leaving the station to reach the street fell over some railroad ties, and received injuries for which this suit was brought. On a verdict for the plaintiff below, and judgment thereon, this writ of error was brought, and errors assigned upon the rulings of the trial judge. The Act concerning vice and immorality provides that no traveling, worldly employment, or business, ordinary or servile labor, or work either upon land or water (works of necessity and charity excepted), shall be done, performed or practiced by any person or persons within this State on Sunday. The penalty prescribed for violating this Statute is the forfeiture of \$1 for every such offense, to be recovered upon conviction, and paid for the use of the poor of the township in which the offense was committed. *Rev. p. 1237, § 1.*

The section contains a proviso that it should be lawful for any railroad company in the State to run one passenger train each way over its road on Sunday for the accommodation of the citizens of the State. This proviso has the effect not only to give to the company a right to run the specified trains on Sunday but also confers the right upon the citizen to use such trains for ordinary travel. *Smith v. New York S. & W. R. Co.* 46 N. J. L. 7.

As between the company and a passenger on its train, it would seem that the latter would have the right to assume that the train on which he is received as a passenger is the train run under the protection of the proviso, whatever effect the duplication of trains might have in subjecting the company to the penalty.

There is also some evidence that the purpose of the plaintiff in going to New York on that day was to obtain from a physician a prescription and get medicine for her mother, a purpose that would probably exempt the plaintiff from the penalty prescribed by the Act. But an instruction to the jury, put on record in the bill of exceptions, put the plaintiff's case on a broader ground. The trial judge assumed that the Company was running this train in violation of the Statute, and that the plaintiff was also traveling in violation of the Statute, and instructed the jury that these circumstances did not debar the plaintiff of her right to recover. If this proposition be sound, it will not be necessary to consider the rulings of the trial judge in construing the proviso, and with respect to the purpose of the plaintiff's journey on that day on her right to recover.

In Massachusetts, Maine and Vermont it has

been held adversely to the legal proposition adopted by the trial judge. In the federal courts, and in the courts of other sister States, the decisions have been in accordance with the ruling of the trial judge. A contract to carry, made on Sunday, or to be performed on Sunday, is by force of the Statute illegal and void. No action could be maintained for the breach of such a contract, nor for services performed under it, where the right of action rests exclusively upon a contract, express or implied. *Reeves v. Butcher*, 81 N. J. L. 224.

It is also clear that a plaintiff will fail where, to make a cause of action, he is compelled to rely upon an illegal contract. But the duty of persons engaged in these public employments to safely and securely carry is independent of contract. It is a duty imposed by law from considerations of public policy, and arises from the fact that persons or property are received in the course of the business of such employments. *Marshall v. York, N. & B. R. Co.* 11 C. B. 655; *Martin v. Great Indian P. R. Co.* L. R. 8 Exch. 9; *Gladwell v. Steggall*, 5 Bing. N. C. 738; *Pippin v. Sheppard*, 11 Price, 400; *Carroll v. Staten Island R. Co.* 58 N. Y. 126.

In *Austin v. Great Western R. Co.* L. R. 2 Q. B. 442, a suit was brought against a railroad company by a child three years and two months old. The plaintiff's mother, carrying the plaintiff in her arms, took a ticket for herself, but not for the child, for passage on the defendant's railway. In the course of the journey an accident happened, and the plaintiff's leg was broken. In a suit for this injury the defendant contended that it was under no contract with the plaintiff, and that it carried the plaintiff without any hire or fare paid for carrying him. The action was held to be maintainable. Blackburn, J., said that "the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but the fact of his being a passenger casts a duty on the company to carry him safely." The English cases to this effect are cited and commented on in *Foules v. Metropolitan Dist. R. Co.* L. R. 5 C. P. Div. 157-169.

The rule may be considered as settled that a railroad company, having accepted a passenger, is under an obligation to take due and reasonable care for his safety, and that that obligation arises by implication of law, independent of contract. To give the plaintiff a standing in court to sue for the injury, she has no need of the aid of a contract which was illegal.

Nor was the plaintiff's violation of the Sunday Law, in a legal sense, the cause of her injury. It was only the occasion for an injury by the defendant's wrongful act, and hence her wrong-doing did not contribute to the injury in such a sense as to deprive her of her right of action. It was merely a condition, and not a contributory cause, of the injury.

Thus in *White v. Lang*, 128 Mass. 598, it was held that if a person, while unlawfully traveling on Sunday, is injured by the assault of a dog, the act of traveling was not a contributory cause of the injury, and that he could, notwithstanding his own violation of the law, maintain his action against the owner of the dog. In sustaining the suit, the court said: "If a person who is at the time acting in violation of law receives an injury caused by the wrongful or

negligent act of another, he may recover therefor if his own illegal act was merely a condition, and not a contributory cause, of the injury. . . . It is true that, if he were not traveling, he would not have received the injury; but the act of traveling is a condition, and not a contributory cause, of the injury." The 92d section of the Road Act (Rev. 1012) provides that all wagons and other wheel carriages of every kind or description, traveling or passing on the highways within this State, belonging to residents therein, shall track on the ground not less than four feet and ten inches, under the penalty of \$5 for each offense, to be recovered, one moiety of which is to be paid to the overseer of the highways, and the other to the informer. The penalty in this Statute, like that in the Sunday Law, is prescribed for the purpose of prohibition, and not revenue, and a citizen traveling a public highway with a wagon of a narrower track than that named in the Statute is engaged in violating the law. In some parts of this State the use of pleasure and business wagons of the New York gauge, which is narrower than that of our Statute, is quite common. In collision cases on public highways or at railroad crossings, the defense that plaintiff is debarred of his action on the ground of contributory negligence, for the reason that the wagon which he was driving did not conform to the statutory gauge, has never occurred to counsel, who are usually astute in discovering grounds of defense under the doctrine of contributory negligence. In my experience, it has never been thought worth while to inquire in such cases as to the track of the wagon injured or destroyed in such a collision, and a defense on that ground would obviously receive no consideration. The cases sustaining the ruling of the trial judge on this head are numerous. They are cited and approved by leading text writers in discussing this subject. Bishop, Non-Cont. Law, §§ 63, 64; 2 Wood, Railway Law, § 318; Beach, Contrib. Neg. § 81; Cooley, Torts, 2d ed. 178, *155 *et seq.*, and notes.

On principle, as well as by the weight of authority, the ruling of the trial judge was correct.

The station at which this accident happened was located upon an embankment elevated above the public road, which crosses the railroad under a bridge carrying the railroad over the public road. The Company had a depot building for the reception of passengers on a level with the track on the north side of its track. At the west end of this building there were steps for the accommodation of passengers, leading down to the public road. On the south side of the embankment there was a stairway leading also to the public road, built by private persons residing in that neighborhood for their own convenience and used by passengers as means of access to and from the station. The Company did not construct or keep this stairway in repair. The stairway rested against the embankment of the railroad. It was on the Company's grounds, and led to the public street. From the depot building to the top of this stairway there was a gravel walk, and the employes of the Company testified that the passage was kept free and open and unobstructed. It was apparently a way provided as a means of access to and from the Com-

pany's depot grounds. On the occasion when the plaintiff received her injury the train reached the station at 9:35 P. M. The night was dark and stormy. There was no light in or about the depot building, and no person there to direct passengers as to the way to leave the depot grounds. The plaintiff, in crossing the tracks on her way to the stairway, fell over some timber, and received the injury for which she sues. The plaintiff testified that the only time she was at that depot before that night she used this stairway, and that she knew of no other passage to or from the depot. The judge submitted to the jury the question whether the plaintiff was justified in using this way out from the depot, in this language: "Did the plaintiff do right in taking this way out? That depends upon the question whether this way of passage was there by the recognition, procurement or assent of the Company, as a means for the entrance and exit of passengers. Proof of such approval by the Company, or of its recognition, need not be made by any resolution or declaration of the Company, or of its agents. If to persons of ordinary understanding and discernment it appeared to be such a way, and by the Company it was allowed to remain and be in use by passengers going to or from trains, anyone going to and from a train as a passenger was authorized to make use of it. If the Company permitted it to be done openly, so that persons of reasonable judgment and discernment would conclude it to be a means of entrance and exit, then any passenger was authorized to take it and use it. It is submitted to you as a question of fact whether, to an ordinary observer, this was held out as one of the passageways from the depot to the public street. If so, any passenger, unwarned, might use it as such. If you should so find, it is entirely immaterial who built the stairway or who kept it in repair."

The duty of a railroad company, as a carrier of passengers, does not end when the passenger is safely carried to the place of his destination. The company must also provide safe means for access to and from its station for the use of passengers, and passengers have a right to assume that the means of access provided are reasonably safe. If there be two ways, one of which is faulty in construction or repair, a passenger using it, and injured by its faulty condition, will not be debarred of his action, although the other, which he might have used, was safer. *Longmore v. Great Western R. Co.* 19 C. B. N. S. 188.

A company, having provided one safe and convenient way of ingress and egress to and from its station, may, as contended for by the Company's counsel, suffer private persons, for their own convenience, to have and use another way of access across its depot grounds, and it may be that those who use such a way will do so at their peril, if they have notice of the private character of the way.

But that is not this case. The passageway taken by the plaintiff led to the public street, and had every indication of having been provided for use by the public, as a way to and from the station. Under the charge of the court and the finding of the jury, it must be taken to be the fact that this way of passage was there by recognition, procurement or con-

sent of the Company, and that by sufferance and use it had obtained such an appearance of a passageway passengers were invited to use, as that persons of reasonable judgment and discernment would conclude it to be a means of entrance and egress. It was of a passageway having these characteristics that the judge said that it was immaterial who built the stairway, or who kept it in repair.

In *Beard v. Connecticut & P. R. Co.*, 48 Vt. 101, there was a stairway for passengers through the company's depot building, and also a stairway at each end of the passenger platform. The stairway at the north end was open at the top, and there was nothing to indicate that it was not for the use of passengers. In fact, that stairway was built by an express company, and was used exclusively by the express company for removing express freight, and opened into the street, over a platform for loading and unloading express wagons. The plaintiff, a passenger, in attempting to pass down the stairway in the dark, fell and was injured. For this injury she sued the railroad company. The defendant's counsel requested the trial judge to charge the jury that the plaintiff could not recover unless she showed that the lower platform, in stepping from which she was injured, was on the defendant's premises. The court declined to so instruct the jury, but told the jury that the plaintiff, to recover, must establish that the company was guilty of negligence in leaving the stairway where it left the upper platform open, and without any guard or notice to warn passengers that the stairway was not to be used as a way of passage to the street below, and that she was injured by such negligence or want of care on the part of the defendant without any neglect or want of care on her part contributing to the injury. This instruction was held to be correct. The court, in sustaining the instructions of the trial judge, speaking of the likelihood of a stranger to regard that stairway as designed to furnish a safe way of getting to the street, said: "If not so designed, and it was unsafe to a stranger for such a purpose in the darkness, it was the duty of the defendant to forewarn against injury by closing up the head of the stairs, or by notifying in some effectual way against using those stairs for getting to the street. . . . In view of the unquestionable law, the request to which the exception was taken seems frivolous. The open stairs on the margin of the platform led the plaintiff, without fault on her part, to the point of harm. . . . The fact that the bottom of the pitfall on which the plaintiff landed, and thereby received hurt, was beyond the line of ownership of the defendant, neither relieves the duty, nor mitigates the fault, of the defendant."

In the case in hand, contributory negligence by the plaintiff was negatived by the jury. The case is here solely on the use of the passageway by the plaintiff, and the duty of the Company with regard to its condition and safety. We think the instruction of the trial judge on that subject was correct. A passageway having the characteristics mentioned by the judge became by the Company's act a passageway which passengers were invited to use, with respect to which the Company was under a duty to have it kept reasonably safe for use.

A passenger using the way under such an invitation was not bound to inquire by whose contributions the stairway was erected or maintained. Nor was the Company absolved from its duty in the premises by the fact that it erected and maintained at its own expense an-

other way of exit. The other exceptions on the record have been examined.

We find no error in the conduct of the trial, and the judgment should be affirmed.

Affirmed unanimously.

INDIANA SUPREME COURT.

William C. DEVOL *et al.*, *Appts.*,

v.

Presley G. DYE and Sadie Nickerson.

(....Ind....)

1. A valid gift *causa mortis* is made where one confined to his bed by a sickness which soon proves fatal, and who is fully apprised of the probable fatal termination of the malady, instructs a person to whom he has intrusted the keys to a private box in a bank vault, which box contains money, etc., to count therefrom a certain amount in gold coin and bank bills and place it in a separate package labeled as the property of a certain third person, and to deliver it to him to-

gether with a package already so labeled in the event of the donor's death, and upon being informed that the packages are prepared replics approvingly, and never again takes possession of the keys, although the money is permitted to remain in the donor's box until his death, and although the donee never constitutes the depository his trustee nor even knows of the intended gift or of the delivery.

2. The person to whom the keys are delivered and who receives the instructions in such case is a trustee for the donee and not the agent of the donor, and hence is not incompetent to testify in regard to the transaction after the donor's death.

NOTE.—*Gifts causa mortis.*

Gifts causa mortis are of a mixed nature, resembling gifts *inter vivos* in the essential requisite of delivery, and resembling legacies in being subject to the debts of decedent, and in being ambulatory or revocable. *Bloomer v. Bloomer*, 2 Bradf. 340; *Rhodes v. Childs*, 64 Pa. 18; *Roper, Leg. 2*; *Redf. Wills*, § 42; *Jones v. Brown*, 34 N. H. 439.

To establish such a gift the common law requires clear and unmistakable proof, not only of an intention to give, but of an actual gift perfected by delivery. *Hatch v. Atkinson*, 56 Me. 324.

Cases of such donations are exceptions not to be extended by way of analogy. *Headley v. Kirby*, 18 Pa. 323.

To make a valid gift *causa mortis*, it must be made during some illness or peril of the donor, and in contemplation and expectation of death from that illness or peril, and death must ensue therefrom. *Parcher v. Suco & B. Sav. Bank*, 3 New Eng. Rep. 239, 78 Me. 470; *Weston v. Hight*, 17 Me. 287; *Grymes v. Hone*, 49 N. Y. 17.

The requisites to constitute a valid gift in view of death, are: the intention of the donor to part with the ownership, established by clear and precise evidence; and a delivery appropriate to the nature of the thing given. *Madeira's App.* (Pa.) 2 Cent. Rep. 312.

An intention to give is sufficiently manifest to constitute a valid gift *causa mortis*, from the fact that a person in *extremis* takes out a package of bonds from beneath his pillow, and hands them to another, saying in substance, "These bonds are for you." *Vandor v. Roach*, 73 Cal. 614.

But where before death, intestate gave a box containing notes to his daughter, to be opened after his death, and divided between "you children," and surrendered the key to her, which she delivered to her husband; and after death of intestate she took the box, and did not divide the notes but returned them to the administrator:—*Held*, not a delivery so as to constitute a gift. *Gano v. Flak*, 1 West. Rep. 551, 43 Ohio St. 463.

Nor is it a complete *donatio causa mortis* where a depositor during her last illness delivered her savings-bank book to a third person, saying that if she died the money was for her sister in Ireland. *Walsh's App.* 1 L. R. A. 535, 123 Pa. 177.

So where a father placed his promissory note in 7 L. R. A.

the hands of a third party with directions to keep it in his possession until six months after the death of the maker, and then deliver it to the payee, it is not good either as a gift *causa mortis* or as a bequest. *Sanborn v. Sanborn* (N. H.), 18 Atl. Rep. 233, 65 N. H. —.

A certificate of deposit may be the subject of a gift *causa mortis*, and if delivered by the donor during her last illness, in anticipation of death, to a third person for the use of the donee, the title passes upon her death although it was payable to the donor's order. *Conner v. Root*, 11 Colo. 183.

Under the Colorado statutes, coverture is no obstacle to making such gift. *Ibid*.

Any act on the part of the owner of a chose in action, showing not only a present intention to transfer, but that he regarded himself as having carried his intention into effect, is sufficient without written evidence of the transaction; and there is no difference between gifts *causa mortis* and gifts *inter vivos*. *Love v. Francis*, 5 West. Rep. 753, 68 Mich. 181. See *Barker v. Frye*, 75 Me. 29; *Fletcher v. Fletcher*, 55 Vt. 325; *Eastman v. Woronoco Sav. Bank*, 136 Mass. 208; *Scott v. Berkshire Sav. Bank*, 140 Mass. 157; *Basket v. Hassell*, 107 U. S. 602 (27 L. ed. 500).

A bill of sale executed to his niece shortly before his death by an intestate who had previously had two strokes of paralysis, containing a clause empowering him to revoke the transfer at any time during his life, the instrument and the subject matter thereof being delivered to his attorney, who, after his death, delivered them to the niece,—is a gift *causa mortis*, and shows a clear intent that the niece should have the benefit of the gift unless revoked during his life. *Williams v. Guile*, 6 L. R. A. 366, 117 N. Y. 343.

Under the law in force in the provinces of Mexico during the years 1832 and 1833, it was necessary that *donatio causa mortis* be solemnized with substantially the same formalities as testaments, and should be made before witnesses other than women, who were not competent. *Morales v. Fisk*, 66 Tex. 189.

A gift *causa mortis* is an assignment perfected by delivery which debars the donor from revocation. *Bond v. Bunting*, 78 Pa. 210; *Gray's Estate*, 1 Pa. 327; *Crawford's App.* 61 Pa. 52.

Gift of bank book. See notes to *Drew v. Hagerty* (Me.) 3 L. R. A. 230; *Walsh's App.* (Pa.) 1 L. R. A. 535.

(April 12, 1890.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for Boone County in favor of defendants in an action by certain residuary legatees to recover possession of certain money claimed by defendants as a gift *causa mortis* from the testator. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. A. J. Seary, J. A. Abbett, and S. M. Ralston for appellants.

Messrs. C. E. Wesner, R. W. Harrison and B. S. Higgins for appellees.

Mitchell, Ch. J., delivered the opinion of the court:

It appears from the special finding of facts that William J. Devol, late of Boone County, died testate on the 6th day of December, 1888, leaving an estate of the probable value of \$30,000, and leaving one brother living and the descendants of three deceased brothers, as his only heirs. At, and for a long time prior to, his death, the testator had been the President of the First National Bank of Lebanon. During this time he had a tin box which he kept in a private drawer in the vault of the bank safe, and in this he kept stocks, bonds, money and other valuables belonging to him personally. Both the box and the drawer were kept locked, and no one had access to it but the testator. On the 15th day of November, 1888, being in failing health, he went South, returning to his home on the 2d day of December following, very sick. From that time until he died, which was four days after he returned, he was confined to his bed, and while he did not wholly despair of recovery, he fully realized the dangerous condition he was in, and was apprised of the probable fatal termination of his malady. Before going South, he intrusted the keys to his box and private drawer in the safe to Mr. Lane, the cashier of the bank, and these remained in the custody of Mr. Lane from that time until after the testator's death.

On the day following the one on which he returned from the South, while sick and propped up in bed, the testator declared to Mr. Lane that it had always been his purpose to give Presley G. Dye, who was a cousin, \$5,000, either in cash or bank stock, and that he had put \$2,000 in gold in a bag and marked the name of the latter upon it, and left it in the tin box in the vault. He then directed Lane to go to the bank and count out \$3,000 more in gold coin, and put it in a sack and mark it as the other sack was marked, and that he should also count out \$1,000 in currency and place it in an envelope, for Mrs. Nickerson, and put her name upon it. He then directed that in case of his death the sacks and packages should be delivered by Lane to the parties indicated by the writing thereon. The gold coin and currency were counted out of the tin box and placed in sacks and in a package, and marked by Lane as directed, after which the latter informed the testator that his directions had been carried out, to which he replied approvingly.

The sacks containing the gold coin and the package with the currency remained in the box and drawer until after the testator's death, 7 L. R. A.

Lane retaining the keys. At the time of the testator's death the tin box was found to contain, in addition to other large sums of money, a sack containing \$2,000, marked in the handwriting of the testator as follows: "\$2,000. This belongs to P. G. Dye, 11-15-1888."

The controversy here is between Presley G. Dye and Mrs. Nickerson on the one hand, the former claiming the two sacks of gold coin, the latter claiming the package containing the currency, and certain residuary legatees under the will of the testator, who assert the invalidity of the gift, and claim the whole fund as part of the residue of the testator's estate.

A gift *causa mortis* is consummated where a person in peril of death, and under the apprehension of approaching dissolution from an existing disorder, delivers or causes to be delivered to another, or affords the other the means of obtaining possession of, any personal goods for his own use, upon the express or implied condition that in case the donor shall be delivered from the peril of death, the gift shall be defeated.

Blackstone defines *donatio causa mortis* to be "a gift in prospect of death when a person in sickness, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods to keep as his own in case of the owner's death."

The chief distinction between gifts *inter vivos*, and those of the character here in question is that, while the former are consummated by delivery, the title to the property is irrevocably vested, while in the latter the title is ambulatory and inchoate until the death of the donor occurs.

The concurrence of three things is essential to the consummation of a gift *causa mortis*: (1) the thing given must have been of the personal goods of the donor; (2) it must have been given while the latter was in peril of death, or while he was under the apprehension of impending dissolution from an existing malady; and (3) the possession of the thing given must have been actually or constructively delivered to the donee, or to someone for his use, with the intention that the title should then vest, conditioned upon the death of the donor, leaving sufficient assets, in addition, to pay his debts. 8 Am. & Eng. Cyclop. Law, 1849-1254.

A mere unexecuted purpose, however clearly or forcibly expressed, so long as it rests merely in intention, is not effectual. The intention must not only have been manifested, but in addition, in order to consummate the gift, the donor must have transferred the possession of the thing to the donee in person, or to someone for his use, under such circumstances as that the person to whom delivery is made is thenceforward affected with a trust or duty in the donee's behalf. *Smith v. Ferguson*, 90 Ind. 229; *Wilcox v. Matteson*, 53 Wis. 23; *Gano v. Fisk*, 43 Ohio St. 462, 1 West. Rep. 501; *Walsh's App.* 122 Pa. 177, 1 L. R. A. 535.

No particular form of words is necessary to give effect to the transaction, if the intention of the donor sufficiently appears, and the intention to give is either accompanied with or followed by acts requisite to constitute a valid delivery. *Kentston v. Leeta*, 54 N. H. 24; *Martin v. Funk*, 75 N. Y. 184; *Coleman v. Parker*, 114

Mass. 30; *Hatch v. Atkinson*, 56 Ma. 324; *Clough v. Clough*, 117 Mass. 88.

The title of the donee in gifts *causa mortis* is of an inchoate character until the death of the donor occurs; but notwithstanding this, where the nature of the gift admits of it, a complete manual transfer of the possession of the subject should take place, and the transaction should be accompanied by words, signs or a writing adequately expressive of the donor's intention. *Flood, Wills of Pers. Prop.* 8.

It is well settled, however, that the delivery need not be made to the donee personally, but may be made to another as his agent or trustee. A delivery thus made is as effectual as though it had been made directly to the donee. Thus, in *Mitroy v. Lord*, 4 DeG. F. & J. 284, *Lord Chief Justice Turner* said: "I take the law of this court to be well settled that in order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do this by transferring the property to the persons for whom he intends to provide, and the provision will then be effectual; and it will be equally effective if he transfers the property to a trustee for the purpose of the settlement, or declares that he himself holds it in trust for those purposes, and if the property be personal, the trust may, I apprehend, be declared either in writing or by parol. *Martin v. Funk*, *supra*; *Beal v. Cronley*, 59 Cal. 665; *Hill v. Stevenson*, 63 Me. 364, 18 Am. Rep. 231; *Minor v. Rogers*, 40 Conn. 512; *Meriwether v. Morrison*, 78 Ky. 572.

It has been held that if delivery is made to a third person, with instructions to deliver to the intended donee at the death of the donor, the latter retaining dominion over it meanwhile, the delivery is ineffectual because the third person in such a case becomes merely the agent or bailee of the donor. If, however, the delivery is made to a third person for the use of the donee, or under such circumstances as indicate that the donor relinquishes all right to the possession or control of the thing given, and intends to vest a present title in the donee, the gift will be sustained. *Farquharson v. Cave*, 2 Coll. Ch. 356, 15 L. J. N. S. Ch. 187; *Flood, Wills of Pers. Prop.* 38.

Where one, in view of impending dissolution, clearly and intelligently manifests an intention to make a present gift of personal property to another, and in consummation of his intention makes such delivery to a third person for the use of the intended donee as he is then capable of making, considering the character and situation of the property, the person to whom delivery is thus made will be presumed, in the absence of contravening circumstances, to take the property as the trustee of the intended donee, and not merely as the agent of the donor. *Shackleford v. Brown*, 89 Mo. 546; *Michenor v. Dale*, 23 Pa. 59; *Sessions v. Mosely*, 4 Cush. 87.

Thus it has been said: "The death-bed delivery to a third person for the donee, which takes effect, is essentially a delivery, not to an agent of the donor, but to a trustee for the donee." 2 Schouler, *Pers. Prop.* § 176; *Bouts v. Ellis*, 7 L. R. A.

17 Beav. 121; *Grymes v. Hone*, 49 N. Y. 17; *Borneman v. Sidlinger*, 15 Me. 429; *Drury v. Smith*, 1 P. Wms. 404.

Expressions are sometimes found in the books to the effect that gifts *causa mortis* are not favored in law because of the opportunity which they afford for the perpetration of frauds upon the estates of deceased persons by means of perjury and false swearing; but gifts of the character of those in question are not to be held contrary to public policy, nor do they rest under the disfavor of the law, when the facts are clearly and satisfactorily shown which make it appear that they were freely and intelligently made. *Ellis v. Secur*, 81 Mich. 145.

While every case must be brought within the general rule upon the points essential to such a gift, yet, as the circumstances under which donations *mortis causa* are made must of necessity be infinite in variety, each case must be determined upon its own peculiar facts and circumstances. *Dickeschied v. Exchange Bank*, 25 W. Va. 841; *Kiff v. Weaver*, 94 N. C. 274, 55 Am. Rep. 601.

The rule requiring delivery, either actual or symbolical, must be maintained, but its application is to be mitigated and applied according to the relative importance of the subject of the gift and the condition of the donor.

The intention of a donor in peril of death, when clearly ascertained and fairly consummated within the meaning of well-established rules, is not to be thwarted by a narrow and illiberal construction of what may have been intended for and deemed by him a sufficient delivery. The rule which requires delivery of the subject of the gift is not to be enforced arbitrarily. *Stephenson v. King*, 81 Ky. 425, 50 Am. Rep. 172.

It clearly appears, from the facts found in the present case, that the sacks containing the gold coin, as well as the package in which the currency was sealed, were delivered to the cashier of the bank for the use of the intended donees. Each parcel of money contained written upon it what in effect amounted to a declaration of a trust in favor of the person who was indicated to be the owner of its contents. The money was carefully counted and placed in packages, thus separating it from all the other money and valuables of the donor. Upon each parcel or package appeared a written declaration, made by or at the request of the donor, indicating as plainly as language could, the intention of the latter in respect to the title and ownership of the property. The character of the property was such that no prudent person would have directed its removal from the vault of the bank. The donor had relinquished the key to his private drawer and tin box to the cashier of the bank, thereby effectually surrendering, so far as could be, all dominion over the property, and affording to the donees the means of obtaining possession of it.

Without pausing to review the authorities, it is sufficient to say that where property is delivered to a third person, for the use of another, as a gift *causa mortis*, and its delivery is accompanied by a written declaration, clearly indicating that it is delivered for the use or upon a trust for an intended donee, or where a death-bed delivery is made in the presence of

(April 2, 1890.)

witnesses who are disinterested and called for the purpose, the intention of the donor should not be permitted to fail by a narrow and illiberal construction, in case a delivery corresponding with the condition of the donor and the situation of the property was actually made. *Ellis v. Seor, supra; Williams v. Guile*, 117 N. Y. 348, 6 L. R. A. 366, 2 Schouler, Pers. Prop. § 179.

Our conclusion is that the facts found show a valid delivery to the cashier for the use of the donees, and that the delivery was made in view of impending death.

The conclusion having already been reached that the cashier of the bank was not the agent of the donor, it follows that he was not incompetent to testify, even if the appellant's contention should be conceded that, as the agent of the donor, he would have been incompetent.

It may not be amiss to say that it was not necessary that the donees should have constituted the cashier of the bank their bailee or trustee, nor that they should have known of the intended gift, or of the delivery, in order to make it an effectual delivery to him as their trustee. The gift being beneficial to them, their acceptance of it is presumed until it is renounced. *Blasdel v. Locke*, 52 N. H. 238; *Darland v. Taylor*, 52 Iowa, 508; *Trouell v. Carraway*, 10 Helsk. 104.

The judgment is affirmed, with costs.

Valentine BORN, Appt.,

FIRST NATIONAL BANK of Indianapolis.

(...Ind....)

1. One who accepts a certified check in the usual course of business does not assume the risk of the solvency of the bank upon which it is drawn, but in case it proves insolvent he may look to the drawer for payment.
2. The acceptance by a creditor of a certified check from his debtor does not *ipso facto* constitute a payment of the debt.
3. The mere acceptance by a creditor of a certified check from his debtor does not constitute a novation.

NOTE.—Payment by check.

A check received for a debt is merely a conditional payment. *Kilpatrick v. Home Bldg. & L. Assn.*, 11 Cent. Rep. 430, 119 Pa. 30; *Cannonsburgh Iron Co. v. Union Nat. Bank* (Pa.) 4 Cent. Rep. 258.

Payment by check is not absolute, but conditional, unless expressly so agreed; and where a check is returned by the creditor and used by the debtor, the debt remains. *Good v. Singleton*, 39 Minn. 340.

The burden of proof is on the maker of a note to overcome the presumption that the check was taken as a conditional payment. *Brown v. Scott*, 51 Pa. 357; *League v. Waring*, 85 Pa. 244.

Surrender by the creditor of the note of the debt or upon such payment will not overcome the presumption that it was a conditional payment. *Cannonsburgh Iron Co. v. Union Nat. Bank, supra*.

But if the party from whom the check is received sustains a loss by want of diligence in its presentation, it will operate as a payment. *Kilpatrick v. Home Bldg. & L. Assn. supra; McIntyre v. Kennedy*, 29 Pa. 418; *Middlesex v. Thomas*, 20 N. J. Eq. 39; 2 Parsons, Notes and Bills, 154.

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APPEAL by defendant from a judgment of the Superior Court for Marion County in favor of plaintiff in an action to recover a debt which defendant alleged had been satisfied by plaintiff's acceptance of a certified check. *Affirmed*.

The facts sufficiently appear in the opinion. *Messrs. Pritchard & Tincher and McDonald, Butler & Snow*, for appellant.

A check which is certified loses its character as a check, and if delivered in payment of an indebtedness and accepted by the creditor, this operates as an absolute payment in cash, and discharges the drawer of the check from all liability, whether on the check or on the original indebtedness.

Harrison v. Wright, 100 Ind. 515; *Laclede Bank v. Schuler*, 120 U. S. 511 (30 L. ed. 704).

If the assignment of the part of the drawer's chose in action specified in the check is complete at the moment the bank has notice of the check as a claimed assignment, it makes no difference whether such notice be given by the drawer, before delivery of the check to the payee, or by the payee after the delivery to him.

Nat. Bank of The Republic v. Millard, 77 U. S. 10 Wall. 152 (19 L. ed. 897); *Griffin v. Kemp*, 46 Ind. 172.

The certification of a check at the request of the holder affords conclusive evidence to all the world that the drawer at the time of the making of the certificate has a credit against the bank to a greater amount than that specified in the check, and that a sufficient amount of the drawer's credit for payment of the check has been set apart and charged against him and in favor of the holder.

Boston M. Nat. Bank v. Boston State Nat. Bank, 77 U. S. 10 Wall. 619 (19 L. ed. 1008).

Such certificate discharges the drawer. As to him it amounts to a payment. Whether this certificate be obtained by the drawer before the check is delivered, and is thus made an inducement to the payee to receive the same, or whether it is made upon the application of the payee for his security, is of no importance.

Washington First Nat. Bank v. Whitman, 94

The receipt of a check does not operate as a payment unless the check is actually paid in due course. *Bernheimer v. Herrman*, 44 Hun, 110; *Hatcher v. Comer*, 75 Ga. 723; *Henry v. Conley*, 48 Ark. 267.

A certified check is regarded only as mere evidence of debt due from the drawer. *Larsen v. Breene*, 12 Colo. 490.

A certified bank check is *prima facie* evidence of payment. *Lineweaver v. Slagle*, 3 Cent. Rep. 615, 64 Md. 465.

So a check duly paid through a bank is *prima facie* evidence of payment of a debt. *Baughner v. Conn* (Pa.) 8 Cent. Rep. 168.

The giving of a check when there are funds to meet it is not ordinarily regarded as payment, but is treated as the means to procure the money. The holder is the agent of the drawer to collect the money. *Woodburn v. Woodburn*, 3 West. Rep. 37, 115 Ill. 427; *Brown v. Leckie*, 43 Ill. 497; 2 Parsons, Cont. 623.

And where a check drawn on a bank where the drawer has no funds or credit is delivered in pay-

U. S. 343 (24 L. ed. 229); *Laclede Bank v. Schuler*, *supra*.

The certification by the Bank of a check delivered in payment of an indebtedness at the request of the holder operates as payment in money.

2 Daniel, Neg. Inst. 8d ed. § 1604; *Jersey City First Nat. Bank v. Leach*, 53 N. Y. 850; *Eszes Co. Nat. Bank v. Bank of Montreal*, 7 Biss. 193.

The drawer of a check, who procures its certification before delivering it to the payee, incurs no liability as drawer; but the sole liability in favor of the holder of the check exists against the bank certifying the check.

Willetts v. Phoenix Bank, 2 Duer, 121; *Farmers & M. Bank v. Butchers & D. Bank*, 4 Duer, 219; *Girard v. Penn Top. Bank*, 39 Pa. 92; *Morse, Banks and Banking*, 810, 818; *Commercial Bank v. Hughes*, 17 Wend. 94; *Dykens v. Leather Mfrs. Bank*, 11 Paige, 612; 2 Dan. Neg. Inst. § 1601; *First Nat. Bank v. Leach*, *supra*; *Thomson v. Bank of British N. A.* 82 N. Y. 1; *Freund v. Importers & T. Nat. Bank*, 76 N. Y. 852; *Washington First Nat. Bank v. Whitman*, 94 U. S. 343 (24 L. ed. 229).

Mr. Ralph Hill, for appellee:

The only effect of the certification of the check is to give it additional currency, by carrying with it the evidence that it was drawn in good faith, on funds to meet its payment, and lending to it the credit of the Bank, in addition to the credit of the drawer. Beyond this, it does not differ from an uncertified check, nor does it make any difference whether the drawer is actually charged on the books of the Bank or not with the amount of the check when it is certified as "good."

2 Daniel, Neg. Inst. §§ 1626, 1627.

The drawer is liable on the certified check, the same as he would have been if the check had not been certified.

Andrews v. German Nat. Bank, 9 Heisk. 211, 24 Am. Rep. 800; *Bickford v. Chicago First Nat. Bank*, 42 Ill. 238; *Rounds v. Smith*, 42 Ill. 245; *Brown v. Leckie*, 43 Ill. 497; *Mutual Nat. Bank v. Rotge*, 28 La. Ann. 638.

Elliott, J., delivered the opinion of the court:

On the 20th day of January, 1886, the ap-

pellant was indebted to the appellee, and after 12 o'clock noon of that day he delivered to it a certified check drawn by him on Ritzinger's Bank, in which bank he then had money on deposit. The banks of the City of Indianapolis had a long established rule requiring all checks presented after 12 o'clock noon to be certified by the bank upon which they were drawn, and it was the well-known custom of such banks to immediately charge the checks certified by them against the depositor. This was done in this instance, and the amount of the check was set aside for the purpose of paying it. Ritzinger's Bank suspended payment, and made a voluntary assignment for the benefit of creditors prior to the business hours of the first day after the check was delivered to the appellee.

We agree with the appellant's counsel that the drawer of a check is released if the holder, instead of presenting it for payment himself, procures it to be certified by the bank upon which it is drawn. If the holder elects to procure the certification of the check it becomes, in his hands, substantially a certificate of deposit. By his own act he makes the bank his debtor and releases the drawer of the check. The reason for this rule is that the moment the check is certified the funds cease to be under the control of the original depositor, and pass under the control of the person who procures the certification of the check drawn in his favor. *Je sey City First Nat. Bank v. Leach*, 53 N. Y. 330; *Thomson v. Bank of British N. A.* 82 N. Y. 1; *Girard Bank v. Penn Top. Bank*, 39 Pa. 92; *Freund v. Importers & T. Nat. Bank*, 76 N. Y. 852.

It is true that the bank by which the check is certified becomes bound for its payment, and that it cannot defeat the right of the holder upon the ground that the drawer has no funds on deposit. *Kemp v. Cincinnati First Nat. Bank*, 85 U. S. 13 Wall. 621 [21 L. ed. 951].

But it is very clear that the authorities to which we have referred do not directly rule this case, for here the holder did not procure the certification of the check; all that it did was to accept the check in the ordinary course of business. Nor do we regard this case as within the sweep of the reasoning of the courts in the cases to which reference has been made. Here the holder accepted the check as it was offered,

the check to represent a new loan for the same sum at 8 per cent, the transaction was not a payment of the first mortgage, where there was no money on deposit to pay the check; and 10 per cent interest could be collected on the debt. *Woodburn v. Woodburn*, *supra*.

The presumption that a third person's check is only a conditional payment may be rebutted. *Briggs v. Holmes*, 10 Cent. Rep. 627, 118 Pa. 283.

Where no notice of the dishonor of the check was given the defendants for over six months, binding instructions should not have been given in favor of the plaintiff. *Ibid*.

Bank checks and promissory notes might be considered payment if the parties so understood and agreed; and a *fortiori*, without such an understanding, agreement or direction, a promissory note would not be converted into an indebtedness by account, by a simple transfer or memorandum of such note made on the books of the creditor. *Hatcher v. Comer*, 75 Ga. 728.

Where an executor holding a mortgage drawing 10 per cent received from the mortgagee his check for the amount due, and immediately handed back

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and did nothing to make the drawee its debtor. The principle which gives force and strength to the decisions referred to fails entirely where there is no act done by the holder of the check save that of receiving it in the form in which it is presented, for the element which sustains those decisions is, that the holder, by procuring the certification of the check after he becomes the owner, voluntarily makes the bank upon which it is drawn his debtor, thus releasing the drawer. It is, in such a case, the holder's own act that changes the relation and situation of the parties.

The certification of a check does not completely change its character; on the contrary, it changes it only in one particular, although the change, it is true, does produce a difference in the relation of the original parties, inasmuch as the drawee ceases to be the debtor of the drawer for the amount represented by the check. But this is the extent of the change in the situation of the respective parties in all cases where the certification is not procured by the holder of the check after it passes into his hands. It remains an order for the payment of money, and the certification, when made before delivery, operates in favor of third parties simply as an assurance that it is genuine and will be paid. The bank that certifies it becomes bound, but beyond this, nothing is added to the legal force or effect of the instrument, except, as we have said, in cases where the holder himself procures its certification.

The party who accepts a certified check in the usual course of business is not bound to take the risk of the solvency of the bank upon which it is drawn. He is bound only to do what the law requires, and that is, to promptly and seasonably present the check for payment. A party to whom a debt is owing has a right to demand payment of his claim in money, for, in the absence of an express agreement, payment can only be made in money. *Hancock v. Yaden* (Ind.) 6 L. R. A. 578.

In accepting a check instead of money the creditor dispenses with the necessity of payment in the legal mode, and the reasonable implication is that the check shall be a payment only in the event that it is honored on presentation. To hold otherwise would, as the Supreme Court of the United States has suggested, seriously interfere with commercial and financial transactions, and break down an established system. *Boston M. Nat. Bank v. Boston State Nat. Bank*, 77 U. S. 10 Wall. 648 (19 L. ed. 1019).

Nor is there any rule of law which requires it to be so held; the analogies are, indeed, the other way, for, as only money is payment where there is no express agreement, there is no sufficient reason for inferring that an order for money, although accepted, is money, or has the same effect as money.

A bank upon which a check is drawn is not liable upon the check unless it is certified as good. *Harrison v. Wright*, 100 Ind. 515.

The certification fixes the liability of the bank, but it does no more. It does not change the situation of the party who takes the check, nor does it make the check money. As it is not money, but is simply an accepted order for money, it does not, of its own force and vigor, operate as money. It cannot take the place of money without an express agreement to that

effect, and therefore cannot, by its own intrinsic force, operate as payment. To make it a payment something must be added, and that something must be an agreement, express or implied, that it shall be regarded as money, the legal medium of payment.

The obvious purpose of certifying checks is to assure the persons to whom they are offered that they are genuine and will be paid, and not that the bank that certifies them is solvent. There is nothing in the nature of the transaction that suggests in the faintest degree that certification is evidence of the solvency and ability of the drawee. It is perfectly clear that the certification of a check means simply that the bank upon which it is drawn will honor it, and there is no reason for implying that one who receives it in the usual course of business does so upon the faith that the certification implies that the bank is both willing and able to pay it. The certification is not intended to convey information as to the solvency of the bank; none of the parties can be regarded as giving it that force, and if not, then it cannot be inferred that any of them agreed that the certification of the check impressed it with the character of money.

We suppose that no one who accepts a certified check gives a thought to the question of the solvency of the bank upon which it is drawn, other than such as he would give if there were no certification, for it would be unnatural and unreasonable to do so, inasmuch as the certification is, in terms and in implication, no more than an agreement that the check will be paid on presentation. It neither represents nor touches the question of the solvency of the bank upon which it is drawn. There is therefore no just reason for concluding that the party who takes a certified check in the ordinary course of business assumes the risk of the solvency of the bank chosen by the drawer of the check as his place of deposit. The fair and reasonable implication is that the party who selects for himself the bank which he will trust with his money assumes the risk of its solvency.

The certification of a check is not intended to convey to the person to whom it is offered an assurance that the bank upon which it is drawn is solvent, for there is nothing in the nature of the transaction nor in the form of the contract which authorizes the inference that any of the parties expected or intended that it should have that effect. It cannot, therefore, be implied that the acceptance of the check by the creditor, *ipso facto*, released the drawer, and imposed upon the creditor the risk of the solvency of the bank by which the check was certified.

It is, and long has been, settled law that an ordinary check does not constitute payment. This doctrine is so well settled that it is unnecessary to refer to the authorities. Accepting, as we must, this rule as obligatory, we cannot conclude that a certified check constitutes payment unless we assume that the certification makes it the equivalent of money as a medium of payment. But neither in principle nor authority is there to be found warrant for this assumption, for, as we have seen, the nature of a check is not changed by certification, except in the one particular already indicated. As there is no other change, it is logically impos-

able that the effect of that change can make the check the equivalent of money.

From whatever point of view the question is examined, it appears clear that there is no release of the drawer of the check unless there is either an express or an implied agreement to that effect.

There is scant authority upon the direct question. The reason for this barrenness is that the use of certified checks is of modern origin. But, scarce as the authorities are, our conclusion that a certified check does not of its own force and vigor operate as a payment is not without support from the decided cases.

In *Bickford v. Chicago First Nat. Bank*, 42 Ill. 238, it was expressly decided that a certified check does not constitute payment. To the same effect are the decisions in *Rounds v. Smith*, 42 Ill. 245; *Brown v. Leckie*, 43 Ill. 497; *Mutual Nat. Bank v. Roige*, 28 La. Ann. 938; *Andrews v. German Nat. Bank*, 9 Heisk. 211, 24 Am. Rep. 800.

The question received consideration in the

recent case of *Larsen v. Breene*, 12 Colo. 480, and it was held that a certified check was not a payment. This general doctrine is asserted by Mr. Tiedeman, who says: "And the same rule applies, although the check had been certified before its delivery to the payee or holder, the certification only having the effect, in that case, of increasing its currency by adding the liability of the bank to that of the drawer. Tiedeman, Com. Paper, § 456.

There was no substitution of one debtor for another in this instance, and the contention of appellant's counsel that there was a novation cannot prevail. The delivery of the check was simply a conditional payment. The release of the original debtor was dependent upon the condition that the check should be honored on presentation. He still remained the debtor, for he was bound for the debt as long as the check remained unpaid. *Culver v. Marks*, post, p. 469.

Judgment affirmed.

NEW MEXICO SUPREME COURT.

EXCHANGE BANK of Dallas

W. W. TUTTLE, Impleaded, etc., *Appt.*

(.....N. M.....)

1. The provision in a promissory note for attorney's fees of a fixed and definite amount in case the note is collected by suit is not contrary to public policy and therefore void, although courts might interfere to prevent oppression or collusion.
2. Where the amount of attorney's fees called for by a promissory note is fixed by the contract, it will be presumed to be the reasonable value of the services rendered, unless the contrary appears.

(January 24, 1890.)

APPEAL by defendant Tuttle from a judgment of the District Court for Socorro County, in favor of plaintiff, in an action upon a promissory note which contained a provision for attorney's fees. *Affirmed.*

The facts are fully stated in the opinion.

Mr. Neill B. Field, for appellant:

There was no evidence offered to sustain the plaintiff's claim except the note sued on. This evidence was insufficient to support a judgment for attorney's fee.

Oelrichs v. Spain, 83 U. S. 15 Wall. 231 (21 L. ed. 45); *Day v. Woodworth*, 54 U. S. 13 How. 371 (14 L. ed. 184).

It is against public policy to allow the recovery of attorney's fees on contracts of this character in any case; but if they are to be allowed at all, they can be allowed only upon evidence of the value of the attorney's services.

1 Daniel, Neg. Inst. §§ 32, 62 A; *Gaar v. Louisville Bkg. Co.* 11 Bush, 182; *Merchants Nat. Bank v. Sevier*, 14 Fed. Rep. 662 and notes; *Bullock v. Taylor*, 39 Mich. 138; *Myer v. Hart*, 40 Mich. 517.

Mr. Isaac S. Tiffany, for appellee:

The stipulation is not against public policy.

1 Story, Eq. Jur. § 259.

In the cases where the doctrine of public policy has been applied the aid of the law is not withdrawn from any consideration of the rights or equities of the parties as between themselves, but solely to prevent an infringement of the public law or policy of the State.

Kedgwick v. Stanton, 14 N. Y. 289.

The following authorities sustain the validity of stipulations in notes providing for the payment of attorney's fees:

First Nat. Bank v. Brees, 39 Iowa, 640; *Garber v. Pontious*, 66 Ind. 191; *Miner v. Paris Rech. Bank*, 53 Tex. 559; *Seaton v. Scott*, 18 Kan. 435; *Oerton v. Matthews*, 35 Ark. 147; *Parham v. Pulliam*, 5 Cold. 497; *Imler v. Imler*, 94 Pa. 872; *Clawson v. Munson*, 55 Ill. 395; *Peyser v. Cole*, 11 Or. 39; *Farmers Nat. Bank v. Rasmussen*, 1 Dak. 57; *Schlesinger v. Artine*, 31 Fed. Rep. 649; *Bank of British*

NOTE.—*Promissory note; stipulation for attorney's fee.*

A stipulation in a note for 10 per cent attorney's fees, in addition to interest, is void. *Wright v. Traver* (Mich.) 8 L. R. A. 50.

But a stipulation in a promissory note for payment, in addition to interest, of costs of collection, including attorney's commissions, on failure to pay at maturity, is valid, although rendering the note non-negotiable. *Bowie v. Hall*, 1 L. R. A. 546, 69 Md. 433.

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So a contract in a note for the payment of attorney's fees, if the note is placed in the hands of an attorney for collection, is valid. *Harton v. Farmers & M. Nat. Bank*, 11 West. Rep. 389, 122 Ill. 362; *Holmes v. Bemis*, 14 West. Rep. 383, 124 Ill. 453.

A provision, in a promissory note, for a stipulated attorney's fee of 10 per cent upon the amount found due is unreasonable, and of no legal effect, and cannot be enforced. The court, in such case, will not modify the amount, and enforce it as modified, except so far as offered and admitted by the defendant. *Kimball v. Moir*, 15 Or. 427.

North America v. Ellis, 2 Fed. Rep. 44; *Adams v. Addington*, 16 Fed. Rep. 89; *Wilson Sewing Mach. Co. v. Moreno*, 7 Fed. Rep. 806; *Howenstein v. Barnes*, 5 Dill. 482, 9 Cent. L. J. 43; *Randolph*, Com. Paper, § 205; 1 Daniel, Neg. Inst. § 62, p. 72; *Smith v. Silvers*, 32 Ind. 821.

McFie, J., delivered the opinion of the court:

"This suit was brought in the District Court for Socorro County upon the following promissory note:

\$3,500.

Dallas, Texas, October 23, 1885.

On December 1, '85, after date, without grace, we or either of us promise to pay to the order of Exchange Bank, Dallas, thirty-five hundred dollars, for value received, at the Exchange Bank of Dallas, with interest from maturity at the rate of twelve per cent per annum, with ten per cent for attorney's fees in case this note is placed in the hands of an attorney for collection, or collected by suit.

L. B. Collins,
C. E. Odem,
W. W. Tuttle.

The declaration, in addition to the usual demand for debt, interest and costs, asked judgment for attorney's fees, as provided by the terms of the note. Collins and Odem were not served with process, but W. W. Tuttle entered his appearance, and filed one plea, that of *non assumpsit*. The defendant, Tuttle, waived a jury, also written finding of facts, and consented to trial by the court, which was had, and the following judgment was rendered by the court at the November Term, A. D. 1888: "At this day, this cause having been heretofore submitted to the court, and the court being now sufficiently advised, doth find the issues for the plaintiff, and assess its damages against defendant, Tuttle, at the sum of four thousand seven hundred thirty and 00-100 dollars, and also the sum of three hundred and fifty dollars as attorney's fees; wherefore it is ordered and adjudged that plaintiff recover of defendant W. W. Tuttle the sum of four thousand seven hundred thirty and 00 100 dollars damages, with 12 per cent interest from this day until paid, and also the sum of three hundred and fifty dollars as attorney's fees, together with its costs in this behalf laid out and expended, to be taxed herein, and that execution issue therefor."

To reverse this judgment, the case is brought to this court by appeal.

Appellant seeks a reversal solely upon the ground that the court gave judgment for attorney's fees, and assigns the following errors: (1) that the district court erred in its finding that the appellant was liable for attorney's fees on the contract sued on; (2) that the district court erred in giving judgment against the appellant for \$350 attorney's fees, when there was no evidence of the value of the attorney's fees before the court; (3) that the judgment of the district court against this appellant is wholly without evidence to support it.

The note was the only evidence offered by the plaintiff, and, although the entire cause of action was put in issue by defendant's plea,

no evidence was offered in support of the plea. The introduction of the note in evidence was sufficient to warrant a judgment for plaintiff for the amount of the note, interest and costs. We are now called upon to say whether or not the court erred in allowing attorney's fees as specified in the note.

Let us consider the first assignment of error: "That the district court erred in its finding that the appellant was liable for attorney's fees on the contract sued on." This question of the allowance or disallowance of attorney's fees provided for in promissory notes and written contracts has been before the courts for many years in this country, and many learned opinions of able judges and courts have been rendered on both sides of the question. An examination of the authorities will show, however, that the fruitful cause of this contrariety of opinion is due mainly to the varied forms in which the question is presented to the courts. One instrument sued on differs in its provision, upon that subject, from that of another. Therefore the phraseology of a decision, apparently applicable, may be, and often is, found to be inapplicable when examined in the light of the facts before the court.

Take the case of *Oelrichs v. Spain*, 82 U. S. 15 Wall. 231 [21 L. ed. 45], cited by appellant. The case is sometimes cited as showing that the Supreme Court of the United States is opposed to the allowance of attorney's fees in any case, whether provided for in the instrument or not; but an examination of that case shows that it was a suit on an injunction bond, with no provision in the instrument for attorney's fees, and the question in that case was whether attorney's fees should be allowed as part of plaintiff's damages, which is a very different proposition.

The case of *Bullock v. Taylor*, 39 Mich. 187, cited by appellant, is not in point in this case. The notes in that case provided that "the undersigned agree to pay \$15 attorney's fee, over and above all taxable costs," each, on six small notes, two of them for \$41.50 each. The surety did not sign the notes, but signed a bond as surety for the makers. The court says, among other things: "The surety insists that such notes are not within the terms of his undertaking. . . . (2) Because they provide for the payment of an attorney's fee, to which he has never consented." Again the court says: "In this State, the attorney's fees which the successful party is permitted to recover in courts of record are prescribed by statute or by rule of court. In justices' courts, none are given except in a few special cases. The policy of our law is to limit such recovery to a very moderate sum in every case where it is permitted at all; . . . and it is a question of very grave importance whether the policy which thus limits attorney's fees, and also limits the rates of interest, can be set aside by provisions like that under review."

It is very apparent that this case was decided mainly upon the ground that such fees as were contracted were prohibited by the statute law or rules of court of Michigan; the contract, therefore, was in violation of law, and the court would not enforce it. In this Territory we have no statute upon the subject.

In *Stoneman v. Pyle*, 85 Ind. 104, the note provided for attorney's fees in case suit was brought, and it was sustained, the court saying: "On the maturity of the note, the maker knew precisely what he was bound to pay, and the holder what he was entitled to demand. . . . The stipulation for the payment of attorney's fees could have no force, except upon a violation of his contract by the defendant," etc.

In *Churchman v. Martin*, 54 Ind. 888, the court held void a note providing for "10 per cent attorney's fees, if suit be instituted."

It might be said, without examination, that these two decisions are contradictory; but they are not so, for the reason that between the two decisions a statute had been passed in that State, as follows: "That any and all agreements to pay attorney's fees, depending upon any condition therein set forth, and made part of any bill of exchange, acceptance, draft, promissory notes or other written evidence of indebtedness, are hereby declared illegal and void." Act March 10, 1875.

The provision was held to be void under the Statute, because upon "condition," and not because it was against public policy.

It may be admitted, however, that some of our ablest courts hold opposite views on some of the points arising out of this question. Our own federal courts are somewhat divided in opinion, *Judges* Deady, Pardee and Speer sustaining the validity of contracts for attorney's fees, while *Judges* Caldwell and McCreary take the opposite view. The early cases upon this subject were disposed to hold against the validity and also negotiability of such contracts, a leading case being that of *Woods v. North*, 84 Pa. 407, placing it upon the ground of uncertainty; but in later decisions a different view is taken, and there is now a large preponderance of decisions that where the amount provided for in a promissory note, at maturity, is fixed and certain, it is negotiable. Applying that test to the note sued on in this case, we are of the opinion that it is negotiable. The weight of authority is to the effect, also, that where a promissory note provides for a fixed and reasonable amount for attorney's fees, if the note is collected by suit, it is valid, and will be sustained by the courts. Illinois, Iowa, Louisiana, Kansas, Kentucky, Indiana, Arkansas, Texas, Colorado, California and the federal courts in Oregon, Kansas and Georgia, sustain the validity of such notes. Pennsylvania, Minnesota, Wisconsin, Missouri and the federal court in Arkansas are not disposed to enforce such provisions.

This case is brought within very limited bounds by the record. We are not called upon to construe the clause of the note sued on, which provides for "10 per cent attorney's fees in case this note is placed in hands of an attorney for collection," because it is not properly raised. The provision just quoted is certainly a questionable one. It is susceptible of being used in a very oppressive and collusive manner. Therefore, if this record showed that the defendant, Tuttle, paid, or tendered payment, of the debt and interest at maturity, or before suit was brought, and the payment tendered was refused for the reason that the note was placed in the hands of an attorney, who demanded 10 per

cent more for attorney's fees, a very different case would be presented; but in this case there was neither payment nor tender of any part of the note, so far as the record discloses. On the contrary, suit was actually brought for the collection of the note, and the defendant, by pleading *non assumpsit*, denied the entire indebtedness, in law, and put the plaintiff upon proof of the entire amount; and while the judgment, except as to the amount of attorney's fees, is in fact admitted, still the entire amount is suspended, and the plaintiff is deprived of the benefit of judgment for the debt and interest. If to declare the clause as to attorney's fees invalid would void the entire note, there would be some justification for the practice; but it will not be contended that such would be the effect, and hence this court cannot, by reversing the judgment of the court below, approve a practice which practically deprives the plaintiff of his legal rights, when, by payment or tender of amount due and admitted, such results would be avoided without depriving the defendant of any legal right. To reverse this case, the court must declare that a provision in a promissory note for attorney's fees of a fixed and definite amount, in case the note is "collected by suit," is contrary to public policy, and therefore void. This we cannot do, as we are satisfied that the weight of authority sustains the validity of such a provision in a promissory note by contract of the parties. We are aware of the force of the argument "that to sustain such contracts, because they are the contracts of the parties, would admit of oppression of the debtor by the grasping creditor," but we cannot presume that such will be the result; and besides it does not follow, and this court does not hold, that the courts will not interfere to prevent oppression and collusion, where the facts are brought before the court in the proper manner. The courts have held void many of the provisions for attorney's fees in notes and contracts, where they are uncertain, excessive or oppressive. Even where a fixed sum has been agreed upon by the parties, the courts have interfered to afford relief, where the amount was clearly exorbitant or oppressive, and the facts were shown to the court. In this case, services of the attorney were rendered. It is not shown that the amount contracted for was excessive, nor that the contract was not a voluntary one, with a full knowledge of all the facts. The note was sufficient evidence to warrant the court in giving judgment for attorney's fees, and in doing so there was no error.

The second assignment of error is, in substance, that the court allowed attorney's fees without requiring proof of their value. If the note sued on provided for a "reasonable attorney fee," the amount not being fixed, such proof should be required; but in this case the amount has been fixed by the contract, and we must presume that the amount fixed was the reasonable value of the services rendered, until the contrary appears. The amount being fixed, and value reasonable, the court below committed no error in giving judgment for the amount provided for in the note.

The third assignment of error is not well taken. There was sufficient evidence to war-

rant the court below in giving judgment for attorney's fees upon the note; in fact, the note was the best evidence of the fact, and proved itself.

Finding no error in the record, *the judgment of the court below is affirmed, with costs.*

Long, Ch. J., and Lee and Whiteman, JJ., concur.

MINNESOTA SUPREME COURT.

Jennie E. EVANS, *Appt.*,

v.

James G. EVANS, *Resp.*

(....Minn.....)

*A decree *a mensa et thoro*, entered under the provisions of § 80 *et seq.*, chap. 62, Gen. Stat. 1878, and remaining in force, does not bar an action for a divorce *a vinculo matrimonii*, upon any of the grounds specified by statute.

(February 18, 1890.)

APPEAL by plaintiff from a judgment of the District Court for Ramsay County denying her application for an absolute divorce from defendant. *Reversed.*

The case sufficiently appears in the opinion.

Mr. F. H. Ewing, for appellant:

Since the passage of the Act of 1857 (20 and 21 Vict. chap. 85), making adultery on the part of the wife, and adultery coupled with desertion on the part of the husband, causes for divorce *a vinculo*, it has been held in England that after a decree *a mensa et thoro* a divorce *a vinculo* may be granted for the statutory cause of adultery occurring after the granting of a divorce *a mensa et thoro*.

Bland v. Bland, L. R. 1 Prob. & Div. 237; *Ritchie v. Ritchie*, 4 Macq. H. L. Cas. 162.

No appearance for respondent.

Collins, J., delivered the opinion of the court:

But one question is presented upon this appeal, and that is, Does a decree of separation from bed and board, forever, made by virtue of the provisions of § 80 *et seq.*, chap. 62, Gen. Stat. 1878, and still in force, bar an action for a divorce *a vinculo matrimonii*, upon the statutory ground of habitual drunkenness (subd. 6, § 6, chap. 62, *supra*), the cause of action having arisen subsequent to the date of the decree *a mensa et thoro*. The court below found as a fact that the defendant had been guilty of habitual drunkenness for the space of one year immediately preceding the filing of the complaint in the case at bar, but refused the relief demanded in the complaint because of the existence of the decree before mentioned from bed and board, and which had been obtained by plaintiff some four years prior to the exhibition of her complaint herein.

Prior to the passage in 1876 of the Act Authorizing Limited Divorces, so called, the only form of divorce proceeding provided by statute was one from the bonds, and by which both parties, without regard to cause or guilt, were

equally and absolutely liberated from the obligations of the marriage contract. Such divorces were to be granted upon proof of the existence of either of six distinct and specifically mentioned grounds, one of which is that specified in the complaint herein. The Statute in question places these separately stated causes of action upon a common level; it makes no attempt to distinguish or discriminate between them; and, if either be established by proper evidence, an unconditional decree must follow. Good morals might suggest that this is unjust, but we take the law as we find it.

The Statute under which the plaintiff obtained a decree *a mensa et thoro* was not intended to abridge the Statute upon the subject of absolute divorce, nor to restrict its operation. To the female only is granted the right of complaint, and she alone can procure the decree. The corresponding privilege is not given an aggrieved husband. The marriage relation is merely suspended as to certain marital rights and relations, not annulled, and, save as they may be regulated by the terms of the decree, property interests remain undisturbed. In case of the death of either party, the survivor becomes a widow or widower, as the case may be. *Dean v. Richmond*, 5 Pick. 461; *Hokamp v. Hagaman*, 86 Md. 511.

And when a decree has been duly announced the court is powerless to revoke it, except upon the joint application of the persons interested and in case of reconciliation. To hold that a divorce from the bonds cannot be adjudged so long as a decree of separation is in force, would lead to the most surprising results. It would confer upon the wife the power to obtain a perpetual decree *a mensa et thoro* from an offending husband, and thereafter to openly give cause for a divorce *a vinculo*, while the husband, no matter how irreproachable his behavior and character might have become in the mean time, remains without remedy or relief. Such a rule would compel an unfortunate wife to ask for an absolute divorce in the first instance, if she regarded a reconciliation as doubtful, or that, possibly, she might want, at some time, to be wholly freed from her marriage vows, instead of simply seeking temporary relief and separation. In the hope, perhaps, of such conduct in the future as would warrant a revocation of the decree.

The Act of 1876 does not expressly provide that a decree under it is in lieu of all other relief, and it is manifest that such was not the intention of the legislators.

The judgment is reversed, and the case remanded, with instructions that judgment be entered as demanded in the complaint.

*Head note by COLLINS, J.

OREGON SUPREME COURT.

Edgar POPPLETON, *Appt.*,
v.
YAMHILL COUNTY, *Respnt.*

(....Or.....)

- *1. The notice given by the board of equalization, or county court sitting as such board, to a taxpayer, of a proposed increase of his assessment, need not specify the property to be added thereto.
2. It is not necessary, where a taxpayer appears before a board of equalization in pursuance of a notice to show cause why corrections should not be made in his assessment, and files an answer in response to such notice, that a reply to such answer be filed.
3. In proceedings before a board of equalization to make corrections of the assessment of the property of a taxpayer, the rules of practice in civil actions or suits do not apply.
4. The appellant, a resident of the County of Yamhill, Or., sent a sum of money to Washington Territory, to be loaned out through agents there, which said agents loaned accordingly, and took notes upon such loans, secured by mortgages on real property in the Territory, retaining the notes and mortgages there, and which had never been in this State. *Held*, that the board of equalization of said county had no authority, under the statutes of this State, to include the said money, notes or mortgages in the assessment of appellant's property for the purpose of taxation.

(January 27, 1890.)

A PPEAL by petitioner from a judgment of the Circuit Court for Yamhill County dismissing a petition for a writ of review to set aside the action of the County Court in adding to petitioner's tax assessment the amount which he had invested in certain securities out of the State. *Reversed.*

Statement by **Thayer, Ch. J.**:

Appeal from a judgment of the Circuit Court for the County of Yamhill, rendered upon a writ of review, issued out of that court, directed to the County Court of said County, to review certain proceedings of assessment and taxation. The assessor of the County of Yamhill applied to Edgar Poppleton, the appellant herein, for a list of his taxable property for the year 1888. That thereupon the appellant furnished him a list purporting to be all of such property. Subsequently the board of equalization of the County caused a notice to be served upon appellant, requiring him to appear, and show cause why his assessment should not be increased. In accordance with the said notice, the appellant appeared, and filed a motion to dismiss the proceedings for the reason that no proper notice had been filed and served; but said board refused to act in the matter, and adjourned without day. The business was then taken to the county court, sitting as a board of equalization, and another notice to the same effect was by the said court caused to be served upon the appellant. In pursuance of said last notice the appellant appeared

by counsel in said court, and filed another motion to dismiss the proceeding on the ground that the court had no jurisdiction in the premises, for the same reason assigned in the former motion. The county court overruled the motion, and the appellant then filed an answer setting forth what he claimed to be all his taxable property. No reply was filed to the answer, and thereupon the appellant filed a motion for judgment in the proceedings, that they be dismissed, which motion the county court denied. The matter was then heard on testimony and proofs, and said court found the following facts: "*First*. That previous to his assessment for the year 1888 said taxpayer had sent to Washington Territory money, to the amount of \$4,500, to be loaned out in said Territory by his agents there, and which said money was so loaned, before said assessment, on mortgage securities on land, and that the notes therefor were held in said Territory, and never had been in this State. *Second*. That said notes are taxable in this State and County, where said taxpayer resides." Whereupon said court decided as follows: "It is therefore ordered and adjudged that the assessment of said taxpayer be, and the same is hereby, raised and increased the sum of \$4,500."

The said writ of review was issued out of the said circuit court to review the said decision. The said last-mentioned court, after hearing the case, decided that the grounds of error assigned in the petition for said writ were not well taken, and adjudged that the writ be dismissed at the cost of appellant, and that the said decision of the county court be affirmed, from which judgment the appeal herein was taken.

Mr. H. Hurley, for appellant:

Courts have repeatedly held that States could not tax personal property situated in another State, including notes and bonds.

People v. Comrs. of Taxes, 23 N. Y. 224; *People v. Smith*, 88 N. Y. 577; *Tuzenell Co. v. Davenport*, 40 Ill. 197; *Catlin v. Hull*, 21 Vt. 152; *Fisher v. Rush Co.* 19 Kan. 414; *State v. St. Louis Co. Ct.* 47 Mo. 594; *Alvany v. Powell*, 2 Jones, Eq. 51; *Lewis v. Chester Co.* 60 Pa. 325; *Finch v. York Co.* 19 Neb. 50; *State Bank v. Richmond*, 79 Va. 118; *Redmond v. Rutherford Co.* 87 N. C. 122.

The theory that intangible personal property has no *situs* except the domicile of the owner is at best nothing but a fiction, and has been frequently ignored by courts when the subject has been brought in question.

People v. Smith, 88 N. Y. 580, 583; *People v. Comrs. of Taxes*, 23 N. Y. 228-239.

Mortgages, bonds, bills and notes are by the common understanding of business men in commercial transactions, as well as of jurists and legislators, for many purposes, considered property, and not as mere evidence of debt, and they may thus have a *situs* at the place where they are found, like other visible, tangible chattels.

State v. Howard Co. Ct. 69 Mo. 454; *People v. Smith*, 88 N. Y. 585; *Blain v. Irby*, 25 Kan. 501; *Wilcox v. Ellis*, 14 Kan. 588; *Fisher v. Rush Co.* 19 Kan. 414; *Desty, Taxn.* 326.

*Head notes by **Thayer, Ch. J.**

This property being in the hands of an agent in Washington Territory for the purpose of being loaned out, and being taxable there, its actual *situs* is thereby established in that Territory, and the fiction must yield to the facts.

1 *Desty*, Taxn. p. 323; *King v. McDrew*, 81 Ill. 418; *McCutchen v. Rice* Co. 7 Fed. Rep. 558; *Duer v. Small*, 17 How. Pr. 201; *People v. Smith*, 88 N. Y. 583; *Fisher v. Rush* Co. 19 Kan. 414. See *Wilcox v. Ellis*, 14 Kan. 603.

Protection and taxation are co-relative terms. Without protection, or some benefit to be returned therefor, taxation would be but another form for spoliation or confiscation.

Fisher v. Rush Co. 19 Kan. 416.

Messrs. J. E. Magers and H. H. Hewitt for respondent.

Thayer, Ch. J., delivered the opinion of the court:

The notices to the appellant, given by the board of equalization and county court, regarding the proposed increase of his assessment, were ample and sufficient; nor was any reply to the answer filed by appellant in response to the notice necessary. Proceedings for the equalization of taxes are not governed by the rules of practice in civil cases, but are necessarily summary. The taxpayer is entitled to be notified of the proposed increase; and, however informal the notice may be, it will answer the purpose intended, as he will be very likely to get there, and usually will not stand upon the order of his going. Besides, the board will not be apt to get at the bottom of his affairs by the most diligent search and inquiry to which it may subject him.

The only matter that need be considered in the case is the right of the said county court to include in the appellant's list of taxable property the money, notes and mortgages he owned and held in the then Territory, now State, of Washington. The question as to a right of government to tax choses in action due to its subjects from those of another jurisdiction has been a great source of embarrassment to the courts. The difficulty, to a great extent, has been occasioned by attempting to apply the maxim that movables follow the person of the owner. The maxim, at best, is only a legal fiction which may be resorted to or brushed aside as the justice of the case requires. If the right, in the outset, had been considered from an equitable standpoint, the law upon the subject would have been relieved of much uncertainty. I can discover no justice whatever in a government exacting from an owner of property which is within the territorial jurisdiction of another government the payment of a property tax thereon, when it is subject to a like burden under the laws of the latter government, whether it be tangible or intangible, as courts have been pleased to distinguish certain kinds of property.

In the present case, what grounds can there be, in sense and reason, entitling the County of Yamhill to claim that the appellant should pay, in support of the county and state government, a tax upon the \$4,500 loaned out in the State of Washington, when neither said County, nor the State of Oregon, can afford him any protection whatever to the property? He loaned

the money under the laws of the then Territory; and if it is not paid, and he is compelled to resort to compulsory means to enforce its payment, it is to the laws of that government he must look for his remedy. And the case would be the same if his agents were to embezzle the funds. Not a judge, justice of the peace, sheriff or constable within the State of Oregon could, by virtue of his office, render him the slightest assistance. How can the State, then, demand from the appellant a contribution on account of his ownership of this property except as an arbitrary exaction, which is but another name for robbery? The money, notes and mortgages were undoubtedly subject to taxation in Washington Territory. The right to tax them there is sustained by a line of decisions of the courts upon the subject, since the one made in *Catlin v. Hull*, 21 Vt. 152, down to the present time, including *Crawford v. Linn Co.* 11 Or. 482; and they are undoubtedly correct in principle.

Property, in all cases, unless exempt by law, should contribute to the expense of the government which protects the owner in his enjoyment of it. But upon what principle a government can claim that property which is outside of its jurisdiction, and subject to the jurisdiction of another government, shall contribute to its expenses, I cannot imagine, unless it be upon the ground that it has the sovereign power to enforce it.

The counsel for the respondent claims that the *situs* of property of the character of that in question must necessarily, from the nature of it, be with the person of the owner, and would have this court infer from that, I suppose, that the \$4,500, or the notes and mortgages, were at the time of the assessment with the person of the appellant. The county court, however, found that the money was sent to Washington Territory, and loaned out by appellant's agents there, before the assessment, upon notes and mortgages which had never been in this State. The counsel's logic may be on the principle of that of the lawyer who assured his client that the authorities would not put him in jail, while the latter was listening to him from within the bars of a cell, conscious of the fact that he was already in jail; though they probably intended to claim that the legal fiction of the property being with the appellant is paramount to the actual fact. But it seems to me, under the circumstances and situation of the property, it had a *situs* in Washington Territory for the purposes of taxation under its laws, and that therefore it could not be regarded, by force of a mere fiction, as being with the person of the appellant.

If the appellant had been a resident of Washington Territory, and had sent the money to this State, to be loaned out by his agents here, and they had accordingly loaned it, and taken notes and mortgages in security therefor, and the securities had been left in the hands of such agents, the property would have been taxable under the laws of this State, beyond a peradventure; and the statute of Washington Territory in force at the several times when the money was loaned, and the assessment made, to which our attention has been called, is sufficiently broad in its terms to have authorized the taxation of the property in that Ter-

ritory. The authorities of this State, therefore, had no moral right to tax the property in question. Nor had they any legal right to do so, unless it is conceded that the statutes of this State require the taxation of property so situated, whether taxable under the laws of another government or not, and that such a requirement is lawful,—a proposition to which I should be exceedingly loath to assent. But even then the assessment in question cannot be upheld, as our statutes, by any fair construction, do not go to that extent.

Section 2731, Hill's Ann. Code, provides that "the terms 'personal estate' and 'personal property' shall be construed to include all household furniture, goods, chattels, moneys and gold dust on hand or on deposit either within or without this State; all boats and vessels, whether at home or abroad, and all capital invested therein; all debts due or to become due from solvent debtors, whether on account, contract, note, mortgage or otherwise,"—which is the only provision from which it could possibly be inferred that the property in question might be taxable in this State. The section was adopted in 1854, and undertook to define the words "personal estate" and "personal property" as used in the Revenue Act of which it was a part. Said words were to be construed as meaning certain articles on hand or deposit, within or without the State; also, boats and vessels, whether at home or

abroad, and all capital invested in them; and also all debts, whether on account, contract, etc. The clause relating to debts due or to become due, etc., was evidently intended to include domestic debts only, as it does not declare, like the other two clauses, that it includes debts due from parties "either within or without this State," or "at home or abroad," or contain terms of equivalent import. Leaving out of the latter clause the qualifying words referred to, after having inserted them in the two former ones, would indicate on the part of the Legislature an intent not to include debts due from parties living out of the State as "personal property" or "personal estate," and authorize the construction indicated. The first clause of the section would include property like that in question, if it had not limited the construction to articles "on hand or on deposit." The property in question was neither on hand or on deposit, but was in the hands of the appellant's agents in Washington Territory,—invested by them, and under their control.

The case is very similar in its features to that of *People v. Smith*, 88 N. Y. 576, and I think we can safely follow the decision therein made.

The judgment of the Circuit Court will be reversed, and the case remanded to that court, with directions to entertain the said writ of review, and determine the same in accordance with the principles announced herein.

KENTUCKY COURT OF APPEALS.

Robert KINNAIRD, *Appt.*,

o.
STANDARD OIL CO.

(....Ky.....)

1. Although one may appropriate all the underground water in his soil he has no right to poison it, however innocently, or to contaminate it, so that when it reaches his neighbor's land it will be unfit for use by either man or beast.
2. The owner of oil stored in large quantities near a spring of water cannot resist a claim for damage to the spring, by its leakage and pollution of the underground currents of water that feed the spring, because he did not know the water was affected by it, when the oil could be seen in puddles outside of the building in which it was stored.
3. If one has on his own premises that which is dangerous or a substance that he is constantly using, which is liable to escape and injure others, whether above or under the ground, and injure the property of his neighbor, or that which his neighbor has the right to use, he must answer for the consequences.
4. On the question of damages for injury to a spring, the water of which is not totally destroyed, evidence that the owner had previously sold water from it is inadmissible.

(January 26, 1890.)

APPPEAL by plaintiff from a judgment of the Circuit Court for Garrard County, in favor of defendant in an action to recover 7 L. R. A.

damages for the pollution by defendant of plaintiff's spring. *Reversed.*

The facts are fully stated in the opinion.

Mr. W. J. Landram, for appellant:

One may no more befoul a subterranean stream than a surface stream.

Hodgkinson v. Ennor, 4 Best & S. 229; *Turner v. Mirfield*, 84 Beav. 390. See also *Ballard v. Tomlinson*, L. R. 29 Ch. Div. 115, 24 Am. L. Reg. N. S. 634.

It may be stated as a general proposition that every enjoyment by one of his own property which violates the rights of another in an essential degree, is a nuisance and actionable as such at the suit of the party injured thereby.

Wood, Nuis. § 1; Gould, Waters, pp. 888, 389, 482, 485, 493.

Mr. M. H. Owsley, also for appellant:

There is no property in underground waters; but they are subject to appropriation and use to the fullest extent by the proprietors of the lands, but not to their abuse of it. In other words, whilst they may appropriate the water, they are responsible if they pollute or poison that which is permitted to escape and enters his neighbor's premises in whatever way it may find its entrance, whether by percolation or in defined streams.

Ballard v. Tomlinson, L. R. 29 Ch. Div. 115, 24 Am. L. Reg. N. S. 637.

The American cases, while recognizing to its fullest extent the right of every land owner to use certain, and even totally abstract all, underground percolating waters, hold him liable for corrupting them.

Chase v. Silverstone, 63 Me. 175; *Roath v. Driscoll*, 20 Conn. 533; *Wheatley v. Baugh*, 25 Pa. 528; *Frazier v. Brown*, 12 Ohio St. 204.

The true cause of action in *Ballard v. Tomlinson*, *supra*, is not exactly that the defendant contaminated underground percolating water, but that he allowed his impure sewage to escape from his premises to the plaintiff's, and the circumstance that it reached there by underground percolation instead of by a surface stream is immaterial.

Nat. Law Rev. March, 1888.

Messrs. Brown, Humphrey & Davie for appellee.

Pryor, J., delivered the opinion of the court:

The appellant, Kinnaird, is the owner of a small tract of land containing about four acres, lying adjacent to or within the boundary of the Town of Lancaster, in the County of Garrard. On this land is a valuable and never-failing spring, that appears upon the surface of the ground at the foot of a hill, and had been used as such for a long period of time. In November of the year 1886 the appellee, the Standard Oil Company, leased from the Kentucky Central Railroad Company a site upon which to build a warehouse for the storage of its coal oil. They erected the warehouse, and placed in it their coal oil, that leaked from the casks, and saturated the ground, both on the inside and outside of the building. The floor of the house consisted of a bed of cinders about twelve inches in depth, that supplied the place of plank, that, as the proof shows, would become very inflammable when saturated with the oil. The bed of cinders, therefore, rendered the property much more secure than if a floor had been laid in the building. The spring of the appellant is located about 200 yards from the oil-house of the appellee, with a hill or rise in the ground between the two, and the proof conduces to show that water on the surface of the ground at the oil-house would naturally flow in an opposite direction from the spring, because it is lower than the ground where the spring emerges from the hill. After the oil had been deposited in the building erected for that purpose, it is manifest that it leaked from the casks, and, being of such a penetrating character, it passed into the ground, and polluted the water or stream from which the spring of appellant was supplied. While it is argued that the proof on this subject is by no means satisfactory, we think it apparent from the testimony that the oil mingled with underground currents of water that fed the spring of the appellant, and caused the injury. The court below, on hearing the testimony, gave a peremptory instruction to the jury, on the ground that no action could be maintained for contaminating the subterranean water that flowed into the spring of the appellant, as the appellee had the right, in the exercise of its legitimate business, to build the house, and store the oil within it, on its own land, although the property of its neighbor was injured by it. If this had been surface water, or a vein of water underground, with a well-defined and known channel, the right to maintain the action cannot be doubted; but, as to hidden or unknown veins of water, it is 7 L. R. A.

said they belong to the soil, constitute a part of it, and may be used, controlled or removed by the owner in the same manner that he could the soil through which the water percolates or runs.

The theory of the defense is that, this water being the property of the owner of the land, its use, if not forbidden by law, cannot work an injury to his neighbor, in the absence of a design to do so, however great the damage sustained. This view of the legal rights of these parties seems to be sustained by numerous reported cases, involving questions analogous in almost every particular, and if followed by this court, it must be held that the peremptory instruction was proper.

The case of *Brown v. Illius*, reported in 27 Conn. 84, was an action on the case for a nuisance, and in the declaration it was alleged that offensive matter in the manufacture of gas, deposited on the surface of the ground, had permeated into the soil around and adjoining the well, and into the well itself, corrupting the water and rendering it unfit for use. The court, in applying the rule in regard to subterranean currents, and in discussing the instruction given by the lower court, held that the ownership of the land sanctioned and justified the use made of it by the defendant, and, although the latter was injured, if the damage resulted from the mingling of the noxious matter with the underground vein of water, it was an injury without any violation of the plaintiff's legal rights by the defendant, and the latter "was under no legal obligation to prevent it in the first instance, or a continuance of it afterwards."

The rule that gives to the owner of the soil all that lies beneath its surface, whether oil or water, was made to apply in the case cited, with the right of the owner to use it at his pleasure, and in any legitimate mode, and the plaintiff denied the right of recovery upon that ground.

The case of *Dillon v. Acme Oil Co.*, 49 Hun, 565, was where the plaintiff owned two lots, upon which he had erected dwellings, and had dug a well on each lot, that he used for household purposes. The defendant erected an oil refinery about 800 feet distant from the lots of the plaintiff, and the oil, leaking on the surface, had permeated the ground until it reached some underground stream that carried it to the wells of the plaintiff. An injunction was sought, and the relief denied, for the reason that the defendant had the right to use that which he owned for legitimate purposes, provided, in doing so, he exercised proper care and skill to prevent injury to others; and, as an illustration of the rule, it was there said that he might dig a well or ditch, and cut off a hidden stream of water that supplied his neighbor's well, and thereby render it useless.

In *Bloodgood v. Ayers*, 108 N. Y. 400, 11 Cent. Rep. 108, it was also held that no person is liable for interrupting a stream supplying a well or spring, unless he knew beforehand where the stream was,—a doctrine, we think, well settled by an unbroken line of authority. That one may divert or consume all the water from underground currents, that have no fixed known channels, and appropriate all the water to his own use, and that he is the absolute

owner of this water while it remains under his soil, with the right to appropriate it as he pleases for legitimate use, will not be denied. This use or right of property is, however, only temporary, and remains only so long as the water stands on or under his land. He cannot follow it when it leaves his premises, and passes to the land of his neighbor; and it may therefore be said that he has not the absolute title, as each owner of the land is vested with the right to use the water, and appropriate the whole of it when it reaches him.

In the case of *Ugjohn v. Richland Board of Health*, reported in 46 Mich. 542, the opinion delivered by Mr. Justice Cooley, it was held to be an established rule that owners of the soil have no rights in subsurface waters not running in well-defined channels, as against their neighbors who may withdraw them by excavations; and therefore, if no right of action exists for ruining the plaintiff's well by withdrawing the water, it is difficult to understand how corrupting its waters by a proper use of the adjoining premises can be actionable, when there is no intent to injure, and no negligence, as each act would destroy the well of the plaintiff. It seems to us, after a careful review of the authorities referred to by counsel for the corporation, all of which are entitled to great weight, that there is a manifest distinction between the right of the owner of land to use the underground water upon it, that originates from percolation or is found in hidden veins, and the right to contaminate it so as to injure or destroy the water when passing to the adjoining land of his neighbor.

It is a familiar doctrine that one must so use his property as not to injure his neighbor, and because the owner has a right to make an appropriation of all the under-ground water, and thus prevent its use by another, he has no right to poison it, however innocently, or to contaminate it, so that when it reaches his neighbor's land it is in such condition as to be unfit for use either by man or beast. One may be entitled by contract with his neighbor to all the water that flows in a stream on the surface that passes through the land of both, and, while he can thus appropriate it, he has no right to pollute the water in such a manner as, when it passes to his neighbor, its use becomes dangerous or unhealthy to his family, or to the beast on his farm. As soon as the water leaves the land of the one who claims the right to use it, and runs on the land of another, the latter has the same right to appropriate it, and, if property, it then becomes as much the property of the last as the first proprietor. The owner of land has the same right to the use and enjoyment of the air that is around and over his premises as he has to use and enjoy the water under his ground. He is entitled to the use of what is above the ground as well as that below it, and still it will scarcely be insisted that he can poison the atmosphere with noxious odors that reach the dwelling of his neighbor, to the injury of the health of himself or family. If not, we see no reason why he should be permitted to so contaminate the water that flows from his land to his neighbor's, producing the same results, and still escape liability for the damages sustained, and whether the water escapes the one way or the other is immaterial. The simple question

is, Can the owner, with a knowledge of the penetrating character of its oil, and the effects following its leakage, store large quantities of it near the spring of the plaintiff, when the oil is seen in puddles outside of the building, the result of leakage of the casks on the inside, and resist the claim of the plaintiff on the ground that it did not know the water was affected by it? The injury has been done, and can it be said that it presents a case of *damnum absque injuria*? We think not.

The case of *Ballard v. Tomlinson*, L. R. 29 Ch. Div. 115, 24 Am. L. Reg. N. S. 634, contains the correct rule on the subject. In that case the water in the plaintiff's well was injured by sewage from the defendant's well, and it was held that an injunction to restrain the defendant from so using his well was proper, and the plaintiff entitled also to damages for what he had suffered by reason of the pollution. While the unlimited right to use the percolating water was conceded to the plaintiff, the right to contaminate the water so as to render it unhealthy or unfit for use, when it came to his neighbor's land, was held to be a violation of plaintiff's rights, for which an action could be maintained. If one has that on his own premises that is dangerous, or a substance that he is constantly using which is liable to escape and injure others, whether above or under the ground, and injure the property of his neighbor, or that which his neighbor has the right to use, he must answer for the consequences.

A recovery was had against gas companies in the case of *Ottawa Gas-Light Co. v. Graham*, 28 Ill. 74; *Pottstown Gas Co. v. Murphy*, 89 Pa. 257; *Columbus Gas-Light Co. v. Freeland*, 13 Ohio St. 392.

In the case in 28 Ill. 74, the gas company erected works near the dwelling of Graham, and injured the water in his well by permitting the substances used in its manufacture to permeate the soil, and find their way to plaintiff's well. The court told the jury that if such substances did soak into the ground, and permeate and pass along and through the earth, mingling with the water of the well, and did thereby render it nauseous to the taste, or unfit for use, the jury should render a verdict for the plaintiff. This branch of the instructions was held to be proper, and no question raised as to the right of recovery, if the jury believed the facts existed as alleged and proven.

In *Pottstown Gas Co. v. Murphy* the court held the company answerable for the corruption of the plaintiff's well by reason of fluids percolating from the works. The entire dominion of the defendant over its property in the present case is undenied, but it had no right, while enjoying its use, although in a legitimate way, to violate, by the manner of its use, the rights of others. It seems to us unreasonable to adjudge that the erection and operation of gas works, or buildings for the storage of oil, with the noxious and injurious substances, by reason of the deposit on the surface permeating the ground, and injuring or destroying the taste or use of water belonging to and on the property of others, is such a legitimate use of one's property, and his dominion over it, as to preclude any recovery for an injury to the property of his neighbor, however great; and to require a notice that the injury

has been inflicted before the action can be maintained would be to destroy the theory or the principle upon which a recovery in the case is permitted. It is argued that the appellee was ignorant of the existence of the nuisance or injury to appellant's spring, and had no right to suppose that its oil was affecting the water in the spring of the plaintiff. This may be so, and still the defendant is responsible for the injury, although it was not aware that its neglect in permitting the oil to leak from the casks, and stand in pools outside the building, had or would work an injury to the plaintiff. If a nuisance, whether neglect or not, the appellee is liable.

We have assumed, in the consideration of the questions presented, that the injury complained of resulted from the manner in which the oil was kept in the store-house of the defendant, but we are not to be understood as taking that question from the jury on the return of the case. Some question was made in the court below as to the right of the plaintiff in estimating the value of his spring, or the damages occasioned by the act of the defendant, to show that years before he had sold water from it; this testimony was properly excluded. We do not understand that the injury has resulted in the entire destruction of the spring or the water for use, and for that reason the actual damage sustained is the criterion of recovery,—the deprivation of the use of the water for domestic or farm purposes up to the time of the trial. The continuance of the use of the building for the purposes of storing the oil, without any additional protection to the flow of the oil to the spring of the plaintiff, would subject the appellee to another action. We cannot well see how the plaintiff can be fully compensated in any other mode; and to make the injury permanent, when it is certainly in the power of the defendant to prevent it, would be subjecting it to the payment of damages, although the beneficial use of the spring had been again restored.

Judgment reversed, and remanded, with directions to award a new trial, and for proceedings consistent with this opinion.

William McQUERRY, *Appt.*,

v.

Elizabeth GILLILAND *et al.*

(....Ky.....)

1. One who has elected to take a devise under a will requiring him to convey to

others certain land of which he holds the title cannot refuse to make such conveyance and claim that the land belongs to him.

2. The inability of the beneficiary under a will to bring suit for conveyance of land to him as directed by the will in the State where the land is situated, because the will is not recorded there, will not prevent him (or his heirs after his death) from bringing such suit in another State, where the will was made.

3. Heirs entitled to a third of certain lands, who claim no more than that part which is set off by metes and bounds, may sue therefor without joining other heirs, where the latter have already received a conveyance of a part equivalent to their share.

(January 16, 1890.)

A PPEAL by defendant from a judgment of the Circuit Court for Lincoln County in favor of plaintiffs in an action to compel a conveyance to them, as heirs-at-law of a devisee under the will of John McQuerry, deceased, of lands devised to their ancestor. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. William Lindsay and W. H. Pettus, for appellant:

The will was insufficient to create a trust in said land in Iowa. It had never been recorded in Iowa, and was not therefore a "muniment of title" or a deed of trust to lands in that State.

See Stat. Iowa; Gen. Stat. Ky.; Perry, Tr. §§ 90-93.

A resulting or a constructive trust did not arise out of the entry of said land warrants in the name of defendant. Blood is a good and sufficient constitution.

See Bigelow, Fraud, pp. 109-111.

The money paid by the father was simply an advancement.

10 Pom. Eq. Jur. §§ 1037, 1039; Perry, Tr. §§ 142-148.

The title being once vested in the defendant, he could not be divested by the act of his father.

See *McIntyre v. Hughes*, 4 Bibb, 186; 17 Am. L. Rev. 76; 2 Spence, Eq. Jur. p. 215.

The principles of equitable election do not apply to this case. There were here no alternate or inconsistent gifts.

See Pom. Eq. Jur. §§ 472-484.

If election should apply to this case, then defendant had long since elected to take the Iowa land. His entry upon it claiming to be the absolute owner; his continued holding under such claim; his improvement thereof at his own expense; and his conduct in relation thereto,—were

NOTE.—Election to take under will.

A beneficiary under a will must accept it in its entirety or not at all. *Ditch v. Sennott*, 5 West. Rep. 162, 116 Ill. 238; *Jarman, Wills*, 386; *Brown v. Pitney*, 39 Ill. 463.

A person cannot accept and reject the same instrument; and there is an implied condition that he who accepts a benefit under it shall adopt the whole by conforming to all its provisions; this is the rule on which the doctrine of election is founded. *Holt v. Holt*, 5 Cent. Rep. 302, 42 N. J. Eq. 383; 2 Story, Eq. Jur. § 1077; *State v. Joyce*, 43 Ind. 312; *Hyde v. Baldwin*, 17 Pick. 303; *Gretton v. Haward*, 7 L. R. A.

1 Swans. 409; *Dillon v. Parker*, Id. 394; *Streatfield v. Streatfield*, Cas. t. Talb. 183.

A devisee cannot take under a will and contrary to it at the same time. *Wilbanks v. Wilbanks*, 13 Ill. 19.

A devisee, by electing to take under a will, waives a right to enforce a claim inconsistent with its other provisions. *Haack v. Weißen*, 43 Hun. 436.

Where legatees took possession of the land itself, which was directed to be sold by the executors, and the proceeds to be used for payment of the legacy, by so taking possession they made their election for a reconversion, and became liable for testator's debts to the extent of the property. *Armstrong v.*

proofs sufficient to show such election on his part.

See Pom. Eq. Jur. §§ 512, 514, 515, 517.

The Kentucky estate which consisted entirely of "lands," at the death of testator's widow, had been settled by a proceeding in the courts of Pulaski County to which plaintiffs were parties, and they did not then require defendant to elect, or to make any compensation on account of holding the Iowa land, but tacitly acquiesced in such holding.

See 2 Spence, Eq. Jur. p. 601.

No fraud or contract was alleged or proven, and since no express or implied trust was shown to have existed a circuit court in this State had no jurisdiction in the premises.

See Perry, Tr. §§ 71, 72, and cases there referred to; *Mansie v. Watts*, 10 U. S. 6 Cranch, 143 (3 L. ed. 181); *Servis v. Nelson*, 14 N. J. Eq. 94; Pom. Eq. Jur. §§ 1317, 1318; *Stanley v. Morse*, 26 Iowa, 454; *Mississippi & M. R. Co. v. Ward*, 67 U. S. 2 Black, 485 (17 L. ed. 311); *Northern I. R. Co. v. Michigan Cent. R. Co.* 56 U. S. 15 How. 233 (14 L. ed. 675), 5 McLean, 444; *Page v. McKee*, 3 Bush, 137; *Cornelison v. Browning*, 10 B. Mon. 423.

Messrs. O. H. Waddle, J. T. May and T. Z. Morrow for appellees.

Bennett, J., delivered the opinion of the court:

The record, as we think, establishes substantially the following state of case: In 1849 the appellant, William McQuerry, and his father, John McQuerry, bought two land warrants each, of 160 acres each, which had been issued by the federal government to the soldiers of the Mexican war. These warrants were for land in the State of Iowa. The appellant, by an arrangement with his father, went to the State of Iowa, in company with his younger brother, Milton Green McQuerry, then about seventeen years old, for the purpose of locating said warrants, and of obtaining patents, two of which were to be in his own name and two in the name of his father, John McQuerry. But, if from any cause, patents on the two warrants could not be obtained in the father's name, they were to be obtained in the appellant's name, for the benefit of the father. The appellant, on arriving at the land office in the State of Iowa, found, owing to the absence of his father from the State, and not having his written power of attorney, that he could not obtain the patents in his father's name, and, pursuant to the alternative agreement, caused them to be issued in his own name, but failed thereafter to convey the land to his father. His father, in 1852, died, leaving a last will,

which was recorded in Pulaski County; and the appellant was named in the will, and qualified, as one of the executors, and entered upon, and continued to discharge, his duties as executor of the will. He was also one of the devisees of the will, and received the portion of the estate devised to him. The testator, among other things, willed to his wife, during her life, this Iowa land, remainder to his son, Milton Green McQuerry, and recited the fact that he bought the two warrants, and that the appellant had to have the patents issued in his own name, and requested him to convey the land to his wife for and during her life, remainder to Milton Green McQuerry. Milton Green McQuerry died soon after the war, without having had issue; and the widow of the testator, John McQuerry, having died in 1884, the appellees brought this action in equity against the appellant, to compel him to convey to the appellee, Mrs. Gilleland, sister of the appellant, and the other appellees, children of his other sister, deceased, their respective portions of said land, they claiming as co-heirs with the appellant of Milton Green McQuerry. The lower court adjudged that appellant should make the conveyance. From that judgment he has appealed.

It is to be observed that appellant is one of the devisees under the will, and is one of the executors of the will. Also, supposing that the testator was mistaken as to owning, or ever having owned, any interest in said land, that the appellant was bound to respect, and that it in fact belonged to the appellant, yet it is a fact that the testator devised a portion of his own estate to the appellant, and directed (the request is in this will a direction) the appellant to convey this land to his widow for life, remainder to Milton Green McQuerry. The testator, in making this direction, assumed to dispose of this land as his own, and, in connection with other estate, certainly his own, devised portions of the whole to all of his children; and, but for reckoning the whole as his, he doubtless would have made a different disposition of the estate that did in fact belong to him.

So the question arises, supposing that said land belonged to the appellant, but, the testator having assumed to dispose of it by will, and the appellant having been made a devisee under the will, and having accepted its provisions, has he not thereby elected to surrender all right to said land, and to make the conveyance according to the direction of the will? The principle is well settled, where a testator devises his own estate, or a part of it, to a person, and also devises that person's estate to another, and that person accepts the estate thus devised to him,

McKelvey, 6 Cent. Rep. 198, 104 N. Y. 179; *Prentice v. Janssen*, 79 N. Y. 478, 14 Hun. 548; *Van v. Barnett*, 19 Ves. Jr. 102; *Mutlow v. Bigg*, L. R. 1 Ch. Div. 385, 15 Eng. Rep. (Moak) 808.

Instances; late cases.

Children of a testator, by accepting beneficiary provisions in the will in respect to land conveyed to him by their grandfather for life only, with limitation to them, thereby surrender any right under the deed of their grandfather inconsistent with the will, and must abide by their election. *Borden v. Ward*, 103 N. C. 173.

Where a mother deeded a quarter of an entire 7 L. R. A.

city lot to one of her sons, and afterwards devised the entire lot to her three sons, including the grantee, share and share alike, such grantee will be required to elect whether he will take under the will; and if he elects not to do so, he will not be entitled to a partition of the remaining three quarters. *Brown v. Brown* (Minn.) 44 N. W. Rep. 250.

A man who wrote his wife's will, and, after an executor had renounced, took administration *cum testamento annexo*, and acted for two or three years, and filed an account as administrator, and received some benefits under the will, must be held to have elected to claim under the will, instead of against it. *Scholl's App.* (Pa.) 17 Atl. Rep. 208.

such person will not be heard to assert his old right, but by thus accepting the provisions of the will, he relinquishes his old right to the other person. He cannot enjoy the bounty conveyed by the will, and at the same time claim his old right. The intention of the testator, in such case, is that both bounties shall take effect, and the conscience of the devisee is affected by this intention; and having accepted the bounty, it would be a fraud upon the testator to allow him to thus accept the bounty, and at the same time hold on to the bounty that the testator intended for another; and, but for the belief that such other would receive the bounty, the devisees would not have been thus made. It is to prevent this fraud that equity puts this donee to his election, and, having made his election to accept the provision for his benefit, he thereby elects to abide by all of the provisions of the will, and surrender all rights inconsistent with them, and to do whatever the will directs him to do in order to carry out its provisions. The right of the appellees did not accrue until after the death of the widow of the testator, which occurred in 1834.

The appellant contends that, as the will was not recorded in Lucas County, Iowa, where the land was situated, the appellees cannot maintain this action. This contention is based upon the fact that, as Milton Green McQuerry could not have maintained an action in the State of Iowa for the recovery of the land, because the will was not recorded in that State, it follows that his heirs cannot maintain this action to compel a conveyance. We cannot agree to this contention. It is well settled that the performance of an equitable obligation, or an obligation that may be enforced by an action *in personam* and not *in rem*, may be enforced wherever the chancellor may obtain personal jurisdiction of the person, without regard to the fact that the real estate to which such obligation relates is situated in another State.

In the case of *Massie v. Watts*, 10 U. S. 6 Cranch, 148 [8 L. ed. 181] (case going to the supreme court from this State), the court said: "Either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of *mala fides* practiced on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found; and the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction. . . . This court is of opinion that, in case of fraud or trust or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree."

In such case the subject matter is not that of the recovery of land. In other words, it is not an action *in rem*. The court need not have the land before it in order to be able to render a judgment. But the action is *in personam*, for

the purpose of enforcing a personal obligation of contract or of trust. It is true that the title to land is to be affected by the decree, in so far as it compels the party to convey; but, as said, by reason of his trust or contract duty, he is personally obliged to convey, and that duty may be discharged in one State as well as another, although the land may not be situated in such State. It is the breach of trust or contract to convey, that may be complied with without regard to the location of the land, that gives the right of action *in personam*. If Milton Green McQuerry were alive, he, for the foregoing reasons, could maintain this action in this State; and, he being dead, the appellees can maintain it.

The judgment is affirmed.

A petition for rehearing was subsequently filed and on February 4, 1890, *Bennett, J.*, delivered the opinion of the court:

It is true that the children of Mrs. Gilmore, the appellee's deceased sister, are not made parties to this action. The reason for not making them parties is that they, as is alleged and proven, in 1872, received from the appellant a conveyance to all of said land, except 120 acres thereof, which is not of greater value than one third of the whole tract, less 20 acres sold by Milton McQuerry in his lifetime. It is true that said children, as representatives of Milton McQuerry, were entitled to one third of the land thus conveyed to them; and, if they or their mother purchased the same from the appellant, the purchase was wrongful, for it belonged to them. It is also true that appellant conveyed to said children the third of said land that belonged to him. It is also true that the appellees only sued for one third of said land, and the court adjudged that she was entitled to the 120 acres of the land, as one third of the whole, and ordered the appellant to make a deed to the same. So the intimation of counsel, to the effect that the appellant's right to only one third of the land was ignored by the judgment, is a mistake. Also, the appellees were entitled to one third of the whole tract, less what Milton McQuerry sold, notwithstanding the fact that Mrs. Gilmore might have waived or failed to assert her right to one third by inheritance, and have bought the same from the appellant. The fact that she failed to do so, if she did, can in no wise prejudice the appellee's right to her third of the whole. The record shows that the appellant conveyed equivalent to two thirds of this land to the children of Mrs. Gilmore,—one third that they were entitled to in right of their mother, as heir of Milton Querry, and one third as a purchase from the appellant, his inheritance from said Milton,—leaving only one third in value of the land, the quantity that the appellee is entitled to. We are at a loss to know why the appellee may not recover this, as it is set off from the balance by metes and bounds, without joining said children.

Petition overruled.

NEBRASKA SUPREME COURT.

Guy C. BARTON *et al.*, Appts.,
v.
UNION CATTLE CO.

(....Neb....)

Pollution of stream. Plaintiffs are the owners of a tract of land through which the Papillion Creek flows, and which land is used for general farming purposes and for stock raising, watering their cattle from the creek. The defendant owns a larger track of land immediately adjoining, up the stream from the plaintiffs. The defendant erected a large feeding stable for cattle, in which were kept and fed a maximum of 8,750 head of cattle. The barn was washed out by means of steam pumps twice daily, and the dung, urine and droppings from the cattle carried by means of sewers into the creek, and by force of the stream down to and upon the plaintiffs' land, thereby fouling and polluting the water, and rendering it unfit for use, creating an atmospheric stench and nuisance. This was continued for about two years. In an action in equity by the plaintiffs against the defendant,—*Held*, that the defendant would be enjoined from continuing such nuisance.

(December 31, 1889.)

APPEAL by plaintiffs from a decree of the District Court for Sarpy County dismissing the petition in a suit brought to enjoin defendant from polluting the waters of a certain creek. *Reversed*. The facts sufficiently appear in the opinion.

Messrs. Hall, McCullough & English for appellants.

Mr. J. M. Woolworth, for appellee:

If in the exercise of his discretion, the chancellor finds that a small sum awarded by a jury will make good to the plaintiff the injury he may sustain, and that vastly beyond that

*Head note by CORN, J.

NOTE.—Damages, for pollution of water of stream.

The measure of damages, in an action by a lower owner against an upper owner for pollution of the stream, thereby depriving plaintiff of the use of the water, and also causing offensive odors affecting health and comfort, is the depreciation in rental value, and the bodily sickness, pain and discomfort thereby caused. *Ferguson v. Firmenich Mfg. Co.* 77 Iowa, 576; *Eufaula v. Simmons*, 86 Ala. 515.

Liability for maintaining a nuisance to the injury of adjoining owners does not depend on the question whether such use by the owner is reasonable or otherwise, but on the question of whether he injures his neighbor. *Reinhardt v. Mentastl*, L. R. 48 Ch. Div. 685, 61 L. T. N. S. 328, 40 Alb. L. J. 490.

When a municipal corporation, by artificial drainage, causes filthy and unwholesome house sewage to flow into and pollute a stream, to the use of which in its natural state a land owner through whose premises it passes is entitled, he is entitled to damages, together with an abatement of the nuisance. *Chapman v. Rochester*, 1 L. R. A. 296 and note, 110 N. Y. 578.

Riparian owners: rights and liabilities.

The upper owner may, as a rule, use the stream in a reasonable manner, for reasonable purposes, 7 L. R. A.

sum the defendant will be injured by a decree against him, the parties will be sent to law to ascertain the damage. In such a case, the remedy at law is adequate.

Burnham v. Kempton, 44 N. H. 88, 101; *Eastman v. Amoskeag Mfg. Co.* 47 N. H. 71, 78; *Whittlesey v. Hartford, P. & F. R. Co.* 23 Conn. 421, 432; *McCord v. Iker*, 12 Ohio, 387; *Atty. Gen. v. Sheffield Gas Consumers Co.* 3 DeG. M. & G. 304; *Richard's App.* 57 Pa. 106; *Parker v. Winnipiseogee Lake Cotton & W. Co.* 67 U. S. 2 Black, 545 (17 L. ed. 338); *Sellers v. Parois & Williams Co.* 80 Fed. Rep. 164; *West Cumberland Iron & Steel Co. v. Kenyon*, L. R. 6 Ch. Div. 773.

The question is, Does the proprietor above use the water for a legitimate purpose and in a reasonable way, without negligence or malice? If he does, the proprietor below cannot complain although by such use the water before it reaches him is reduced in quantity or deteriorated in quality.

Snow v. Parsons, 28 Vt. 459; *Jacobs v. Allard*, 42 Vt. 803; *Haskins v. Haskins*, 9 Gray, 390; *Prentiss v. Geiger*, 74 N. Y. 841; *Gould v. Boston Dock Co.* 18 Gray, 442.

The feeding of cattle, and flow of what naturally comes from them into the river, is a natural use of the land and water—the evil only arises from the great extent of the business. But extent of the business is an accident and not a true test of the right. The true test is, naturalness of the use.

Loose v. Buchanan, 51 N. Y. 477; *Pennsylvania Coal Co. v. Sanderson*, 4 Cent. Rep. 475, 113 Pa. 126.

It is not right to suppress such a business for sake of the slight advantage which may accrue to the plaintiffs therefrom.

Earl of Ripon v. Hobart, 3 Myl. & K. 169; *Pennsylvania Coal Co. v. Sanderson and Richard's App. supra*; *Atchison v. Peterson*, 87 U. S. 20 Wall. 507 (22 L. ed. 414).

even as a means of carrying off waste matter. Whether the use to which he wishes to devote it is reasonable must be determined by the circumstances. *Ferguson v. Firmenich Mfg. Co.* 77 Iowa, 576.

A lower owner cannot recover against an upper owner for the pollution of the stream, if he himself contributed to it. *Ibid*.

The fact that a stream has been used as a common sewer for many years is no excuse to an upper owner for polluting it, thereby causing damage to a lower owner. *Ibid*.

An upper owner has no right to pollute the water unnecessarily. *Spence v. McDonough*, 77 Iowa, 460.

All the water of a stream may be used by an upper owner, if it is required for watering his stock. *Ibid*.

Where the pollution of a stream by an upper owner is continuous, the rule that one who takes no steps to avoid the consequences of another's negligence cannot recover damages therefor has no application, as such pollution is not a case of mere negligence, but a continued tortious act. *Satterfield v. Rowan* (Ga.) 9 S. E. Rep. 877.

Under the Georgia Code, an upper owner has no right to pollute or adulterate the water so as to render it unfit for use by a lower owner. *Ibid*.

Cobb, J., delivered the opinion of the court:

This cause was appealed from the judgment of the District Court of the County of Sarpy, which dissolved the injunction against the defendant, and dismissed the action of the plaintiffs. The suit was brought to restrain the defendant from polluting the waters and injuring the flow of the current of Papillion Creek, by discharging into it the manure and offal from the extensive cattle-feeding barns maintained by the defendant, in such manner and degree as to injure the stream for husbandry, and destroy it for watering live stock, on the adjacent premises of the plaintiffs. The facts appear that in 1885 the plaintiffs bought two parcels of land lying on said stream. The one of eighty acres was originally pre-empted by Gilmore, and was bought of one Frost, by which names it is designated; the other, of 160 acres, was bought of Gates, after whom it is called,—both lying on the creek below the defendant's lands and barns. In the same year the defendant bought 400 acres of land on the creek, adjacent to and above the lands of plaintiffs, for feeding barns and grounds for its cattle. The barns are alleged to provide stalls for 3,500 cattle, each animal having a small separate stall, ranged in rows, heads and tails, in uniformity, with aisles for feeding between head rows, and the like between tails for carrying away manure and offal; the droppings falling into a trough to be carried off by a flow of water, in quantities, two or three times daily, and thus conveyed to a sewer, through which it is carried on into the stream, amounting to 1,000,000 gallons daily. By this method it is claimed by the plaintiffs the water of the stream is disturbed and polluted, rendered foul for all common uses, and impregnated with noxious exhalations, destructive to husbandry and dangerous to health. The plaintiffs ask that the judgment below be reversed; that the injunction against the defendant be restored and continued, remedying the injuries complained of, and for general relief. The answer of the defendant admits the location of the land and property of either party on Papillion Creek, in Sarpy County, as alleged, and admits maintaining the cattle barns in the manner stated; and sets up that the plaintiffs had notice and full knowledge of the manner and results of defendant's business prior to establishing it, and consented thereto, and therefore have no cause of complaint.

Upon the trial the allegations of the petition as to the ownership and occupation of the property constituting the plaintiffs' riparian proprietors of a portion of the small stream called the "Papillion," in Sarpy County, was fully proved; that they owned and occupied said property on either side of said stream for general farming and cattle raising purposes. The allegations of the petition as to the occupation of a large tract of land upon said stream immediately above and adjoining the land of the plaintiffs by the defendant Company, and the use of it by said defendant in the manner and for the purpose as set out in the plaintiffs' petition, was also fully proved. The nature, character and extent of the damage and injury to the plaintiffs caused by the use of the defendant's feeding barn, and the casting of the manure and urine of their cattle, and other foul

and deleterious substances therefrom, into the said stream, and such substances mixing with the water of said stream, and floating down to and upon the land of plaintiffs, was also proved.

I shall not deem it necessary to set out specifically the dates of the acquisition of their several rights in their respective properties upon said stream by the parties plaintiffs and defendant, as, upon a careful examination of the evidence applicable to that branch of the case, it does not appear that either party has acquired any prescriptive rights, or been guilty of laches which can be urged against them in the case. While from the evidence it may be deemed probable that the nuisance to the plaintiffs' land by the defilement of the water of the creek was aggravated by the discharge of premature calves, or, as one of defendant's witnesses called them, "slumps or deacons," therein, along with the ordinary dung and urine from the cattle, during a portion of the time covered by the pleadings, to an extent not to be apprehended generally in the future, yet it appears from the evidence that the method used by the defendant of using warm or heated feed tends to cause cows to prematurely drop their calves, and where large numbers of them are kept together, and fed in that manner, an entire cessation of that source of defilement is scarcely to be expected. But, aside from this, it is fully established by the evidence that the maintenance of defendant's feed stable in the manner contemplated by its owner and those skilled in that method of feeding cattle, and operated strictly in accordance with the rules and requirements of the system adopted, contemplates, and will inevitably cause, the destruction of the stream below, so far as its value to the plaintiffs is concerned, and for the use and purpose for which it has heretofore been deemed most useful and valuable.

Considerable evidence as well as discussion on the part of defendant is devoted to the proposition that the injury complained of is trifling; and it is sought to show that plaintiffs may provide means of watering their stock without resorting to Papillion Creek, by the outlay of a few hundred dollars, and an annual expenditure of 20 per cent of the original cost. To this point defendant cites the case of *Jacobs v. Allard*, 42 Vt. 803. In that case plaintiffs were the owners and operators of a starch mill propelled by water. Defendant was the owner of a shingle mill on the same stream above. The cause of action was "that the defendant, 'with the intent and design to injure the orators, and damage and hinder them from the use of the water for the purpose of their starch factory,' threw into the stream the saw-dust and shavings and waste from the shingle mill. . . . and that they render the water impure and unfit for making starch, and clog the flume and penstock, and prevent the use of the starch factory," etc. The court, in the opinion, says: "The evidence makes a rather strong impression on our minds that much of the trouble which the orators claim, and give evidence to show, that they experience in the condition of the water as it comes to their works, is attributable to the manner in which they have constructed and adjusted a new dam, in reference to their works, and to the lack of proper fend-

ers and strainers to protect against impurities that may get into the stream from the mills and works above the orators. It would seem that by proper modes and means, which they could, without unreasonable pains and expense, have adopted and put in use, they could have secured themselves from the troubles complained of while the defendant was using his shingle mill, and letting the saw-dust and waste from it go into the stream."

The distinction between the above case and the case at bar in respect to the remedy suggested is that in the one case it is a prevention of the effect of the pollution, and in the other it contemplates the enduring of the effect of the pollution of the stream, but suggests the creation of an artificial watercourse to supply plaintiff's land, and contemplates the abandonment of the stream, which is the subject of the litigation. The difference, as it seems to me, is radical in principle, and I do not think that the comparatively small cost at which plaintiffs might be able to supply water for their cattle from an independent source can be considered in connection with their right to have the stream remain uncontaminated in the manner shown by the pleadings and bill of exceptions.

I cannot agree with the defendant in the assertion in the brief under the second point, that "the waters of the Papillion before the building of the defendant's barn were unfit for cattle." I do not so understand the evidence. While it was doubtless inferior in sparkling clearness to the waters of streams of mountainous regions, where the soil is poor, consisting in great part of sand and gravel, the evidence as a whole fails to distinguish it from the general run of Nebraska streams of about the same size, in respect to the clearness and salubrity of its waters, and the height of its banks and firmness of its bottom. That it has been used by the inhabitants of the country along its banks for the purposes of stock water since the first settlement of the territory is sufficiently established by the evidence.

Defendant in the brief under the third point uses the following language: "We admit the general rule that the proprietor above must so use the water as not to impair the enjoyment of it by the proprietor below, and therefore must not pollute it. But that general rule is subject to a qualification inherent in the nature of the subject, and the relative rights of the parties." The rule is stated in nearly the same language by Judge Maxwell, in the article on injunctions, 10 Am. & Eng. Cyclop. Law, 844: "Every owner of land through which a stream of water flows is entitled to the use and enjoy-

ment of the water, and to have the same flow in its natural and accustomed course, without obstruction, diversion or pollution. The right extends to the quality, as well as the quantity of water. If, therefore, an adjoining proprietor corrupts the water, an action will lie against him;" and this is the law substantially as laid down in the cases there cited, especially *Holman v. Boiling Spring Bleaching Co.* 14 N. J. Eq. 335; *Richmond Mfg. Co. v. Atlantic De Laine Co.* 10 R. I. 106; *Gardner v. Neuburgh*, 2 Johns. Ch. 162; *Baltimore v. Warren Mfg. Co.* 59 Md. 96.

These cases are authority for the plaintiffs in the case at bar as to all its branches. In most or all of them it was held that an injunction would be granted without regard to the magnitude of the interest enjoined. It is true, as stated by the defendant in the brief, that no complaint is made that the defendant's barns were improperly built or negligently managed. Nor can it be denied that the defendant's business might be legitimately carried on without damage to adjoining land owners upon a stream of the size of the Missouri or the Platte, but it is manifest from the evidence that it cannot, in the magnitude described in the evidence, be carried on without infringing upon the rights of the lower land owners upon a stream of the size of the Papillion.

I do not deem it necessary to discuss the question whether the plaintiffs have a remedy by action at law, for I understand it to be settled by the authority of the cases cited, as well as many others, that a continuing nuisance by polluting the waters of a stream, and others of a like character, may be proceeded against either by law or in equity at the election of an injured party. See also *Webb v. Portland Mfg. Co.* 8 Sumn. 189; Ang. Watercourses, § 444, and cases there cited; *Atty-Gen. v. Steward*, 20 N. J. Eq. 415; *Lyon v. McLaughlin*, 32 Vt. 423.

The injury complained of by the plaintiffs is the pollution of the watercourse, and not the improper or unreasonable use of the water of the stream by the defendant. This is a question of fact, and, as the decree of the district court was for the defendant, it must be presumed that it found that there was no pollution of the stream; but such finding is unsustained by the evidence as contained in the bill of exceptions, and is clearly against it. The decree of the district court is reversed, and a decree for the plaintiffs, as prayed, will be entered in this court.

Reversed.

The other Judges concur.

MAINE SUPREME JUDICIAL COURT.

Eben H. FERNALD *et al.*, Complainants,
v.

KNOX WOOLEN CO. *et al.*

(... Maine....)

1. Owners of mills on a stream, flowing from a great natural pond or lake, have no right

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to lower the outlet and draw down the water in the pond or lake below its natural low-water line.

2. The right to divert water from a stream, under Rev. Stat., chap. 82, § 1, does not include the right to lower the outlet of a great natural pond or lake, and lower the surface of the water.

3. An injunction may be granted to

prevent drawing down the water of a pond below its natural low-water line where defendants avow an intention to do so whenever, in times of drought, the water is needed, and have already lowered the outlet to some extent, although the damages have thus far been nominal only.

(June 26, 1889.)

ON report from the Supreme Judicial Court for Knox County, for the opinion of the full court, of a suit brought to enjoin defendants from drawing down the water in certain ponds below its natural level and to recover damages for injuries alleged to have resulted from such action. *Judgment for plaintiffs.*

The case sufficiently appears in the opinion.

Mr. J. H. Montgomery, for complainants: The public have a superior claim in the pond. Ordinance, 1641, 1647.

Private persons may restrain a nuisance affecting the public rights, when they receive special damages.

High, Inj. § 1554.

Injunction will be granted to restrain the depression of the outlet of a great pond for the purpose of drawing off its waters below its natural low-water mark, and damages given.

Potter v. Howe, 2 New Eng. Rep. 167, 141 Mass. 357.

Messrs. William H. Fogler, Charles E. Littlefield and T. R. Simonton for defendants.

Walton, J., delivered the opinion of the court:

This is a bill in equity, the prayer of which is that the defendants may be restrained by injunction from drawing off the waters of certain ponds named in the bill below their natural low-water mark.

It appears that the plaintiffs own land bounded on the ponds, and that the defendants own mills on the outlet; and the complaint is that by excavating the channel the defendants are able, in times of drought, to draw down the water in the ponds below their natural low-water line, and that this is a damage to the plaintiffs' land.

We think the injunction prayed for must be granted. We do not think the owners of mills on a stream, flowing from a great natural pond or lake, have a right to lower the outlet, and draw down the water in the pond or lake below its natural low-water line.

Such a right is inconsistent with the existence of the pond as a pond. If exercised to its fullest extent, it would destroy the pond. All the water might be drawn out, and its bed left dry, a mere stream of running water only remaining. And, if exercised to any extent, the necessary effect must be to widen the shores, and deprive the adjoining land owners of their natural water frontage; for it is the settled law of this State that lands bounded on a great pond or lake extend only to the natural low-water line, and that all beyond is owned by the State; and this natural water frontage may be as valuable to the land owner as the right to draw water is to the mill owner. But, whether of equal value or not, it is of equal validity in law, and entitled to equal protection.

This precise question was recently considered in Massachusetts, and the court held that the water of a great pond could not be lawfully drawn down below its natural low-water line; 7 L. R. A.

See also 17 L. R. A. 628.

that such a use of the water would be unreasonable; that great ponds belong to the public; that to draw down the water below its natural level is inconsistent with the common right to the use of the pond as a pond; that for such an abstraction of the water an information or an indictment would undoubtedly lie for the public wrong; and that an adjoining landowner thereby deprived of his natural water frontage could obtain redress by injunction. *Potter v. Howe*, 141 Mass. 357, 2 New Eng. Rep. 167.

As great ponds and lakes are public property, the State may undoubtedly control and regulate their use as it thinks proper. But, in the absence of legislative authority, no individual or corporation can lawfully draw down the water of a great natural pond or lake below its natural low water line.

It is urged in defense that our Mill Act secures to mill owners the right to cut canals and divert water, and that the lowering of the outlet of a pond, and the drawing down of the water, may be justified under this Act. We think not. The language of the Statute is that a man may cut a canal on his own land, "and thereby divert from its natural channel the water of any stream," etc. Rev. Stat. chap. 92, § 1.

To divert is to turn aside. The mere abstraction of water can hardly be called a diversion of it. The lowering of a natural channel can hardly be called the diversion of water "from its natural channel." Nor can the water of a pond properly be called the water of a stream. The terms "pond" and "stream" do not mean the same thing. Nor is there anything in the history of the Act, or the inconvenience to be remedied, which leads us to believe that the Legislature could have intended that the word "stream" should include a pond. We think the Statute does not apply.

The evidence fails to satisfy us that at the time of the commencement of this suit the defendants had drawn down the waters of the ponds referred to in the plaintiffs' bill below their natural low-water level more than once, and then only for a short time, during the dry season of 1886. The damages, therefore, can be nominal only. But, as the defendants admit that they have lowered the outlet of the ponds some four feet more, and avow their intention to draw down the water below its natural low-water line, whenever, in times of drought, the water is needed for their mills, we think the plaintiffs are entitled to the injunction prayed for.

Bill sustained. Injunction as prayed for, with nominal damages, and costs.

Peters, Ch. J., and **Danforth, Virgin, Emery and Haskell, JJ.**, concurred.

Otis W. BROOKS

2.

CEDAR BROOK & SWIFT CAMBRIDGE
RIVER IMPROVEMENT CO.

(....Maine....)

1. A riparian owner has no right of ac-

NOTE.—Riparian rights, how conferred. See notes to *Haines v. Hall* (Or.) 8 L. R. A. 603; *Fulmer v. Williams* (Pa.) 1 L. R. A. 603.

tion for the washing away of the soil of the banks and bottom of a stream across his land in consequence of the increased flow of water at certain times, occasioned by a dam, made with legislative authority, for the purpose of facilitating the driving of logs.

2. Incidental injuries to land by the washing away of the soil of the banks and bottom of a stream, caused by a reasonable increase of the flow of water at certain times produced by a dam authorized by the Legislature to facilitate the driving of logs, is not the taking of the property of a riparian owner for which compensation is necessary.

3. A clause of a charter authorizing land to be taken, which makes the corporation "accountable to the owners thereof for all damages," does not include consequential injuries.

(June 5, 1889.)

ON report from the Supreme Judicial Court for Oxford County, for the opinion of the full court, of a suit to recover damages for injuries to plaintiff's lands, which were alleged to result from the interference by defendant with the natural flow of a certain stream which crossed them. *Judgment for defendant.*

Defendant was incorporated and given power to improve certain streams for the purpose of facilitating the driving of logs. It built a dam across the Swift Cambridge River above plaintiff's lands, and thereby accumulated a head of water which it permitted logowners to use in driving their logs upon payment of certain tolls. The action of the logs and water injured plaintiff's lands, and he brought this action to recover damages therefor. The case was submitted on an agreed statement of facts, and in case defendant was liable damages were to be assessed by a referee, otherwise judgment to be for the defendant.

Mr. D. Hammons for plaintiff.

Mr. A. E. Herrick, for defendant:

The provisions in the Constitution of the State, art. 1, § 21, as to making compensation for property taken, applies only to such a taking as transfers the title from the owner to others for public use.

Cushman v. Smith, 84 Me. 247.

The State is above the individual, and has created this Company with certain rights. In the exercise of these rights it is not liable for injurious consequences unless so done as to constitute actionable negligence.

Lawler v. Paring Boom Co. 56 Me. 443; *Spring v. Russell*, 7 Me. 273; *Whittier v. Portland & K. R. Co.* 88 Me. 27; *Boothby v. Androscoggin & K. R. Co.* 51 Me. 318.

That indirect and remotely consequential injury might arise would not make the defendant liable when such injury was not the result of its action.

Sumner v. Richardson Lake Dam Co. 71 Me. 109.

Emery, J., delivered the opinion of the court:

Facts agreed. Swift Cambridge River in Maine is a non-tidal stream, but is capable, in its natural state, of floating to market logs and other products of the forest, and hence is a public highway for all the people of the State. *Brown v. Chadbourne*, 81 Me. 9.

7 L. R. A.

The Legislature authorized the defendant Company, among other things, to build dams across this river for the purpose of facilitating the driving of logs and improving the navigation. Spec. Laws 1875-77, chap. 106.

The defendant Company, in pursuance of its charter, and for the purposes named, built a dam across the river, about four miles above the plaintiff's land. There is no suggestion, in the statement of facts, that the dam is not properly constructed, and not wholly within the terms of the defendant's charter.

The head of water accumulated by this dam increases the flow below the dam, when the gates are opened for the passage of logs. This increased flow facilitates the driving of the logs, which is the object of the Company's charter and works. The greatest increase in the height of the river, where it passes through the plaintiff's land, caused by this increased flow, is one foot. The action of this increased flow of water, and of the logs borne along upon it, "has tended to widen and deepen the stream by gradually wearing away the soil of the banks and bottom across the plaintiff's land."

The plaintiff brings this common-law action to recover damages for that injury to his land. He makes no other complaint. None of his land has been appropriated by the defendant. It has not flowed nor occupied his land. It has not diverted any water from or upon it. So far as appears, it has by their erections detained the water a reasonable time, and let it down in reasonable quantities, at proper seasons. This is just what is being continually done on nearly every stream in the State, and what every riparian owner submits to, with little thought of claiming damages.

The plaintiff's injury, if any, does not flow from the wrongful act of anyone, and hence is *damnum absque injuria*. To hold otherwise,—to hold that the mere tendency of an increased flow of water, at times, in its natural channel to wear away soil, is in itself a cause of action against the owners of mills and dams,—would prevent all improvement of inland navigation, and would paralyze all industries dependent on water power. A law requiring such a judgment can never have been established by the people.

The plaintiff urges, however, that the Legislature cannot authorize the improvement of the navigation of the public streams of the State without providing compensation to riparian owners for such injuries as his. It may be at once conceded, fully, that the Legislature cannot authorize the taking any property of a riparian owner, for use in improving the navigation, without providing compensation. If riparian land is taken for storage of water, or for a receptacle for discharged waters, or for dams, locks, etc., the owner is entitled to compensation for the injury caused by such taking. This concession, however, does not include incidental injuries, where no land is appropriated, and no water is diverted.

The riparian owners on all public streams in this State hold their riparian lands subject to the paramount right of navigation of such streams by the public. The public right of navigation existed before the private ownership of the land under or adjoining the public streams. The title to the whole, lands and rivers, was first in

the sovereign, whether king, province or State. In all the grants of lands from the sovereign, there is always, at least unless otherwise expressly stipulated, a reservation of the public right to use all navigable rivers as public highways. Such a reservation naturally and properly retains with it the right for the sovereign to make and authorize all reasonable improvements, from time to time, to facilitate the use of the river by the public, even though the land owner thereby suffers inconvenience or loss, so long as none of his property is actually appropriated by the sovereign. This sovereign right has been continuously exercised in this State since its first settlement, and by the general, if not universal, consent of all its citizens. The statutes of nearly every legislative session contain Acts authorizing the improvement of rivers as public highways, by the erection of dams, and applying to nearly all the public rivers of the State. All these Acts assume the right of the State to make such improvements, without making compensation, except where private property is actually appropriated. The General Statute authorizing the erection of dams for creating water power contains no provision for compensation to riparian owners, when the stream is not diverted, nor the land overflowed. The early, long-continued and universal acquiescence in the exercise of such a right is the strongest evidence of its existence. A judicial decision can hardly be necessary to establish it.

The courts, however, have recognized this right of the State.

In *Moor v. Veazie*, 32 Me. 343, 357, the court, through Chief Justice Shepley, declared (quoting from Hale, De Jure Maris, chap. 4, prop. 8) that "the common law accorded to the sovereign power the care, supervision and protection" of the common right of navigation in navigable rivers," and the court further used the following language: "The power which has 'the care, supervision and protection' of a common right is bound to regulate its use in such manner that it may be safe and convenient. The duty to make the use safe and convenient involves the right to remove obstructions, to improve, or to render more safe and convenient the water for the purpose of navigation."

In *Sumner v. Richardson Lake Dam Co.*, 71 Me. 106, it did not appear that the defendant's dam in any way caused the injury complained of, and hence the case is not directly in point. Still, the defendant company was chartered to build dams to improve the navigation of a public stream, and the court plainly intimated that the charter was lawful, though it did not provide compensation for consequential injuries,—such injuries as are complained of here.

In other States, this question between the State and the riparian owners has been directly presented and adjudicated.

In *Hollister v. Union Co.* 9 Conn. 436, the defendant company was authorized by the Legislature to build piers, wharves, bridges, etc., in the Connecticut River, to improve its navigation. The company's works, built under its charter, deflected the current of the river against the plaintiff's land, washing it grad-

ually away. It was held that the plaintiff had no cause of action. The decision was put on the ground that the State had the control of the river, and the right to improve its navigation by any appropriate means, and that every grantee of land on the river took subject to that right.

In *Holyoke Water-Power Co. v. Connecticut River Co.*, 20 Fed. Rep. 71, the same doctrine was upheld by the federal court in the Connecticut District.

In *Henry v. Vermont Cent. R. Co.* 30 Vt. 638, the defendant company, in pursuance of legislative authority, constructed works that turned the current of a stream, so that it washed away the plaintiff's land. It was held that the injury was consequential only, and that the plaintiff could not recover.

In *Alexander v. Milwaukee*, 16 Wis. 264, the city, under legislative authority, made a "straight cut" across a point of land, to improve the harbor. The current flowing through this straight cut came against and wore away the plaintiff's land. Held, that the plaintiff had no cause of action.

In *Green v. Swift*, 47 Cal. 538, the defendants, by legislative authority, changed the current of American River, so as to make the floods less dangerous at Sacramento. This change caused the current to wash the lands of the plaintiff. Held, that the defendant was protected by the legislative authority.

In *Monongahela Nav. Co. v. Coon*, 6 Pa. 383, the company, under its charter, built dams and locks in the Monongahela River to improve its navigation. These works so held back the water as to retard the current in the Youghiogheny River above, to the injury of the plaintiff. Held, that the State had the right to improve the navigation of its rivers, and that the plaintiff had no cause of action.

The same doctrine is well expressed in a later Pennsylvania case, *McKeen v. Delaware D. Canal Co.* 49 Pa. 439, by Agnew, J., as follows: "The injury, therefore, which followed the raising of the water in the stream to improve the navigation, was not a taking of property, but one merely consequential, which he must suffer without compensation. . . . Everyone who buys property upon a navigable stream purchases subject to the superior rights of the Commonwealth to regulate and improve the stream for the benefit of all her citizens."

It is urged, however, that the defendant's charter makes it responsible, in this action, for the plaintiff's injury.

By the second section of the charter the Company is authorized to take land and materials, "being accountable to the owners thereof for all damages, if any, to be ascertained by reference, or by actions on the case." This does not include consequential injuries. The right of action here specified is clearly confined to land and materials taken by the Company. No land nor materials have been taken in this case. *Hollister v. Union Co.* 9 Conn. 436, *supra*.

Judgment for the defendant.

Peters, Ch. J., and Walton, Danforth, Virgin and Haskell, JJ., concurred.

Larkin THORNDIKE
v.
Inhabitants of TOWN OF CAMDEN.

(.....Maine.....)

1. A town has no authority to vote a tax for reimbursement of a collector who has improperly taken a note for taxes, and after accounting for it as money, been unable to collect it.
2. The designation of a person against whom a tax warrant is issued by a wrong name will not excuse the collector's failure to collect the tax where the mistake is too slight to raise any question of identity.
3. Citizens can be taxed only for lawful public purposes.

(June 23, 1889.)

ON defendants' exceptions to a judgment of the Supreme Judicial Court for Knox County (Danforth, J.) in favor of plaintiff in an action to recover back money paid by plaintiff as tax collector to the town treasurer, upon a certain tax warrant which he afterwards failed to collect. *Sustained.*

The case was referred to the court without the intervention of a jury, upon the following agreed statement of facts:

"This is an action for the recovery of an amount voted by the Town to be paid to the plaintiff, and interest on same.

"It is agreed that plaintiff was collector of taxes of said Town for the year 1873, and that among the various taxes intrusted to him for collection for that year was one against D. Knowlton & Co. amounting to more than \$300; that he failed to collect of them a portion of said tax, amounting to \$316.06 except to take the note of said D. Knowlton & Co., running to himself; that said note was never paid to him, or any part thereof, owing to the insolvency of said D. Knowlton & Co.; that the plaintiff, supposing said note to be collectible, paid the amount of the same to the town treasurer for the said Town of Camden; that he did not, as collector, attempt to enforce any portion of said tax against the real estate of said company, as the tax was assigned to D. Knowlton & Co., while the property meant to be taxed belonged to and was in the name of D. Knowlton Company, a corporation, there being no such party as D. Knowlton & Co.; that in 1885, at the annual meeting of said defendant Town, on an article of the following tenor, to wit:

"Art 31st. To see if the Town will vote to refund to Larkin Thorndike so much of the tax assessed to D. Knowlton & Co. in 1873 as was paid to the Town, but never collected, amt. to \$316.06, and interest on same; also, what sum of money they will vote to raise to pay the same,"—it was voted as follows:

"Art. 31st. Voted the selectmen be authorized to pay Larkin Thorndike the sum of three hundred dollars (\$300) the same to be raised by assessment; that this sum was early in the year of 1885 demanded of the selectmen of said Town, but has never been paid to the plaintiff, nor assessed by said Town. Luke Upham protested against the payment of said 7 L R A.

sum, which was recorded. The taxes on the property of D. Knowlton Company, corporation, for years 1872 and 1877 were assessed in the name of D. Knowlton & Co., and paid to collector."

Mr. Thomas A. Hunt, with Mr. T. R. Simonton, for defendants.

Mr. J. H. Montgomery, for plaintiff:

A municipal corporation has power to settle disputed claims against it, and an agreement to pay these is not void for want of consideration.

Dillon, Mun. Corp. § 477.

A vote by a town is in law a promise express, and if there be a consideration, it is a foundation for an action.

Nelson v. Milford, 7 Pick. 25.

The collector paid the amount of the tax to the Town under a mistaken idea of his rights, and the Town voted to refund the money inadvertently paid to it by the plaintiff. This is a good consideration for the vote and binds the Town.

Nelson v. Milford, supra; Bean v. Jay, 23 Me. 121.

Emery, J., delivered the opinion of the court:

This case is presented by the defendants' exceptions to the ruling of the presiding justice awarding judgment for plaintiff on an agreed statement of facts. In submitting a case upon an agreed statement, the plaintiff has the burden of stating all the facts necessary for the maintenance of his action. He must not depend on inferences. Omissions will be construed against him.

In this case we must assume that the plaintiff was the duly elected and qualified collector of taxes in the defendant Town for the year 1873; that he had a legal and sufficient warrant to collect a tax of \$316, legally assessed against a party liable to taxation in said Town, and styled in the warrant, "D. Knowlton & Co.," that he made no effort to collect said tax further than to illegally permit them to give their note instead of the money for their tax; that he took the note as money, and accounted for it as money to the town treasurer; that twelve years afterwards, in 1885, the note not having been paid, the Town voted, under proper articles in the warrant, to pay him \$300 in consideration of the premises, the said sum to be raised by assessment.

Has the Town the power to impose a tax for such purpose? Clearly not, unless the plaintiff's claim is incident to, or connected with, the exercise by the Town of its legal powers.

A town is not a business or a charitable corporation. It is simply a political organization, created as a convenient agent for the performance of certain governmental duties and purposes. Its powers are almost entirely political, and are properly limited to its duties. It has only such control over the citizen and his money or property as is expressly granted to it, or is necessary to the performance of its duty to the public. Indeed, a town is only a trustee for the public. It does not own the money in its treasury, nor the municipal property generally, but only holds them in trust for the public, and subject to public control through the Legislature. Dillon, Mun. Corp. § 61; *Meriwether v. Garrett*, 102 U. S. 472 [26 L. ed. 197].

The narrow limit of the taxing power of a town, and of its power over money paid into its treasury from other sources than town taxes, is illustrated by many decided cases. In the absence of a special statute, a town cannot raise money for purposes of local defense against an invading enemy (*Stetson v. Kempton*, 13 Mass. 272); nor to build places of amusement for its inhabitants (*Ibid.*); nor to abate taxes (*Cooley v. Grantville*, 10 Cush. 56); nor to celebrate an anniversary (*Tash v. Adams*, Id. 252), not even "Fourth of July" (*Hood v. Lynn*, 1 Allen, 103); nor to provide uniforms for a local military company (*Claffin v. Hopkinton*, 4 Gray, 502); nor to obtain a city or town charter (*Frost v. Belmont*, 6 Allen, 152); nor to oppose division of the town (*Coolidge v. Brookline*, 114 Mass. 592; *Westbrook v. Deering*, 63 Me. 231); nor to pay a private fire company (*Greenough v. Wakefield*, 127 Mass. 275); nor to build a courthouse (*Bacelder v. Epping*, 28 N. H. 354); nor to build a county jail (*Drew v. Davis*, 10 Vt. 506); nor to build a bridge in another town (*Concord v. Boscawen*, 17 N. H. 465); nor to aid a private cemetery association. *Luques v. Dresden*, 77 Me. 186.

It cannot divide among its inhabitants money received from the State (*Hooper v. Emery*, 14 Me. 375); nor assess a tax to pay back money voluntarily paid into its treasury to aid in relieving the town from military draft. *Perkins v. Milford*, 59 Me. 315.

Within its sphere, a town may exercise some discretion as to what claims to pay or to contest. In the matter of schools, roads, paupers, fire-engines, town-houses, etc., matters which towns are created to care for, the town may determine what claims on these accounts it will pay. The claim in suit, however, arises out of matters which are not intrusted to the control of town meetings. It concerns the collection of public taxes.

The Statute (Rev. Stat. chap. 3, § 46) empowers a town to raise money for specified purposes,—that is, to fix and order by vote the amount to be assessed and collected for proper town charges; but there the discretionary power of the town seems to end. The Statute gives it no control over the assessment or collection of any taxes. It is true the Statute requires the town to appoint the assessors and collectors of all state, county and town taxes to be levied within its territory, but the town does this as the political agent of the State. The appointment could have been intrusted to any other agency. These officers are not corporate agents. They are public officers, owing to the public, and not to the town alone, the duties imposed by Statute. Only their appointment comes from the town. Their authority is from the Statute, and they cannot be controlled by the town in the execution of that authority. *Desty, Taxn.* 508, 685; *State v. Wulton*, 62 Me. 106.

No vote of the town can relieve the assessors of any part of their statute duty; nor can such vote control their action in any detail. The town cannot by vote increase, diminish or vary the duties which the tax collector owes to the public, nor relieve him in case of his neglect, except in the very few cases where the Statute so provides. There is an implication, perhaps, in Rev. Stat., chap. 6, § 178, that the town may

relieve a collector who has made a fruitless arrest after one year. In general, the negligent collector is dealt with, not by the town, but by other public officers clothed with authority for that purpose.

The assessors are authorized by statute in certain contingencies to take his tax warrant from him (§§ 147, 149); the state, county and town treasurers may each issue his warrant of distress against a delinquent or slothful collector. §§ 151, 152, 158. All these officers proceed, not under any vote of the town, but independent of it, and under statute authority. It would be their duty to act, when the occasion arises, even in spite of a vote of the town. When a tax collector has once received a legal tax warrant, he becomes chargeable with the whole amount of the tax, state, county and town. He must account in money to each treasurer for the amount ordered to be paid to him. *Fake v. Whipple*, 89 Barb. 839; *Gorham v. Hall*, 57 Me. 58.

This liability is not a private debt, due to the town as a corporation, which the corporation may release. It is an official liability to the public, which he can acquit himself of only by executing his warrant. If he neglects to execute his warrant, his liability to pay to the treasurers the amounts due them is as living and binding as if he had collected the money. His payments to the treasurers are general, on account of the whole sum ordered to be paid each, and not particular, on any individual tax. His warrant commands him to pay over a certain gross amount, not any particular taxes, to each treasurer. Any money he officially pays the treasurer, he pays on account of and to diminish this gross sum,—this liability. If he be dilatory, his own money or property can be taken on a treasurer's warrant of distress, and no vote of the town can restrain the treasurer or restore the money. If he be dilatory in collecting, and voluntarily pays his own money to the treasurer without waiting for the warrant of distress to be issued, he only does his official duty,—only pays what he was bound to pay, and could be compelled to pay. If no vote of the town can restrain the treasurer from compelling payment, it would seem that no vote of the town can force him to restore what has been voluntarily paid him by the collector on account of his official liability. In neither case does the collector acquire any right to repayment from his subsequent omission to collect of the taxpayer.

Without the execution or revocation of his warrant, the tax collector seems to have no claim in law, morals or good conscience, either to be excused from failure to collect, or to receive out of the town treasury sums he has paid under his liability, though in anticipation of collection. Such a claim on its face, whatever the particular facts, does not come within the purview of town meetings. If a town has no power to raise money from taxes to restore a gift voluntarily made to the town by one of its citizens, as was held in *Perkins v. Milford*, 59 Me. 315, much less has it power to raise money from taxes to restore to a public officer money he has paid to the town treasurer under an official obligation to do so.

This claim is that of a public officer to be compensated for a loss suffered by his neglect

of his public duty. We nowhere find any authority for a town to make such compensation. For a town to make such a compensation to a delinquent collector, or to otherwise relieve him, would be in effect abating the taxes he omitted to collect. A town has no power to abate a tax. *Cooley v. Grannville*, 10 Cush. 56.

The only tribunals authorized to grant abatements are the board of assessors and the appellate tribunal,—the county commissioners. A town meeting has no authority to review, modify or reverse the judgment of the assessors as to the persons or property to be taxed. Nor has it any authority to excuse a man from paying his tax, or to refund to him a legal tax once paid. To concede that a town can, directly or indirectly, abate a tax by vote in town meeting, is to concede the power of a town to determine who shall pay taxes and who shall be exempt, and the consequent power to place the public burdens wholly on such citizens as the majority shall single out for that purpose. This court has emphatically held that a town has no such power, and that the Legislature cannot confer it. *Brewer Brick Co. v. Brewer*, 62 Me. 62.

If the town cannot abate the tax, it certainly cannot excuse the collector from collecting it. The town cannot do indirectly what it has no direct power to do.

The agreed statement of facts does not disclose any legal excuse for the collector's failure to collect the tax in question. He had no concern with the ownership of the property, nor with the propriety of the tax. It is said in the agreed statement that the property meant to be taxed belonged to, and was in the name of,

"D. Knowlton Company," a corporation, there being no such party as "D. Knowlton & Co." It is said, however, that D. Knowlton & Co. gave a note for the tax, and that afterwards D. Knowlton & Co. became insolvent. There must therefore have been a party called "D. Knowlton & Co.," and it was unquestionably the same party as "D. Knowlton Company." The variation was simply in the name of the same party, and too slight to raise any question of identity. The agreed statement negatives the possibility of any other party. There was nothing in the matter of name to hinder the collector a moment. *Farnsworth Co. v. Rand*, 65 Me. 19.

The validity of the tax was not questioned.

We cannot see any ground upon which to sustain the vote of the Town directing the assessment of a tax upon its citizens to pay this claim. The law has not made town meetings the courts of last resort in a matter so highly important to every citizen as the prompt collection of public taxes. It does not permit the bestowal of public money upon a delinquent officer by a friendly majority in a town meeting. The limited power of towns over public money was well stated in *Westbrook v. Deering*, 63 Me. 281. The taxpayer is by no means at the mercy of local majorities. The law carefully guards his rights and immunities, and only permits him to be taxed for lawful public purposes. It gives the courts power to afford him ample protection against the inconsiderate, unauthorized action of towns.

Exceptions sustained.

Peters, Ch. J., and Walton, Danforth, Virgin and Haskell, JJ., concurred.

TENNESSEE SUPREME COURT.

MAYOR, etc., OF NASHVILLE, *Plff. in Err.*,

Michael COMER *et al.*

(...Tenn....)

Damages for an alleged negligent construction of a sewer, in consequence of which plaintiff's premises are injured by discharge therefrom, must be limited to the actual damage sustained up to the time of bringing suit, and cannot include prospective damages on the ground that the defects are permanent, although human labor will be necessary to remedy the defects.

(January 23, 1890.)

ERROR to the Circuit Court for Davidson County to review a judgment in favor of

plaintiffs in an action to recover damages for permanent injuries to their property by reason of the discharge thereon of sewage from defendant's sewer which was alleged to be defectively constructed. *Reversed.*

The facts are fully stated in the opinion.

Mr. J. M. Anderson, for plaintiff in error:

A municipal corporation can be indicted for maintaining a nuisance.

State v. Barksdale, 5 Humph. 154; *State v. Murfreesboro*, 11 Humph. 217; *Hill v. State*, 4 Sneed, 443; *Chattanooga v. State*, 5 Sneed, 578; *Dillon, Mun. Corp.* §§ 1048, 1049.

Where a suit is brought to recover damages for a wrong which the plaintiff has a right at any time to abate, or the defendant no right to continue, the recovery must be limited to such

NOTE.—*Damages recoverable for negligent construction of sewer.*

A municipal corporation cannot create or maintain a nuisance. See *note* to *Chapman v. Rochester* (N. Y.) 1 L. R. A. 298.

A municipal corporation which conducts surface water wrongfully diverted from its natural channel is liable for damages occurring in consequence. *Ibid.*

It is liable for any special injury sustained by others from the negligent or unskillful exercise of its authority in constructing sewers. *Ibid.*

7 L. R. A.

A city is liable for negligent construction of its sewers, whereby injury is caused to the property of others. See *note* to *Seymour v. Cummins* (Ind.) 5 L. R. A. 123.

A city is liable for collecting and precipitating surface water on another's land. *Ibid.*

A municipal corporation in the construction of its streets has no more right to collect the surface water and discharge it upon adjacent lands, in a body than has a private person. See *note* to *Ryeholki v. St. Louis* (Mo.) 4 L. R. A. 594.

damage as has been sustained up to the time the action was commenced, and no estimate can be made of prospective damage upon the hypothesis that the wrong will be continued.

Harmon v. Louisville, N. O. & T. R. Co. 87 Tenn. 64; *Uline v. New York Cent. & H. R. Co.* 101 N. Y. 98, 2 Cent. Rep. 116; 3 Sutherland, Damages, p. 399.

Mr. Albert D. Marks, for defendants in error:

Wherever by one act a permanent injury is done, the damages are assessed once for all; and any depreciation in the value of the property will be an element of damages according to the extent and duration of the plaintiff's estate.

3 Sutherland, Damages, p. 372.

When a wrongful act is done which produces an injury that is not only immediate, but from its nature must necessarily continue to produce loss, independent of any subsequent wrongful act, then all the damages resulting both before and after the commencement of the suit may be estimated and recovered in one action.

3 Sutherland, Damages, p. 403. See also *Powers v. Council Bluffs*, 45 Iowa, 655.

If permanent damages are allowed, they are measured by the depreciation of value caused by the nuisance or by adding to the amount of damages allowed for past injuries the amount necessary to restore the premises to their former condition or to protect the plaintiff against future injury.

3 Sutherland, Damages, p. 414.

If the injury is to the value of the premises themselves, the difference in the value of the premises before the nuisance existed and their value with the nuisance there is the measure of damages.

Wood, Nuis. p. 1002.

When the nuisance is of such a character that its continuance is necessarily an injury, and it is of permanent character so that it will continue without change from any cause but human labor, the damage is original and may be at once fully compensated.

Wood, Nuis. p. 1005; *Harmon v. Louisville, N. O. & T. R. Co.* 87 Tenn. 614; *Iron Mountain R. Co. v. Bingham*, 4 L. R. A. 622, 87 Tenn. 522.

The courts have no authority to interfere with the discretion of the city in the planning and building of sewers, by ordering abatement as a nuisance, or by the exercise of any power peculiar to equity.

Horton v. Nashville, 4 Lea, 39.

Messrs. Steger & Washington, also for defendants in error:

This sewer was a permanent improvement and whatever damage it occasioned is of a permanent nature. Therefore plaintiffs cannot bring successive actions, but are confined to one action.

Where the improvement causing the injury is a permanent one the damage should be considered and treated as original and may be at once fully compensated.

Troy v. Cheshire R. Co. 23 N. H. 83; *Elizabethtown, L. & B. S. R. Co. v. Combs*, 10 Bush, 392; *Powers v. Council Bluffs*, 45 Iowa, 655.

The diminution of the value of the adjacent property occasioned by these circumstances will be the measure of his right of recovery.

7 L. R. A.

Finley v. Hershey, 41 Iowa, 394; *Illinois Cent. R. Co. v. Graybill*, 50 Ill. 242; *Ottawa Gaslight Co. v. Graham*, 28 Ill. 73; *Chicago & I. R. Co. v. Baker*, 73 Ill. 816; *Seely v. Aiden*, 61 Pa. 306; *Hart v. Evans*, 8 Pa. 22; *Bispa v. Sergeant*, 7 Watts & S. 9.

Where a city constructs a sewer of insufficient size and capacity to carry off the water, thereby causing overflow, it is liable in damages.

Rochester White Lead Co. v. Rochester, 3 N. Y. 463; *Seifert v. Brooklyn*, 101 N. Y. 186, 54 Am. Rep. 664; *Ashley v. Port Huron*, 35 Mich. 296, 24 Am. Rep. 552; *Pumpelly v. Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 166 (30 L. ed. 557); *Arimond v. Green Bay Co.* 81 Wis. 816; *Eaton v. Boston, O. & M. R. Co.* 51 N. H. 504, 13 Am. Rep. 147; *Gillison v. Charleston*, 16 W. Va. 282; *Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540; *Pye v. Mankato*, 36 Minn. 373, 1 Am. St. Rep. 671.

Lurton, J., delivered the opinion of the court:

This is an action at law by defendants in error to recover damages resulting from an alleged negligent construction of a sewer, whereby both storm and sewage water, in times of unusual freshet, have been discharged from the sewer upon the premises owned by them. The market value of the freehold is charged to have been depreciated, and damages are sought both for injury and destruction of household furniture, as well as for permanent impairment of value of the realty. There was evidence admitted going to show value of the premises before and after the alleged wrong. The trial judge charged the jury that, if they found from the evidence "that the market value of the plaintiff's property has been permanently impaired by the construction of the sewer, its proximity and liability to back up surface water, and discharge offensive sewage matter upon his premises, he would be entitled to recover the difference in the market value of the property before and since the building of the sewer." This is assigned as error.

The sewer complained of was erected by the City, and is upon the public street upon which the property of Comer abuts. A private tributary sewer, erected and maintained by Comer, crosses his property, and passes under his house, and enters the public sewer. The supposed defect in the public sewer seems to be that in times of unusual rains it has not capacity sufficient to carry off the storm water flowing into it, and upon several occasions the accumulated sewage and storm water has been so great as to result in backing the water into the smaller and tributary sewer of Comer, whereby his premises have been flooded. Assuming that defendants in error were entitled to recover damages, the question is, What damages? Were they limited to such actual damage as they had sustained up to the time of their bringing of their suit, or may they recover not only past, but prospective, damages? If the latter, then the charge of his honor is correct; but, if limited to damages already sustained, then the charge is erroneous. The learned counsel for Comer and wife defend the measure of damages stated to the jury by the circuit judge upon the suggestion that "the

sewer was a permanent improvement, and whatever damage it occasioned is of a permanent character," and that for this reason plaintiff cannot bring successive actions, but must recover his damage once for all. The recovery of prospective damages can only be justified upon the assumption that the premises of Comer will for all time to come be subject to the same disgusting invasion of sewage as has heretofore occurred. Damages assessed upon this basis, as is frankly conceded by counsel, would operate as a perpetual license to the City to continue the wrong of which it has been convicted. This we hold to be the consequence of a recovery upon a similar charge in a case of an action for a nuisance, where the judgment was submitted to by the defendant. *Harmon v. Louisville, N. O. & T. R. Co.* 87 Tenn. 614. See, to same effect, 3 Sutherland, Damages, pp. 412, 414.

Is it just or right to assume that the wrong of which Comer complains is produced from a cause permanent in its character? That the sewer is a permanent improvement, and cost a great deal of money, will not, as we shall undertake to show, be a conclusive factor in the settlement of the question. It was lawfully constructed by the City, upon a public street. It was not erected with any purpose to discharge its sewage upon the premises of Comer, but, rather, to carry off the drainage, as well as that of others in the same territory. The complaint is not that the City has been guilty of any misconduct in erecting a sewer where this has been constructed, but that its servants have so unskillfully built it that upon the recurrence of certain unusual conditions it discharges its contents upon the premises of defendants in error. Now, upon what authority is it to be assumed that the negligence or unskillfulness of the servants of the City in the construction of this sewer will not be remedied? The argument is advanced that, inasmuch as it will require the expenditure of human labor to remedy the defects in this sewer, therefore the damages are to be treated as permanent and original, and recoverable in one action. This test is supported by the opinion of Judge Bell, who delivered the opinion of the court in the case of *Troy v. Cheshire R. Co.*, 23 N. H. 88. In that case it appears that the railway company had built its roadway in and upon a public highway, in such manner as to obstruct and destroy its value as a street. The town was held entitled to recover as for a permanent occupation of the street, and damages were assessed accordingly. Now, if the railway was lawfully upon the street, then the damages recoverable were properly recovered in one suit. *Harmon v. Louisville, N. O. & T. R. Co. supra.* But, if it was unlawfully there, then it was a trespass, and an abatable nuisance, and successive actions would lie so long as it continued thereon, the recovery in such actions being limited to damages already accrued, and subsequent to the last recovery. Whether there rightfully or as a trespasser does not appear from the report of the case before us, but the inference is that it was not a trespasser; for otherwise there would have been no occasion for propounding the rule by which the permanent character of an injury is to be determined. This rule, as announced by Judge Bell, was that 7 L. R. A.

"wherever the nuisance is of such a character that its continuance is necessarily an injury, and where it is of a permanent character, that will continue without change from any cause but human labor, then the damage is an original damage, and may be at once fully compensated." 23 N. H. 102.

This seems to us an artificial and arbitrary test. There are supposable nuisances, which, by the effect of time, might at last abate themselves, but by far the greater number of trespasses, wrongs and nuisances would continue indefinitely, without the expenditure of human labor to remove or abate them. It is a rule which does not recommend itself by either its reasonableness, its certainty of application or its justice. It seems, however, to have commended itself to the Supreme Court of Iowa, who adopted it as a light sufficient to guide their decisions. One of the most signal illustrations of the unfortunate results flowing from a departure from the general rule which allows successive actions so long as a wrong in the nature of nuisance is continued, is found in this Iowa case. The facts of that case were that the plaintiff's lots were washed and cut by a ditch dug by the city, into which a natural watercourse was turned. After the cutting and removal of the soil had gone on for several years, the plaintiff sued for damages, alleging the negligent cutting of the ditch. It was held that his entire damages had accrued when the diverted stream first began to injure him, and that, not having then sued, he was bound by the Statute of Limitations. The judge who delivered the opinion, after quoting the principle above cited from *Troy v. Cheshire R. Co.*, said: "If we apply the principle above stated to the case at bar, we must hold that the damages were original. The plaintiff's ground of complaint is that the ditch was improperly constructed. As constructed, it resulted in the excavation of the plaintiff's lots. The damage consisted, not in excavating the lots, but in doing an act which resulted in their excavation. The result, too, was a necessary one, the ditch remaining as constructed. The cause of the difficulty was a permanent one, in that it would not grow less unless remedied by human labor. The case, therefore, is strictly within the rule applied in *Troy v. Cheshire R. Co.*, above cited." *Powers v. Council Bluffs*, 45 Iowa, 656.

Thus the application of the rule now contended for would require a plaintiff to foresee all the possible results, and to convince a jury of what he, with prophetic ken, is required to foresee, on penalty of subsequently having to quietly endure consequences which he could not reasonably have conjectured as likely to result from what at first seemed a trifling injury.

The cases of *North Vernon v. Voegler*, 103 Ind. 814, 1 West. Rep. 566, and *Fonle v. New Haven & N. Co.*, 112 Mass. 334, have been examined, and we find that they do measurably support the contention of defendants in error. None of these cases are satisfactory in their reasoning, and the decided weight of authority is opposed to them. They are all reviewed in the case of *Uline v. New York Cent. & H. R. Co.*, 101 N. Y. 98, 2 Cent. Rep. 116, and an opposite conclusion reached.

In reviewing the case of *North Vernon v.*

Voegler, a case more analogous to the one under consideration than any other to which we have been referred, Earl, J., said: "What right was there to assume that the street would be left permanently in a negligent condition, and then hold that the plaintiff could recover damages upon the theory that the carelessness would forever continue? A municipality or a railroad corporation, under proper authority, may erect an embankment in a street; and if the work be carefully and skillfully done it cannot be made liable for the consequential damages to adjacent property. But if it be carelessly and unskillfully done it can be made liable. It may cease to be careless, or remedy the effects of its carelessness, and it may apply the requisite skill to the embankment; and this it may do after its carelessness and unskillfulness, and the consequent damages, have been established by a recovery in an action. The moment an action has been commenced, shall the defendant, in such a case, be precluded from remedying its wrong? Shall it be so precluded after a recovery against it? Does it establish the right to continue to be a wrong-doer forever by the payment of a recovery against it? Shall it have no benefit by discontinuing the wrong? And shall it not be left the option to discontinue it?" 101 N. Y. 125, 2 Cent. Rep. 126.

This assumption that a wrong-doer is to be presumed from the mere character of the work to intend to continue in his wrong, and that he will not remedy his defective or unskillful work, is repudiated in the majority of American cases.

In *Hargreaves v. Kimberly*, 26 W. Va. 787, the action was for diverting the course of a stream so as to throw surface water upon the lands of plaintiff. The damages were limited to such as had been already sustained, the court saying "that in all those cases where the cause of the injury is in its nature permanent, and a recovery for such injury would confer a license on the defendant to continue the cause, the entire damage must be recovered in a single action. But where the cause of the injury is in the nature of a nuisance, and not permanent in its character, but of such a character that it may be assumed that the defendant would remove it rather than suffer at once the entire damage which it might inflict, if permanent, then the entire damage cannot be recovered in a single action, but actions may be maintained, from time to time, as long as the cause of the injury continues."

In the case of *Plate v. New York Cent. R. Co.* the plaintiff in a former action had recovered damages of defendant for injuries sustained by the flooding of his land resulting from the negligent construction of its embankment and ditches, causing water to flow back upon his land. The same cause continuing, and other damages accruing, a second action was brought. It was held that the former judgment only established the right of plaintiff to recover damages subsequently sustained from the same cause. 37 N. Y. 472.

In *Thayer v. Brooks*, 17 Ohio, 489, the action was for damage for diverting water from the mill of the plaintiff by means of a canal cut by defendant. The jury were charged that they might render judgment for such damages

as plaintiff has sustained by the mill-site having been diminished in value in consequence of the diversion of the water. The case was reversed, the supreme court saying: "This was going too far. . . . He was only liable . . . for the damages actually sustained prior to the commencement of the suit."

In *Duryea v. New York* the action was for wrongfully discharging water and sewage upon the premises of the plaintiff. Recovery was limited to damages actually sustained. 26 Hun, 120.

In *Bare v. Hoffman* the action was for diverting water from plaintiff's tannery by means of a pipe laid on the defendant's land. The jury were charged that they might recover the permanent damages to the freehold. The supreme court said a severance of the connection of the pipe with the stream would remove the whole cause of the complaint. "The act he committed was not of such a permanent character as to assume it to continue through all coming time, and to justify the assessment of damages accordingly. The general rule is that successive actions may be brought as long as the obstruction is maintained. A recovery in the first action establishes the plaintiff's right. Subsequent actions are to recover damages for a continuance of the obstruction." 79 Pa. 71.

Cases might be indefinitely multiplied in line with those cited. The line of cases presented by defendants in error is reviewed by Mr. Sutherland, who says, as to the effect of a recovery based upon the presumption of the permanent character of the wrong, that "such recovery will have the effect to give the defendant a permanent right to do the acts which constitute the nuisance, as fully as though there had been a condemnation of the property by the exercise of the power of eminent domain. But the option to recover permanent damages in a common-law action, with this effect, is not generally admitted in this country, and is wholly unknown in England." 3 Sutherland, Damages, 413, 414.

The weight of authority and the weight of reason alike condemn, as contrary to a true public policy, any rule by which a wrong-doer may thus procure a license to continue his misconduct. Such a rule would in many instances operate as a method by which private property would be condemned to private use against the will of the owner. It seems to us that the true rule deducible from the authorities is that the law will not presume the continuance of a wrong, nor allow a license to continue a wrong, where the causing the injury is of such a nature as to be abatable either by the expenditure of labor or money; and that, where the cause of the injury is one not presumed to continue, the damages recoverable from the wrong-doer are only such as have accrued before action brought, and that successive actions may be brought for the subsequent continuance of the wrong or nuisance.

It follows that it was error to admit proof as to the effect of the overflowing sewer upon the market value of Comer's property, and error to charge the jury that they could assess the damages upon any assumption that the wrong of the City would be perpetuated.

Reverse, and remand for new trial.

SMITH, County Clerk, *Appt.*,
 MAYOR, etc., OF NASHVILLE
 (.....Tenn.....)

1. A city is not liable for a privilege tax on its waterworks under the Revenue Act of 1887, where the works are corporate property provided for furnishing water to extinguish fires and sprinkle the streets, and to supply its citizens either as a gratuity or for a compensation.
2. The liability of a city for a privilege tax of its waterworks on the ground of furnishing persons and corporations outside the corporate limits cannot be determined in a suit to recover back money paid under protest for a privilege tax assessed under the Revenue Act of 1887, for exercising the privilege of running a water company within its own limits, where there was no assessment for doing business elsewhere than in the city, and it does not appear that parties receiving the water outside of the city were in any city, town or taxing district, or if in any of these what was the number of inhabitants therein; as the amount of the tax depends on such population.

(February 1, 1890.)

A PPEAL by defendant from a judgment of the Circuit Court for Davidson County in favor of plaintiff in an action to recover the amount paid under protest in satisfaction of a claim for alleged illegal taxes. *Affirmed.*

The facts are fully stated in the opinion.

Mr. Ed. M. Woodall for appellant.

Mr. Lutton Taylor for appellee.

Caldwell, J., delivered the opinion of the court:

This record raises the question of the liability of the City of Nashville for a privilege tax on the waterworks, under the Revenue Act of 1887. The case was before the court on petition for certiorari and supersedeas at the December Term, 1887, and the opinion there delivered is reported in 2 Pickle, beginning at page 214. The petition alleged the construction and maintenance of the waterworks by the City in its corporate capacity, for the public good, and not as a private enterprise for pecuniary gain or profit, and this court held that, in the absence of express statutory provision on the subject, the exemption from taxation arose by implication of law from the public ownership, nature and use of the property, as revealed by the allegations of the petition. It was further decided, however, that the City could not in that mode question its liability for that part of the tax assessed in favor of the State; but that its remedy was to pay the same under protest, and sue to recover the amount in thirty days, as provided by the Act of 1873. Hence, so far as the State was concerned, the petition was dismissed. As to the county it was retained, and remanded for further proceedings. Subsequently, the amount claimed for the State was paid under protest, and suit to recover the same was brought in due time. This new suit and what remained of the former one were then consolidated by mutual agreement, and heard together before the Honorable W. K. McAllister, Circuit Judge, without the intervention of a jury. Judgment was for the City, and there is an appeal in error on behalf of the State and county.

7 J. R. A.

The correctness of the decision heretofore made by this court on the allegations of the petition is conceded, but counsel for the State and county say that the proof on the trial refutes those allegations, and shows that the waterworks were used for pecuniary gain and profit, and not exclusively for the public good. P. J. Flanigan, comptroller of the City, was the only witness introduced. We give the material part of his evidence in his own words, as found in the bill of exceptions. He said "that said City always owned and operated the waterworks, . . . and it was maintained by levying a tax upon persons in said City who used the water supplied. That the water was used for extinguishing fire, sprinkling streets and the use and benefit of citizens in said City. That there were several factories adjacent to said City, but beyond its corporate limits, and several thickly-settled places in close proximity to said City, which from time to time were annexed to said City. That the factories laid their own pipe, connecting with the City's water-mains, and, in case of emergencies, when their private water supplies were exhausted, they used water furnished by the City; but this was only occasionally. The main reasons why connections were made was to provide for an abundant supply of water in case of fire. That in all there were about \$6,000 paid by factories and persons living adjacent to the corporate limits. That this . . . was not the real source from which the revenue was derived. That about \$85,000 annually were derived [from all sales of water], \$50,000 of which went to pay the operating expenses, and the remainder to pay the interest on about \$1,000,000 invested by said City in the waterworks improvement, and that the remainder was not sufficient, and that there was a deficit annually which was made up from other sources. . . . That the fire companies responded to alarms when given, if adjacent to the City, and used water furnished by the City in extinguishing them, and had frequently responded to alarms sent in from factories beyond the corporate limits."

It is seen at once that the waterworks are corporate property. That is not denied. The debate is with respect to the nature of the use. As to that, for the sake of convenience, we divide all the purposes for which the City furnishes water into three classes: (1) to extinguishing fires and sprinkling the streets; (2) to supply citizens of the City; (3) to supplying persons and factories adjacent to but beyond the corporate limits. If the business were confined to the first class, there would be no ground to base a decision on, so clearly would the use be exclusively for public advantage. We think there can be but little more doubt about the second class, especially in view of certain words in the city charter, to which we will advert presently. Nothing should be of greater concern to a municipal corporation than the preservation of the good health of the inhabitants. Nothing can be more conducive to that end than a regular and sufficient supply of wholesome water, which common observation teaches all can be furnished in populous cities only through the instrumentalities of well-equipped waterworks. Hence, for a city to meet such a demand is to perform a public act, and confer a public blessing. It is not strictly a govern-

mental or municipal function, which every municipality is under legal obligations to assume and perform, but it is very closely akin to it, and should always be recognized as within the scope of its authority, unless excluded by some positive law. If the responsibility be voluntarily assumed or fixed by law, whether the one or the other, the performance of it is the doing of an act for the public weal,—a lending of corporate property to a public use.

The eighth subsection of section 17 of the Charter of the City of Nashville (Acts 1883, chap. 114) enumerates some of the powers conferred upon the mayor and city council in these words: "To provide the City with water by waterworks, within or beyond the boundaries of the City, and to provide for the prevention and extinguishment of fires, and organize and establish fire companies." Here the first clause, "to provide the City with water by waterworks," is very broad and comprehensive, and was obviously intended to authorize the corporation to furnish the inhabitants of the City with water. Having accepted the charter, and undertaken to exercise this authority in the manner detailed by the witness, it cannot be held that the City in doing so is engaging in a private enterprise, or performing a municipal function for a private end. It is the use of corporate property for corporate purposes, in the sense of the Revenue Law of 1877. It can make no difference whether the water be furnished the inhabitants as a gratuity or for a recompense, the sum raised in the latter case being reasonable and applied for legitimate purposes. So raising a fund to help defray the expense of operating the waterworks, and to keep down the interest of the City's indebtedness, incurred in the construction thereof, is no more engaging in business for gain and profit than would be the assessment and collection of taxes for that or any other legitimate object. To the extent that money is realized by sale of water, if it be so termed, the necessity of laying taxes in the usual way is diminished. If the water were furnished free of charge, then the expenses of operating the works and meeting the interest on the debt would have to be met by an increased tax assessment.

We believe the views here expressed are sustained not only by sound reason and policy, but also by the weight of adjudged cases. In a Connecticut case it was decided that land owned by the City of Hartford, and used for reservoirs for collecting and storing water for the benefit of its inhabitants, was not subject to taxation by the Town of West Hartford, in which the land was situated; and, further, that the question of exemption was not affected by the fact that the water was sold to consumers, and the water rents applied in payment of interest on the investment, and incidental expenses. In the same case it was further held that another portion of the same tract, bought by the water commissioners at the same time, was not exempt, because not used for reservoirs or other public purposes. *West Hartford v. Bd. of Comrs.* 44 Conn. 387.

By Act of the Legislature of New York a certain board of commissioners of Rochester was authorized to determine and execute the best and most expedient plan of supplying that

city "with a sufficient quantity of pure and wholesome water for the use of its inhabitants and the extinguishment of fires." Laws 1872, chap. 387. As a part of this plan lands were purchased in the Town of Rush, and a reservoir was erected thereon. Water was supplied therefrom for the city's own use, and for the consumption of the inhabitants, the latter paying prescribed water-rates. The amount of rents received from consumers of the water was less than the interest on the bonds issued for the construction of the works. One question submitted to the court on those facts was: "Can the Town of Rush legally impose a tax upon the said property of the City of Rochester?" The court of appeals, speaking through Danforth, J., said that it could not, because the waterworks, being "for the public good," were in legal contemplation "held for public purposes." *Rochester v. Rush*, 80 N. Y. 302.

Other cases in harmony with these two might be cited, but that is not deemed necessary.

The cases relied on as in direct conflict we do not find to be so. The strongest adverse case is that of *Louisville v. Com.*, 1 Duv. 295. There the court, in discussing the implied exemption of municipal property from taxation, used this language: "The more precise and distinctive test for classification is this: Whatever property, such as court-house, prison and the like, which became necessary or useful to the administration of the municipal government, and is devoted to that use, is exempt from state taxation; but whatever is not so used, but is owned and used by Louisville in its social or commercial capacity, as a private corporation, and for its own profit, such as vacant lots, market houses, fire engines and the like, is subject to taxation." 1 Duv. 293.

It will be observed that reservoirs or waterworks are not enumerated here; and we are not informed, and cannot with certainty determine from the language used, on which side of the line the learned judge would have placed such property if he had mentioned it in the classification of exempt and non-exempt property. So it is not necessarily an authority in point.

The Iowa case does not touch the question at all. Here the waterworks were owned and operated by a private company, and not by the city. The company bound itself to furnish the City of Des Moines and its inhabitants with pure and wholesome filtered water at certain rates, and, after a limited period of time, to sell all of its property used in its business to the city, at its election. Because of this arrangement and contract with the city, the company denied its liability for taxes. *Chief Justice Rothrock*, in delivering the opinion of the court, said: "The fact that the city is furnished water for which it pays what is presumed to be a fair consideration does not change the property from a private to a public use. The reservation of the city of the right to purchase the works does not invest it with any title or right to the property, or in any sense make it public property, until it shall elect to purchase." *Re Des Moines Water Co.* 48 Iowa, 324.

If possible, the decision in the case of *Barley v. New York*, 8 Hill, 581, is still further from the question before us. That was an action

against the city for damages for injuries resulting from the negligent and unskillful construction of a dam by the city water commissioners. The commissioners were held to be the agents of the city in such a sense that it was liable for the injuries complained of. No question of taxation was raised in the case.

Mr. Cooley and Mr. Desty both lay down the rule that municipal property is by implication exempt from taxation when put to a public use, and that it is not exempt when not so used. They give instances of both classes and cite the cases. Each author gives some prominence to the Kentucky case reported in 1 Duvall, but Mr. Cooley, in his concluding sentence, says that the doctrine of that case would seem to limit implied exemptions unreasonably, unless restricted to the case of special assessments. Cooley, Taxn. 172-174; 1 Desty, Taxn. 48, 49.

With respect to the third class, there is an equally obvious, though altogether different, solution of the question. It is this: The tax in litigation was assessed against the City of Nashville for "exercising the privilege of running a water company" within her own limits, in a city "of 40,000 inhabitants, or over;" the amount of the tax, as to the State's part, being

determined by the statute according to the population. There is no assessment for the privilege of doing the business of a water company elsewhere than in the City; hence, if there be liability to the tax for furnishing water to any other person than her own citizens, to individuals and factories adjacent to and beyond her corporate limits, that liability cannot be adjudged in this case because not put in issue. Moreover, in addition to the lack of such issue, it does not appear in this record that the persons and factories receiving the water outside of the limits of Nashville were in any city, town or taxing district, nor, if in any of these, the number of inhabitants therein. Yet such facts are indispensable to a correct determination of liability or non-liability for the tax, and for an ascertainment of the amount of tax, if liability exists. The tax is to be assessed against water companies doing business "in cities, taxing districts or towns," and the amount of the State's part of the tax varies from \$50 to \$300, according to population ranging from 500 to 40,000 or over. Acts 1837, chap. 1, § 4, pp. 20, 21.

Let the judgment be affirmed.

MONTANA SUPREME COURT.

Michael KIRCHER, *Appt.*,
v.
J. H. CONRAD *et al.*, *Repts.*

(....Mont....)

1. One who purchases wheat for seed is subject to the rule of *caveat emptor*, and representations on the part of the seller as to the kind or quality of the grain, which do not amount to an express warranty, will not render him liable to an action for damages on the part of the buyer although the grain proves to be different from what it was represented to be.

2. A warranty that certain wheat purchased after inspection was spring wheat is not made where the seller said that he did not know what kind it was, but agreed to write and find out if he could do so, and when subsequently asked if he had got an answer said, "We have. It is spring wheat."

(January 6, 1890.)

APPEAL by plaintiff from an order of the District Court for Custer County granting defendants' motion for a new trial in an action to recover damages for the breach of an alleged warranty that certain wheat was spring wheat, in which judgment had been rendered for plaintiff. *Affirmed.*

NOTE.—Warranty of quality.

It is the general rule of law "that no warranty of the quality of a chattel is implied from the mere fact of sale." The rule in such cases is *caveat emptor*, by which is meant that when the buyer has required no warranty, he takes the risk of quality upon himself. This rule and its exceptions are fully discussed in an excellent annotation of Mr. Bennett to Benjamin on Sales, ed. 1883, 564, 623. 7 J. R. A.

The facts are fully stated in the opinion.

Messrs. J. W. Strevell and James H. Garloch, for appellant:

The defendants knew before and at the time they sold the wheat to the plaintiff that he was inquiring for and wanted spring wheat to be used for seed. To constitute a warranty under such circumstances it is sufficient that the agent of the defendants on finally making the sale represented to the plaintiff that the wheat was spring wheat.

Benjamin, Sales, §§ 618, 624; *Thorne v. McVeagh*, 75 Ill. 81.

Where the buyer goes to the vendor of an article, seeking to purchase an article of a particular kind or quality for a particular purpose, and so informs the vendor, there is a warranty on the part of the vendor that the thing sold is of the kind and is fit for the purpose for which the buyer requests it.

Milburn v. Belloni, 39 N. Y. 53.

Plaintiff is entitled to, as damages, the value of the crop which he would ordinarily have had from his land under the circumstances in that year, after deducting the expenses of harvesting the crop, which he would have had to incur had the wheat corresponded with the warranty.

Passenger v. Thorburn, 34 N. Y. 634; *Van Wyck v. Allen*, 69 N. Y. 61; *White v. Miller*, 71 N. Y. 118.

The first and general rule relating to warranty in contracts of sale is that the buyer purchases at his own risk—*caveat emptor*—unless the seller either gives an express warranty, or unless a warranty is implied by law, or unless the seller is guilty of a fraudulent representation or concealment (*Story, Sales*, 401); but the rule *caveat emptor* never applies to cases of fraud. *Irving v. Thomas*, 13 Me. 418; *Ottis v. Alderson*, 10 Smedes & M. 478.

Mr. George F. Shelton, for respondents:

If the sale of wheat was by sample, then the only warranty that could be implied from the language used was the warranty that the bulk corresponded with the sample.

Benjamin, Sales, § 650; *Carter v. Crick*, 4 Hurl. & N. 412, 28 L. J. N. S. Exch. 288. See also *Gachet v. Warren*, 72 Ala. 288.

Upon the sale of a specific article then present and subject to examination, no warranty of its quality or fitness for a particular use will be implied, though the seller is aware that the article is purchased especially for such use.

Benjamin, Sales, § 661, note U; *Lord v. Grow*, 39 Pa. 38; *Deming v. Foster*, 42 N. H. 165; *Shisler v. Bazter*, 109 Pa. 443, 58 Am. Rep. 738; *Lindley v. Hunt*, 23 Fed. Rep. 52. See also elaborate note to *Reynolds v. Palmer*, 21 Fed. Rep. 483, 489; *Salem India Rubber Co. v. Adams*, 28 Pick. 256; *Moore v. McKinley*, 5 Cal. 471; *Byrne v. Jansen*, 50 Cal. 624.

When an article is sold upon an executory contract, like the one in question, the delivery and acceptance of the article, after an examination, or an opportunity to examine, is a consent or agreement that the article corresponds with the contract and precludes a recovery for any difference.

Dutchess Co. v. Harding, 49 N. Y. 321; *Reed v. Randall*, 29 N. Y. 358; *Hargous v. Stone*, 5 N. Y. 73; *Doune v. Dow*, 64 N. Y. 411; *Salem India Rubber Co. v. Adams*, supra; *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515.

Blake, Ch. J., delivered the opinion of the court:

This is an appeal from the order of the court below, in granting the motion of the respondents, who were the defendants in the action, for a new trial. The questions to be investigated may be readily understood by stating the substance of the pleadings.

The complaint alleges that the defendants were merchants in 1887, and that plaintiff purchased, through their "duly authorized agents and clerks," 81 bushels of wheat, to be used by him in the spring of 1887 for seed; that he informed the agents of the defendants that he desired the wheat to be spring wheat for seed, to be sown that year; that defendants, by their agents, sold and delivered said wheat to plaintiff, and represented and warranted the same to be spring wheat, and fit to be used for sowing in the spring of 1887; that defendants charged plaintiff therefor \$85, which plaintiff agreed to pay; that plaintiff believed the representation of the defendants, that said grain was spring wheat, to be true, and sowed the same in the spring of 1887; that said wheat was not spring, but winter, wheat, and therefore failed to produce any crop; and that plaintiff lost his entire crop of wheat for the season of 1887, and his labor in putting said seed into the ground, and was damaged in the sum of \$1,585.

The answer denies that plaintiff purchased any seed wheat, and alleges that he bought a quantity of wheat which was kept and sold as "chicken feed," and that plaintiff was informed of the character and quality thereof at the times alleged in the complaint; denies that the agents or clerks of the defendants represented or warranted to plaintiff that said wheat was spring wheat, and says that the clerks and agents of

defendants told plaintiff that they did not know whether the grain was spring or winter wheat; denies that the agents or clerks of defendants made any representations to plaintiff by which plaintiff was misled or deceived as to the kind or character of said wheat; alleges that said clerks and agents told plaintiff, at the time and before he bought the wheat, that they did not know whether it was winter or spring wheat, and that defendants had bought and sold said wheat for feed, and no other purpose, and defendants could not warrant the wheat in any manner as suitable for seed; and denies that plaintiff was misled, or deceived, or damaged by any representations of the clerks or agents of defendants. The replication denies the averments of the answer.

The testimony at the trial tended generally to prove the allegations of the respective parties in their pleadings, and was conflicting. The jury found for the appellant, who is the plaintiff in the action. The transcript does not disclose the grounds upon which the motion for a new trial was granted, and which may have been errors in law, or the insufficiency of the evidence to justify the verdict. If they were founded upon the last, then, as the testimony is conflicting, we must follow the case of *Chauvin v. Vahlon*, 7 Mont. 581, and affirm the order appealed from.

In conformity with the best practice, which has prevailed in this court, and in order to settle the law of the case upon another trial, we deem it necessary and proper to review the questions which have been submitted, and decide every subject of controversy. It is admitted that the respondents were dealers in general merchandise at the times which are mentioned in the pleadings; that one Tompkins was employed by them as clerk and salesman and was in charge of their business, when the wheat was delivered to the appellant; that the grain was subject to the inspection of the appellant, who bought the same in the belief that it was suitable for seed in the spring of 1887; that no person can ascertain by inspection the difference between spring and winter wheat; that this grain was winter wheat; and that the appellant suffered damages through the total failure of his crop. We shall assume, for the purposes of the discussion, that the testimony of the appellant is a narration of the facts, and can thereby distinguish some of the cases which have been cited by counsel as authority from that at bar.

Kircher testified that, in the fall of 1886, he looked at some wheat in the store of the respondents, and asked what kind it was. Tompkins said he didn't know, and that he sold it for chicken feed. Kircher then said that, if he knew it was spring wheat, he would buy 60 or 70 bushels; and that Tompkins replied, "If you want to buy that much, we can find out." Kircher said, "If you can do that, find out;" and Tompkins told him "he would write and find out." That Tompkins then took Kircher back to Flager, in his office. That Flager, one of the respondents, told Kircher "he would write and find out." That afterwards Flager told Kircher "he did not have an answer, but expected one in a short time." That afterwards Flager said "he did not have an answer yet, but expected one every day." That in March, 1887,

Kircher went into the store, and said to Tompkins, who was then in charge of the business of the respondents: "How about that wheat? Have you got an answer yet?" He said: "We have. It is spring wheat. We have just got a load of it." Kircher said: "Are you sure it is spring wheat?" and Tompkins replied: "What do you take me for?" The appellant then bought the wheat, but did not receive any statement or memorandum in writing concerning the transaction.

Did Tompkins, under these circumstances, and by virtue of his employment, have the authority to make this warranty that the grain, which was purchased by the appellant, was spring wheat? This court has adopted the rule, which is not disputed, and has held, that the principal is responsible for the acts of his agent when they have been done within the scope of his authority, and that his liability will not be enlarged. *Herbert v. King*, 1 Mont. 475; *Deer Lodge Bank v. Hops Mining Co.* 3 Mont. 146; *First Nat. Bank v. Hall*, 8 Mont. 841.

The power of Tompkins is also defined in the following authorities:

In *Upton v. Suffolk Co. Mills*, 11 Cush. 586, *Mr. Justice Metcalf* says: "A general agent is not, by virtue of his commission, permitted to depart from the usual manner of effecting what he is employed to effect. 3 Chitty, Law of Com. and Man. 199. When one authorizes another to sell goods, he is presumed to authorize him to sell in the usual manner, and only in the usual manner in which goods or things of that sort are sold. Story, Ag. § 60. See also *Shaw v. Stone*, 1 Cush. 228. The usage of the business in which a general agent is employed furnishes the rule by which his authority is measured."

Mr. Benjamin, in his treatise on Sales, says: "The general rule is, as to all contracts, including sales, that the agent is authorized to do whatever is usual to carry out the object of his agency, and it is a question for the jury to determine what is usual." 2 Benjamin, Sales, 3d Eng. ed. § 945. See also *Pickert v. Marston*, 68 Wis. 465; *Smith v. Tracy*, 36 N. Y. 79; *Palmer v. Hatch*, 46 Mo. 585; *Stewart v. Woodward*, 50 Vt. 78; *McCormick v. Kelly*, 28 Minn. 135; 2 Addison, Cont. 988.

Many of the cases which are relied on by counsel to establish the right of Tompkins to warrant the quality of the wheat are inapplicable to the facts before us. The foregoing testimony of Kircher proves that the respondent Flager and Tompkins refused, upon several occasions, to express any opinion as to the character of the grain, except that it was chicken feed. In reply to the request of the appellant, Flager promised to write a letter and find out what he could on this point. The conversation between Tompkins and Kircher, in which the words constituting the alleged warranty were used, was in logical effect a statement that an answer had been received by Flager, from some person who is not affected by these proceedings, conveying the information that the grain was spring wheat. Tompkins was not a party to this correspondence. The complaint does not allege that Tompkins or the respondents have been guilty of fraudulent conduct, and the gist of the action is the warranty by the

agent of the respondents that the grain referred to was spring wheat. No form of words is essential to constitute an express warranty in the sale of chattels. There is no controversy relating to these principles.

Do the conditions which have been presented subject the appellant to the rule of *caveat emptor*? The case of *Lord v. Grow*, 39 Pa. 83, is on all fours with the case set forth in the pleadings of the appellant. A portion of the statement of facts is as follows: "On the 9th of April, 1859, the plaintiff went to the defendants, who are dealers in grain, for the purpose of purchasing some seed spring wheat for sowing. He asked F. P. Grow, one of the defendants, whether he had any good seed spring wheat. Mr. Grow answered in the affirmative. . . . The plaintiff took the wheat, which he and the miller thought was spring wheat (there being both kinds in the mill), and sowed it; but it proved to be winter wheat." *Mr. Justice Strong*, in the opinion, says: "We have here the bald question whether, in sales of personal property on inspection, without express warranty, the law presumes an engagement on the part of the vendor that the article sold is of the species contemplated by the parties. . . . The tendency of the modern cases has also been to the doctrine that, in sales of articles in regard to which the seller is presumed to have superior knowledge, there is a warranty that the thing sold shall be in kind what it is represented to be. Illustrations of this are found in sales of wine by wine merchants, of jewels by a jeweler, and of medicines by a druggist. In this class of cases the buyer and the seller do not deal on equal terms. . . . The case before us is not one of this character. The wheat was not sold by sample, and neither the contract of sale, nor the identity of the article, was defined by a bill of parcels, nor was the subject of the contract a manufactured article, ordered and supplied for a particular purpose. True, the difference between spring wheat and other wheat is not ascertainable by inspection, and it may be assumed that they are not the same in species. Still, the case is one of a purchase on inspection of an article, of which the vendor's means of knowledge were no greater than those of the vendee. . . . To the purchaser of goods on inspection the language of the law is *caveat emptor*. There may be a few exceptions, such as we have referred to, but a sale of such an article as wheat is not one of them. When the purchaser has seen it, and gets what he saw, no warranty is implied that it is properly described by the name which the vendor gives to it."

The authorities hold that it is the duty of the buyer to make an inspection of goods, and the consequence of any omission so to do must be suffered by him.

In *Barnard v. Kellogg*, 77 U. S. 10 Wall. 383 [10 L. ed. 987], *Mr. Justice Davis* says: "No principle of the common law has been better established, or more often affirmed, both in this country and in England, than that in sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the article he sells, the maxim of *caveat emptor* applies. Such a rule

requiring the purchaser to take care of his own interest, has been found best adapted to the wants of trade in the business transactions of life. And there is no hardship in it, because, if the purchaser distrusts his judgment, he can require of the seller a warranty that the quality or condition of the goods he desires to buy corresponds with the sample exhibited." See also *Reynolds v. Palmer*, 21 Fed. Rep. 433, note by Lawson, 439; *Lindley v. Hunt*, 22 Fed. Rep. 52; 1 Pars. Cont. 5th ed. 577; Story, Sales, 4th ed. §§ 849, 878; Biddle, War. § 5; 2 Benj. Sales, 6th Am. ed. 843, note 23.

The case of *Lord v. Grow*, *supra*, is doubted by Mr. Biddle, and the American edition of the work on Sales by Mr. Benjamin. Biddle, War. § 125; 2 Benjamin, Sales, 6th Am. ed. 843, note 23.

But other text writers have cited it with approval, and the same court has reiterated its doctrine in the recent case of *Shisler v. Baxter*, 109 Pa. 443, 58 Am. Rep. 788. It appeared that Shisler purchased of Baxter what both parties called "Wakefield cabbage" seeds, which cannot be distinguished by their appearance. After referring to *Lord v. Grow*, *supra*, Chief Justice Mercur says: "The vendee had just as much knowledge in regard to the kind and quality of the seed as they (the vendors) had. In such case, in the absence of express warranty, the exemption of liability of the vendor is too well settled to need any further citation of authorities."

The application of these principles to the evidence of the appellant is sufficient to justify the court below in sustaining the motion for a new trial, and virtually disposes of the action, unless additional facts are shown.

While the form of the warranty is unimportant, the circumstances attending it must be critically examined. Prof. Parsons expounds the law on this subject, and writes: "All warranties, however expressed, are open to such construction from surrounding circumstances, and the general character of the transaction, and the established usage in similar cases, as will make the engagement of warranty conform to the intention and understanding of the parties: provided, however, that the words of warranty are neither extended nor contracted in their significance beyond their fair and rational meaning. For these words of warranty are usually subjected to a careful, if not a precise and stringent, interpretation, as it is the fault of the buyer who asks for or receives a warranty if it does not cover as much ground and give him as effectual protection as he intended." 1 Parsons, Cont. 5th ed. 576.

When the evidence of the appellant is subjected to this test, it is difficult to say that Tompkins made a warranty in any form which would be recognized by the courts. It was the duty of the appellant to protect his interests by securing a bill of parcels which described in certain terms the wheat he purchased. The authorities hold that Tompkins had the power under his employment to execute this instrument, and thereby make an express warranty of the quality of the grain. The secret instructions of the respondents to their salesmen, which were not known by the appellant, cannot affect the transaction, and were properly excluded by the court below.

It is therefore adjudged that the order appealed from be affirmed, with costs.

Harwood and DeWitt, JJ., concur.

ILLINOIS SUPREME COURT.

POSTAL TELEGRAPH CABLE CO.,

App't.,

v.

Charles D. LATHROP *et al.*

(.....III.....)

1. **Controverted questions of fact cannot be considered on appeal** from the appellate court, although the court has not expressly found, in terms, against appellant on those questions, and portions of its opinion are inconsistent with and negative the presumption of such a finding.
2. **The question whether or not telegraph dispatches are sufficient** to inform the operator of their meaning, and of the possible risk of loss by mistake, is not to be determined solely by the dispatches themselves, but all the facts and circumstances, including pre-

vious messages sent by the operator for the same parties, may be considered.

3. **Where enough appears in a telegraph message to show** that it relates to a commercial business transaction, it is sufficient to charge the company with damages resulting from its negligent transmission, although the operator may not be able to understand its meaning as to quantity, quality, price, etc., as the sender and the party to whom it is sent understand it.
4. **A message saying:** "Please buy in addition to thousand August 1000 cheapest month," is sufficiently explicit to charge a telegraph company with the loss resulting from inexcusable mistake; and the same is true of a message stating: "Put stop order on 5000 Dec. at seventeen cents, this order good until countermanded."
5. **Instructions which are lengthy** and in the nature of a *résumé* of the evidence, and an argument, do not constitute reversible error if

NOTE.—Telegraph messages.

The fact that a telegraph message was not so worded as to inform the company of the relation existing between the parties does not relieve the company of liability for damages resulting from a negligent delay in transmitting and delivering the message, by which a mother was summoned to her dying son. *W. U. Teleg. Co. v. Feebles (Tex.)* 123. W. Rep. 800.
7 L. R. A.

The sender of a message must sustain a loss by a mistake in transmission, as between himself and the receiver. *Ayer v. W. U. Teleg. Co.* 4 New Eng. Rep. 784, 79 Me. 493.

The sender has a remedy over against the company when the error is the result of its negligence. *Ibid.*

they are not so unfair to appellants as to have misled the jury to his prejudice.

(January 21, 1890.)

APPEAL by defendant from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of plaintiffs in an action to recover damages for losses alleged to have resulted from mistakes made in the transmission of certain telegraph messages. *Affirmed.*

The messages were delivered by plaintiffs to defendant's operator in Chicago to be transmitted to New York. The first one, as received by the Company, read as follows: "Please buy in addition to thousand August 1000 cheapest month." As delivered by it, it read: "Please buy in addition, two thousand August, one thousand cheapest month."

The other read: "Put stop order on 5000 Dec. at seventeen cents, this order good until countermanded." As delivered it had the word seventy substituted for seventeen.

Mr. James L. High, for appellant:

If appellant was not apprised, either from the messages or otherwise, of their meaning and of the possible risk involved, it cannot be charged with having contemplated the extraordinary damages claimed.

Hadley v. Bazendale, 9 Exch. 341; *Sedgwick*, Damages, 6th ed. 76, 77; *W. U. Teleg. Co. v. Martin*, 9 Ill. App. 587; *Shields v. Washington Teleg. Co.* 9 West. L. J. 283; *Sanders v. Stuart*, L. R. 1 C. P. Div. 826; *Baldwin v. U. S. Teleg. Co.* 45 N. Y. 744; *Beaupré v. Pacific & A. Teleg. Co.* 21 Minn. 155; *Gray*, Telegraph, 161; *Mackay v. W. U. Teleg. Co.* 16 Nev. 222; *Dorgan v. Teleg. Co.* 1 Am. L. T. N. S. 406; *Daniel v. W. U. Teleg. Co.* 61 Tex. 452; *W. U. Teleg. Co. v. Reynolds*, 77 Va. 173; *Doughtery v. Am. Teleg. Co.* 13 Cent. L. J. 428; *Pinckney v. W. U. Teleg. Co.* 19 S. C. 71; *Ellis v. Am. Teleg. Co.* 13 Allen, 226; *Candee v. W. U. Teleg. Co.* 34 Wis. 471; *Kinghorn v. Montreal Teleg. Co.* 18 Up. Can. Q. B. 60; *U. S. Teleg. Co. v. Gildersleeve*, 29 Md. 232; *Behm v. W. U. Teleg. Co.* 8 Biss. 131; *First Nat. Bank v. W. U. Teleg. Co.* 80 Ohio St. 555; *Hord v. W. U. Teleg. Co.* 8 Cin. L. Bull. 147; *Stevenson v. Montreal Teleg. Co.* 16 Up. Can. Q. B. 530; *McColl v. W. U. Teleg. Co.* 7 Abb. N. C. 151; *Wann v. W. U. Teleg. Co.* 87 Mo. 472; *Camp v. W. U. Teleg. Co.* 1 Met. (Ky.) 164; *Breese v. U. S. Teleg. Co.* 48 N. Y. 132; *Aiken v. W. U. Teleg. Co.* 69 Iowa, 31; *Redpath v. W. U. Teleg. Co.* 113 Mass. 71; *Grinnell v. W. U. Teleg. Co.* 113 Mass. 299; *Clement v. W. U. Teleg. Co.* 137 Mass. 463; *Redfield*, Carr. 552, 557, 561; *Birney v. New York & W. P. Teleg. Co.* 18 Md. 841; *Tyler v. W. U. Teleg. Co.* 60 Ill. 421.

Messrs. Dexter, Herrick & Allen, for appellees:

If from his course of dealing with the sender of the message, or from his position as the receiver of messages of like character, the Company's agent ought to have known its meaning or its importance, although it might have been unintelligible to the general public, the Company will not be heard to say that it was unintelligible or it was an apparently unimportant message to him.

2 Thomp. Neg. p. 857; *W. U. Teleg. Co. v. Harris*, 19 Ill. App. 847; *W. U. Teleg. Co. v. 7 L. R. A.*

Blanchard, 68 Ga. 299; *W. U. Teleg. Co. v. Landis* (Pa.) 11 Cent. Rep. 193; *Rittenhouse v. Independent Line of Teleg.* 44 N. Y. 263.

We deny that in order to sustain the recovery it was necessary that the dispatches should disclose the detailed information claimed by appellant's counsel.

Tyler v. W. U. Teleg. Co. 60 Ill. 421; *W. U. Teleg. Co. v. Tyler*, 74 Ill. 168; *U. S. Teleg. Co. v. Wenger*, 55 Pa. 262; *W. U. Teleg. Co. v. Harris*, and *Rittenhouse v. Independent Line of Teleg. supra.*

The messages sufficiently disclosed their importance to entitle appellees to recover their actual damages.

W. U. Teleg. Co. v. Griswold, 37 Ohio St. 802; *Marr v. W. U. Teleg. Co.* 35 Tenn. 530; *W. U. Teleg. Co. v. Landis* (Pa.) 11 Cent. Rep. 193; *W. U. Teleg. Co. v. Blanchard, supra*; *Squire v. W. U. Teleg. Co.* 98 Mass. 232; *True v. Internat. Teleg. Co.* 60 Me. 9.

Wilkin, J., delivered the opinion of the court:

It seems to be thought by counsel for appellant that, notwithstanding the judgment of affirmance in the appellate court, controverted questions of fact may still be reviewed in this court; because, as is said, the appellate court has not expressly found, in terms, against appellant on these questions, and because portions of its opinion are inconsistent with and negative the presumption of such a finding. This position is untenable. Sections 87 and 89 of our Practice Act (Rev. Stat. ed. 1889, chap. 110) prohibit this court from re-examining controverted questions of fact in all cases of this kind. We may look into the evidence for the purpose of deciding as to the correctness of instructions, or, in a proper case, to determine whether or not there is any evidence tending to support a material element in the cause of action or defense. In such cases it becomes necessary to examine the evidence in order to settle questions of law, but we have uniformly held that we cannot examine evidence to determine whether the appellate court found correctly as to the facts in issue. See *Montgomery v. Black*, 124 Ill. 62, 12 West. Rep. 594, and cases cited; *Commercial Nat. Bank v. Proctor*, 98 Ill. 561; *Darlington v. Chamberlain*, 120 Ill. 585, 9 West. Rep. 466; *Sangamon Coal Mining Co. v. Wiggerhaus*, 122 Ill. 281, 11 West. Rep. 578; *Hayes v. Massachusetts Mut. L. Ins. Co.* 125 Ill. 631, 1 L. R. A. 308.

We also said in *Coalfield Coal Co. v. Peck*, 98 Ill. 145, that we could not look to the opinion of the appellate court to ascertain what that court found the facts to be.

The controlling question in the case, so far as we are at liberty to pass upon it, arises on the refusal of the trial court to give the third instruction asked by appellant, as follows: "(3) The jury are instructed that the defendant is only liable for such damages, if any, as were actually contemplated, or which might reasonably be supposed to have been contemplated, by the parties in the delivery and receipt of the messages in the transmission of which the alleged errors occurred; and if the jury believe from the evidence that such messages were not sufficiently clear or precise to inform the agents of the defendant receiving

them of their meaning, and of the possible risk and damage which might result from mistakes in their transmission, and that such facts were not disclosed by the plaintiffs to the defendant or its agent, then the defendant cannot be charged with having contemplated the special damages claimed by the plaintiffs in this action, and plaintiffs are only entitled to recover the amount actually paid by them for the sending of such messages, with interest at 6 per cent from the date of payment to the date of your verdict."

It is earnestly contended by counsel for appellant that the messages, "Please buy in addition to thousand August one thousand cheapest month," and "Put stop order on five thousand Dec. at seventeen cents," were, unexplained, meaningless and unintelligible to the operator of appellant who transmitted them; and therefore, as in case of cipher dispatches, no special or consequential damages could have been reasonably contemplated by the parties when they were sent, and hence none can be recovered in this suit. This position is based on the rule of damages announced in *Hadley v. Baxendale*, 9 Exch. 341, and followed generally in this country as well as in England. In any view of that rule, as applied to this case, the instruction is too narrow.

The evidence shows that at the time of sending these dispatches appellees were, and had for some time prior thereto been, engaged in the business of jobbers in coffee, tea and sugar in the City of Chicago; that Crofman & Bro. were commission merchants in New York, buying and selling coffee, rubber and hides on commission; that appellant had a branch office near the place of business of appellees, from which the messages in question were sent, and had frequently sent others pertaining to their business. It also tends to show that from business transactions in New York between appellant and the firm of Crofman & Bro. appellant knew the business in which the latter firm was engaged. It is in proof that during the month of June, 1887, and prior to the first mistake complained of, a number of dispatches were sent by appellees to Crofman & Bro. from appellant's Chicago office. One on the 13th read: "Please wire us to-day whether you do or do not execute an order for five thousand bags, as we must place it elsewhere if you decline." Another of the same date refers to "five thousand bags." It must, at least, be conceded that there is evidence tending to show that from their previous dealings appellant knew, or might by reasonable diligence have understood, the purport of these messages. Therefore, in determining whether or not the messages were sufficient to inform the operator of their meaning, and of the possible risk of loss to appellees by a mistake in transmitting them, the jury should have been left free to consider all the facts and circumstances proved in the case bearing on that question, whereas the instruction limits the inquiry to that which appears in the dispatches themselves, and to such facts as may have been disclosed by the plaintiff to the defendant or its agent at the time they were sent. See 2 Thomp. Neg. 857.

On the question as to how far mere indefiniteness in the language of a message will defeat a recovery for consequential damages 7 L. R. A.

against a telegraph company, the decisions cannot be said to be harmonious. Counsel for appellant contends that the better line of authorities sustains the rule announced in this instruction, viz., that the operator who transmits a message must be able to understand its meaning as to quantity, quality, price, etc., as the sender and party to whom it is sent themselves understood it; otherwise it is said he cannot reasonably be supposed to have contemplated damages as the probable consequence of a failure to correctly transmit it. While some of the cases cited go to that extent, especially where the message is in cipher, another line of decisions, and we think founded on the better reasons, hold that where enough appears in the message to show that it relates to a commercial business transaction between the correspondents it is sufficient to charge the company with damages resulting from its negligent transmission.

In *U. S. Teleg. Co. v. Wenger*, 55 Pa. 262, a message read: "Buy fifty (50) North Western fifty (50) Prairie du Chien, limit forty-five (45)." There was a delay by the telegraph company in its delivery, resulting in a loss to the sender on account of the advance in price of Chicago & Northwestern Railway Company stock and the Milwaukee & Prairie du Chien Railway Company stock, which the message was intended to order purchased. The Supreme Court of Pennsylvania sustained a recovery, saying: "The dispatch was such as to disclose the nature of the business to which it related, and that the loss might be very likely to occur if there was a want of promptitude in transmitting it, containing the order."

In *Tyler v. W. U. Teleg. Co.*, 60 Ill. 421, the message was: "Sell one hundred (100) Western Union. Answer price." The message, as delivered, read, "Sell one thousand (1,000)," instead of "one hundred (100)." The message was intended as an order to sell 100 shares of stock in Western Union Telegraph Company. The agent, obeying the order as delivered, sold 1,000 shares of said stock, and to fill the order was compelled to buy 900 shares. We held that the plaintiff was entitled to recover the difference between the price for which the shares of stock were sold and that which he was compelled to pay for those purchased. On the question as to the sufficiency of the dispatch to inform the agent of the transaction to which it referred so as to charge the telegraph company with resulting damages, the rule announced in *U. S. Teleg. Co. v. Wenger*, *supra*, was approved, and it was held that the dispatch disclosed the nature of the business as fully as the case demanded. On a second appeal (74 Ill. 168) by general language the decision is reaffirmed.

In *W. U. Teleg. Co. v. Griswold*, 37 Ohio St. 802, a dispatch read: "Will you give one fifty for twenty-five hundred at London? Answer at once as I have only till to-night." As delivered, it read "one five" instead of "one fifty," as written. It was an inquiry whether the sender would pay 150 in gold for 2,500 bushels of flax-seed at London, Ontario, the parties having previously corresponded on the subject. The sender replied to the dispatch as received, ordering the purchase, and recovered from the telegraph company the difference in

price. On appeal to the supreme court, it was contended, as it is here, that the message was indefinite, and therefore the recovery below unauthorized. But the court said: "It appeared upon its face that it related to a business transaction,—a transaction involving the purchase and sale of property. The company was therefore apprised of the fact that a pecuniary loss might result from an incorrect transmission of the message. Where this appears, there is no such obscurity as relieves the company from liability for negligently failing to transmit and deliver the message in the language in which it was received."

In *Marr v. W. U. Teleg. Co.*, 85 Tenn. 530, a message was delivered to the company reading: "Buy one hundred shares Memphis and Charleston." As delivered it read: "Buy one thousand shares Memphis and Charleston." The recovery for consequential damages was sustained, the supreme court of that State saying: "This message was so written that the slightest reflection would enable the operator, who understood its transmission, to see its commercial importance, and put him on his guard against error."

In *W. U. Teleg. Co. v. Blanchard*, 68 Ga. 299, the message sent read: "Cover two hundred September one hundred August." By an error in its transmission, as received it read 200 August instead of 100. As sent, it was an order to sell 100 bales of cotton for August delivery, and 200 for September delivery. The agent sold 200 bales for August, and plaintiff was compelled to buy 100 at a loss in order to meet the sale. A recovery for this loss was sustained by the Supreme Court of that State in the following language: "As to the fifth ground in the request to charge, we do not see but what the message sought to be transmitted was, according to the proof, an ordinary commercial message, intelligible to those engaged in cotton dealing; and we can see no such special purpose intended by the sender, which was unknown to the company, as to vary the rule of liability. There was at least enough known to show it was a commercial message of value attached to the message, and that is sufficient." See also *Squire v. W. U. Teleg. Co.* 93 Mass. 232; *Pepper v. W. U. Teleg. Co.* 87 Tenn. 554, 4 L. R. A. 680; 8 Sutherland, Damages, 801.

All cases which hold that a telegraph company is not liable for consequential damages for a failure to transmit a dispatch as received, on the ground of indefiniteness or obscurity in the language of the message, do so upon the ground that, unless the agent of the company may reasonably know from the message itself, or is informed by other means, that it relates to a matter of business importance, he cannot be supposed to have contemplated damages as a result from his failure to send it as written, as in the case of cipher dispatches.

The Supreme Court of Wisconsin in *Candee v. W. U. Teleg. Co.*, 84 Wis. 472, says: "The operator who receives and who represents the company, and may for this purpose be said to be the other party to the contract, cannot be supposed to look upon such a message as one pertaining to transactions of pecuniary value and importance, and in respect to which pecuniary loss or damages will naturally arise in case of his failure or omission to send it. It may be a

mere item of news, or some other communication of trifling and unimportant character."

It is clear enough that, applying the rule in *Hadley v. Baxendale*, *supra*, a recovery cannot be had for a failure to correctly transmit a mere cipher dispatch, unexplained, for the reason that to one unacquainted with the meaning of the ciphers it is wholly unintelligible and nonsensical. An operator would therefore be justifiable in saying it contains no information of value as pertaining to a business transaction, and a failure to send it, or a mistake in its transmission, can reasonably result in no pecuniary loss.

The messages in this case, however, are not cipher dispatches. Their language is plain and intelligible to everyone who can read, so far as they purport to disclose the business to which they relate. They are abbreviations, and clearly indicate that they relate to business transactions between the sender and sendee. The first message, "Please buy in addition to thousand August one thousand cheapest month," was notice to the agent at Chicago that appellee was ordering the agent in New York to purchase merchandise for them. We do not agree with counsel in saying that it might as well be construed to be an order "for a thousand tooth-picks or a thousand papers of pins as anything else." Everyone of intelligence knows that such articles are not purchased in that way. Suppose, however, that the agent was not informed as to the quantity, quality and value of the merchandise to be purchased by the message, would that justify him in contemplating, within the rule in the *Hadley Case*, *supra*, no damages as a result of his negligence or omission of duty in promptly and correctly sending it forward? It certainly cannot be contended that the agent must be informed of all the facts and circumstances pertaining to a transaction referred to in a telegram, which are known by the parties themselves, to make his company liable for more than nominal damages. If it should be so held, the telegraph would cease to be of practical utility in the commercial world.

It is not easy to state a case in which it can be said the parties contemplated, at the time of contracting, all the damages which will probably result from a failure to perform the contract. We think the reasonable rule, and one well sustained by authority, is that where a message as written, read in the light of well-known usage in commercial correspondence, reasonably informs the operator that the message is one of business importance, and discloses the transaction so far as is necessary to accomplish the purpose for which it is sent, the company should be held liable for all the direct damages resulting from a negligent failure to transmit it as written, within a reasonable time, unless such negligence is in some way excused. Under this rule, both dispatches as presented to appellant's operator were sufficiently explicit to charge it with the loss sustained by appellees, resulting from what has been found by the jury to be its inexcusable mistakes.

Objection is also urged to the ruling of the circuit court in giving, modifying and refusing other instructions; also in excluding certain evidence offered on behalf of the defendant below. We have examined these several points

of objection, and think they are without substantial merit, unless it be as to the giving of the fourth and fifth instructions on behalf of plaintiffs. They are subject to just criticism. They violate a wholesome rule of practice announced in *Merritt v. Merritt*, 20 Ill. 80. They are very lengthy; are rather in the nature of a *résumé* of the evidence and an argument than concise statements of the law, and for that

reason should have been refused. But, after having carefully compared them with the evidence, we cannot say that they are so unfair to appellant as to have misled the jury to its prejudice.

Finding no reversible error in the record, the judgment of the Appellate Court will be affirmed.

TEXAS SUPREME COURT.

Thomas DWYER

v.

GULF, COLORADO & SANTA FÉ R. CO.

(.....Tex.....)

1. A state statute providing a penalty for the refusal of a railroad company to deliver freight on payment or tender of the charges due as shown by the bill of lading, is not invalid as a regulation of commerce.
2. A carrier cannot be considered as ratifying the original contract for shipment of goods which it receives from another company and transports when it is bound by statute to perform such service.
3. The penalty provided by the statute for the refusal of a railroad company to deliver freight on payment or tender of the charges due as shown by the bill of lading, applies only to a company which has itself executed, authorized or ratified the execution of the bill of lading.
4. The original way-bill is admissible in evidence in a suit against a connecting carrier for refusal to deliver the goods on tender of the charges agreed on in the bill, where, in connection with other evidence, it shows that the carrier had paid accrued charges in amount equal to the sum specified, as tending to show that it did not intend to ratify that contract.
5. The exhibition of the bill of lading at the time of the tender of the charges and demand of the goods is not a condition precedent to the recovery of a penalty under the statute for refusal to deliver the goods, although such penalty should be inflicted only for a willful disregard of the law.

(January 14, 1890.)

CROSS appeals from a judgment of the District Court for Washington County in favor of plaintiff in an action to recover the statutory penalty for refusal to deliver freight upon tender of the charges specified in the bill of lading. *Reversed.*

The facts are fully stated in the opinion.

Mr. J. W. Terry for appellant.

Messrs. Bassett, Muse & Muse for appellee.

Gaines, J., delivered the opinion of the court:

This case was before this court at a former term, and was reversed, and remanded for a new trial, in accordance with an opinion which is reported in 69 Tex. 707. The question then presented is not now involved. The action

was brought by appellee against appellant to recover the penalty prescribed by the Act of May 6, 1882, for the failure of the Company to deliver to him certain merchandise transported by it, upon his tender of the charges for carriage specified in the bill of lading. The defendant interposed an exception to the petition, and now insists that the court erred in overruling it.

The bill of lading was for a certain carload of nails received at the City of Pittsburgh, in the State of Pennsylvania, by the Pittsburgh, Cincinnati & St. Louis Railway Company, and bound that company to transport the merchandise from that city to the City of Brenham, in the State of Texas, for a freight charge of \$197.50. The Statute under which the proceeding was instituted reads as follows: "That any railroad company, its officers, agents or employes, that shall refuse to deliver to the owner, agent or consignee, any freight, goods, wares and merchandise of any kind or character whatever, upon the payment or tender of payment of the freight charges due as shown by the bill of lading, the said railroad company shall be liable in damages to the owner of said freight, goods, wares or merchandise to an amount equal to the amount of the freight charges, for every day said freight, goods, wares and merchandise is held after payment or tender of payment of the charges due as shown by the bill of lading, to be recovered in any court of competent jurisdiction." Laws Called Sess. 17th Leg. 35.

It is urged that the law as applied to the transaction alleged in the petition is a regulation of commerce between the States, and is such as only the Congress of the United States has the power to make. If so, the Legislature had no power to make such a law in reference to bills of lading for the carriage of goods from another State into this State; and it would be our duty either to construe the Act as not applying to such bills of lading, or to hold that, as so applied, it is in contravention of the Constitution of the United States, and therefore void. We would not, however, in construing the Act, give it an application that would render any part of it void, unless the intent to so apply it was made manifest by the language of the Act itself.

But the question recurs, Is the provision under consideration in contravention of the Federal Constitution? As to what laws passed by the Legislature of a State are to be deemed a regulation of commerce between the States, within the meaning of that Constitution, there have been numerous decisions in the courts of

the United States. Considering the all-pervading influence of the commerce of the country, and that any state law in relation to commercial transactions, not confined to those begun and completed within the State, would almost necessarily affect in some degree the commerce between the States, the result is not surprising.

From the opinions delivered in the case of *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557 [80 L. ed. 244], it would seem that the decisions of the Supreme Court of the United States upon these questions have not been altogether consistent; but it also appears, from that and later cases in the same court, that the tendency now is to extend the power of Congress over matters affecting interstate commerce, and correspondingly to restrict that of the States. We think, however, that by the decisions of that court (which are authoritative upon these questions) the following propositions must be deemed to have been settled: (1) that a State can make no law regulating the rate of freight for the carriage of goods between that and another State, although the regulation be construed as applying only to so much of the line of transit as lies within its own borders (*Wabash, St. L. & P. R. Co. v. Illinois*, *supra*); (2) that it can make no law which empowers, either directly or indirectly, a burden by way of taxation upon interstate commerce (*Pickard v. Fullman Southern Car Co.* 117 U. S. 34 [29 L. ed. 785]; *State Freight Tax Case*, 82 U. S. 15 Wall. 232 [21 L. ed. 146]; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 186 [29 L. ed. 158]; *Walting v. Michigan*, 116 U. S. 446 [29 L. ed. 691]; *Western U. Teleg. Co. v. Texas*, 105 U. S. 460 [26 L. ed. 1067]; *Mobile County v. Kimball*, 102 U. S. 691 [26 L. ed. 238]; *Robbins v. Shelby County Taring Dist.* 120 U. S. 489 [30 L. ed. 604]; *Leloup v. Mobile*, 127 U. S. 640 [32 L. ed. 311]; *Asher v. Texas*, 128 U. S. 129 [32 L. ed. 268]); (3) that wharves and bridges and ferries across streams, constituting the boundaries between the States, may be established and regulated by the States, in the absence of legislation on the same subject by Congress, provided no burden other than an ordinary charge for their use be imposed upon the commerce passing over them (*Gilman v. Philadelphia*, 70 U. S. 8 Wall. 713 [18 L. ed. 96]; *Esanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678 [27 L. ed. 442]; *Parkersburg & O. R. Transp. Co. v. Parkersburg*, 107 U. S. 691 [27 L. ed. 584]); and (4) that, in the exercise of their police powers, the States may enact laws which, though they affect commerce between the States, are not to be considered regulations of that commerce, within the meaning of the Constitution of the United States. *Chicago & N. W. R. Co. v. Fuller*, 84 U. S. 17 Wall. 560 [21 L. ed. 710], and cases there cited; *Smith v. Alabama*, 124 U. S. 465 [31 L. ed. 508].

Is the law in question in this suit a proper exercise of the police power of the State? This power relates to such a number and variety of subjects that it is impossible to define it, except in terms so general that the definition is of but little practical utility in any case difficult of solution. We think, however, the opinions in the cases last cited throw much light upon the question before us.

In *Chicago & N. W. R. Co. v. Fuller* the question was as to the validity of a statute of 7 L. R. A.

Iowa which required all railroad companies in the State, in September of each year, to fix their rates of fare for passengers and freight, and on the 1st day of October following to post up at their depots a printed copy of such rates, and to cause a copy to remain posted during the year, and subjected the companies to penalties in case of a failure to comply with its provisions. In the conclusion of its opinion the court uses this language: "If the requirements of the statute here in question were . . . regulations of commerce, the question would arise whether, regarded in the light of the authorities referred to, and of reason and principle, they are not regulations of such a character as to be valid until superseded by the paramount action of Congress. But, as we are unanimously of the opinion that they are merely police regulations, it is unnecessary to pursue the subject."

In *Smith v. Alabama*, *supra*, the court says: "A carrier exercising his calling within a particular State, although engaged in the business of interstate commerce, is answerable, according to the laws of the State, for acts of non-feasance or misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time or place, he is liable in an action for damages, under the laws of the State, in its courts; or if, by negligence in transportation, he inflicts injury upon the person of a passenger brought from another State, a right of action for the consequent damage is given by the local law. In neither case would it be a defense that the law giving the right to redress was void as being an unconstitutional regulation of commerce by the State. This, indeed, was the very point decided in *Sherlock v. Alling*, 98 U. S. 99 [23 L. ed. 819]."

The Statute we have under consideration, like every other law which gives a remedy to the shipper against the carrier for a violation of his contract, does in some remote degree affect interstate commerce, when applied to a contract of carriage from one State to another. But it imposes no tax. It neither fixes nor regulates any rates. It makes no discrimination between commerce wholly within the State and that between the State and other States. It imposes no duty upon any carrier not already imposed by the common law. It applies to all railroad companies in the State and to all contracts of carriage alike, and merely provides a penalty for the purpose of enforcing a compliance with an obligation which already existed at common law. In respect of the question before us, the Statute is not distinguishable from any other law affording a remedy for the breach of a contract of carriage of goods between two States. We conclude that the Statute was a proper exercise of the police power reserved to the State, and is therefore valid. The court, therefore, did not err in overruling the defendant's exception to the petition.

In answer to the petition, the defendant pleaded that the shipment which gave rise to this controversy was over the Pittsburgh, Cincinnati & St. Louis Railway to St. Louis, and thence over the Texas & St. Louis Railway to McGregor, Tex., where the freight was delivered to its road for transportation to Bren-

ham; that the Pittsburgh, Cincinnati & St. Louis Company had no authority to contract for the carriage of the nails over its road, and that its agents at McGregor received the freight for transportation to Brenham at its customary rates, without having any knowledge of the bill of lading executed by that company; that upon receipt of the freight it paid the accrued charges, as shown by the way bill to be \$197.50, and that its charges in addition amounted to \$35. The entire charges, as shown by the bill of lading, were \$197.50. The defendant introduced evidence of the facts alleged in its answer, and the court charged the jury as follows: "If the jury believe, from the evidence, that the defendant Company received the nails at the Town of McGregor from another company, and transported them to the Town of Brenham, this would constitute an affirmation of the original contract of shipment, and the defendant thereby became bound by the terms of the shipment as shown in the bill of lading." In this we think there was error. Our statutes made it obligatory upon any railroad company in this State to draw over its road, without delay, the passengers, merchandise and cars of every other railroad company which may enter and connect with its road. Rev. Stat. art. 4251. See also articles 4226, 4227, 4251-4254.

In the absence of a provision of this character, it might be proper to hold that a carrier who has received freight from another carrier upon a through bill of lading, without any express agreement as to the charges, should be presumed to have ratified the bill of lading, though made without its authority, and to have become a party to the contract. But certainly, when the carrier is bound by statute to receive and transport the goods without delay upon tender by the connecting carrier, no such presumption should be indulged. Such a rule would be to force a contract upon a carrier to which he had not given his consent, and compel to carry at a rate fixed by another company. The result of the construction of the law by the court below is that a railroad company is not permitted to refuse to receive the goods for transportation; yet, if it does receive them, it ratifies by that act a bill of lading made without his authority. This, in our opinion, cannot be tolerated. We so held at the last Tyler Term in a case not yet [officially] reported. *R. Co. v. Baird*, 12 S. W. Rep. 580.

Should a railroad company in Arkansas receive freight to be transported to El Paso, in this State, for a less charge for the whole distance than the customary charge of the Texan road for the transportation over its own line, could the latter be forced to accept the contract? We think not. We do not think the Legislature intended that such a construction should be given to the Statute under consideration. Our opinion is that the Act only applies when the railroad company that is sought to be charged in damages has either itself executed the bill of lading, or authorized another company to execute it, or has ratified it by some voluntary act on its part. Instead of the charge complained of, the court should have given an instruction, in substance, the same as charge No. 1, requested by defendant.

7 L. R. A.

We think the court should not have excluded the original way bill, when offered in evidence. In connection with other testimony, it showed that defendant paid, at the time it received the nails, accrued charges amounting to as much as the entire charge agreed upon on the bill of lading, for the transportation of the property for the whole distance, and tended to show that it never intended to ratify that contract. We infer from the statement appended to the bill of exceptions that the depositions of the witnesses Murray and Dodge were objected to in writing, and were suppressed at a term of the court previous to the trial. If so, the bill of exceptions should have been then taken, and the depositions were properly excluded when offered on the trial.

The plaintiff has filed cross-assignments of error. The goods were first demanded on the 15th of December, 1884, and again on the 27th of January, 1885. On both occasions the charges shown by the bill of lading were tendered. There was a dispute whether or not the bill of lading was presented at the time of the first demand. It was formally exhibited to the Company's agent when the second tender and demand were made. Under these circumstances, the court charged the jury, in effect, that, in order to make the demand effectual under the Statute, the plaintiff must at the time have exhibited his bill of lading, and refused to charge that such presentation of the instrument was not necessary. We are of opinion that the court erred in these rulings. The Statute does not expressly require that the bill of lading shall be shown to the agent of the railroad company when the goods are demanded, nor do we find anything either in the words of the Act, or the nature of the business, from which it ought reasonably to be inferred that the Legislature so intended. It is to be presumed, as a matter of law, that a party to a contract knows its contracts; and, as a matter of fact, it is not unreasonable to suppose that the agents of a railroad company, who receive freight at its destination, know the charges which the company is entitled to receive as shown by the bill of lading. We think, therefore, that it was not intended that the exhibition of the bill of lading at the time of the tender of the money and demand of the goods should be a condition precedent to the recovery of the damages. But the Statute is strictly penal, and the penalty is severe, and we think a case may arise in which the owner of the goods should not recover if he has refused to exhibit his contract. It is only for a willful disregard of the law that its penalties should be inflicted. Hence, if there should be a mistake, if the agent of the company should not in fact know the contents of the bill, and should the owner of the goods having it in his power refuse to produce it, he would not be entitled to recover. In regard to appellee's second assignment of error, it is sufficient to say that it was decided upon the former appeal that the defendant had no right to require of plaintiff a receipt for the overcharge; and that if such a right should be insisted upon, on another trial, it would be proper to instruct the jury that it did not exist. If no issue should be again made upon the question, we do not see that

such an instruction would be either necessary or proper.

For the errors pointed out, the judgment is re-

versed, and the cause remanded. Each party will pay one half of the costs of this appeal.

INDIANA SUPREME COURT.

David C. WALLING *et al.*, Appts.,

v.

Albert D. BURGESS *et al.*

(....Ind.....)

1. A surviving partner has the right to sell and convey partnership real estate if necessary to pay the debts of the firm, and such conveyance passes an equitable title.
2. Prior conveyance of partnership real estate by the trustee of a deceased partner, and by his grantees to the surviving partner, do not invalidate a sale finally made by the surviving partner to liquidate the firm debts.
3. The widow of a deceased partner who has received all such partner's share of the proceeds of partnership real estate in excess of the amount necessary to pay firm debts, is estopped from claiming any interest in the real estate as against the purchasers.
4. Error in overruling demurrers to certain paragraphs of an answer is immaterial where the same evidence could be introduced, and the same facts found under the general denial as under these paragraphs of the answer, and there is a special finding of facts which controls the judgment.

(October 30, 1899.)

APPEAL by defendants from a judgment of the Circuit Court for Noble County in favor of plaintiff Burgess, in an action to obtain possession of certain real estate which had formerly belonged to a partnership and which plaintiffs claimed as heirs of the deceased partner, and to quiet title thereto. *Reversed.*

The facts are fully stated in the opinion.

NOTE.—Surviving partner; rights of.

Surviving partners of an insolvent firm, who are themselves insolvent, may make a general assignment of all the firm assets for the benefit of all joint creditors, with preferences to some of them. *Patton v. Leftwich*, 6 L. R. A. 569, 14 Va. L. J. 9.

The full extent and duty of the trust of a surviving partner is to collect all the firm assets, to apply them to the firm debts, and to distribute the surplus, if any, among the surviving partners and the representatives of those who are dead. *Ibid.*

A surviving partner can recover for all the work done under a partnership contract, which was necessary to complete a job partly performed when the other partner died. *O'Connell v. Schwanabeck*, 76 Mich. 518. See note to *Patton v. Leftwich* (Va.) 6 L. R. A. 569.

Application of property to partnership debts. See note to *Darby v. Gilligan* (W. Va.) 6 L. R. A. 740.

Accounting of surviving partners.

The widow, legatees, distributees or creditors of the general estate of a deceased partner not charged with the duties of administering, cannot maintain a bill for an accounting against the surviving partners. Their remedy is to compel the representative of decedent to account or have him removed. 7 L. R. A.

Messrs. A. A. Chapin and R. P. Barr for appellants.

Mr. Henry G. Zimmerman, for appellees: Partnership real estate cannot be sold for payment of partnership debts until all the personality is exhausted.

Parsons, Partn. pp. 875, 888, 889, and cases cited.

Nor could the lots be sold for payment of partnership debts, after the decease of Burgess, except it be made by the surviving partner (*Wilson v. Nicholson*, 61 Ind. 241; *Barry v. Briggs*, 22 Mich. 201; *Sage v. Woodin*, 66 N. Y. 578; *Cobble v. Tomlinson*, 50 Ind. 550; *Dupuy v. Leavenworth*, 17 Cal. 262), in the proper proceeding (*Case v. Beauregard*, 99 U. S. 119, 25 L. ed. 370; *Fitzpatrick v. Flannagan*, 106 U. S. 648, 27 L. ed. 211); and to which proceeding the widow and heirs are made parties.

Pom. Rem. p. 310; *Parsons*, Partn. *373, 386, 351, 364.

After the purchase by Hildreth of the Burgess one-half interest from Hopkins, he was sole owner. It was his individual property; and he could not sell it as partnership assets.

Barkley v. Tapp, 87 Ind. 25, and cases cited; *Case v. Beauregard*, 99 U. S. 119 (25 L. ed. 370), and cases cited.

The surviving partner and the heirs after the deceased partner are tenants in common of the real estate of the late firm.

Parsons, Partn. 441, 458, 459; *Coll.* Partn. §§ 123, 129; 3 Kent, Com. 87; 1 *Parsons*, Cont. 183; *Story*, Partn. § 846; 2 *Perry*, Tr. § 866, p. 498.

In case of dissolution each partner holds the joint property clothed with a trust to apply it

Vienne v. McCarty, 1 U. S. 1 Dall. 154 (1 L. ed. 79); *Tate v. Tate*, 35 Ark. 289; *Hutton v. Laws*, 55 Iowa, 710; *Bosensweig v. Thompson*, 66 Md. 563; *Harrison v. Righter*, 11 N. J. Eq. 339; *Ludlow v. Cooper*, 4 Ohio, 1; *Stanton v. Carron* Co. 18 Beav. 146; *Davies v. Davies*, 2 Keen, 539.

An exception to this rule is where there is fraud or collusion between the executor of decedent and the surviving partner, in which case one entitled to an accounting of the separate estate may follow the assets and compel the surviving partners to account. *Seeley v. Boehm*, 2 Madd. 173; *Newland v. Champion*, 1 Ves. Sr. 105. See *Travis v. Milne*, 9 Hare, 141.

So where a deceased partner held a separate estate as trustee for his wife, and mingled it with the partnership funds, his widow can compel the surviving partners to account. *Dent v. Slough*, 40 Ala. 518.

And a legatee, distributee or creditor of the individual estate, in order that the account may be final and entire, may compel the executor to come to an account. *Hammersley v. Lambert*, 2 Johns. Ch. 508.

In the absence of fraud the next of kin cannot file a bill for account against surviving partners, one of whom is administrator of the deceased partner. *Hyer v. Burdett*, 1 Edw. Ch. 326.

to the payment of the joint debts, and subject thereto, to be distributed among the distributees according to their respective shares therein.

Story, Partn. § 360; Parsons, Partn. p. 442; Lindley, Partn. p. 592.

Olds, J., delivered the opinion of the court:

This is an action brought by the appellees, as plaintiffs, against the appellants, to obtain possession of real estate, and quiet title thereto. The complaint is in two paragraphs. The first alleges that appellees are the owners and entitled to the possession of the undivided one half of lots 70 and 73, in Mitchell's Addition to the City of Kendallville, Noble County, Ind., and that appellants have possession without right, claiming title. The second paragraph alleges appellees and appellants are tenants in common of the real estate, and appellants are in possession, claiming title to the whole, and denying appellees' title. Appellants answered in four paragraphs. The first is a general denial. The others set up special defenses. Demurrers were filed to each of the second, third and fourth paragraphs, and overruled, and exceptions and reply filed, and trial had. The trial resulted in a finding for the appellee Albert D. Burgess that he was the owner and entitled to the possession of the undivided one fourth of the real estate, and in favor of the appellants against appellee Zoradia Hanvell, and judgment rendered accordingly, and this appeal is prayed by appellants, and errors assigned by them. Appellee Zoradia also asked and obtained leave, and assigns cross-errors. The court, at the request of the appellees, found the facts specially, and states its conclusions of law thereon. We deem it unnecessary to set out the finding of facts in full. The conclusions of law were to the effect that appellee Albert D. Burgess inherited the undivided one fourth of the real estate from his deceased father, and that the title had not been divested, and that the appellee Zoradia Hanvell's interest was bound by a decree against her, quieting the appellants' title, in the Noble Circuit Court. Appellants excepted to each of the conclusions of law; also moved for judgment in their favor against both of appellees, the plaintiffs below; and also moved for judgment in their favor against appellee Albert D. Burgess,—which motions were overruled, and exceptions and errors properly assigned. The appellee Zoradia Hanvell also excepted to the conclusions of law.

The facts found, summarized, amount to this: That Burgess and Hildreth were equal partners, engaged in the business of running a foundry and machine-shop, and Burgess died. At the time of his death they owned, as partnership property and as assets of the firm, the real estate in question, consisting of lots 70 and 73, on which was erected the building in which they conducted said business, and in which building was the necessary machinery for conducting the business, which was attached to and was a part of the real estate, and was adapted to and used for conducting the business. One of the lots was conveyed to them jointly, and the others conveyed to them by their firm name. They also owned a small amount of personal property, and the firm owed debts in excess of the value of the personal property of the firm. On the day Burgess died

he made a written instrument conveying and transferring all of his personal property, except his household goods, to one David S. Welch, in consideration of \$1, in trust to be sold by him, and the debts of Burgess to be paid out of the proceeds, and balance to be paid to his heirs *pro rata*, according to their legal interest. Burgess died, leaving Hildreth as surviving partner. At the time Burgess died the assets of the firm, independent of the lots and fixtures, amounted to the value of \$1,005.40, and the indebtedness of the firm amounted to \$2,564, leaving a deficiency of \$1,558.60, after applying the proceeds of the personal property to the payment of the debts. Welch, with the consent of Hildreth, and in the belief on the part of Welch and Hildreth that he had the authority to do so, took possession of the Burgess interest in the partnership, and Welch and Hildreth ran the business for a time in the name of Welch & Hildreth. Then, with the consent of Hildreth, Welch sold and conveyed the one-half interest in the business and property, including the real estate, to Hopkins & Hopkins, in consideration of \$2,400 and the payment of one half of the firm debts. In the sale by Welch to Hopkins & Hopkins, he purported to act as trustee of the Burgess estate, and he and Hildreth believed he had the right to so act and convey a good title, and Hopkins & Hopkins also relied on his having authority to convey. Hildreth and the Hopkinses ran the business for a short time, and the Hopkinses sold out to Hildreth, and Hildreth executed his note to Welch for the balance that the Hopkinses were to pay him, and paid the Hopkinses the balance, and borrowed \$2,333 in money, part of which he used in paying firm debts, and the balance in making improvements on the property. Hildreth paid off the indebtedness, and paid Welch, and Welch paid over to the widow of Burgess, Zoradia Burgess, all he received for the purchase. Albert D. Burgess was a minor. Afterwards Hildreth sold and conveyed all the property, including the real estate in question, to the appellants and one Amos B. Park. Zoradia claimed an interest in the real estate for herself and minor son, Albert D., and a compromise was effected, and a suit brought by appellants and Amos B. Park against them to quiet title. Zoradia was properly served, and authorized an attorney to appear for her. Albert D. was at the time a minor and a resident of Ohio, and the notice as to him was insufficient, and he was sued by the wrong name. A guardian *ad litem* was appointed for him, and judgment was rendered against them, quieting title in the plaintiffs to that suit against the appellants. Amos B. Park afterwards sold and conveyed his title to the appellant Henry S. Park. All of these sales were made in good faith, and for the full value of the property.

The firm being in the financial condition which it was, it is important to inquire into the authority of Hildreth, as surviving partner, in the settlement of the partnership. It was made the duty of the surviving partner at that time to file an inventory of the assets and a list of the liabilities of the firm in the clerk's office, but no forfeiture attached if he failed to do so; and, if the survivor proceeded to settle the partnership, accounted for the assets and paid the debts, we fail to see how he would be deprived

of any right which he would have possessed if he had filed the inventory of assets and list of liabilities, as provided for by the statute. According to the settled law of this State, and which is supported by many authorities, the lots in controversy were liable for the debts of the firm, and are regarded in equity as personal property, and liable to be sold for the payment of the firm debts. As against the firm creditors and firm liabilities, the widow and heirs of the deceased partner took no interest in this property. The property (the lots in question), according to the finding of the court, were at that time, the date of the death of Burgess, worth \$4,458.28, and were liable for \$1,558.60 of firm indebtedness, and subject to sale for the payment of the same; and the widow and heirs of the deceased partner, Burgess, had an interest in the undivided half in excess of the amount necessary to pay said firm indebtedness.

It is held in the case of *Huston v. Neil*, 41 Ind. 504, that when the members of a firm executed a mortgage without the wives of the individual members of the firm joining, and which was foreclosed without the wives being made parties, and sold for the payment of the mortgage debt, that, as there was no surplus above the payment of the mortgage debt, the wives had no interest in the real estate, and were not necessary parties. Suppose, for instance, that, immediately before the death of Burgess, Burgess & Hildreth had sold and conveyed their real estate without the wife of Burgess joining, and the purchase money had been paid to the members of the firm, and become a part of the partnership assets, it would seem clear that the widow and heirs could not have claimed and held any interest in the real estate so sold and conveyed. One of the purposes and objects of treating the partnership real estate as personal property in equity is that it may be sold and conveyed by the members of the firm in the usual course of business without the wives of the individual members joining in the conveyance. Were it otherwise, the business of the firm might be stopped, and the partners unable to realize on the assets of the firm by reason of the wife of one of the members refusing to join in a conveyance of the real estate.

When Burgess died, Hildreth survived and became the only member of the firm, and what the partners themselves might have done in the lifetime of Burgess Hildreth might do alone, if necessary to pay the debts of the firm and settle the partnership. In case of a sale by the partners in the lifetime of all, the excess of the purchase money above paying debts becomes assets of the firm, in which the widow and heirs of a partner whose death occurs afterwards would be entitled to their respective shares, and the excess of the purchase money, above paying debts of the firm, of a sale made by a surviving partner, would go the widow and heirs on settlement of the partnership.

The conclusion, therefore, is irresistible that, in case of the death of a partner, the survivor or survivors must pay the debts out of the personal property, if there is sufficient personal property to do so, and the widow and heirs of the deceased partner in that event would have the right to the share of the deceased partner

in the real estate owned by the firm; but if the personal property is not sufficient to pay all the debts of the firm, and it is necessary to sell the real estate of the firm to pay the debts of the firm, the surviving partner has the right to sell and convey the same. If he sells and conveys the same in good faith, for a valuable consideration, without an order of court, he passes an equitable title to the same to the purchaser. Applying this rule to this case, at the death of Burgess, after applying the personal property to the payment of the firm debts, there yet remained \$1,558.60 of firm debts unpaid, and no assets to pay the same except the real estate,—the two lots in question in this case, which the findings in effect show to have been improved together in a manner suitable and proper for the business in which the partners were engaged, and were partnership real estate, and indivisible; and Hildreth had the right to sell the same, and apply the proceeds to the payment of said firm debts; and, having that right, he did sell and convey the same in good faith to the appellants and one Amos B. Park, who afterwards conveyed his interest to appellant Henry S. Park; and they took possession, and made valuable improvements, and the proceeds named from such sale went to the payment and liquidation of the debts of the firm.

True, the findings show that there had been some other sales by Welch, purporting to act as the trustee of the deceased partner's interest, and the form of the original indebtedness may have changed to some extent; but all of these transactions and sales were made in good faith, and the money which finally liquidated and paid the debts came from the sale to the appellants, in consideration for which Hildreth, the surviving partner, conveyed them the partnership property in question in this case, and Hildreth paid all the firm debts. This, we think, passed the equitable title to all of the real estate, and not merely a sufficient interest to pay the firm debts, and that, too, whether there was afterwards a full and legal settlement and accounting by the surviving partner with the legal representatives or heirs of the deceased partner or not. Taking this view of the case, it is immaterial to consider and determine the legality of the sale made by Welch, as trustee; as, the conveyance made by Welch to the Hopkinses, and by them to Hildreth, being made in good faith, and in no way diverting or squandering the interest of the deceased partner, it could not invalidate the sale finally made by Hildreth, the surviving partner. The right was in Hildreth to sell and convey the real estate and liquidate the firm debts, and he undertook to sell and convey all of the property, and such sale and conveyance passed the equitable title. The facts found show the property was sold for its full value, and that the widow received all of the proceeds of the sale in excess of the amount necessary to pay the firm debts. Clearly, she is estopped by that act from claiming any interest in the real estate as against these appellants, and she is likewise bound by and precluded by the decree entered against her in the Noble Circuit Court, quieting the title, from setting up any claim of title to the real estate.

The conclusions of law in favor of appellee

Albert D. Burgess are erroneous. The conclusions of law on the facts found ought to have been that the appellants, the defendants below, are the equitable owners of the real estate in question, and there should have been a judgment in favor of the defendants against both of the plaintiffs below for costs. We are aware that the authorities are not all in harmony on the question under consideration, but we think the doctrine we have laid down fully supported by authority, and the logical conclusions which follow from established principles. Parsons on Partnership states the rule thus: "The following, then, is the American rule: Real estate, purchased and held as partnership property, is so treated in equity, and subjected to all the incidents of partnership property. If there be death, the surviving partner, whether he hold the whole title, or hold it in part, or hold none of it, if he be a creditor of the partnership, has the same rights against the real estate, and only the same, which any other creditor has. But this real estate goes to pay the debts of the partnership, and only after they are paid does it, or what is left of it, become the property of the partners, or their representatives, free from all claims." Parsons, Partn. 8d ed. top p. 403, *372.

In the case of *Shanks v. Klein*, 104 U. S. 18 [28 L. ed. 685], Justice Miller delivering the opinion, it is held that real estate purchased with partnership funds for partnership purposes, though the title be taken in the individual name of one or both partners, is in equity treated as personal property so far as necessary to pay the debts of the partnership, and to adjust the equities of the copartners; and for this purpose, in case of the death of one of the partners, the survivor can sell the real estate so situated, and, though he cannot convey the legal title which passed to the heirs or devisees of the deceased partner, his sale invests the purchaser with the equitable ownership of the real estate, and the right to compel a conveyance of the title from the kin or devisee in a court of equity. *Tillinghast v. Champlin*, 4 R. I. 178, 67 Am. Dec. 514, and authorities cited in note, p. 541; *Grisson v. Moore*, 108 Ind. 296, 3 West. Rep. 657; *Haas v. Shaw*, 91 Ind. 884-896.

In note to *McCormick's Appeal*, 57 Pa. 54, 98 Am. Dec. 200, the editor, in speaking of the difference in the rule in England and this country, says: "But in this country, when the objects of the conversion have been accomplished, a reconversion takes place. When the property has fulfilled all its functions as personal property in respect to the partnership, the partners and the creditors, and is no longer wanted for those purposes, it becomes, in the hands of those who hold the legal title, real estate, and subject to all incidents as such." See authorities there cited. This we think the true doctrine; but while it remains personal property it is subject to being sold and conveyed by the partners or the surviving partners, and when it becomes necessary to sell a parcel of real estate which is indivisible, to apply a portion of the proceeds to the payment of firm debts, the sale in good faith, for a valuable consideration, passes the equitable title to the whole tract, and the heirs of the decedent,

or his legal representatives, take the surplus of the proceeds, instead of the real estate.

Cross-errors are assigned by appellees. It is contended that the court erred in overruling demurrers to each of the second, third and fourth paragraphs of answer. If errors were committed in such rulings, they were harmless errors. It is held by this court that if a demurrer is overruled to a bad answer, and there is a general finding, it is error. The effect of upholding a bad answer is to adjudge that, if the defense pleaded is proved, the defendant is entitled to a verdict. *Oser v. Shannon*, 75 Ind. 852.

This is manifestly true when there is a general finding, but when there is a special finding of facts they control the judgment, and, unless the facts found entitle the defendant to a judgment, one cannot be rendered in his favor, no difference what may have been pleaded in the answer. In this case, under the issues joined by the general denial, the same evidence could be introduced, and the same facts found, as under the special answers filed; "and there is a special finding of facts which control and govern the verdict to be rendered, so that it removes the presumption that if the defendants prove the defense pleaded they are entitled to judgment, and makes it affirmatively appear that no harm resulted by reason of an erroneous ruling, if there was one on the demurrers to the answers, and brings the case within a well-recognized rule, that a cause will not be reversed on account of a harmless error. *Tracewell v. Farnley*, 104 Ind. 497, 2 West. Rep. 270; *Nixon v. Campbell*, 106 Ind. 47, 2 West. Rep. 681; *Krug v. Davis*, 101 Ind. 75.

Some other cross-errors are assigned, all of which we have considered, and find no error, and do not deem it proper to extend this opinion by stating the questions at length.

The judgment is reversed as to appellee Albert D. Burgess, at his costs, with instructions to the court below to restate its conclusions of law, by stating as a conclusion of law on the facts found that the defendants are the owners of all the real estate in question and described in the complaint, and entitled to judgment for their costs; and to sustain the motion of the defendants for judgment in their favor against the plaintiff Albert D. Burgess, and to render judgment in favor of defendants against said Albert D. Burgess; and the judgment is affirmed against appellees Zoradia Hanvell.

A petition for rehearing was subsequently filed and argument had thereon, and on February 26, 1890, *Olds, J.*, delivered the opinion of the court:

It is urged that the facts stated in the opinion, as to the financial condition of the firm of Burgess & Hildreth at the date of the death of Burgess, are not in harmony with the facts as found by the trial court, and that the debts did not exceed the personal assets of the firm to as great an amount as stated in the opinion. On a re-examination of the findings of fact, in the light of the argument on petition for rehearing, there seems to be some uncertainty as to the indebtedness of the firm, and the value of the real and personal estate owned by the firm at the date of the death of Burgess, the

findings of facts being unnecessarily long and uncertain. In view of such uncertainty, justice will be best subserved by modifying the mandate in the original opinion by ordering a new trial, instead of a restatement of the conclusion of law and the sustaining of appellants' motion, and the mandate is hereby modified to that extent.

Judgment is reversed as to appellee Albert D. Burgess, at his costs, with instructions to sustain appellants' motion for new trial, and for further proceedings in accordance with this opinion, and the judgment is affirmed as to Zoradia Hanvell.

Eather S. DAVIS, Impleaded, etc., *Appt.*,

v.

Mina A. FOGLE.

(.... Ind.)

The adoption of a child does not operate to revoke an antecedent will of the adopting father, although no provision is made in the will or otherwise for such adopted child, under statutes which give the adopted child all the rights and interest in the estate of the adopting father by descent or otherwise that he would have if the natural heir, and provide that if after the making of his will testator shall have born to him legitimate issue, such will shall be deemed revoked, unless provision shall have been made in such will for such issue.

(March 11, 1890.)

APPEAL by defendant, Eather S. Davis, from a judgment of the Circuit Court for Noble County overruling a demurrer to the complaint in an action to quiet title to certain real estate which plaintiff claimed as heir-at-law of William C. Davis, deceased. *Reversed.*

The facts are fully stated in the opinion.

Messrs. Morris & Barrett and Thomas M. Eells, for appellant:

The issue, the birth of which revokes the prior will of its parent, is one born in the natural and original way, and in lawful wedlock.

Co. Litt. 144; *Schafer v. Eneu*, 54 Pa. 304.

Unless a written will is revoked as provided in sections 2559, 2560 or 2565, it must stand.

Hughes v. Hughes, 37 Ind. 188.

Mr. P. V. Hoffman, for Eli C. Davis:

Eli C. Davis is, within the spirit of the Statute, legitimate issue of William C. Davis born after the making of the will.

If a man should make a will, a woman after the making of the will should have a bastard child born, and the man making the will should then marry the woman and acknowledge the child as his, such birth and marriage would revoke the will.

Milburn v. Milburn, 60 Iowa, 411.

The Statute for the adoption of children makes them to all intents and purposes the natural heirs of the adopting parent.

Humphries v. Davis, 100 Ind. 274, 369. See also *Paul v. Davis*, 100 Ind. 423; *Barnes v. Allen*, 25 Ind. 222; *Schouler*, Dom. Rel. § 232; *Krug v. Davis*, 87 Ind. 590; *Swall v. Roberts*, 115 Mass. 262.

NOTE.—Revocation, revival and republication of will.

The Connecticut Statute of 1821, providing that no devise of real estate should be revoked except by cancellation or later will or codicil, applied to every will containing both devises of real estate and bequests of personalty, as well as to wills containing devises of real estate only. *Goodsell's App.* 4 New Eng. Rep. 331, 55 Conn. 171.

Testamentary capacity is as requisite in the revocation of a will as it is in its execution. *McIntire v. Worthington*, 10 Cent. Rep. 129, 68 Md. 203.

The New Hampshire Statute (Gen. Laws, chap. 196, § 14) provides the only mode by which a will can be revoked, and courts cannot accept even a definite intention to perform the prescribed act for the act itself. *Hoitt v. Hoitt*, 1 New Eng. Rep. 547, 63 N. H. 475.

A will, under the Act of Assembly in Pennsylvania, can be revoked only by a writing proved by two or more witnesses. *Lawson v. Morrison*, 2 U. S. 3 Dall. 286 (1 L. ed. 384).

Canceling a second will by the testatrix herself is a revival of the first, if undestroyed. *Ibid.*

A will or codicil may operate as a revocation of a prior testamentary instrument, either by an express clause of revocation or by an inconsistent disposition of the previously devised property. *Webb v. Carpenter*, 5 New Eng. Rep. 672, R. I. Index BB, 68.

A codicil "I hereby unqualifiedly revoke" a bequest operates as a revocation, notwithstanding it also contains a bequest which must fail. The revocation and the subsequent bequest are disconnected. *Lutheran Congregation's App.* 3 Cent. Rep. 269, 113 Pa. 32.

Where a codicil expressly confirms the will in so far as it is consistent with the will, and was executed with all due formalities, it is a republication of the will, and supplies all omissions in the execution of the will. *7 L. R. A.*

tion of the latter. McCurdy v. Neall, 5 Cent. Rep. 324, 43 N. J. Eq. 333.

As a general rule a second will with clause of revocation revokes the former will. On destruction of second will, the former unanceled will is generally revived. Circumstances may show intent to revive or not to revive. Mere making of a second will revokes the first as to personal estate. *Boudinot v. Bradford*, 2 U. S. 2 Dall. 206 (1 L. ed. 376).

Evidence of declarations by the testator is admissible to show whether, by canceling a second will, he meant to die intestate, the first one still existing. *Ibid.*

Proof, even of a single witness, may be satisfactory that a testator, in canceling his last will, intended to revive a former unanceled will, and the former will is thereby revived. Authorities cited. *Williams v. Williams*, 3 New Eng. Rep. 110, 142 Mass. 515.

Under the Alabama Code an erasing of the name of a legatee by drawing a pen through it, if made with intention to revoke the whole will, as shown by accompanying declarations of the testator, is effectual for that purpose. *Law v. Law*, 83 Ala. 422.

But a will cannot be revoked *pro tanto* by expunging the name of a single legatee. *Ibid.*

The burning of a will by the testator's direction, even if done before death, will not operate as a revocation unless done in his presence. *Dower v. Seeds*, 28 W. Va. 118.

Under the Alabama Code a revocation of a part cannot be made by burning, tearing, canceling or obliterating it. *Law v. Law*, *supra*.

The destruction by a testator of the later of two inconsistent wills, with the intention and purpose of making a third one, does not, without more, revive the earlier will, even if no will is made and the earlier will is found among testator's valuable papers. *McClure v. McClure*, 86 Tenn. 173.

Messrs. H. G. Zimmerman and Frank M. Prickett, for appellee:

The Statute for the adoption of heirs is in the nature of a remedial statute.

1 Bl. Com. 450.

The Statute is to be construed "beneficially so as to correct the mischief and advance the remedy."

Domat, p. 141; *People v. Dana*, 23 Cal. 11; Potter's Dwarrr. Stat. p. 144.

No statute stands entirely alone, for, in interpreting and enforcing it, aid is obtained from the rules of the common law as well as from other statutes.

Robinson v. Rippey, 111 Ind. 118.

Statutes are to be construed as parts of a uniform system, and such a scheme adopted as will give each part its appropriate place, and not destroy uniformity and harmony by cutting the system into disjointed and incongruous parts.

Lutz v. Crawfordville, 109 Ind. 468; *Humphries v. Davis*, 100 Ind. 274; *Paul v. Davis*, 100 Ind. 422; *Bradley v. Thixton*, 117 Ind. 255; *Robinson v. Rippey*, 111 Ind. 112, and cases there cited; *Morrison v. Jacoby*, 114 Ind. 84; *Chicago & A. R. Co. v. Summers*, 118 Ind. 10.

Under the "civil law," or Roman law, the adoption of a child under the power of its natural parent was a revocation of an antecedent will.

1 Jarman, Wills, 5th ed. and notes by Bigelow *124, p. 152; Just. Inst. lib. 2, chap. 17, § 1. Section 2560, Rev. Stat., reaffirmed what had been for centuries the common law of this country and of England, and what had been

long before it was adopted by the common law of England, the civil or Roman law.

Since the Act of August 17, 1855, the legal heirs of A, and his natural heirs, have, in the courts of law, equal "rights and interest" in his estate, and of necessity equal claims to his bounty.

Courts in giving effect to statutes are not to regard the mere letter, but they are to look to its spirit and purpose.

Clift v. Shockley, 77 Ind. 297.

An adopted child may take by the designation of "heir" or "issue," under our laws.

Sevall v. Roberts, 115 Mass. 262; *Burrage v. Briggs*, 120 Mass. 103; *Jenkins v. Jenkins*, 6 New Eng. Rep. 890.

Olds, J., delivered the opinion of the court:

This is an action to quiet title to real estate. William C. Davis, who died on the 11th day of April, 1889, was at the time of his death the owner in fee of the real estate described in the complaint. The appellant, Esther S. Davis, was the third and childless wife of the deceased. The deceased had no children by his first wife. The appellee, Mina A. Fogle, was his child by the second wife. In 1888 said William C. Davis adopted Eli C. Davis as his child and heir. After the marriage of said William C. Davis to his third wife, Esther S. Davis, and before the adoption of Eli C. Davis, he made a will devising the real estate in controversy to his wife, Esther S. Davis, in fee. The appellee, Mina A. Fogle, brought this suit, making Esther S. and Eli C. Davis defendants, alleging the facts, and con-

The revocation of a will by intentionally destroying it will not revive a former will which was expressly revoked by the later one. *Hawes v. Nicholas*, 2 L. R. A. 863, 72 Tex. 481.

One seeking to establish a will presumptively revoked by its destruction must show by facts and circumstances that the will was actually fraudulently destroyed. *Collyer v. Collyer*, 110 N. Y. 481. — Under the provision of Ky. Gen. Stat., chap. 112, § 11, that no will or codicil, after being revoked, shall be revived, otherwise than by re-execution thereof, or by a codicil, the preservation of a holographic will by a married woman for many years after marriage, and her frequent recognition of the paper as her will, will not amount to a republication or re-execution of it, where it has been revoked by her marriage. *Stewart v. Mulholland* (Ky.) 10 Ky. L. Rep. 824, 10 S. W. Rep. 125.

See generally notes to *Hawes v. Nicholas* (Tex.) 2 L. R. A. 863; *Riggs v. Palmer* (N. Y.) 5 L. R. A. 348.

What will not operate a revocation.

Declaration of intention to make a will at a future time, even though embodied in a formal recital in a deed, cannot operate as a revocation of a will already made. *Rife's App.* 1 Cent. Rep. 60, 110 Pa. 232; 1 Jarman, Wills, 171, 173.

The verbal declarations of the testator, showing a present revocation, or an intention to revoke in the future, are not admissible as evidence for any purpose, the Statute (Code, § 2296) not authorizing such mode of revocation. *Slaughter v. Stephens*, 61 Ala. 418.

A mere intimation, by a testator, of his intention by a future act to make a new disposition, does not effect an actual present revocation. Unless a subsequent will differs from, and is inconsistent with, a former, it will not operate as a revocation. *Rife's App.* 1 Cent. Rep. 60, 110 Pa. 232. 7 L. R. A.

The fact that a will is found with memoranda and unexecuted papers evidencing an inchoate intention to make another will does not effect a revocation, under Gen. Laws, chap. 193, § 14, providing the manner in which wills may be revoked. *Holt v. Holt*, 1 New Eng. Rep. 558, 63 N. H. 475.

Where a will is not shown to have been expressly revoked, no subsequent changes in circumstances of deceased,—as, his second marriage, death of some of his children and legatees, or alienation of certain property,—will operate as a revocation by implication. *Ibid.*

Partial revocation only produces an ademption of the subject of the devise, and thus limits the operation of the will to the extent of the revocation. *Ibid.*

A will containing a provision which renders it invalid cannot operate either as an express or implied revocation of a former will. *Dower v. Seeds*, 28 W. Va. 138.

Where a will, after giving certain bequests, gave the residue of an estate to A and others, to be divided between them, a codicil giving A all of the residue after payment of expenses, without division, does not revoke the bequests. *Webb v. Carpenter*, 5 New Eng. Rep. 672; R. I. Index BR. 68.

A subsequent deed of trust made for testator's own benefit, conveying the real estate to trustees; and a subsequent codicil giving an additional legacy, in other respects confirming the will,—do not operate as a revocation. *Cheesman v. Cummings*, 3 New Eng. Rep. 360, 142 Mass. 65.

Where power is exercised to dispose of funds by will, the subsequent investment of the funds in lands will not revoke the provision in the will. *Horner v. Clements*, 9 Cent. Rep. 510, sub nom. *Clements v. Horn*, 44 N. J. Eq. 505.

When it is sought to establish a posterior will, to overthrow a prior one made by the testator in health

tends that the adoption of EH C. Davis by her father revoked the will, and that she and Eli C. each inherited a one-half interest in the real estate, subject to a life estate in favor of Esther S. Davis, the third and childless wife of the deceased.

The appellant, Esther S. Davis, demurred to the complaint for want of facts, which demurrer was overruled and she excepted.

The question presented for decision is, Does the adoption of a child under the Statute of this State operate to revoke an antecedent will of the adopting father, he having made no provision in the will or otherwise for such adopted child? This question must be determined mainly by the construction to be given to our statutes.

Counsel for appellee, in their able brief in this case, contend that the "Statute declaring and defining the rights and interests of adopted heirs in the estate of their father contains no limiting or qualifying words, nor are the rights and interests of the adopted heir restricted to the rights and interests of a 'natural heir' in any particular case or class of circumstances, nor to 'natural heirs' born prior to the date of the will of their father, whereby no provision has been made for them.

But the wording is that the adopted child shall be entitled to and receive all the rights and interests in the estate of such adopting father by descent or otherwise of a natural heir; and as the legal status, rights and capacities of an adopted heir are by the Statute made co-equal with those of a natural heir, these co-ordinate legal consequences and results

must of necessity flow therefrom; hence, if the natural birth of an heir subsequent to the date of its father's will (no provision having been therein made for such heir) shall be deemed a revocation of the will of its father, so, also, the legal birth of an heir subsequent to the date of its father's will (no provision having been therein made for such heir) shall in like manner be deemed to work a revocation of its father's antecedent will."

So much of the Statute providing for the adoption of children as is material reads as follows: "Such court, when satisfied that it will be for the interest of such child, shall make an order that such child be adopted, and from and after the adoption of such child it shall take the name in which it is adopted, and be entitled to and receive all the rights and interest in the estate of such adopting father or mother, by descent or otherwise, that such child would if the natural heir of such adopting father or mother."

It is further provided that if such child shall die without leaving a wife or husband, issue or their descendants surviving him or her, seised of any real estate or personal property which may have come to such child by gift, devise or descent from such adopting father or mother, such property shall descend to the heirs of such adopting father and mother, the same as if such child had not been adopted.

It is held by this court that when an adopted child dies without issue, owning real estate which came to it by inheritance from its adopting father or mother, that the same shall descend, on the death of the child, to the adopting

and under circumstances of deliberation and care, where the subsequent will was made when the testator was in enfeebled health and in hostility to the provisions of the first one, the prior will is to prevail, unless he who sets up the subsequent one can satisfy the conscience of the court of probate that he has established a will. Authorities cited; *Re Dietz's Will*, 4 Cent. Rep. 842, 41 N. J. Eq. 284.

Revocation by sale of property.

A devise is broken by sale of the real estate by the testator in his lifetime. *Emery v. Union Society*, 4 New Eng. Rep. 538, 79 Me. 384.

This was the common-law rule and it prevails by statute in the State of Kentucky. *Hazelwood v. Webster*, 32 Ky. 408.

But a subsequent sale and conveyance do not operate a revocation when any part of the purchase money remains unpaid, unless the intention appears by some instrument in writing. *Slaughter v. Stephens*, 81 Ala. 418.

Where testator subsequently deeded a portion of the tract to the devisee, the latter takes under the devise only so much as is not included in the deed. *Pickett v. Leonard* (N. C.), 10 S. E. Rep. 466.

A deed of gift is not a revocation of a previous will devising the same property to the same person, unless there is an inconsistency between the two instruments, or some other manifestation of an intent to revoke. *Aubert's App.* 1 Cent. Rep. 105, 109 Pa. 447.

A sale of the land devised, subsequent to the execution of the will, while it might operate a revocation *pro tanto* of the will, would not invalidate it entirely, or prevent its probate as to the other property embraced in it. *Moore v. Spier*, 80 Ala. 122.

The burden of proof is upon the party claiming against a will to show that the testator intended a

revocation of his will by selling the property. *Hazelwood v. Webster*, *supra*.

The mere sale of the land did not create the presumption that the testator so intended. Other evidence must be produced. *Ibid*.

The courts will presume an intention on the part of a testator to avoid partial intestacy, unless the contrary intention actually appears in the will itself. *Delehanty v. St. Vincent's Orphan Asylum Society* (Sup. Ct.) 20 N. Y. S. R. 324.

Conveying a part of the estate indicates a change of purpose in the testator as to that part; but suffering the will to remain uncancelled evinces that his intention is unchanged with respect to other property. *Holt v. Holt*, 1 New Eng. Rep. 559, 63 N. H. 475.

Marriage revokes antecedent will.

Under the Statute of 1872, a marriage, whether of a man or a woman, must operate *per se* as a revocation of a prior will. *McAnulty v. McAnulty*, 9 West. Rep. 530, 120 Ill. 23.

A will and codicil of a woman are revoked by her subsequent marriage. *Blodgett v. Moore*, 1 New Eng. Rep. 582, 141 Mass. 75; *Nutt v. Norton*, 2 New Eng. Rep. 594, 143 Mass. 242; *Swan v. Hammond*, 138 Mass. 45.

But as to a man marriage alone would not revoke a prior will. *McAnulty v. McAnulty*, *supra*.

In the absence of a statute, marriage alone, without the birth of a child, will not revoke a will. *Goodsell's App.* 4 New Eng. Rep. 531, 55 Conn. 171.

Marriage and birth of a child, occurring after execution of a will, without circumstances to weaken their effect, operate as a revocation. *Baldwin v. Spriggs*, 8 Cent. Rep. 383, 65 Md. 373.

After a good deal of doubt and hesitation, it was finally settled in England before our Revolution that marriage and issue taken together did amount

father or mother surviving, in preference to the natural mother. *Humphries v. Davis*, 100 Ind. 274; *Humphries v. Davis*, 100 Ind. 370; *Paul v. Davis*, 100 Ind. 423.

The court, in the case of *Humphries v. Davis*, *supra*, at page 282, says: "Not only is the conclusion which we have stated that to which the cold rules of logic and the benign ones of natural equity lead, but it is also the conclusion to which the general principles both of the American law and the Roman law lead. It is a principle of both systems of jurisprudence that in case of failure of descendants capable of taking, the inheritance shall go back to the kinsmen of the blood from which it came. Our Statute fully recognizes the general principle, for it provides that when the inheritance comes from the paternal line it shall go back to the kinsmen of that blood, but when the inheritance comes from the maternal line it shall go back to the kinsmen of the mother's side."

These decisions go as far, it would seem, in holding the legal status of the adopted child to be the same as a natural child as is warranted under the Statute, but the conclusions are reached on broad equitable principles and differ very materially from the questions presented in this case. These decisions go no further than to hold that the surviving adopting father or mother inherits from the adopted child such property only as it inherited from the deceased adopting father or mother; and the Statute was so amended in 1863, Elliott's Revision, § 29, as to provide that property which may come to such adopted child by descent, devise or gift from its adopting father or mother shall,

upon its death without husband, wife or issue surviving, descend to the heirs of such adopting father or mother, which amendment was no doubt deemed necessary to prevent the natural heirs of such adopted child from inheriting to the exclusion of the heirs of its adopting parents that which came from them, and of right ought, on the death of such child without husband or wife, issue or descendants surviving, to descend to the heirs of the adopting parents. There is a material difference in the matter of inheritance by an adopted and natural child, also as to the descent of property owned by them. An adopted child inherits from its natural parents, but not from the relatives of the adopting parents. The natural parent inherits all such property as the child may acquire otherwise than through the adopting parents. In the case of *Humphries v. Davis*, 100 Ind. 283, it is said by the court: "It does her (the mother) no injustice to leave her with her right to such property as her child may acquire otherwise than through its adoptive parents, but it would do great injustice to permit her to secure the property acquired by her child in virtue of both its natural and adoptive rights."

But we think the Statute relating to the revocation of wills is decisive of the question involved in this case. Sec. 2559, Rev. Stat. 1881, provides: "No will in writing, nor any part thereof, except as in this Act provided, shall be revoked, unless the testator, or some other person in his presence and by his direction, with intent to revoke, shall destroy or mutilate the same, or such testator shall execute a sec-

ond to an implied revocation of a will previously made, and that such implied revocations were not within the Statute of Frauds; but that such implied revocations might be rebutted and controlled by circumstances. The final determination of the matter seems to have been reached by the cases of *Christopher v. Christopher*, 2 Dick. 445, and *Sprague v. Stone*, Ambler 721.

The most important of the English cases since the Revolution is *Marston v. Roe*, 8 Ad. & El. 14, by fourteen out of the fifteen English judges, where the general doctrine was reaffirmed. But the courts there seem to have felt the difficulties that would result from such a view, and *Lord Kenyon* in *Doe v. Lancashire*, 5 T. R. 49, decided in 1792, placed the rule upon another ground, namely: a tacit condition annexed to the will when made, that it should not take effect if there should be a total change in the situation of the testator's family. This view of *Lord Kenyon* was afterwards adopted by *Lord Ellenborough* in *Kenebel v. Scrifston*, 2 East, 530.

Connecticut Laws 1885, chap. 110, § 135, providing for revocation of a will by subsequent marriage or birth, is not retrospective. *Goodsell's App.* 4 New Eng. Rep. 381, 55 Conn. 171.

A married woman under the statutes of Maine, being able to make or revoke a will as freely as a *feme sole*, the former rule that the will of a *feme sole* is revoked by her marriage is no longer in force, as is the reason for it no longer exists. *Re Hunt's Will*, 81 Me. 275.

The rule that remarriage acts as revocation of a will is abrogated by statutory provision entitling a widow and children not provided for by will to the same share in the estate as if the testator had died intestate. *Holt v. Holt*, 1 New Eng. Rep. 547, 68 N. H. 475.

Where a woman during her second marriage

made a will in favor of the children of her former marriage, and subsequently married a third husband, who survived her, there having been no issue by either the second or third marriage, the will was not revoked by the second marriage. Whether the marriage would have revoked a will made in favor of a stranger, —*quære*. *Ward's Will*, 70 Wis. 251.

Antenuptial will.

A woman's antenuptial will is not revoked by her marriage. *Morey v. Sohler*, 3 New Eng. Rep. 274, 68 N. H. 507.

A will containing a provision for the betrothed of testator is not revoked by his subsequent marriage to her, under Pa. Act 1883, § 15 (Pub. Laws, 250); and on his death without children by such marriage, the widow may elect to take under the will under Pa. Act 1848, § 11. *Fidelity Ins. T. & S. D. Co's App.* 121 Pa. 1.

Power of appointment in a will executed by a woman before her marriage will not be revoked by her marriage, an antenuptial agreement having been made that her property should descend according to her will, without specifying what will, and in fact her husband having had no knowledge of the will in question. *Osgood v. Bliss*, 2 New Eng. Rep. 146, 141 Mass. 474.

A will made by a woman in contemplation of marriage and in pursuance of an antenuptial contract, although dated two days prior to the contract and the marriage, is not within Ky. Gen. Stat., chap. 112, declaring that "every will made by a man or woman shall be revoked on his or her marriage, except a will made in the exercise of a power of appointment," etc.; and such will is not revoked by the marriage. *Stewart v. Mulholland*, 10 Ky. L. Rep. 824, 10 S. W. Rep. 125.

ond. A revocation of the second shall not revive the first will, unless it shall appear by the terms of such revocation to have been his intent to revive it, or unless, after such revocation, he shall duly republish the previous will.

Section 2560 provides that, "if, after the making of a will, the testator shall have born to him legitimate issue, who shall survive him, or shall have posthumous issue, then such will shall be deemed revoked, unless provision shall have been made in such will for such issue."

It is held in *Runkle v. Gates*, 11 Ind. 95, that to revoke a will the requirements of the Statute must be strictly pursued. It is manifestly true, no act, thing or deed will revoke a will once duly executed unless it comes within the provisions of the Statute providing for the revocation of wills. To hold that the adoption of a child revokes the will, it is necessary to interpolate into section 2560, after the words "legitimate issue," the words "or shall adopt a child," or words to the same effect, for the words of the Statute are plain and explicit. They are: "If, after the making of the will, the testator shall have born to him legitimate issue." It would be legislation and enacting a statute to so construe it, and would be putting an unwarranted construction upon the Statute to hold that the words "the testator shall have born to him legitimate issue" mean the same as or include an adopted child, or that by the adoption of a child a parent has born to him or has legitimate issue. The one is made a legal heir by legal proceedings under the Statute, and the other is an heir by reason of being born in lawful wedlock; for one the parent has natural love and affection, for the other the parent may or may not have. The one the parent is bound to by nature and under moral obligation to support, maintain, educate and provide for, and to the other the parent is made under such obligations as the Statute imposes and none other. The Statute gives to the one certain rights and imposes certain obligations on the adopting parents, but it does not make it the legitimate child and issue of the adopting parents or a child born to them. One becomes an heir by birth, the other by the judgment of a court.

By section 1 of an Act approved March 11, 1889, p. 480, it is provided "that, if a man marry a second or subsequent wife, and have by her no children, but has children alive by a former wife, the interest of such second or subsequent childless wife in the lands of the decedent shall only be a life estate, and the fee of the same shall, at the death of such husband, vest in such children, subject only to the life estate of the widow."

It might as well be claimed that if, during the lifetime of such second or subsequent wife the husband and wife adopt a child, it would be the same as if one were born to them, and such wife would inherit the one third in fee of the real estate owned by the husband, since, if a child was born to them as the fruits of the marriage, she would inherit, and the birth of the legitimate child fixes the status of the wife as to her interest in the property of her husband; and if, as contended by counsel for appellee, the status of an adopted child is the same in law as a child born in wedlock, and possesses

the same rights as a child born in wedlock, and the adoption revokes an antecedent will the same as the birth of a child, then with equal force can it be said that the status and rights of the parents are fixed by the adoption of a child the same as by the birth of a child. As well it might be said that, if the father die testate and devise his real estate to his daughter for life, and the fee to the heirs of her body in case she shall have issue born to her, but in case she shall have no issue born to her, then the fee to a son, if the daughter adopt a child, that it would take the fee in the real estate the same as if it were a natural child born of her body.

These illustrations legitimately flow from the theory contended for by counsel for appellee in the construction of section 2560, if carried to a reasonable extent, and we think are clearly erroneous and cannot be supported by authority. We have examined the authorities cited by counsel for appellee, and think none of them sustain the doctrine contended for.

The case of *Sevall v. Roberts*, 115 Mass. 262, is based upon a statute somewhat different from the Statute of this State, and the decision goes no further than to hold that the adopted child took as the heir of the adopting father, the statute under which the adoption was made providing that the adopted child, for the purpose of inheritance, etc., should be the same as if born to them in lawful wedlock, except in certain cases, and the court held that the case under consideration did not come within any of the exceptions named in the Statute, and is far from being decisive of the questions presented in this case.

It seems clear to us that the adoption of a child does not revoke an antecedent will of the adopting parent; that it cannot be construed to operate the same as the testator having born to him legitimate issue.

The court erred in overruling the demurrer to the complaint, and the judgment must be reversed.

Judgment reversed, with costs.

Petition for rehearing overruled May 15, 1890.

Melinda E. CULVER, Admx., etc., of
Moses C. Culver, Deceased, Appt.,

v.

Jacob F. MARKS.

(...Ind....)

1. Presentation of a check for payment and notice to the drawer of nonpayment, are un-

NOTE.—Bank check, what constitutes.

The essential characteristic of a check is that it shall be instantly payable on demand; and that demand is effected unconditionally when one of a set of several checks is presented for payment; and payment of one will discharge the whole set. Merchants Nat. Bank v. Ritzinger, 6 West. Rep. 840, 118 Ill. 484.

An order drawn upon a bank for the payment of a sum certain to a named person, and payable on demand, in legal effect purports to be drawn on funds of the maker in the bank, and is a check. It is none the less a check because drawn by one bank

necessary when the drawer has or leaves no funds on deposit for its payment at the time when it should be presented, or if he consents or agrees that the same shall not be presented for payment. Under such circumstances the drawer's liability becomes fixed at that time without presentation and notice and whatever takes place afterwards in the state of his account at the bank will not change the rights of the parties.

3. **The cause of action** in such case to recover from the drawer the amount called for by the check rests upon the check and is not governed by the Statute of Limitations relating to contracts not in writing.
3. **Checks dated at a certain place** and drawn upon the "First National Bank" will be presumed, in the absence of anything to the contrary, to have been drawn upon the First National Bank of such place, where it appears that such bank exists and no other bank or place appears on the check.
4. **Evidence supporting one of several counts** setting out the same cause of action will sustain a finding for plaintiff in respect to such cause.
5. **Checks** for the payment of which there is no money on deposit bear interest from the time when presentation should have been made.
6. **Willingness on the part of the bank officials** to pay a check for the payment of which there are no funds on deposit will not render the presentation of the check for payment necessary in order to charge the drawer.
7. **Original entries made in the books of a bank** are admissible in evidence to show the state of a depositor's account at a certain past time, where they were made in the usual course of business by authorized bookkeepers in the discharge of their duties, and were correct when made.

upon another. *State v. Vincent*, 9 West. Rep. 915, 91 Mo. 662; *Bull v. First Nat. Bank*, 123 U. S. 105 (31 L. ed. 97).

A bank check or bill of exchange, not naming any time for payment, is payable on demand, and must be presented for payment within a reasonable time. *Parker v. Reddick*, 65 Miss. 242.

A check is not to be treated as overdue merely because it has not been presented as early as it might have been, or as a bill of exchange is required to be, to charge the drawer or indorser or transferrer. A check is not due until it is demanded. *Bull v. First Nat. Bank*, 123 U. S. 105 (31 L. ed. 97).

A bank need not take notice of memoranda on a check, placed there by the depositor for his own convenience. *State Nat. Bank v. Dodge*, 124 U. S. 333 (31 L. ed. 458).

Parol evidence of custom is not admissible to show that a draft payable in future was equivalent to a check. *Woodruff v. Merchants Bank*, 25 Wend. 478; 3 Randolph, Com. Paper, 38.

Payment of check.

A bank's protection in the payment of checks consists in the fact that it has strictly followed the depositor's directions in disbursing his funds. *Lynch v. First Nat. Bank*, 9 Cent. Rep. 564, 107 N. Y. 179.

Where a check reads "Pay to myself or order," and was certified by the bank while in the drawer's possession, the bank was justified in refusing to pay it to the third party without the drawer's indorsement. *Ibid.*

Giving a check authorizes payee to demand payment; on refusal to pay, drawer has right of ac-

tion; demand for whole balance is not necessary. *Viets v. Union Nat. Bank*, 2 Cent. Rep. 751, 101 N. Y. 583.

(March 15, 1890.)

APPEAL by defendant from a judgment of the Circuit Court for Tippecanoe County allowing a claim filed against her as administratrix to recover the amount of certain checks and notes given by her intestate. *Affirmed.*

The facts fully appear in the opinion.

Messrs. John R. Coffroth, T. A. Stuart and A. L. Kumlir, for appellant:

If a suit be brought against the drawer of a check without presentment and notice, the onus is on the plaintiff to show that no damage has been done to drawer, as injury is prima facie presumed.

Daniel, Neg. Inst. § 1598.

A check is only a contract by the drawer that the bank will pay it on demand. Until presentment, it is no evidence in the hands of the payee that the drawer is indebted to him.

Daniel, Neg. Inst. § 1646; Fleming v. McClain, 13 Pa. 177.

If at the time of the execution of the checks it was agreed that they should not be presented, and that Culver should pay them, that constituted an agreement partly in writing and partly oral, and six years would bar a recovery.

Marion Co. v. Shipley, 77 Ind. 553; *Madison Co. v. Miller*, 87 Ind. 257; *High v. Shelby Co.*, 92 Ind. 580; *Hackleman v. Henry Co.*, 94 Ind. 36; *Gordon v. Gordon*, 96 Ind. 134; *Tomlinson v. Briles*, 101 Ind. 538; *Brust v. Barrett*, 16 Hun,

tion; demand for whole balance is not necessary. *Viets v. Union Nat. Bank*, 2 Cent. Rep. 751, 101 N. Y. 583.

On payment of a check indorsed by a clerk with out authority, the bank collecting it guarantees the genuineness of the indorsement. *Central Nat. Bank v. North River Bank*, 44 Hun, 114.

The burden of proving that the payee has parted with his title rests upon the bank. *Citizens Nat. Bank v. Importers & T. Nat. Bank*, 44 Hun, 336.

The drawer of a check cannot sue the bank upon the check itself. *First Nat. Bank v. Shoemaker*, 9 Cent. Rep. 870, 117 Pa. 94.

Unless a check has been accepted by a bank, the holder cannot sue it. *Ibid.*; authorities cited in *Kuhn v. Warren Sav. Bank* (Pa.) 9 Cent. Rep. 621.

Nor can the holder of a bank check sue the bank for refusing payment, unless it was accepted by the bank or charged against the drawer. *National Bank of the Republic v. Millard*, 77 U. S. 10 Wall. 153 (19 L. ed. 897); *First Nat. Bank v. Whitman*, 94 U. S. 343 (24 L. ed. 229).

The certificate of a bank that a check is good is equivalent to acceptance. *Merchants Nat. Bank v. State Nat. Bank*, 77 U. S. 10 Wall. 604 (19 L. ed. 1008).

Demand, when excused.

A demand is excused where a drawer had no funds in drawee's hands, or where holder is prevented by unavoidable necessity from making demand. *Bassenhorst v. Wilby*, 11 West. Rep. 273, 45 Ohio St. 833.

So demand is excused where the holder is prevented from making it by unavoidable necessity in the time required by law. See *Parsons, Notes and Bills*, chap. 11, § 7; 1 *Parsons, Notes and Bills*, 446.

409; *Brush v. Barrett*, 82 N. Y. 400; *Wood, Lim.* § 140, p. 811; *Morse, Banks and Banking*, p. 263.

Without some proof, there was no way to tell on what bank the check was drawn.

Glass v. Tipton, T. & B. Turp. Co. 32 Ind. 376; 2 *Daniel, Neg. Inst.* § 1581; *Morse, Banks and Banking*, § 227.

In a case of this kind, mere identity of name, without other proof, is not sufficient.

Jones v. Jones, 9 Mees. & W. 75; *Moore v. Bunker*, 29 N. H. 420, 481; *Bennett v. Libhart*, 27 Mich. 489; 1 *Wharton, Ev.* § 701; *Louden v. Walpole*, 1 Ind. 319.

The tabulated statement purporting to be a transcript of the books of the bank was not admissible in evidence.

1 *Wharton, Ev.* § 245; *Eborn v. Zimpelman*, 47 Tex. 503; *Tome v. Parkersburg Branch R. Co.* 39 Md. 86, 17 Am. Rep. 540, 561, 20 Alb. L. J. 4, 5; *Greenl. Ev.* § 83.

The introduction of the entries on the books was not the proper method of proving the state of the account of Culver with the bank.

Rogers v. State, 99 Ind. 213; *Brewster v. Doane*, 2 Hill (N. Y.) 587; *Wilbur v. Selden*, 6 Cow. 162; *Merrill v. Ithaca & O. R. Co.* 16 Wend. 586, 594; *Fisher v. New York*, 67 N. Y. 73, 77; *Nicholls v. Webb*, 21 U. S. 8 Wheat. 326 (5 L. ed. 628); *Chenango Bridge Co. v. Lewis*, 63 Barb. 111.

To be competent, the declaration must be wholly against the interest of the declarant.

1 *Greenl. Ev.* § 149; 1 *Phillips, Ev.* p. 306; *Middleton v. Melton*, 10 Barn. & C. 317-327; *Gleadow v. Atkin*, 1 Crompt. & M. 410-423; *Doe v. Robeson*, 15 East, 32; *Higham v. Ridgway*, 10 East, 109; *Doe v. Beriss*, 7 C. B. 456; *Poorman v. Miller*, 44 Cal. 269; *Bornheimer v. Baldwin*, 42 Cal. 27; *Dencer v. Parsons*, 8 Ill. App. 625; *Craig v. Miller*, 103 Ill. 605; *Asken v. Hodge*, 61 Ill. 436; *Hardin v. Gouverneur*, 69 Ill. 140-145; *Blackburn v. Crawford*, 70 U. S. 8 Wall. 175-189 (18 L. ed. 186-192); *Lawrence v. Kimball*, 1 Met. 524.

Messrs. Byron W. Langdon, Thomas F. Gaylord and Behm & Behm, for appellee:

The drawer of a check is liable to the holder without presentment in either of these cases, (a) where there are insufficient funds, (b) or the drawer draws out his whole account or appropriates it to other persons or purposes, and (c) whenever the drawer induces the holder to forbear presentment.

Stewart v. Smith, 17 Ohio St. 85; *Hoyt v. Seeley*, 18 Conn. 353; *Spangler v. McDaniel*, 3 Ind. 275; *Blankenship v. Rogers*, 10 Ind. 333; *Fletcher v. Pierson*, 69 Ind. 233; *Robinson v. Hawksford*, 9 Ad. & El. N. S. 52; *Conroy v. Warren*, 8 Johns. Cas. 264; *Morrison v. Bailey*, 5 Ohio St. 18; *Kinyon v. Stanton*, 44 Wis. 479; *Eichelberger v. Finley*, 7 Har. & J. 881, 887; *Dana v. Third Nat. Bank*, 13 Allen, 447; 2 *Parsons, Notes and Bills*, 2d ed. 71, 87; *Daniel, Neg. Inst.* §§ 1090, 1093, 1103, 1583, 1596, 1598; *Pollard v. Bowen*, 57 Ind. 235; *Schmied v. Frank*, 86 Ind. 254; *Boyd v. Bank of Toledo*, 22 Ohio St. 526.

In the absence of anything on the paper to indicate or restrict the place of payment, the presumption of law is that it is payable where dated.

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Abbott, Tr. Ev. § 42, p. 411; *Ricketts v. Pendleton*, 14 Md. 320; *Stewart v. Eden*, 2 Caines, 127; *Bullard v. Thompson*, 85 Tex. 313; *Orcutt v. Hough*, 54 N. H. 472.

It was proper to show, by someone who was qualified to speak, that the books contained so many entries and no more; not to prove the entries, but to show that all had been put in evidence, and to discover if any had been omitted.

McCormick v. Pennsylvania Cent. R. Co. 49 N. Y. 315; *Howard v. McDonough*, 77 N. Y. 593.

The entries in the books of the bank were legal evidence.

Wharton, Ev. § 240; *Alter v. Berghaus*, 8 Watts, 77; *Crouse v. Miller*, 10 Serg. & R. 158; *Reynolds v. Manning*, 15 Md. 510; *Union Bank v. Knapp*, 3 Pick. 96; *New Haven & N. Co. v. Goodwin*, 42 Conn. 230; *Coolidge v. Brigham*, 5 Met. 68; *Stephen, Dig. Evidence* (Chase's ed.) and notes, 64, 66; *Price v. Earl of Torrington*, 1 Smith, Lead Cas. (7th Am. ed.) 589, note.

Olds, J., delivered the opinion of the court: This is an action by Jacob F. Marks, against Malinda Culver, administratrix of the estate of Moses C. Culver, deceased, to recover a claim against the estate of the decedent.

It is contended by the appellee that the appeal was not taken and perfected within the time allowed by statute. The appellant asked and obtained leave of this court to appeal, which disposed of this question, and it is unnecessary to consider it further.

Appellant's decedent died in December, 1884, and the claim was filed in February, 1885. The basis of the claim is three checks, copies of which are filed with the complaint, and marked A, B and C, and are in the following words and figures:

A.

Lafayette, Ind. Nov. 1, 1869.

The First National Bank.

Pay to J. F. Marks one thousand dollars. \$1,000.

(Signed) M. C. Culver.

B.

Lafayette, Ind. Nov. 8, 1870.

First National Bank.

Pay to J. F. Marks or bearer, five hundred dollars. \$500.

(Signed) M. C. Culver.

C.

Lafayette, Ind. Dec. 29, 1870.

First National Bank.

Pay to J. F. Marks or bearer, one thousand dollars. \$1,000.

(Signed) M. C. Culver.

Also three promissory notes, one dated December 17, 1870, for \$1,051.84, executed by the decedent to appellee; one dated September 1, 1870, for \$550, executed by decedent to appellee; and one dated July 29, 1872, for \$2,000, executed by the decedent to one Smith Lee, and assigned by him to appellee.

There are some nineteen paragraphs of complaint, most of them declaring upon the checks, and varying in their allegations. There was no further pleading filed. There was a trial

by the court under the Statute, and a finding for the appellee on the checks and notes, aggregating \$7,694.81. The court's finding is as follows: "The court, being in all things fully advised, finds that there is due the plaintiff, of and from the administratrix, to be paid out of the estate of the decedent, Moses C. Culver, on account of the note for \$2,000, and dated July 29, 1872, the sum of eight hundred and twenty-three dollars and twelve cents (\$823.12); on the due bill dated December 17, 1870, the sum of seven hundred and ninety-six dollars and fifty-nine cents (\$796.59); on the two \$1,000 checks, one dated November 1, 1869, and one December 29, 1870, the sum of three thousand nine hundred and thirty-six dollars and twenty-six cents (\$3,936.26); on the \$550 note, dated September 1, 1870, the sum of one thousand three hundred and eighty-three dollars and thirty-four cents (\$1,383.34), including \$125.75 as and for attorney's fees; and on the check for \$500, and dated November 8, 1870, the sum of \$755,—being the principal and interest thereon from the 1st day of January, 1878, and making in the aggregate the sum of seven thousand six hundred and ninety-four dollars and thirty-one cents (\$7,694.81)."

The appellant demurred to each paragraph of the complaint, which was overruled and exceptions. The appellant also filed a motion for new trial, which was overruled and exceptions; also moved the court in arrest of judgment, which was overruled and exceptions reserved; and these various rulings of the court are assigned as error. No question is presented as to the sufficiency of the paragraphs on the notes, or the right of the appellee to recover the amount due upon them.

The paragraphs of the complaint are numerous, and we do not deem it necessary to set them out, as we can state the questions presented in much less space.

They all declare upon the checks, and aver facts to excuse the necessity for presentment to the bank for payment, and notice to the drawer of nonpayment, differing in the averments in this particular. Some aver that Culver, the drawer, did not have money or funds sufficient in amount in said bank on the day of the date and delivery of said check, nor did he have enough on the day after the date of drawing and delivering said check in said bank, to pay said check. The ninth paragraph, declaring on the check dated November 1, 1869, alleges that Culver, the drawer, did not have money or means enough in said bank on the day of the date of said check, nor did he have sufficient funds or money in said bank until the 11th day of November, 1869, to pay said check.

Others aver that all the money or means said Moses C. Culver had in said bank on the day of the date of said check, or had at any time thereafter in said bank, were, by said check, paid to said Moses C. Culver, or to other persons on the order, check or request of the said Culver, and not to the plaintiff on account of said check.

Others aver that at the time of the execution and delivery of said check, the said Moses C. Culver requested the plaintiff not to present said check to said bank for payment, and that he, the said Moses C. Culver, should be permitted

to pay, and that he, the said Culver, would pay said check without presentment thereof for payment to said bank; and the plaintiff then and there promised not to present for payment said check at said bank, and to permit the said Culver to pay the same without presentment for payment at said bank; that in pursuance of said request of said Culver, and the promise of the plaintiff, the plaintiff did not present said check, nor was the same presented to said bank for payment.

The fourteenth paragraph, on the check dated December 29, 1870, alleges that Culver did not have money or means sufficient in amount in said bank on the day of the date of said check, nor did he have enough means or money in said bank for more than thirty days thereafter, to pay said check.

The foregoing are the averments in the respective paragraphs relating to the checks. The several paragraphs are respectively based on the checks as the foundation of the action, and the checks constitute a cause of action. *Henshaw v. Root*, 60 Ind. 220; *Fletcher v. Piereson*, 69 Ind. 281.

The general rule is that a check must be presented to the bank for payment, and that notice of nonpayment must be given to the drawer; but there are exceptions to this rule.

In *Bolles on Banks and Their Depositors*, p. 325, § 833, it is said: "Another excuse is the lack of funds with the drawee. The drawing of a check under such circumstances, unexplained, is a fraud which deprives the maker of every right to require presentation and demand of payment."

In *Franklin v. Vanderpool*, 1 Hall (N. Y.). 78, it is held that if a maker of a bank check has no funds in the bank upon which it is drawn at the date of the check, it is not necessary for the holder to present such check at bank for payment, in order to enable him to sustain an action upon it against the maker. Where the maker of a check withdraws his funds from the bank so that the check cannot be paid, no demand and notice are necessary. *Bolles on Banks, etc., supra; Sutcliffe v. McDowell*, 2 Nott & McC. 251.

In 2 *Morse on Banks and Banking*, 3d ed. § 425, it is said: "Presentment, however, may be altogether dispensed with, provided that if made it could not at the time be legally and properly met by the bank with a payment;" and numerous authorities are cited in support of this statement. This is in accordance with a well-settled legal principle that the law requires no unnecessary thing to be done. Checks are presumed to be drawn against a fund deposited in the bank out of which they are to be paid, and if there is no such fund so deposited out of which they can be paid, the presumption is that a demand will be of no avail and useless, and it must be further presumed that the drawer knows the state of his account with the bank, and whether or not he has sufficient funds on deposit to pay the check, and if he has not, no demand is necessary, and if no demand be necessary, then certainly no notice is necessary; being no demand, there could be no notice of demand.

It is further stated in *Morse on Banks and Banking, supra*, that "regular presentation may be waived by conduct or representations;

any agreement, express or implied, will excuse want of the usual formalities."

It is further said that "a check given as evidence of a loan to the drawer need not be presented to the drawee."

This doctrine is held in the case of *Ourrier v. Davis*, 111 Mass. 480.

It is the well-settled rule that in the absence of any agreement or special circumstances, a check shall be presented at least within banking hours on the day following the date of its delivery, if the bank on which it is drawn is in the same place where the payee lives or does business; and that the first presentment fixes the rights of the parties. If, upon such presentation, the bank offers and is willing to pay and the payee refuses to accept it, and afterwards, and before it is again presented, the bank fails, as between the payee and the drawer, the payee suffers the loss. See *Morse, Banks and Banking*, §§ 421, 426.

And it must necessarily follow from the well-settled law regarding checks that, if the drawer has no funds in the bank at the time the payee is by law required to present the check for payment, no necessity for demand and notice exists, and that the liability of the parties is fixed at this time. That is to say, if demand and notice be necessary, demand must be made on the day following the delivery of the check if the bank is in the same place where the payee lives and does business, and notice must be given, and the liability is thereby then and there fixed, and the payee may immediately bring suit. So, on the other hand, it must logically flow and necessarily follow from this rule, that if the drawer has no money or funds on deposit in the bank at the time the payee is required to present the check, then the liability of the drawer is fixed without presentation and notice, and the payee may at once bring suit on the check, and whatever takes place afterwards in the state of his account at the bank can make no difference, and will not change the rights of the parties.

The authorities cited, we think, are decisive of all the questions presented by the rulings on the demurrers to the several paragraphs of complaint, and that the general rule is that the payee must present the check for payment and give notice to the drawer of its nonpayment; but that no presentation or notice is necessary when the drawer has no funds on deposit for the payment of the check at the time when the check should be presented; or if he have funds on deposit at the time and withdraw the same, leaving none on deposit for the payment of the check, or if, by consent of the drawee or agreement between him and the payee, the check is not to be presented at the bank for payment, then there is no necessity for presentation and notice.

There was no error in overruling the demurrers to the complaint.

It is contended that the right of recovery was barred by limitation. What we have said in passing upon the complaint disposes of this question. The check being in writing and constituting the foundation of the action, it is not barred by the Statute of Limitations.

A question is made as to the check. It is contended that as the complaint alleges that the checks were drawn on the "First National

Bank of Lafayette, Indiana," and that there was no proof of such fact except that the checks were read in evidence and that the checks are drawn on the "First National Bank," that the proof made by the introduction of the checks does not correspond with the averments of the complaint. The checks were copied and made a part of the respective paragraphs of the complaint which declared upon them, and showed affirmatively in each paragraph of the complaint the name of the bank upon which they were drawn. They were each dated at "Lafayette, Indiana," and drawn on the "First National Bank," and the name of no other place or bank appeared upon the check, and the evidence showed that there was a First National Bank at Lafayette, and the fair presumption, in the absence of anything appearing to the contrary, is that it related to and that they were drawn upon that bank. *Walker v. Woollen*, 54 Ind. 164; *Roach v. Hill*, 54 Ind. 245; *Dutch v. Boyd*, 81 Ind. 146.

It is not contended that there is no evidence to support the allegations of the paragraphs of the complaint which allege that it was agreed that appellee should not present the checks at the bank for payment, but that Culver should pay them without presentation. This can make no difference. There were several other paragraphs of the complaint respectively declaring on each of the checks, and if the evidence supported one paragraph declaring on each check, the finding would be sustained. It was not necessary, because appellee declared on each cause of action in several various forms of averments, that he should prove the allegations of each paragraph of his complaint.

It is contended that the assessment of the amount of recovery is too large; that the court allowed interest upon the checks. In this there is no error. Under the law as we have stated, the cause of action accrued upon the checks at the time they should have been presented, if there had been money in the bank for their payment, and as the payee resided at the same place where the bank was doing business this would be the next day after the delivery of the check, and appellee is entitled to interest from that date.

We now come to questions presented by the motion for new trial on the admission and rejection of evidence.

The appellant offered to prove by Mr. M. L. Pierce, president of the bank, that if, at the date of several checks, or at any time during the year 1869 and 1870, checks for like amounts had been presented to the First National Bank drawn by Moses O. Culver, by the holder of such checks, they would have been paid. The offer was properly made. The witness was sworn and asked the proper question and the evidence was excluded. In this ruling of the court there was no error. The evidence offered is to the effect that the bank would have paid the checks without regard to whether Mr. Culver had funds in the bank or not. It is a well-settled rule that the liabilities of the parties are fixed by the fact of the drawer having or not having funds in the bank out of which the check could be lawfully paid, and the fact that he had no funds in the bank against which the check is drawn and out of which he had a legal right to have it paid; or, in other words,

if the bank was not at the time indebted to the drawer for money deposited, whereby he had the right to expect the bank to pay the check and charge it to him as against such deposit account, then the payee was relieved from making a demand, and this cannot be changed by a willingness on the part of the bank to pay the check of the drawer, notwithstanding he may have no funds on deposit. The payee took the check with the legal obligation resting upon him to present the check at the bank for payment, and if he failed to do so and the drawer had funds in the bank to pay it, and loss ensued by reason of such failure, the payee suffers the loss; but if the drawer had no funds in the bank for the payment of the check, the payee is excused from presenting the check for payment. If the drawer has no funds in the bank at the time for presentment for payment, there is no legal obligation resting upon the payee to present it for payment. The bank had no legal right to permit the drawer to overdraw and pay his check out of the funds of other depositors or the money of the stockholders.

The next question for consideration is the exception of the appellant to the ruling of the court to the admission in evidence of the entries in the books of the First National Bank, made in the usual course of business, showing the state of the account of said Moses C. Culver at and subsequent to the execution of the checks sued upon. As preliminary to the introduction of the entries in these books in evidence it was shown by the clerks and officers of the bank, produced in court as witnesses, and as to the entries made by such witnesses, that they were at the time the entries were made the proper and authorized bookkeepers to make such entries; that the entries were made by them in the due course of business, in the discharge of their duties, and were correct when made; that the entries made by them were original and entered by them in books kept for that purpose, and that they had no recollection of the facts represented by the entries.

As to the entries made by parties who were not witnesses, it was shown that the enterer was at the time the entry was made the proper bookkeeper and agent of the bank to make the entries in the due course of business; that the entries were original entries in original books made by such bookkeepers in due course of business, and were in the known handwriting of such bookkeepers, and that the enterer was dead or a nonresident of the State of Indiana. After the making of such preliminary proof the entries were admitted in evidence over the objection of the appellant.

It was proper to prove in this case the state of Moses C. Culver's account with the bank upon which he drew the checks, at the time he drew them and subsequent thereto, under the issues in the case. And it is pertinent to the question to consider how such facts could be proven if the evidence introduced was not admissible or competent for that purpose. The bank with whom he did business and upon which he drew the check, kept books and made an entry of all their business; of the money deposited by Culver and checks drawn by him and paid by the bank. The books were kept

by disinterested parties. Some of the persons who at the time of the transaction kept the books took the deposit and placed it to Culver's credit, paid the checks drawn by him and entered them on the books or charged them to his account, were dead. Others were beyond the jurisdiction of the court, and others had no personal recollection of the transaction, except to know that the books were kept in due course of the banking business, and were correct and showed a correct statement of the account.

Unless the evidence admitted was competent the appellee is deprived of making proof of the facts.

Price v. Earl of Torrington, 1 Smith, Lead. Cas. (9th ed.) 566, was an action for beer sold and delivered. It was held that a book containing an account of the beer delivered by the plaintiff's drayman, and which it was the duty of the drayman to sign daily, was competent to prove the delivery on proof that the drayman was dead and of his handwriting.

In a note to this case it is said: "A party's books of account and original entries are now in most, if not all, of the United States, received as evidence of a sale and delivery of goods to, or of work done for, the adverse party." On the same subject it is further said: "The reason for its introduction has never been placed by any court on higher ground than that of necessity, for, in view of the number and frequency of transactions of which entries are daily required to be made, the difficulty and inconvenience of making formal common-law proof of each item would be very great. To insist upon it, therefore, would either render a credit system impossible or leave the creditor remediless."

In 1 Greenleaf on Evidence, 14th ed. § 115, it is said: "It is upon the same ground that certain entries made by third persons are treated as original evidence. Entries by third persons are divisible into two classes: first, those which are made in the discharge of official duty and in the course of professional employment; and secondly, mere private entries. Of these latter we shall hereafter speak. In regard to the former class, the entry, to be admissible, must be one which it was the person's duty to make, or which belonged to the transaction as a part thereof, or which was its usual and proper concomitant."

In 1 Wharton, on Evidence, 8d ed. § 238, it is said: "An accountant or other business agent may be regarded as a member of a well-adjusted business machine, noting in the proper time and in the proper way what it is his duty to note. If he has no personal motive to swerve him, the inference is that what he does in this way he does accurately, and his evidence, if there be nothing to impeach it, rises in authority precisely to the extent to which he is to be regarded as a mechanical and self-forgetting register of the events which accounts are offered to prove. Hence it is that the memoranda or book entries of an officer, agent or business man when in the course of his duties become evidence after he is deceased, or after he has passed out of the range of process or become incompetent to testify of the truth of such entries,—subject, however to be excluded if it appear that in making the entries he was not registering, but manufacturing current facts."

The rule as stated by Greenleaf and Wharton is well supported by authorities. *Sickles v. Mather*, 20 Wend. 72.

In *Faxon v. Hollis*, 18 Mass. 427, the book of a blacksmith, kept in ledger form, the items being first noted down on a slate and then entered in the book, was held to be competent evidence. *Reynolds v. Manning*, 15 Md. 510; *Kelso v. Fletcher*, 48 N. H. 282; *Coolidge v. Brigham*, 5 Met. 68; *New Haven & N. Co. v. Goodwin*, 42 Conn. 280.

In *Alter v. Berghaus*, 8 Watts, 77, it is held that the absence of a witness from the State, so far as it affects the admissibility of secondary evidence, has the same effect as his death. This was in relation to the admission in evidence of original entries in books made by such absent person.

We think the evidence is clearly admissible, but we might add that, as regards the books kept by bookkeepers and officers of national banks, by § 5209, U. S. Rev. Stat., it is made a penal offense to make a false entry in any such books; so that these entries were not only made as original entries in the due course of business, but the persons making them were liable to criminal prosecution, and, upon conviction, to suffer imprisonment, if they made a false entry.

A bookkeeper for the bank made out a statement of all the items of Culver's account appearing in the books of the bank, and appeared and was sworn as a witness, and stated that he had prepared such statement and had it with him, and with the books before him was interrogated as to what items appeared in the account. The court permitted such statement so made out and testified to by the witness in evidence, and allowed the same to be read to the jury over the objection and exceptions of the appellant, and this ruling of the court is complained of as error.

This was a long statement of accounts, and the witness who made out the statement was subject to cross-examination. The appellant had an opportunity to test its correctness and cross-examine the witness who made out the statement. The appellant had as full and complete an opportunity to discover any error in the statement made by the witness as if he had appeared as a witness and testified from the books without making any written statements. When the entries in books are numerous and complicated, it is competent to permit an expert bookkeeper, who has examined the books, to give a summary oral statement of their contents and computations made. See *The Work of the Advocate*, by Elliott, p. 217, and authorities there cited. See also *Von Sachs v. Kretz*, 72 N. Y. 548; *McCormick v. Pennsylvania Cent. R. Co.* 49 N. Y. 315; *Howard v. McDonough*, 77 N. Y. 593.

We see no reason why, when such expert witness, who has examined the books and made an abstract of them, testifies as a witness, and opportunity is given for cross-examination in regard to such statement, as in this case, the statement may not be admitted in evidence and read to the jury. We think the abstract of the books was properly admitted; but the original entries made in the books were also in evidence in this case, and no complaint is made that the statement did 7 L. R. A.

not correspond with the books; and whether properly admitted or not, no harm could have resulted to the appellant by reason of the admission of such statement, and therefore no reason exists for the reversal of the case. *Citizens State Bank v. Adams*, 91 Ind. 288; *Hays v. Morgan*, 87 Ind. 231, 235, 236.

There is a further question as to the ruling of the court in refusing to allow the appellant to ask one Spencer a cross-examining question. We have considered this and there was no error.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

William THOMPSON *et al.*, Appts.,

v.

Jacob M. REASONER.

(....Ind.....)

An action sounding in tort cannot be maintained to recover damages for injuries resulting to lands by reason of the casting of surface water thereon through a drain which was constructed in good faith in accordance with a judgment of a court having jurisdiction of the parties and subject matter, although such judgment has been subsequently reversed on appeal for error, no stay of proceedings pending the appeal having been obtained.

(March 12, 1890.)

APPEAL by defendants from a judgment of the Circuit Court for Blackford County in favor of plaintiff in an action to recover damages for injuries resulting from the alleged wrongful casting of surface water upon plaintiff's land. *Reversed.*

The facts are fully stated in the opinion.

Messrs. C. E. Shipley, B. G. Shinn and Elisha Pierce, for appellants:

If the court has jurisdiction in a cause and makes an erroneous ruling and decision, so it be not void, the decision will stand and be binding upon the parties until set aside in some direct proceeding known to the law.

Young v. Wells, 97 Ind. 410; *Gavin v. Graydon*, 41 Ind. 559; *Smith v. Clifford*, 99 Ind. 114.

The plaintiff, by completing the appeal as an appeal in term time or by appealing in vacation, procuring supersedeas and giving appeal bond, might have stayed further proceedings under the petition for drain, and thereby prevented, not only the judgment establishing the ditch, but also its construction.

Chambers v. Kyle, 67 Ind. 206.

The petitioners are not responsible for the error of law committed by the court.

McMillin v. Staples, 36 Iowa, 532; *Dill v. Bowen*, 54 Ind. 204; *Lockenour v. Stiles*, 57 Ind. 380; 2 Addison, Torts, p. 752; 1 Hilliard, Torts, p. 443; *Blalock v. Randall*, 78 Ill. 224; *Glendon Iron Co. v. Uhler*, 75 Pa. 487; *Cannon v. Sipples*, 39 Conn. 505; *Shippen v. Bowen*, 4 McCrary, C. C. 58; *Miller v. Porter*, 71 Ind. 521; *Strieb v. Cox*, 111 Ind. 299.

Messrs. Cantwell & Cantwell and J. A. Bonham for appellee.

Mitchell, C. J., delivered the opinion of the court:

Reasoner instituted this action against Thompson and three others, and charged that the defendants had wrongfully and unlawfully constructed a ditch or drain in such a manner as to drain the surface water off their lands, and cause it to be cast upon and overflow the plaintiff's lands, to his damage.

It appeared upon the face of the pleadings that in November, 1888, the defendants, having given due notice, presented their petition to the Circuit Court of Blackford County, asking for the location and construction of a drain, so as to reclaim and drain certain wet lands of which they were the owners. Such proceedings were thereupon had, in pursuance of the Statute providing for the drainage of wet lands, as that the ditch prayed for was regularly established, and the construction of the work entered upon, and in due time completed.

At the proper time Reasoner and two others, whose lands were not described in the petition, nor in the report of the commissioners of drainage, as liable to be either benefited or damaged, appeared and, after waiving notice, presented a remonstrance against the report of the commissioners, alleging, among other things, as grounds therefor, that they would sustain damage to their lands respectively by the construction of the drain as proposed, and that the proposed drainage could not be accomplished without an expense exceeding the aggregate benefits. Upon motion, the court rejected the remonstrance upon the ground that the remonstrants were not within the terms of the Statute which prescribed the class of persons entitled to remonstrate.

The remonstrants thereupon appealed to this court, and upon the hearing it was held that the court below had committed error in rejecting the remonstrance. The judgment was reversed accordingly. *Reasoner v. Creek*, 101 Ind. 482.

No stay of proceedings having been had or applied for, the drainage commissioner to whom the construction of the work was referred, collected the assessments made, completed the drain under the direction and to the approval of the court, and was finally discharged pending the appeal of the remonstrants in this court. After the judgment was reversed, the proceeding was reinstated in the court below, and at the next term the court ascertained the amount of damage which each of the several remonstrants would sustain, and found that the expense of constructing the work and the damages exceeded the aggregate benefits. Thereupon the proceeding was dismissed, leaving the drain as it had theretofore been constructed on the lands of the defendants, in full and complete operation.

The plaintiff charges that the drain thus constructed discharges the surface water off the defendant's lands into a creek which flows through the plaintiff's land, which lies some distance below the point of discharge, and causes the creek to overflow its banks and inundate his lands, to his damage. He had a verdict and judgment in the court below.

The question now is whether or not the appellants, upon whose petition the drainage pro-

ceedings were instituted and carried forward, are liable in a civil action for damages for the injuries resulting to the lands of the plaintiff on account of the construction of the ditch, or whether they may avail themselves of the judgment under which the drain was constructed, as a defense against any claim for damages to the plaintiff's land.

The general principle is well settled that a subsisting judgment of a court which had jurisdiction of the persons and subject matter is binding at least upon all who were parties, and constitutes a sufficient justification for all acts done in its enforcement, until it is reversed or set aside by competent authority. *Gray v. Brignardello*, 68 U. S. 1 Wall. 637 (17 L. ed. 698); *Freeman, Judgments*, § 483; *Wait, Fraud. Conv.* 2d ed. §§ 448, 444.

A judgment regularly given, although it may be erroneous, is nevertheless the act of the court, and anyone who proceeds to enforce it may avail himself of its protection until it is reversed. Whatever contrariety there may be in the adjudged cases in other respects, all the authorities agree that where a judgment is merely erroneous, it will afford complete protection to all persons who proceed to enforce it, and who act in reliance upon the adjudication.

Upon the reversal of an erroneous judgment, the law raises an obligation against one who has received the benefit of the judgment, to make restitution to the other party of any money or property that may have been received, or for its value or equivalent in money in case the plaintiff asserts title to the thing received, or has converted it to his own use. *United States Bank v. Bank of Washington*, 31 U. S. 6 Pet. 8 (8 L. ed. 299); *South Fork Canal Co. v. Gordon*, 2 Abb. (U. S.) 479; *Reynolds v. Hoemer*, 45 Cal. 616.

In case money has been received, it may be recovered back in an action for money had and received. *Metzner v. Bauer*, 98 Ind. 425; *Martin v. Woodruff*, 2 Ind. 237; *Clark v. Pinney*, 6 Cow. 297.

Thus, it is said in *McJilton v. Love*, 18 Ill. 486: "If the plaintiff has derived any benefit from the judgment, he must make as full restitution to the defendant as the circumstances of the case will permit. If he has received payment in money from the defendant, the latter can recover it back in an action of *indebitatus assumpsit*. If he has obtained money by the sale of the property of the defendant, the latter may recover it as so much money had and received to his use. If he has purchased in property under the judgment and still retains the ownership, the defendant may recover the special property in the appropriate action. If he has aliened the property, he is responsible to the defendant for its value."

"The restitution," says the Supreme Court of Missouri, "to which the party is entitled upon the reversal of an erroneous judgment, is of everything which is still in the possession of his adversary. *Gott v. Powell*, 41 Mo. 416.

While a judgment defendant is entitled to compel the fullest restitution of all benefits which the plaintiff received on account of the enforcement of an erroneous judgment, it is not strictly accurate to say that the latter is liable to an action for damages for enforcing a judgment pending an appeal where there has

been no stay of proceedings. There would be no inducement for an appellant, in any case, to secure a supersedeas to stay proceedings if it were held that the plaintiff assumed the liability of all damages which might result from the enforcement of the judgment; nor would anyone venture to enforce a judgment while the right of appeal existed or while an appeal was pending. Where payment of a subsisting judgment is enforced by taking out regular process, the plaintiff is acting under authority of law, and cannot be held responsible for damages as a wrong-doer, because it turns out in the end that the court committed an error in rendering the judgment. The plaintiff takes the chance of losing the title to any property he may have purchased at an execution sale, and of being compelled to restore to the last farthing any benefit he may have received under the judgment, but he cannot be compelled to make good all the damage which the defendant, who neglected to stay proceedings pending the appeal, may have sustained by the erroneous action of the court. *Galpin v. Page*, 85 U. S. 18 Wall. 350-374 (21 L. ed. 959-965); *Gay v. Smith*, 38 N. H. 171; *Bryant v. Fairfield*, 51 Me. 149; *Freeman, Executions*, §§ 846, 847; *Herman, Executions*, p. 608.

As has been said, "Case for the malicious motive and want of probable cause for the proceeding is the only sustainable form of action to recover damages." 1 Chitty, Pl. 186; *Day v. Bach*, 46 N. Y. Super. Ct. [14 Jones & S.] 480.

The action, in the absence of malice or want of probable cause, against a plaintiff who has enforced payment of an erroneous judgment, is not founded upon any supposed wrong that he has committed, but lies to compel a restitution of any benefits which accrued to him, on the ground that, in equity and good conscience, he ought, after the reversal, to restore to the defendant everything of value which he received on account of the erroneous judgment.

Thus, in *Simpson v. Hornbeck*, 8 Lans. 53, one of the parties recovered a judgment against the other in an action for the conversion of personal property, from which there was an appeal without stay of proceedings. After the appeal the party who had judgment in his favor obtained an execution against the body of the other, upon which the latter was arrested and imprisoned. Afterwards the judgment was reversed, and it was held that an action to recover damages for false imprisonment was not maintainable. This, upon the principle that it would be unjust to hold that a judgment duly rendered by a court of competent jurisdiction of both the parties and the subject matter should fail to protect a party acting under it, before reversal, on account of error committed by the court. *Miller v. Adams*, 7 Lans. 131, 52 N. Y. 409; *Palmer v. Foley*, 71 N. Y. 106; *Dusenbury v. Kelsey*, 85 N. Y. 383; *Hayden v. Shed*, 11 Mass. 500.

"The party causing process to be issued is not responsible for anything that may be done under it when the process is afterwards set aside, not for irregularity, but for error. There is a manifest distinction between setting aside process for irregularity and reversing a proceeding for error, on appeal. In the one case a man acts irregularly and independently, without the sanction of any court. He therefore

takes the consequences of his own unauthorized act. But when he relies on the judgment of a competent court, however erroneous that may be, the party acting upon the faith of it ought to be protected." *Williams v. Smith*, 14 C. B. N. S. 596; *Prentice v. Harrison*, 4 Ad. & El. N. S. 352; *Marks v. Townsend*, 97 N. Y. 590.

In *Day v. Bach*, 87 N. Y. 56, an attachment had been granted against the property of the defendants. Afterwards the defendants moved to vacate the writ of attachment. This motion was denied below, but upon appeal the judgment denying the motion was reversed. Pending the appeal most of the attached property was sold by the order of the court as perishable property, and it was held that, the process having issued regularly in a case where the court had jurisdiction, the plaintiff was entitled to justify what was done under it, although it was afterwards set aside for error in the judgment. In that case the court said: "It does not appear that the defendants purchased any of the property on the sale, or had or retained any part of it. The sale by the sheriff having been made under the order of the court, the money derived therefrom stood as a substitute for the property. This the plaintiff has received, and the defendants, having had neither the property nor its value, are not responsible to the plaintiff."

After an exhaustive examination of the authorities, the learned judge who delivered the opinion in *Day v. Bach*, *supra*, deduced from them the following propositions: (1) That a void writ or process furnishes no protection to a party, and he is liable to an action for what has been done under it, and it is not necessary that it should be set aside before bringing the action. (2) If the writ is irregular only, and not absolutely void, no action lies until it has been set aside, but when set aside it ceases to be a protection for acts done under it while in force. (3) If the process was regularly issued in a case where the court had jurisdiction, the party may justify what has been done under it after it has been set aside for error, and an action for false imprisonment, in case of arrest, or of trespass for property taken under it will not lie.

Upon principle and upon the irrefutable reasoning of all the authorities, the conclusion follows that the appellants in the present case are not liable in an action sounding in tort for damage resulting to the plaintiff's property from the construction of the drain. The appellants invoked the jurisdiction of the court for the purpose of securing the construction of a work in which public as well as private interests were concerned. The work was constructed and completed by an officer of the court, in pursuance of a judgment regularly given. The power and jurisdiction of the court were regularly invoked, and although it may now be conceded that they were erroneously exercised, the judgment and proceedings were efficacious for the protection of those who invoked the jurisdiction of the court, and acted under the solemn sanction of its authority.

It may be well to remark that the principles enunciated by *Mr. Justice Field* in *South Fork Canal Co. v. Gordon*, *supra*, which seem to have, to some extent at least, controverted the decision in *Smith v. Zent*, 83 Ind. 86, were sub-

sequently modified by the same eminent judge in *Galpin v. Page*, 85 U. S. 18 Wall. 350 [21 L. ed. 959]. Freeman, Executions, § 347.

It should be noted that this action does not proceed upon the ground or assumption that the appellants, either jointly or severally, have, by means of the erroneous judgment under which the drain was constructed, received benefits in excess of the amount paid by them, equal to the amount of damage sustained by the plaintiff; nor does it appear that the damage which resulted to the plaintiff below inured to the special benefit of the appellants' property. The statute provides that a party affected may remonstrate, and assign as one of the causes that the work cannot be accomplished without an expense exceeding the aggregate benefits; and it also provides that if the ground of remonstrance is established the proceeding shall be dismissed. The plaintiff availed himself of his right and procured the proceedings to be dismissed after the drain had been constructed. He might have waived the above ground of remonstrance and had his damages assessed, but he elected to take the other course. Whether he may yet have his damages assessed upon the lands benefited, or whether, in an equitable action, he might have the benefits received by each of the appellants, or which inure to their lands respectively, apportioned, are questions we do not decide now. It is enough to decide that his action to recover damages cannot be maintained.

The judgment is therefore reversed, with costs.

RAPP, *Appt.*,
v.
REEHLING *et al.*
(....Ind....)

1. A will is not invalid because made on Sunday without any unusual circumstances or special necessity for its execution upon that day. The drafting and execution of the will does not constitute "common labor" or work in one's "usual avocation" within the meaning of Rev. Stat. 1881, § 2000.

2. A complaint in an action to contest a will, alleging that testator's intention was different from that expressed by the will, is demurrable.

(February 26, 1890.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Allen County in favor of defendants in an action brought to contest a will. *Affirmed.*

The facts are fully stated in the opinion.

Mr. S. R. Alden for appellant.

Messrs. Colerick & Oppenheim for appellees.

Olds, J., delivered the opinion of the court.

This is an action by the appellant against the appellees, to contest the will of Christian Gottlieb Rapp, deceased. The errors assigned are the rulings of the court in sustaining demurrers to the second and third paragraphs of appellant's complaint. The first paragraph of complaint having been withdrawn, there was a judgment on the demurrer for the appellees.

The second paragraph alleges that the will was executed on Sunday, and alleges facts showing that the will might have been executed upon some other day of the week, and that there was no necessity for the execution of the will upon Sunday; that the testator was, and had been for a period of time prior and subsequent to the execution of said will, in a condition, both physically and mentally, to have executed a will, and that, as a matter of convenience, he arranged with his attorney, who drafted the will, and a friend, to come to his (the testator's) house on Sunday, and draft the will, and the will was drafted and written by the attorney, and executed by the testator, on Sunday. This paragraph presents the question as to the validity of a will executed on Sunday without any unusual circumstances or special necessity having existed for its execution upon that particular day. It is contended by counsel for appellant that a will executed upon Sunday is void unless it be shown that some unusual circumstances existed making a necessity for its execution upon that day; that the drafting and execution of a will come within the definition of "common labor," and are prohibited by § 2000, Rev. Stat. 1881, which provides that "whoever, being over fourteen years of age, is found on the first day of the week, commonly called Sunday, rioting, hunting, fishing, quarreling, at common labor or engaged in his usual avocation (works of charity and necessity only excepted), shall be fined in any sum not more than ten nor less than one dollar; but nothing herein contained shall be construed to affect such as conscientiously observe the seventh day of the week as the Sabbath, travelers, families removing, keepers of toll-bridges and toll-gates and ferrymen, acting as such."

It is contended that a broad construction should be given to the words "common labor" and "usual avocation," so as to include the drafting and execution of a will, and that such has been the construction placed upon the Statute by this court, by holding that contracts and bonds, and even church subscriptions, come within the term "common labor," and their execution is prohibited on Sunday, and are therefore invalid unless afterwards ratified.

We are unable to agree with the theory of counsel. There is a wide distinction between the execution of contracts, notes and bonds on Sunday, and the execution of a will. The for-

NOTE.—Contract made on Sunday.

Contracts made upon Sunday, when not made in the course of a business prohibited upon that day by statute, are valid. *Beham v. Ohio*, 75 Tex. 87.

The mere signing of a contract on Sunday, which is not delivered on that day, does not avoid the contract under a statute forbidding the doing any business on that day. *Gibbs & Sterrett Mfg. Co. v. Brucker*, 111 U. S. 597 (28 L. ed. 534).

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Where defendant, without the concurrence or knowledge of the plaintiff, signed on Sunday a paper writing which bore date on a week day, and which, to become a contract between the parties, required the assent and signature of the plaintiff, which was given on a week day, this does not avoid the contract. *Id.* See note to *Anderson v. Bellinger* (Ala.) 4 L. R. A. 680.

mer are instruments executed in the common, every-day affairs of life, in the usual course of business. They create a liability from one person to another. They are the foundation of, or a necessity for their execution arises out of, business transactions. It is not so in regard to a will. Its execution is the voluntary act of the testator. It may be revoked or changed, in a proper manner, at his decretion. It provides for the disposition of the testator's estate after his death. It might be said to have some elements of sacredness about it. It is executed in anticipation of the death of the testator, and is to take effect at his death, and be operative thereafter. One of its prime objects is to enable the testator to provide in a proper manner for those who are the objects of his bounty, giving to those who need and who ought to receive, his bounty, but who would not, were it not for the right of testamentary disposition of property. By the execution of a will the testator is also enabled to aid in continuing and building up institutions of charity and learning, which would not be done by other methods, requiring a surrender of the full control of one's property during life; and these objects, accomplished by means of testamentary disposition of property, are entitled to be treated with some degree of sacredness and respect. But, if the drafting and execution of a will could be said to fall within the term "common labor," yet there would at all times exist a necessity for the immediate execution of a will. The law recognizes the right of persons to make a testamentary disposition of their property by will, and to make such disposition while in life, and possessed of sufficient mental capacity to make a will; and the only certainty of being able to make such disposition of one's property is to do so instantly, when one is possessed of his faculties. Death is certain, and life is uncertain. One has no lease of life or his mental faculties. Either may be extinguished instantly, and the only security one has of being able to execute a will, and dispose of his property in that manner as he may desire, is to do so when in the possession of his faculties; and the uncertainty of life creates a constant necessity, and presents to one's mind the uncertainty of being able to provide for those who are near to him, and are the objects of his bounty, or making provision for, and aiding in, the perpetuation of those institutions in which he is interested, and which are sacred to him, and beneficial to the public interests, if the making of the will be delayed. The drafting and execution of a will is akin to the execution of a marriage contract, and solemnizing the marriage. It may as well be said that the minister, while engaged in solemnizing a marriage, is engaged in common labor, or at his usual avocation, as that the lawyer who drafts a will is so engaged, as the minister, evidently, is engaged in solemnizing of marriages more frequently than the lawyer is engaged in the writing of wills.

The Statute makes it a penal offense to be found engaged in common labor, or engaged in one's usual avocation. It certainly would not

be contended that a minister of the gospel, engaged in solemnizing a marriage on Sunday, or a lawyer engaged in writing a will to be executed on Sunday, would be subject to indictment and prosecution for a violation of the Statute; and yet, if either come within the prohibition of the Statute, they would be liable to a criminal prosecution, and the one is evidently as much a violation of the Statute as the other. The one act is the solemnizing of a contract whereby two persons are joined together, and become members of one family, by the bond of holy wedlock, whereby they both become members of one household,—a contract and union in which society are interested. The other is engaged in the execution of a will providing for the members of his household. The law, it is true, provides for a distribution of property; but oftentimes the relationship or the circumstances are such as that the law does not make a proper or equitable provision; and in such cases the purpose of a will is a sacred one, making proper provision for the members of the testator's household, or the persons who are the objects of his bounty, and dependent upon him for support, and not so related as that, the law would cast his estate upon them. Possibly unjust wills may be made, but that does not affect the right to make a will.

It seems clear to us that the drafting and execution of a will do not come either within the letter or spirit of the Statute heretofore referred to. It is not an act commonly done, but rather an uncommon act, to execute a will. It is rare that a person who dies possessed of property disposes of it by will, and those who do seldom make but one during a lifetime. Occasionally one revokes a will, and makes a new one, or adds a codicil, but testamentary disposition of property is an exception to the usual mode in which the title to property passes from one to another, and certainly no desecration of the Sabbath existed on account of the day being occupied for that purpose. No evil tendencies were growing out of such work on the Sabbath day which required legislation to correct; but we are not required to pass upon the question without authority, as the courts of other States have passed upon the same question, and held that a will executed on Sunday is valid. *Bennett v. Brooks*, 9 Allen, 118; *Beitenman's App.* 55 Pa. 183; *George v. George*, 47 N. H. 27.

The third paragraph of the complaint, as we construe it, alleges a mistake in the will; that, by a mistake of the scrivener or translator of the will it was not written as the testator intended; that he did not intend or wish or will to give the one half of his estate to the persons named, to whom it was devised and bequeathed in the will, but intended to give it to other persons. These averments seek to contradict the terms of the will, or to show that the testator's intention was different from that expressed by the will. This cannot be done. *Bunnell v. Bunnell*, 78 Ind. 163; *McAlister v. Butlerfield*, 31 Ind. 25; *Grimes v. Harmon*, 35 Ind. 193.

There is no error in the record.

Judgment affirmed, with costs.

MICHIGAN SUPREME COURT.

Alice M. HUNN, Admx., etc., of George
Hunn, Deceased,

v.

MICHIGAN CENTRAL R. CO., *Appt.*

(....Mich.....)

1. It is the duty of the master to supervise, direct and control the operation and management of his business so that no injury shall ensue to his employes through his own carelessness or negligence in carrying it on, or else to furnish some person who will do so, for whom he must stand sponsor.
2. A person vested with full control in a particular branch of business, subject to no supervision except the master's, over the action of employes whose duty it is to obey him, stands in the place of the master and is not a fellow servant with them.
3. A train dispatcher having full control in the telegraph management of trains is not a fellow servant with trainmen.
4. The contributory negligence of a fellow servant will not prevent the recovery for injury to a servant which was due in part to the negligence of the master.
5. What was usually and habitually done in the running of trains may be proved to rebut a claim that an employe was negligent in running a train in violation of rules.
6. Mortuary tables contained in How. Stat.,

§ 4245, are admissible in evidence as tending to show a person's expectancy of life at a certain age.

7. If no improper testimony affecting the subject of damages has been admitted, and the court has given to the jury proper instructions, the amount of damages awarded is beyond the reach of a writ of error.

8. Evidence as to the extent of the property of the family, and of an incumbrance thereon, is inadmissible in an action to recover damages for the death of plaintiff's husband.

(December 23, 1899.)

ERROR to the Circuit Court for Jackson County to review a judgment in favor of plaintiff in an action to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Reversed.*

The facts fully appear in the opinion.

Mr. Ashley Pond, with *Messrs. Gibson & Parkinson* and *H. M. Campbell*, for defendant, appellant:

When the company uses due diligence in the selection of competent, skillful and trusty servants it is not answerable in damages to one of them for any injury received by him in consequence of the carelessness of another, while both are engaged in the same service of the common master.

NOTE.—Fellow servants, who are.

A fellow servant is one who serves and is controlled by the same master; and common employment is service of such kind that, in the exercise of ordinary sagacity, all who engage in it may be able to foresee, when accepting it, that through the negligence of fellow servants they may be exposed to injury. *McAndrews v. Burns*, 30 N. J. L. 117; *Ewan v. Lippincott*, 47 N. J. L. 192.

In order to constitute persons fellow servants, it is necessary that they shall be, at the time, directly co-operating with each other in the business in hand, or that their usual duties shall bring them into habitual association, so that they may exercise an influence upon each other promotive of proper caution. *Chicago & A. R. Co. v. Kelly*, 127 Ill. 637.

The following have been held to be fellow servants:

A brakeman working a switch for his train on one track in a railroad yard and the engine-man of another train of the same corporation upon an adjacent track. *Randall v. Baltimore & O. R. Co.* 109 U. S. 478 (7 L. ed. 1003); *Wolcott v. Studebaker*, 34 Fed. Rep. 11.

A conductor and a brakeman. *Pease v. Chicago & N. W. R. Co.* 61 Wis. 163; *Wolcott v. Studebaker*, 34 Fed. Rep. 13.

Section or trackmen and the engineer or brakeman of a train. *Connelly v. Minneapolis & E. R. Co.* 33 Minn. 80; *Wolcott v. Studebaker*, *supra*.

The foreman of a gang of section or trackmen engaged in the discharge of his ordinary duties in the course of his employment is a fellow servant with them. *Olson v. St. Paul, M. & M. R. Co.* 33 Minn. 117; *Wolcott v. Studebaker*, *supra*.

The foreman of a mine and a miner employed to work under his direction. *Stephens v. Doe*, 73 Cal. 23.

So a mining boss and other employes are fellow
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servants. *Reese v. Biddle*, 2 Cent. Rep. 793, 112 Pa. 72.

An inspector of cars and a brakeman (*Smith v. Potter*, 46 Mich. 253), and a station agent and a brakeman. *Dealey v. Philadelphia & R. R. Co. (Pa.)* 3 Cent. Rep. 112.

A fireman on a passenger train, and an engineer in charge of an engine not connected with such train, but belonging to the same railroad company, are fellow servants. *Howard v. Denver & E. G. R. Co.* 26 Fed. Rep. 337; *Wolcott v. Studebaker*, 34 Fed. Rep. 12.

So a track repairer and an engineer are fellow servants. *Van Winkle v. Manhattan R. Co.* 32 Fed. Rep. 273.

But a track-walker over a section of a railroad is not a fellow servant with those in charge of a train by which he is struck and killed. *Sullivan v. Missouri Pac. R. Co.* 97 Mo. 113.

An engineer in charge of the train of a railroad company is the superior—not the fellow servant—of a brakeman on the same train acting under his orders. *East Tennessee & W. N. C. R. Co. v. Collins*, 35 Tenn. 227; *Louisville & N. E. R. Co. v. Moore*, 33 Ky. 675.

So the conductor and engineer of a "wild train" are not fellow servants of a laborer on a gravel train, who is injured by a collision due to their negligence. *Northern Pac. R. Co. v. O'Brien (W. T.)* 31 Pac. Rep. 32.

Trackmen are not fellow servants with trainmen on the same road. *Howard v. Delaware & H. Canal Co. (Vt.)* 6 L. R. A. 75, 40 Fed. Rep. 196.

A train dispatcher is not, by mere virtue of his employment, the representative of the railroad company, but is a fellow servant with the other employes. *Hankins v. New York, L. E. & W. R. Co.* 55 Hun, 61, 23 N. Y. S. R. 59.

Where it was the duty of a yardmaster to see to the making up of trains, if he directed a boy engaged as a call-boy to perform the duties of a

Gardner v. Mich. Cent. R. Co. 58 Mich. 590; *Quincy Mining Co. v. Kitta*, 42 Mich. 40; *Mich. Cent. R. Co. v. Dolan*, 32 Mich. 510; *Mich. Cent. R. Co. v. Leahy*, 10 Mich. 199; *Davis v. Detroit & M. R. Co.* 20 Mich. 114; *Holden v. Fitchburg R. Co.* 129 Mass. 268; *Smith v. Potter*, 46 Mich. 258; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. 433; *New York, L. E. & W. R. Co. v. Bell*, 3 Cent. Rep. 576, 112 Pa. 400; *Conley v. Portland*, 1 New Eng. Rep. 797, 78 Me. 217; *Wood, Mast. and Serv.* § 425.

All who are directly engaged in accomplishing the ultimate purpose in view, that is the running of the road, must be regarded as engaged in the same general business, and are fellow laborers.

Hard v. Vermont & C. R. Co. 32 Vt. 473; *Wilson v. Madison etc. R. Co.* 18 Ind. 226; *Toner v. Chicago, M. & St. P. R. Co.* 69 Wis. 188; *Gaffney v. New York & N. E. R. Co.* 4 New Eng. Rep. 33, 15 R. I. 456; *Conway v. Belfast & N. C. R. Co.* 9 Ir. Rep. (C. L.) 498; *Dana v. New York Cent. & H. R. R. Co.* 23 Hun, 478; *Morgan v. Vale of Neath R. Co.* L. R. 1 Q. B. 149; *Rose v. Boston & A. R. Co.* 58 N. Y. 217; *Blessing v. St. Louis, K. C. & N. R. Co.* 77 Mo. 410, 15 Am. & Eng. R. R. Cas. 300; *Campbell v. Pennsylvania R. Co.* (Pa.) 2 Cent. Rep. 46.

Trainmen and train dispatchers, though many miles apart and with distinct duties, are nevertheless co-servants in the accomplishment of the same general object.

Robertson v. Terre Haute & I. R. Co. 78 Ind.

77; *Chicago, St. L. & N. O. R. Co. v. Doyle*, 60 Miss. 977, 8 Am. & Eng. R. R. Cas. 171.

Mr. Thomas A. Wilson, with *Messrs. Barkworth & Cobb*, for plaintiff, appellee: The rule of responsibility for the negligence of co-employees does not go to the extent of exonerating the employer from liability when its negligence and that of its employees combined to produce the injury.

Grand Trunk R. Co. v. Cummings, 106 U. S. 700 (27 L. ed. 266); *Keegan v. Western R. Co.* 8 N. Y. 175, 59 Am. Dec. 476; *Chicago & N. W. R. Co. v. Sweet*, 45 Ill. 197; *Smith v. New York Cent. R. Co.* 24 N. Y. 244; *Paulmier v. Erie R. Co.* 34 N. J. L. 261; 2 Thomp. Neg. 981.

The train dispatcher is a vice-principal.

Slater v. Jewett, 85 N. Y. 61; *Lewis v. Seifert*, 9 Cent. Rep. 751, 116 Pa. 628; *Darrigan v. New York & N. E. R. Co.* 52 Conn. 285; *Phillips v. Chicago, M. & St. P. R. Co.* 64 Wis. 475; *Sioux City & P. R. Co. v. Smith*, 22 Neb. 775; *Pittsburgh, O. & St. L. R. Co. v. Henderson*, 37 Ohio St. 549; *Crew v. St. Louis, K. & N. W. R. Co.* 20 Fed. Rep. 87; *Smith v. Wabash, St. L. & P. R. Co.* 92 Mo. 359; *Washburn v. Nashville & C. R. Co.* 3 Head, 638; *McLeod v. Ginther*, 80 Ky. 399, 8 Am. & Eng. R. R. Cas. 162; *Smith v. Potter*, 46 Mich. 258.

When a master delegates duties which the law imposes upon him to an agent, the agent, whatever his rank, in performing these duties acts as a master.

Capper v. Louisville, E. & St. L. R. Co. 1 West. Rep. 287, 103 Ind. 305; *Indiana Car Co.*

switchman, the fact that he was on an engine in charge of it at the time of giving the orders is immaterial; and if it was negligence to give such orders, it was his negligence as yardmaster, and not as engineer. *Hardy v. Minneapolis & St. L. R. Co.* 36 Fed. Rep. 667.

Vice-principals, master liable for negligent acts of.

A vice-principal and direct representative of the master, invested with his own authority over inferior servants, is not a fellow servant with the latter. *Faren v. Sellers*, 39 La. Ann. 1011.

One having the full control of another's timber yard, and employing and discharging men, is a vice-principal; and one upon whom the management of the yard devolves in his absence is a temporary vice-principal, for whose negligence the master is liable. *Baldwin v. St. Louis, K. & N. W. R. Co.* 75 Iowa, 297.

A person who is clothed by a corporation with the control and management of a distinct department, in which his duty is that of direction and superintendence, is a vice-principal. *Chicago, B. & Q. R. Co. v. Sullivan* (Neb.) 43 N. W. Rep. 415.

Where a workman engaged in the erection of a building was injured through the negligence of one having the full control of the erection and the men, the master is liable. *Slater v. Chapman*, 12 West. Rep. 60, 67 Mich. 523.

A master mechanic in a machineshop, having entire control of the shop as well as of all the work and employes therein, and having full authority to employ and discharge workmen, and to select and change machinery,—is not a fellow servant of a machinist employed. *Taylor v. Evansville & T. H. R. Co.* (Ind.) 6 L. R. A. 584.

So a car repairer in the shops of a railroad company is not a fellow servant of the foreman of the shop. *Missouri Pac. R. Co. v. Williams*, 15 Tex. 4.

The fact that an employe has authority from the master to discharge his fellow servants does not alone constitute him more than a fellow servant 7 L. R. A.

himself. *Webb v. Richmond & D. R. Co.* 97 N. C. 387.

Where the foreman of the company has power to control and direct the movements of his men, the railroad company will be liable for acts of negligence committed by him in the course of his employment, whereby one of the men under his control, without the latter's fault, is injured. *Sioux City & P. R. Co. v. Smith*, 22 Neb. 775.

A conductor, having the entire control and management of a railway train, is not a fellow servant with the fireman, the brakeman, the porters and the engineer of the train. *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377 (23 L. ed. 787).

A person appointed by a manufacturing company to inspect, repair and provide machinery for others to operate, who are employed by the same company, stands in the place of master to such operators, rather than that of fellow servant. *Atchison, T. & S. F. R. Co. v. McKee*, 37 Kan. 592.

A railroad company is liable for injury to its brakeman on duty from obstructions on the tracks, caused by the negligence of its section boss. *Hulehan v. Green Bay, W. & St. P. R. Co.* 63 Wis. 520.

Plaintiff engaged to work for defendant at shoveling snow to clear the railroad track. The superintendent of defendant agreed to send a train to keep the men warm while at work at night, but failed to do so, and in consequence plaintiff's toes were frozen. It was held that defendant was liable. *Hyatt v. Hannibal & St. J. R. Co.* 1 West. Rep. 683, 19 Mo. App. 294.

Independent employment.

Where an employe is exercising an independent employment, the master is not responsible for his negligence or misconduct. Authorities cited in *Wabash, St. L. & P. R. Co. v. Farver*, 9 West. Rep. 621, 111 Ind. 196.

Rendering service in course of an occupation representing the will of the employer only as to the

v. Parker, 100 Ind. 181; *Atlas Engine Co. v. Randall*, 100 Ind. 298; *Krueger v. Louisville, N. A. & C. R. Co.* 9 West. Rep. 247, 111 Ind. 51; *Ohio & M. R. Co. v. Collarn*, 78 Ind. 261.

The growing sentiment in favor of holding the master responsible for the proper conduct of all the various branches of his business by those who are put in charge of them by him, with control and direction over other servants entrusted to them, is favored by the courts of nearly, if not quite, every State in the Union, as well as the federal courts.

Schultz v. Chicago, M. & St. P. R. Co. 18 Wis. 875; *Berea Stone Co. v. Kraft*, 81 Ohio St. 287; *Little Miami R. Co. v. Stevens*, 20 Ohio, 415; *Cleveland, C. & C. R. Co. v. Keary*, 8 Ohio St. 201; *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541; *Waaalan v. Mad River & L. E. R. Co.* 8 Ohio St. 249; *Pittsburg, Ft. W. & C. R. Co. v. Desinney*, 17 Ohio St. 197; *Coules v. Richmond & D. R. Co.* 84 N. C. 309; *Galveston, H. & S. A. R. Co. v. Delahunty*, 58 Tex. 206; *McCooker v. Long Island R. Co.* 84 N. Y. 77; *Lake Shore & M. S. R. C. v. Lavalley*, 86 Ohio St. 221; *Shearm. & Redf. Neg.* § 96; *Wharton, Neg.* § 205.

Champlin, J., delivered the opinion of the court:

About 8 o'clock on the morning of December 30, 1885, engine No. 120, with a way car, under the charge of W. D. Loomis as conductor,

and Samuel Maitland as engineer, and George Hunn as fireman, left Bay City, going south, with orders to run wild to Rives Junction, over the Jackson, Lansing & Saginaw Railroad, leased and operated by the defendant Company. On the same morning engine No. 177, without any train, was proceeding north over the same road, under the charge of Nilson Napier as conductor, Robert Mills, engineer, and Thomas Looney, fireman. Both engines were run under orders by telegraph from one Kilmer, a train dispatcher of Bay City. It was the duty of Kilmer, as train dispatcher, to establish a meeting point for these two engines, under a rule adopted by the defendant Company which reads as follows: "Rule 133. When an order is given by telegraph for two or more trains to meet at a station, the train dispatcher must first order the green signal displayed at such meeting point by the operator, and receive assurance from him that the signal has been displayed before giving orders to either train. In ordering one train to be held for another, the dispatcher will order each train held for the other." Kilmer established such a meeting point at Saginaw City, and notified engine 120 of that fact, but neglected to notify engine No. 177, and gave no order to hold this engine at that point. Napier, the conductor of No. 177, reached Saginaw City, and saw the green signal, and found the order there to hold W. D. Loomis, conductor of No. 120, but no order

result, and not as to the means, is an independent employment. *Edmundson v. Pittsburg, McK. & Y. R. Co.* 1 Cent. Rep. 869, 111 Pa. 818.

Where a mechanic is employed by the owner of a building to make repairs, with no specific arrangement as to conditions, his employment is independent, imposing on the employé responsibility for negligence of himself or those aiding him; and the owner of the building is not liable therefor. *Hexamer v. Webb*, 2 Cent. Rep. 439, 101 N. Y. 377.

When a contractor takes entire control of the work, the employer, if he is not negligent in his selection, is not liable to third parties for the contractor's want of care in the performance of it. Authorities cited in *Lancaster Ave. Imp. Co. v. Rhoads*, 8 Cent. Rep. 214, 116 Pa. 377.

A mining corporation which is having a shaft constructed by contractors who have sole charge of all the works is not liable for an injury to an employé of the contractors, caused by the breaking of a rope in the shaft from a defect of which the contractors had notice, and whose duty it was to remedy it. *Lendberg v. Brotherton Iron Min. Co.* 75 Mich. 84.

A gas company is not liable for injuries from an explosion of gas, due to the negligence of the contractor laying its pipes, before it had accepted the work. *Chartiers Valley Gas Co. v. Lynch*, 10 Cent. Rep. 625, 118 Pa. 363.

But where a contractor lays a railroad track under an agreement that those in charge of the construction train shall be employed and paid by the company, and not by himself, and that he shall have no control of the train in any manner, the company is liable for injuries to a person employed by him, resulting from negligence to those in charge of the construction train. *Chicago, B. & Q. R. Co. v. Clark (Neb.)* 42 N. W. Rep. 703.

A grain-trimmer employed by a contractor to work in trimming a cargo of grain on a steamship is not a fellow servant with a mate and seamen of the ship, through whose negligence he is injured. *Crawford v. The Wells City*, 38 Fed. Rep. 47.

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Master liable for acts of agent or representative.

An employer is liable for injury caused by one employé to another, by virtue of authority conferred by him upon the employé causing the injury. *Mason v. Edison Mach. Works*, 24 Blatchf. 93, 28 Fed. Rep. 223.

Employers may put in their place an agent or representative in carrying on their work, for whose default and negligence they will be liable. *Smith v. Oxford Iron Co.* 42 N. J. L. 467.

An employer cannot escape liability, even to an employé, for the nonperformance or negligent performance of a duty which he owes to an employé, merely by intrusting its performance to some other employé or agent. *Pike v. Chicago & A. R. Co.* 41 Fed. Rep. 96; *Krueger v. Louisville, N. A. & C. R. Co.* 9 West. Rep. 247, 111 Ind. 51; authorities cited in *Pennsylvania Co. v. Whitcomb*, 9 West. Rep. 825, 111 Ind. 212.

A railroad company is liable when its officers or agents who are invested with a controlling or superior duty in furnishing suitable machinery are, in discharging it, guilty of negligence, from which injury results to a servant of the company. *Hough v. Texas & P. R. Co.* 100 U. S. 213 (25 L. ed. 612).

The master is liable for the negligence of the agent or subordinate to whom he has given the entire charge of his business or a distinct part of it. *Lewis v. Seifert*, 9 Cent. Rep. 755, 116 Pa. 623.

And his liability is the same although the employé deviates from the master's instructions. *Atchison, T. & S. F. R. Co. v. Randall*, 40 Kan. 421.

Where plaintiff, while in the exercise of care in performing his duties in removing a wrecked car, was injured through negligence of a direct representative of the railroad company which employed him, he may recover compensation. *Sheldon, J. dissents. Wabash, St. L. & P. R. Co. v. Hawk*, 10 West. Rep. 187, 121 Ill. 259.

Whenever a master delegates to another the performance of a duty to a servant which rests upon himself absolutely, he is liable for the manner in

for himself. He received his clearance, and proceeded north three or four miles, and met engine No. 120 upon a curve at about 8 degrees and 20 minutes. The respective engines were running at from ten to twelve miles an hour. The collision resulted fatally to Hunn. At the time a thick fog was prevailing, the night was dark, and the view at the curve was obstructed by houses and other objects, which prevented the approaching engines from being seen from each other a distance of from three to four car-lengths. The accident occurred within the limits of the Saginaw yards. The time-card rule, which was well known to all employés of the Company, required "that trains will run carefully, and under full control, through all yards, and irregular trains must keep sharp lookout for switching engines."

The plaintiff recovered a judgment in the court below, and the defendant asks its reversal upon several grounds, the principal of which are the following: "(1) The declaration was insufficient, in not setting forth with more particularity the duty of the defendant, the breach of duty which caused the accident, and the cause of the accident. (2) The only negligence proved upon the trial was that of the train dispatcher, and no recovery can be had, for the

reason that his negligence was that of a fellow servant. (3) The testimony relative to damages, and the charge of the court in reference thereto, were erroneous."

The declaration was not demurred to. It states a cause of action, and is sufficient after verdict.

The second ground above stated, if sustained, prevents a recovery in the action, and raises the most important point in the case. The court long ago announced and has steadily adhered to the doctrine that a master is not liable to a servant for injuries received through the negligence of a fellow servant while engaged in a common employment. *Mich. Cent. R. Co. v. Leahy*, 10 Mich. 193; *Davis v. Detroit & M. R. Co.* 20 Mich. 105; *Mich. Cent. R. Co. v. Dolan*, 32 Mich. 510; *Mich. Cent. R. Co. v. Austin*, 40 Mich. 247; *Quincy Mining Co. v. Kitts*, 43 Mich. 34; *Day v. Toledo, O. S. & D. R. Co.* 43 Mich. 523; *Mich. Cent. R. Co. v. Smithson*, 45 Mich. 212; *Mich. Cent. R. Co. v. Gilbert*, 46 Mich. 176; *Smith v. Potter*, 46 Mich. 258; *Henry v. Lake Shore & M. S. R. Co.* 49 Mich. 495; *Greenwald v. Marquette, H. & O. R. Co.* 49 Mich. 197; *Ryan v. Bagaley*, 50 Mich. 179; *Gardner v. Mich. Cent. R. Co.* 58 Mich. 590.

The rule is a salutary one in all cases of fel-

which the duty is performed. *Lindvall v. Woods* (Minn.) 4 L. R. A. 793.

A foreman in charge of men employed in raising a part of a railroad track is an agent of the company, and not a fellow servant of one of the men under his orders. *Stephens v. Hannibal & St. J. R. Co.* 96 Mo. 207.

If the duty of keeping a bridge in repair was intrusted by the company to its foreman, his negligence is that of the company. *Bowen v. Chicago, B. & K. C. R. Co.* 14 West. Rep. 744, 95 Mo. 268.

Where defendant, engaged in mining quartz, appointed a superintendent to supervise and manage its mining operations, work done by his employé was the same as if done by himself, and defendant was liable for injury resulting therefrom. *McDade v. Washington & G. R. Co.* (D. C.) 8 Cent. Rep. 797, 5 Mackey, 144.

Agents charged with the duty of procuring machinery, or with the duty of inspecting and keeping the same in suitable repair, are not to be regarded as fellow servants with employés laboring in the business where such machinery is used. *Wells v. Coe*, 9 Colo. 159; *Kelly v. Erie Teleg. & Teleph. Co.* 34 Minn. 321.

The rule that the employé assumes all the risks incident to the service he enters does not apply where a superior agent representing the master orders the employé to do a designated act, in the performance of which the latter is injured by the superior's negligence. *Taylor v. Evansville & T. H. R. Co.* (Ind.) 6 L. R. A. 584.

Combined negligence of master and co-servant.

If the negligence of the master is combined with the negligence of a fellow servant, and the two contribute to the injury of another servant who is free from negligence, the master is liable. *Franklin v. Winona & St. P. R. Co.* 37 Minn. 409.

A master, to be exempt from liability to a servant for negligence of fellow servants, must himself have been free from negligence. *Baltimore & O. R. Co. v. McKenzie*, 81 Va. 71.

The master is responsible for the negligent act of one servant causing injury to a co-servant, where such servant was, by the appointment of the master, charged with the performance of duties which the master was bound to perform for the protec-

tion of his servants. *Loughlin v. State*, 7 Cent. Rep. 70, 105 N. Y. 159.

In legal contemplation his negligence was the negligence of the master. *Baltimore & O. R. Co. v. McKenzie*, *supra*; *Babcock v. Old Colony R. Co.* (Mass.) 23 N. E. Rep. 325.

A master is responsible for an injury to a servant from the combined negligence of the master and a fellow servant, notwithstanding the contributory negligence of such servant. *Faren v. Sellers*, 39 La. Ann. 1011; *Fisk v. Central Pac. R. Co.* 72 Cal. 38.

If the negligence of a railroad company contributes to—that is to say, has a share in producing—an injury to an employé, the company is liable, even though the negligence of a fellow servant was also contributory. *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700 (37 L. ed. 266).

A master is not released from liability for an injury to a servant from a defective machine, by the fact that the operator of the machine was negligent in managing it, where his negligence simply contributed to the injury caused by the master's negligence. *Sherman v. Menomonee River Lumber Co.* 1 L. R. A. 173, 72 Wis. 122.

In order to render the master liable, the superior must stand so far in the place of the master as to be charged in the particular matter from which the injury results with the performance of a duty which the master owes to a servant. *Louisville & N. R. Co. v. Lahr*, 36 Tenn. 335.

If a section-master was intrusted by a railroad company with the performance of the duty, or a part of the duty, of supervision of the tracks, which a reasonable regard for the safety of its employés required the corporation to perform, such company is liable for his negligence. *Babcock v. Old Colony R. Co.* *supra*.

Liability of master for injuries caused by his negligence. See notes to *Sherman v. Menomonee River Lumber Co.* (Wis.) 1 L. R. A. 173; *Griffin v. Boston & A. R. Co.* (Mass.) 1 L. R. A. 698.

Liability for negligence of vice-principal or agent. See note to *Muhlman v. Union Pac. R. Co.* (Colo.) 2 L. R. A. 192.

Fellow servants, who are. See notes to *Hussey v. Coger* (N. Y.) 3 L. R. A. 856; *Lindvall v. Woods* (Minn.) 4 L. R. A. 793; *Murray v. St. Louis Cable & W. R. Co.* (Mo.) 5 L. R. A. 735.

low servants where the master has exercised due care in the selection of competent employes, and has become pretty generally recognized by the courts of last resort in this country. But the question of who are fellow servants still perplexes the judicial mind, and gives rise to a great diversity of opinion. Some courts go so far as to hold that, if the master exercises due care in selecting employes, his full duty towards his servants is discharged, even though he selects one or more agents to represent him in overseeing, he controlling and carrying on the business, however large and extended it may be, if he retains the right of employing and discharging his servants. Others hold that so long as they are employed and paid by the same master, and are engaged in a common enterprise, they are fellow servants. But this is the extreme, and denies substantially all liability of the master in a vast majority of cases where enterprises of any considerable magnitude are carried on. Perhaps no satisfactory rule has yet been formulated by which it may in all cases be determined who are fellow servants, in such sense as to shield the master from the negligence of his servant. We may start, however, where the rule is clear that a master is liable to his servant for an injury caused by his own negligence. The master may not choose to give his personal attention to his business, and may desire to put another in his place, to manage and control it for him as fully as he might do if personally present. Such person is his *alter ego*, and the master is as responsible for his acts of omission and commission, while engaged in the business intrusted to him, as if he did such acts himself. It is the duty of the master to supervise, direct and control the operations and management of his business, so that no injury shall ensue to his employes through his own carelessness or negligence in carrying it on, or else to furnish some person who will do so, and for whom he must stand sponsor. This is true of natural persons, and it is especially true of corporations, who can only act through natural persons. Whenever the business conducted by the person selected by the master is such that the person selected is invested with full control (subject to no one's supervision except the master's) over the action of the employes engaged in carrying on a particular branch of the master's business, and, acting upon his own discretion, according to general instructions laid down for his guidance, it is his province to direct, and the duty of the employes to obey, then he stands in the place of the master, and is not a fellow servant with those whom he controls.

In *Quincy Mining Co. v. Kitts*, 42 Mich. 39, this court said: "This duty of due care in the employment and retention of competent servants is one the master cannot relieve himself of by any delegation, and, if it becomes necessary to intrust its performance to a general manager, foreman or superintendent, such officer, whatever he may be called, must stand in the place of his principal, and the latter must assume the risks of his negligence. The same is true of the general supervision of his business. If there is negligence in this, the master is responsible for it, whether the supervision be by the master in person, or by some manager, superintendent or foreman to whom he delegates it. In

other words, while the servant assumes the risk of the negligence of fellow servants, he does not assume the risk of negligence in the master himself, or in anyone to whom the master may see fit to intrust his superintending authority."

It was upon this principle that in *Ryan v. Bagaley*, 50 Mich. 179, this court held the owner of a mine liable for the negligence of the mining captain. The question was made to turn upon whether the mining captain was intrusted with the management of the mine without interference. If he was, in respect to legal responsibility his negligence was the negligence of the defendant.

It now becomes pertinent to inquire what the duties of Kilmer, the train dispatcher, whose negligence caused the death of the fireman, Hunn, were. The division superintendent's name was W. A. Vaughn. In receiving dispatches from the train dispatcher, the conductors and engineers never act upon them unless signed with the initials "W. A. V." Dispatches delivered by the operator so authenticated were considered authoritative, and were acted upon. Mr. Hair was the chief train dispatcher at Bay City, and he had six train dispatchers under his supervision in the Bay City office, only one of whom, however, was on duty at a time. He testified that the train dispatchers signed the initials "W. A. V." to their dispatches, and were authorized to do so, and that the division superintendent, Mr. Vaughn, never sees them at all, and knows nothing about them, and does not even know the instructions in regard to train dispatchers. He was asked:

Q. Who has the control of trains on the Jackson, Lansing & Saginaw division, or who did have at the time of this accident?

A. Mr. Kilmer, in regard to moving them backwards and forwards; the entire charge at that time; nobody else has any right to interfere.

He further testified that no more than one person has control of the trains at any one time, and no other train dispatchers would have the right to interfere, not even the division superintendent, or the superintendent, or the president of the Company, unless they wanted to relieve the train dispatchers themselves. If they wanted to take his program, and sign it, by these orders they could do so; they have the authority. They would have to receipt for it, and take upon themselves the duties.

Rule 124 of the Company reads as follows: "The general and assistant superintendent, the division superintendent and the train dispatchers on duty are the only persons authorized to move trains by special order, and but one person on the same circuit shall be permitted to move trains by special order at the same time."

Rule 127 is as follows: "The train dispatcher on duty will have full power to run any train or engine by telegram that he may think proper. No irregular train or engine will be allowed to run upon the road, either upon a single or double track, without his knowledge and instructions, unless they can follow a regular train under a red flag, and then only to a station where they can obtain an order," etc.

Mr. Vaughn, the division superintendent

over the division of defendant's road, testified as follows:

Q. Do you do the dispatching or giving of orders for the running of trains upon the road?

A. I don't.

Q. In the system of doing business upon your road, what persons—I do not refer to their names—but what persons have charge in telegraph management of trains—had at that time?

A. The train dispatcher.

Q. When a train dispatcher is engaged in the duty of dispatching trains upon the line, what other persons have rights or powers there, so far as interfering?

A. No other.

It is thus seen that the train dispatcher has absolute control over the division of the road from Rives Junction to Mackinaw, so far as the running and operating trains thereon is concerned. It is his province to direct, and it is the duty of all employes operating trains to obey. This is the most important branch of the railroad service, and is the highest exercise of the franchise conferred upon railroad corporations. It is the corporation who does it, through the train dispatcher. This officer, by Rule 124 above quoted, is ranked with the general, the assistant and the division superintendents, and by Rule 127 he is given supreme control. To say that such an official, exercising such control, is a fellow servant with those whom he directs, ignores all distinctions between master and servant. If his act is not the act of the master, then no railroad corporation ever ran and operated a railroad.

In *Darrigan v. New York & N. E. R. Co.*, 53 Conn. 285, there were two irregular trains, going in opposite directions, on the western division of defendant's road, which were run as directed by the telegram from the train dispatcher in the division superintendent's office at Hartford. He ordered the east-bound train to run to Waterbury until 6 o'clock. Soon after he was relieved, in the regular course of business, by an assistant, who, a little before 5 o'clock, sent an order to the west-bound train at Waterbury to run to Brewster's. In obeying this order the trains collided, and the plaintiff was injured. The negligence of the train dispatcher was admitted, but it was claimed by the defendant that such negligence was the negligence of a fellow servant. In deciding this question, the court said: "It is immaterial that these men are hired and paid by a common employer, and that their employment is designed to accomplish one common result. That argument, if pressed to its logical conclusion, would obliterate all distinctions among those engaged in railroad business, from the president down to the humblest servant, and would practically exempt the company from all duty and all liability to those in its service." And the court further said: "Cases are constantly arising, especially in the operation of railroads, which no general rule can provide for, in which the master must be regarded as constructively present, and in which someone must be invested with a discretion and a right to speak and command in his name and by his authority. Such a right carries with it the corresponding duty of obedience—someone

must hear and obey. . . . It must also devise some suitable and safe method by which to run special and irregular trains, and regular trains when off their regular time. . . . Emergencies will arise which no system of rules can anticipate and provide for, in which the company must act, and act promptly and efficiently. In this case the scheme devised was to have these trains controlled by one who knew the position and movement of every train on the road liable to be affected by them—a train dispatcher acting in the name and by the authority of the superintendent. Is there not a wide and manifest difference between the duty of such an agent and the duty of a locomotive engineer? The duty of the former pertains to management and direction; that of the latter to obedience."

The case of *Smith v. Wabash, St. L. & P. R. Co.*, 92 Mo. 359, 8 West. Rep. 729, was very similar to the one under consideration, and the Supreme Court of Missouri held, after a consideration of authorities, that this railroad company was liable for the negligence of its train dispatcher which resulted in the death of one of the servants of the company.

The following cases are to the same effect: *Sheehan v. New York Cent. & H. R. R. Co.* 91 N. Y. 382; *Booth v. Boston & A. R. Co.* 78 N. Y. 88; *Pittsburgh, C. & St. L. R. Co. v. Henderson*, 87 Ohio St. 552; *Washburn v. Nashville & C. R. Co.* 3 Head, 688; *Chicago, B. & Q. R. Co. v. McLallen*, 84 Ill. 109; *Missouri Pac. R. Co. v. Dwyer*, 86 Kan. 58; *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377 [28 L. ed. 787]; *Phillips v. Chicago, M. & St. P. R. Co.* 64 Wis. 475; *Hannibal & St. J. R. Co. v. Kanaley*, 89 Kan. 1; *McKune v. California Southern R. Co.* 66 Cal. 302, 21 Am. & Eng. R. R. Cas. 539; *Gravelle v. Minneapolis & St. L. R. Co.* 10 Fed. Rep. 711; *Gilmore v. Northern P. R. Co.* 18 Fed. Rep. 866; *State v. Malster*, 57 Md. 287; *Murphy v. Smith*, 19 C. B. N. S. 861; *Malone v. Hathaway*, 64 N. Y. 5; *Cumberland & P. R. Co. v. State*, 44 Md. 283; *Fiske v. Boston & A. R. Co.* 58 N. Y. 549; *Dobbin v. Richmond & D. R. Co.* 81 N. C. 446; *Covles v. Richmond & D. R. Co.* 84 N. C. 309; *Dowling v. Allen*, 74 Mo. 18; *Slater v. Jewett*, 85 N. Y. 61.

In holding that the train dispatcher is not a fellow servant with the fireman, I do not consider that I run counter to the doctrine, so often recognized by this and other courts, in relation to fellow servants, in which, broadly stated, it is said: "It is sufficient if they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purposes. The rule is the same, though the one injured may be inferior in grade, and is subject to the control and direction of the superior whose act caused the injury, provided they are both co-operating to effect the same common object." This cannot be applied when the superior causing the injury represents the master, and it is always a subject of inquiry to ascertain the nature and extent of the authority of the superior whose negligence caused the injury. If his authority and duties are such as the master must necessarily, either personally or by another, exercise and discharge, then the above rule does not apply.

There are some authorities which hold that a train dispatcher, and those operating trains under his control, are fellow servants. It seems to me, however, that those authorities do not give sufficient prominence to the position which the train dispatcher occupies in operating a railroad. He is the corporation for the time being, and exercises powers which neither the superintendent, nor the president, nor any other officer or agent of the corporation, can interfere with.

The defendant requested a charge to the effect that, although the jury might find the defendant guilty of negligence, yet if the fellow servant of deceased contributed to produce his death the plaintiff could not recover. This request was rightly refused. The correct rule, and the reason for it, is stated in *Paulmier v. Erie R. Co.*, 84 N. J. L. 151, as follows: "The servant does not agree to take the chance of any negligence on the part of his employer, and no case has gone so far as to hold that where such negligence contributes to the injury the servant may not recover. It would be both unjust and impolitic to suffer the master to evade the penalty for his misconduct in neglecting to provide properly for the security of his servant. Contributory negligence, to defeat a right of action, must be that of the party injured." *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700 [27 L. ed. 266]; *Keegan v. Western R. Corp.* 8 N. Y. 175; *Chicago & N. W. R. Co. v. Sweet*, 45 Ill. 197; 2 Thomp. Neg. 981; *Perry v. Lansing*, 17 Hun, 84; *Busch v. Buffalo Creek R. Co.* 29 Hun, 112; *Gray v. Philadelphia R. Co.* 24 Fed. Rep. 168.

The second count of the declaration was based upon the negligence of defendant in employing an incompetent train despatcher, and quite an amount of testimony was introduced in the case in the effort to prove that fact. But this count, upon an intimation of the court, was practically abandoned. The defendant insists that the testimony introduced under that count remained in the case, and was prejudicial to it. We do not see anything in the testimony upon this branch of the case that could have possibly prejudiced the jury. The testimony introduced tended to show the capability of Kilmer, and the care and caution exercised by defendant in selecting him for the position. Its tendency was favorable to the defendant.

Under defendant's claim of contributory negligence of a fellow servant's running the trains, in violation of the rules of the Company as to speed, testimony was admitted by the court tending to show that a strict compliance with the rules was impracticable, and that they were lived up to as nearly as they could be, and the trains run on the time allowed by the schedule prepared by the Company. We think it was competent to show what was usually and habitually done in the running of trains, because, if the Company permitted or had so framed the rules as to require the employés to exercise some discretion in the matter of strict obedience, it ought not to be permitted to hold its employés to the very letter of the rule in order to shield the Company from liability for what it had tacitly permitted. But the admission of such testimony could not harm defendant, if it was the Company's negligence that was the proximate cause of the injury, although a con-

curring cause was the negligence of a fellow servant in running at a greater rate of speed than the rules allowed. The court gave full effect to the rules in his charge to the jury, so far as they were material, by instructing the jury that "if you find, as a matter of fact, that the collision resulted entirely from the negligence of one or both of the engineers of engines No. 120 and 177, the defendant is not chargeable with the consequence of that negligence."

There was testimony introduced tending to show that the deceased was earning \$900 a year at the time of his death, and was twenty-seven years of age. A witness was then introduced, and he was permitted to testify that he had made a computation of the present value of an annuity based upon the expectancy of life of a man of the age of twenty-seven years on an income of \$900, and that its present value was \$10,725.80. The court also, against defendant's objections, permitted the mortality tables found in § 4245, How. Stat., to be admitted in evidence, and the Northampton tables for showing the present value of a dower interest or of an annuity, found upon page 142 of Cheever's Probate Law. Mrs. Hunn also testified that her husband's earnings were her only means of support; that he owned a place at the time worth about \$2,000. She was also permitted to testify, against defendant's objections, that there was an incumbrance upon the place of \$1,100 or \$1,200. There was also considerable testimony introduced as to his physical health, and as to his being afflicted with varicose veins, and varicose tumors, and how such disease would impair his health, or affect the probable duration of his life. Upon the question of damages the court, among other things, instructed the jury as follows: "Now, in estimating her pecuniary loss, you should consider the personal character of her deceased husband, as shown by the evidence; his mental and physical capacity; his habits as to industry, economy or otherwise; his health,—whether at the time of his death he was afflicted with any disease, or physical infirmity, as varicose veins, which would be likely to reduce his earning power in the future, or shorten his life; consider his capacity, disposition to earn money, as shown by the evidence; the salary he was then earning, and the amount, whether greater or less, which, under the testimony, you think he would, with reasonable probability, be likely to earn in the future; the probable length of time he would continue to live and earn money, and furnish his wife with support, or other pecuniary advantages; and for this purpose you may consider the evidence of the mortuary tables, or expectancy of life, given you from the Statute by Mr. Birney, considering, in the same connection, how much that natural expectancy for the life of a man might be reduced by the circumstances of his physical infirmity of varicose veins, as shown by the evidence. But you must not consider Mr. Birney's computation, based upon the annuity tables, of how much money it would take to purchase an annuity, as testified to by him. That evidence I understand to have been withdrawn from your consideration. At all events, gentlemen, you will give it no weight in determining your verdict. These, and all other facts, conditions and circumstances appear in the evidence, which tend to

throw light upon or aid you in reaching a fair and just conclusion as to the amount of her pecuniary loss, you may and should consider in making up your verdict. Now, the pecuniary benefits which Alice M. Hunn would, with reasonable probability, have realized by being his wife during the length of time that relation would have continued if he had lived she has lost by his death; and these benefits, fairly and justly estimated by you with reference to their pecuniary value, under all the evidence in the case and the instructions I have given you, will furnish the measure of her pecuniary injury in this case. The question is not what he might have earned or saved if he had lived, but it is what she, as his wife, would have realized if his death had not occurred from the collision."

The mortuary tables contained in Howell's Statutes were properly admitted in evidence, as some testimony tending to show Hunn's expectancy of life at the age of twenty-seven. *Balch v. Grand Rapids & I. R. Co.* 67 Mich. 394, 11 West. Rep. 476.

Such tables are not conclusive. They show the probable age which a healthy person may expect to reach, whose age is given. But when that is before the jury, and the physical condition of the person at the time of his death, and all testimony which may reasonably affect his duration of life, the jury must determine from the testimony before them the probable duration of the decedent's life had he not died as a result of his injury. The testimony of Birney was properly excluded, and the jury told not to regard it. His figures showed the value of Hunn's life to be \$10,725.30. The jury found the plaintiff's damages to be \$7,500, and this sum the defendant's counsel insists is excessive.

Whether damages found by a jury are excessive or not does not present a question of law. If no improper testimony affecting the subject of damages has been admitted, and the court has given to the jury proper instructions to guide them in reaching a conclusion, the amount of the damages awarded is beyond the reach of a writ of error.

The court erred in admitting testimony showing the extent of their means, and the incumbence upon the land. When the question was objected to, the court said he would admit it as showing the extent of their means.

In *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 214, *Mr. Justice Cooley* said: "What the family would lose by the death would be what it was accustomed to receive, or had reasonable expectation of receiving, in his lifetime; and to show that the family was poor has no tendency towards showing whether this was or was likely to be large or small. One man contributes liberally in aid of his poor relations, another delights in contributing luxuries where comforts are already abundant, but when the contribution is cut off in either case the extent of the loss is not measured by the wealth or poverty of the recipient, but by the contribution itself. A dollar lost, whether by a poor man or rich man, is neither more nor less than a dollar, and a reasonable expectation of benefit to a certain amount must, when lost, be compensated to the same extent, whether the loser be rich or poor."

We cannot say that this testimony did not influence the jury. It was admitted as having 7 L. R. A.

some bearing upon the measure of damages, and it must be presumed that it formed an element in the estimation of damages by the jury. The instruction to allow merely nominal damages, so far as the brother and sisters were concerned, was correct. *Chicago & A. R. Co. v. Shannon*, 48 Ill. 338; *Chicago & N. W. R. Co. v. Swett*, 45 Ill. 205.

For the error pointed out the judgment must be reversed, and a new trial granted.

Sherwood, Ch. J., and Campbell and Morse, JJ., concurred with Champlin, J. Long, J., did not sit.

Jennie PINKERTON, *Appl.*,

v.

Marcus VERBERG.

(....Mich....)

1. A mere suspicion that a woman walking on the street in the night is plying the vocation of a prostitute will not justify her arrest without a warrant, in the absence of any act on her part indicating that such is her purpose.
2. Being saucy to an officer, or daring him to arrest after he has threatened to arrest without warrant or any right to do so, will not justify him in making the arrest.
3. An officer is liable for assault and illegal arrest for arresting a woman without warrant on mere suspicion that she is plying the vocation of a prostitute.
4. Evidence of specific acts of lewdness is inadmissible in an action for false arrest as a prostitute.

(December 23, 1889.)

ERROR to the Circuit Court for Kalamazoo County to review a judgment in favor of defendant in an action to recover damages for an alleged assault and illegal arrest. *Reversed.*

The facts are fully stated in the opinion.

Mr. Hampden Kelsey, for plaintiff, appellant:

The general reputation of plaintiff should not be established by witnesses from police headquarters, but should come from the vicinage.

1 Greenl. Ev. § 461.

Evidence of general conduct cannot be given.

1 Greenl. Ev. § 55; *Patterson v. Garlock*, 39 Mich. 447; *Wilson v. Bowen*, 7 West. Rep. 338, 64 Mich. 184.

Specific acts of misconduct on plaintiff's part at previous times would not make the defendant's act lawful.

Best, Ev. § 257.

Walking the streets in a lawful manner is no offense; therefore the plaintiff had done nothing which would justify the officer in arresting her without a warrant.

Drennan v. People, 10 Mich. 169; *Quinn v. Heisel*, 40 Mich. 576; *Re Way*, 41 Mich. 299; *Ross v. Leggett*, 61 Mich. 445.

If the plaintiff was conducting herself lawfully, then the defendant had no right to arrest her, and his act would be malicious and exemplary damages could be recovered.

Newman v. Stein, 75 Mich. 402.

Even if defendant had arrested plaintiff on belief that she had or was about to commit a felony, his belief could not be arbitrary, but must be founded on circumstances which would give probable cause for such belief.

People v. Burt, 51 Mich. 199.

Mr. James H. Kinnane for appellee.

Long, J., delivered the opinion of the court:

This action is brought by plaintiff to recover damages for assault and illeral arrest. Defendant, at the time of the arrest, was a policeman of the City of Kalamazoo, and claims to have arrested defendant because she was a street walker. It appears that plaintiff lived on Kalamazoo Avenue East, and some time in the fore part of August, 1883, went from her own home to a sister's, living on the corner of Church and Eleanor Streets, in the city. There she met a younger sister, and the two went down into the city upon the main street, called into the Watkins House closets, and after plaintiff had shown the younger sister, who had no acquaintances in the city, around the city for a time, the two went together back to the home of the sister, when plaintiff started to return to her own home, and in doing so she again passed the Watkins House, but on the opposite side of the street. After having gone some little distance from there towards her own home, she heard someone following her on the walk. She hastened her speed, but, when near the railroad crossing, Mr. Verberg, the defendant, walked up to her side, and asked where she was going. She told him she was not going very far, and then he wanted to know where she lived. To this plaintiff responded that she did not know as that made any difference to him. Defendant then asked what her name was. She told him that did not make any difference to him, and that she was attending to her own business. Defendant continued to walk with her until she got to her own door, and she then told him that she lived there. Plaintiff then told him he was not much of a gentleman to be following her home, when he said not to give him any more sauce, or he would take her and run her in.

Plaintiff then says: "I told him I had not done anything to be run in for; that I did not know what he could run me in for; I guessed I had not done anything out of the way; and so he took hold of me, and took me up town. When he got up to the corner of Water Street, I told him I was not going any further with him, and he got hold of me, and tore my dress pretty nearly all off of me, and tried to make me walk, and blew a whistle, and Mr. Warren, who was across the street, came over, and asked him what he arrested me for, and he said he had made up his mind that he would not take any more of my sauce, and when they got upon the corner they stopped there, and Mr. Warren told him he knew me; that I was a married lady. They went out to one side, and had a talk, and Mr. Warren said: 'You can do as you have a mind to; but I don't think you had better lock her up.' Mr. Warren walked down Main Street, and Mr. Verberg said I could go home if I wanted to; but, if he ever caught me out again as late as that, he would take me and lock me up. It was then about half past ten o'clock, and I went home."

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Witness further stated that defendant took hold of her arm at and in front of her own house, and pulled her along as far as the railroad, and as far as Water Street, when he tore her clothes because she would go no further. Defendant gave his version of the affair, on his direct examination by his own counsel, as follows: "I saw her on this particular night by the Watkins House with three other women, and they all went into the house. I slipped into the office of the Watkins House. They stayed in there a few minutes, and came out, and went up as far as Rose Street. They crossed over, and she came down the street alone. She went west on Kalamazoo Avenue. I walked down that way to see what was going to be done. I believed she was plying her vocation as a prostitute. She walked quite fast. I walked down to the Grand Rapids & Indiana Railroad, caught up to her, and asked where she lived, and what her name was. She said it was none of my business. I said: 'I have asked you a civil question, and I would like to have you answer it.' She said: 'I don't have to answer any question from you.' I said: 'Well, I have had orders to that effect, to make these street walkers get off the street or lock them up.' By this time she had got in front of her own house. I didn't know at that time that she lived there. She said: 'I dare you to arrest me.' She said I had no business down there. I had no business to follow her. She was attending to her own business, and I had to attend to mine. She dared me to lock her up; to arrest her. At first I started away. She halloed after me: 'Will dare you to arrest.' I came back and said: 'Come on, if you want to go to jail. I can take you there.' So we walked up as far as Dickinson's hardware store, and she stopped, and I says: 'Come on; don't stop here.' She walked along then; and right in front of the restaurant, between the alley and back of McDonald's drug store, she threw herself right down on the sidewalk, and I asked her to get up two or three times. She refused to do it. I thought by the way she acted she had been drinking. I didn't see anyone around close by. I didn't want to have no regular wrestle there, so I blew my whistle, and Mr. Warren came up, and assisted me in getting her up. When we got her up to the corner of Main and Rose Streets, she said, if we would not lock her up, she would go home, and she awfully hated to be locked up,—begged in that way. I spoke to Mr. Warren a few minutes, and finally told her, if she would go home, I would let her go to-night, and, if I caught her out again, I would lock her up, as late as that."

Witness further testified that he did not know that he tore any of her clothing.

It will be noticed that there is but little difference in the version given by the parties to the controversy as to what took place on that occasion.

The court, in its charge to the jury, stated: "The defendant claims that he had a right to arrest the plaintiff because he was at the time of making the arrest a policeman of the City of Kalamazoo, and that at the time of the arrest the plaintiff was engaged in the commission of an offense against the law. The character and ordinance of the City of Kalamazoo

provide that policemen shall have authority to arrest, without warrant, all persons who shall, in their presence, be guilty of any offense, misdemeanor or breach of the peace, or who shall, in their presence, be guilty of any disorderly conduct, for punishment of which a warrant could lawfully issue. Disorderly conduct for which an arrest might be made without a warrant, if committed in the presence of the officer, would include what is commonly termed 'street walking.' That is the offense of a common prostitute offering herself for sale upon the streets at unusual or unreasonable hours, endeavoring to induce men to follow her for the purpose of prostitution; and, in case such an offense is committed in the presence of an officer, a policeman has not only the authority, but it is also made his duty, to arrest the person so offending. So, in order to determine whether the defendant had the right to make the arrest complained of in this case it will be necessary for you to inquire and determine whether the plaintiff was at the time of the arrest engaged in the commission of any offense, or whether the defendant had any reasonable ground for believing she was. If you should find that at the time she was arrested by defendant she was conducting herself in an orderly manner, not committing any breach of the peace, or disorderly conduct or offense against the law, and that the defendant had no reason to believe she was, then the defendant had no right or authority to arrest her, and the plaintiff would be entitled to a verdict; and in such case it makes no difference what her past history may have been, nor what her character was, so far as any justification of the defendant was concerned. But if you find, from the evidence in the case, that at the time of the arrest the plaintiff was a woman of unchaste character, and was upon the street engaged in street walking,—that is, if she was upon the street for the purpose of attracting attention and inducing men to follow her for purposes of prostitution,—then the plaintiff is not entitled to recover, unless you find that defendant used unnecessary force and violence in making the arrest. Or if you find, from the evidence, that the plaintiff was at the time of her arrest by the defendant an unchaste woman, and known by the defendant to be so; and if you also find that she had at that time the reputation of being a common prostitute, whether that reputation was deserved or undeserved, and that this reputation was known to defendant; and if you further find that she was at that time upon the public street, at such an hour and under such circumstances; if her conduct was such that the defendant had reason to believe that she was engaged in street walking,—then, whether she was so engaged in street walking or not, the defendant would be justified in making the arrest, and, unless you find that he used unnecessary force and violence in making the arrest, your verdict should be for the defendant. The question, as I have already indicated to you, is not altogether whether the plaintiff was already engaged in street walking, but whether the defendant had reasonable ground to believe she was, and made the arrest upon such ground. If he had reasonable ground to believe that she was engaged in street walking, and made the arrest on such ground, then defendant would

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not be liable, although, as a matter of fact, the plaintiff was in the streets for a legal purpose."

In order to better understand the force and effect of this charge, it will be necessary to consider the evidence to some extent that the court permitted the defendant to introduce. While the plaintiff was on the stand as a witness in her direct case, the counsel for the defendant was permitted, under objection of plaintiff's counsel, to ask her: "Your husband had you arrested the other day for assault and battery?" It appears that this arrest was made after the time the assault was claimed to have been made in the present case, and the witness testified that she had never been arrested in her life, until the time when the defendant arrested her. In answer to the question propounded, she stated that her husband did cause her arrest for assault and battery. Witness was further asked if, upon one occasion, Officers Warren and Verberg did not call upon her one night, and find her in bed with one Charles Vose. Plaintiff denied this, and claimed that she had a room there, and worked for Charles Vose, and his father and mother, in their restaurant.

It appears that, several years before this arrest, plaintiff's husband had been arrested, and convicted and sent to state prison for some offense, but had recently returned. The plaintiff and he were then living together. The defendant, while on the stand as a witness, was permitted to testify that about a year previous he and another policeman visited the Gale Block, in which was the Vose restaurant, and there knocked on the door; that Mr. Vose came to the door, and, being asked who was in there with him, answered that it was his wife; that he had also seen the plaintiff a great many times on the street at from 10 to 12 o'clock, and that she did not seem to be doing any business, but just walking the street.

Plaintiff was recalled by the defense, and testified that she was never put out of the Gale Block in consequence of living with Mr. Vose; that he did not live there with her; that he had a room there, and she had a room, and a good many others had rooms there; that Mr. Miller, the janitor of the building, never told her to move out in consequence of the manner in which she conducted herself.

Mr. Miller was then called by the defendant, and testified that plaintiff had rooms there; that he served papers to get Vose out, but was not acquainted with the reputation of the plaintiff at that time; that he saw a man in there one night, but could not see if there was anything wrong; that it might have been Mr. Vose, as he told him they were going to be married in about a week. Witness testified that he saw men go into the big hall door, but could not say whether the room where they went was occupied by her.

Mr. Warren was also called, and testified to seeing plaintiff in bed with Vose. Other testimony of like character was also given by defendant, under objection of counsel for the plaintiff. Defendant also gave evidence of the general reputation of the plaintiff as a common prostitute. Plaintiff denied all the specific acts of lewdness to prove which such witnesses were called.

At the close of the testimony the counsel for plaintiff asked the court to instruct the

jury: "(1) If the jury shall find that the plaintiff, at the time she was arrested by the defendant, was conducting herself in an orderly manner, and not committing any breach of the peace, then the defendant had no right or authority to arrest her. (2) No officer is justified in making an arrest without a warrant, when the person whom he arrests is peaceable, and not engaged in open violence; as, for example, by fighting, engaging in a riot, or about to escape after committing a felony. (3) The law does not look with favor on arrests made without a warrant, and an arrest without a warrant cannot be justified if the person arrested was not engaged in a breach of the peace; as, for an example, in fighting, or in a riot, or about to escape after having committed a felony. (4) If the jury shall find that the plaintiff was, at the time she was arrested, walking on the street, without molesting anyone, then she was not committing any act that would justify the defendant in arresting her without a warrant, and his act in arresting her was unjustifiable, and the burden is on him to justify the act. (5) If the jury shall find from the evidence that the plaintiff, at the time of her arrest, was walking on the street in a lawful manner, then the jury would be warranted in going beyond actual damages, and giving the plaintiff a further sum as exemplary damages."

These instructions the court refused.

It is insisted here that the arrest was legal, and within the authority of the officer, under the provisions of section 3 of chapter 14 of the charter of the City of Kalamazoo. This section is as follows:

"Sec. 3. The marshal and police shall have and exercise, within said city, all the power given by law to constables for the preservation of the peace, and to apprehend and arrest offenders against the laws of the State. They shall have the power to enter any disorderly or gaming house, or dwelling-house, or any other building where a felon is known to be secreted or harbored, or where any person is who has committed any breach of the peace, or where any felony or breach of the peace has been committed. It shall be the duty of the said marshal and police, and they are hereby fully authorized, to suppress all riots, disturbances and breaches of the peace; to arrest, upon view, all persons fleeing from justice; to apprehend, upon view, any person found in the act of committing any offense against the laws of the State; and to take such persons before the proper officer or magistrate, to be dealt with according to law; to make complaints before the proper officer or magistrate of any person known, or believed by them, to be guilty of crime, or having violated any ordinance or regulation of said city; and to serve all process, writs and warrants that may be delivered to them for that purpose, or that may be required in any prosecution for the violation of any ordinance or regulation of said city. In prosecutions under any city ordinance or regulation of said city, the marshal and regular police thereof shall have the same powers, and shall perform the same duties, as are given to and performed by constables under the laws of the State; and, generally, they shall perform all such duties pertaining to their respective offices as may be required by the city council."

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It is claimed further, by counsel for defendant, that the question whether the plaintiff was at the time of the arrest engaged in street walking or not, or whether the defendant had reasonable grounds to suppose that she was, was a question for the jury, and, as such, was properly submitted to them. That it appears from the record the officer well knew the reputation of the appellant, and that she was a common prostitute; and judging from her actions, the unseasonable time of the night and the suspicious quarter of the city, it cannot be said the officer acted arbitrarily or without good and reasonable grounds for assuming and believing that the appellant was then and there on the public streets plying her vocation as a common prostitute.

Counsel state, as a further proposition, "that, assuming it to have been true that the defendant acted upon an uncertainty, but had good and reasonable cause to believe that the plaintiff was conducting herself unlawfully and in a disorderly manner, and did so believe, he would still be justified in making the arrest in the manner that he did."

It is not claimed that the defendant had a warrant for the arrest of the plaintiff at the time he took her into custody, and started to convey her to the jail; and it appears that no warrant had ever been issued for the plaintiff's arrest for that or any other offense. From the whole record, it appears that the only excuse offered by the defendant for the arrest on that night was that he had heard her reputation as a common prostitute discussed by the police officers of the city, and some others; had made up his mind that she was such, and had seen her frequently on the streets, sometimes at unseasonable hours, and at one time found her in bed with a Mr. Vose. This is about the substance of the reasons given by him which led him on that night to believe she was on the street playing her vocation as a common prostitute. All he had seen that night was that the plaintiff was down on Main Street, went into the Watkins House with three other women, and from there up the street for a distance, and, turning, walked towards her own home. He does not testify nor claim that he saw her talking with any man, or that she accosted any man, or did anything more than walk along a public street towards her own home, as any decent or well-behaved lady might have done. She was even hurrying forward faster when she heard the defendant's footsteps rapidly approaching her as if to overtake her. When he had overtaken her, he asked her name and where she lived, and kept pace with her until she had arrived opposite her own door. He was not successful in finding out her name, and claims the plaintiff told him it was none of his business. He started and walked away from her for a little distance, according to his own testimony, when she told him, or hallooed at him, as he says, and dared him to arrest her, when he turned, and said, "If you want to go to jail, I can take you there." He then made the arrest. Can anything be more certain even from the defendant's own testimony, than that the arrest was made because, as plaintiff says, she gave him some sauce, or as defendant says, she dared him to arrest her? He knew as well when he started to leave her, whether she was

on the street plying her vocation as a common prostitute, as he did when he made the arrest; and yet he turned away to leave, and only made the arrest when she dared him to make it.

If persons can be restrained of their liberty, and assaulted and imprisoned, under such circumstances, without complaint or warrant, then there is no limit to the power of a police officer. Personal liberty, which is guaranteed to every citizen under our Constitution and laws, consists of the right of locomotion,—to go where one pleases, and when, and to do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all other citizens. One may travel along the public highways or in public places; and while conducting themselves in a decent and orderly manner, disturbing no other, and interfering with the rights of no other citizens there they will be protected under the law, not only in their persons, but in their safe conduct. The Constitution and the laws are framed for the public good, and the protection of all citizens, from the highest to the lowest; and no one may be restrained of his liberty, unless he has transgressed some law. Any law which would place the keeping and safe conduct of another in the hands of even the conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our Constitution guarantees. These are rights which existed long before our Constitution, and we have taken just pride in their maintenance, making them a part of the fundamental law of the land. Whatever the charter and ordinances of the City of Kalamazoo may provide, no police officer or other conservator of the peace can constitutionally be clothed with such power as was attempted to be exercised here. No disorderly conduct; no breach of the peace, committed in presence of the officer; no suspicion of felony,—and yet under the charge of the court which counsel seek to maintain here, a woman may, simply upon suspicion that she may commit an act which at most would only amount to a misdemeanor, be assaulted and imprisoned, if the officer has good reason to believe, and does believe, that she is plying her vocation in such a manner that it will result in an offense. No more dangerous doctrine could be laid down. It is a doctrine which, if upheld, would place even the most respectable lady in the land under the surveillance of policemen, and give them authority to arrest and imprison upon mere suspicion of an offense, however insignificant; and, if carried to the extent contained in the charge of the circuit judge, it would not matter how undeserved the bad character or reputation of such person might be. If idle gossip is once set afloat, reflecting upon the character and reputation of the most virtuous woman, and that gossip once comes to the ears of the police officer, he may act upon it, and be led to believe that the woman is upon the street intending to ply her vocation as a street walker or common prostitute, and at once, without the formality of complaint or warrant, place her under arrest and convey her to jail. The law has more regard for the liberty of the citizen, and there is a more decent and orderly manner

of enforcing the law for the public good. The officer had no right to arrest the plaintiff without warrant upon mere suspicion that she was upon the street for the purpose of plying her vocation as a common prostitute, even under the provisions of the city ordinance above cited. Our Statute gives no such right, and at the common law no such right existed. Suspicion that a party has on a former occasion committed a misdemeanor is no justification for giving him in charge of a constable without a justice's warrant; and there is no distinction in this respect, between one kind of misdemeanor and another. 1 Archb. Crim. Pr. and Pl. p. 103, note 1; 2 Hale, P. C. 89.

An arrest for misdemeanor, without a warrant, by one who does not see the offense committed, is illegal.

In *People v. Pratt*, 22 Hun, 300, it was held that an officer had no authority to arrest, without warrant, a common prostitute, unless disorderly conduct is committed in his presence. It is true that an officer, as a conservator of the peace, may arrest street walkers or common prostitutes who are on the street plying their vocation; but a mere suspicion that they are doing so, where there is no act indicating that the party is there for that purpose, will not justify the arrest without warrant.

In *Re Way*, 41 Mich. 304, *Mr. Justice Campbell*, speaking upon the subject of arrest without warrant, says: "It must not be forgotten that there can be no arrest without due process of law. An arrest without warrant has never been lawful, except in those cases where the public security requires it, and this has only been recognized in felony, and in breaches of the peace committed in presence of the officer. *Quinn v. Heisel*, 40 Mich. 576, and *Drennan v. People*, 10 Mich. 169."

The court was in error in that portion of its charge relative to the defendant's acting upon his information and belief that the plaintiff was a common prostitute, as a justification for the arrest without warrant. The court was also in error in refusing to give the plaintiff's requests to charge. Each request stated the law correctly as applied to this case, and should have been given. The court was also in error in permitting defendant to introduce evidence of specific acts of lewdness on the part of plaintiff. On such a trial, it could not be expected that a party so attacked could be prepared to meet every issue so made.

The judgment must be set aside, with costs, and a new trial ordered.

Campbell, Champlin and Morse, JJ., concurred with **Long, J.**

Joseph H. COFRODE et al., Relators,

v.

George GARTNER, Circuit Judge, Resp't.

(.....Mich.....) |

1. An action on contract is within the jurisdiction of the courts of the State in which was the place of performance, although the parties are residents of other States.
2. Consent of the parties is sufficient to give jurisdiction over them to a court which has jurisdiction of the subject matter.

3. Filing a declaration on the part of the plaintiff, and appearance and pleading on the part of defendants, is a sufficient waiver of process, although the parties are nonresidents.
4. The right of citizens of other States to bring suit in a state court where a citizen of that State may, is guaranteed and protected by U. S. Const., art. 4, § 2.
5. A court has no discretion to refuse to hear a case between nonresidents of which it has jurisdiction, merely because the suit is brought there only for convenience of parties and attorneys, and will entail expense upon the county.

(Campbell, J., dissents.)

(January 31, 1890.)

PETITION for a writ of mandamus to compel respondent, as Circuit Judge for Wayne County, to entertain a suit growing out of a contract to be performed in another part of the State, between parties all of whom are nonresidents of the State, defendants having appeared by attorney without service of process. *Writ granted.*

The facts are fully stated in the opinions.

Messrs. Ashley Pond, W. L. Carpenter and John Atkinson, for relators:

The Circuit Court for the County of Wayne has jurisdiction of the subject matter of actions of assumpsit upon agreements which must be performed, if performed at all, within the State, but elsewhere than in the County of Wayne.

Thompson v. Michigan Mut. Ben. Asso. 52 Mich. 522; *Atkins v. Bortler*, 46 Mich. 552.

Its jurisdiction in that regard does not depend upon whether or not any of the parties to the agreement in question, or to the action, are residents of the State.

Great Western R. Co. v. Miller, 19 Mich. 305; *Roberts v. Knights*, 7 Allen, 449; *Peabody v. Hamilton*, 106 Mass. 217; *Roberts v. Dunsmuir*, 75 Cal. 203; *Barrell v. Benjamin*, 15 Mass. 354; *Miller v. Black*, 2 Jones, L. 341; *McCormick v. Pennsylvania R. Co.* 49 N. Y. 303; *Latourette v. Clarke*, 45 Barb. 327.

It is not essential to give jurisdiction of the subject matter of a particular action, of the kind in question, that the defendant should be actually found and served with process within said State and county; the voluntary appearance of such defendants will suffice to give such jurisdiction.

Hawes, Jurisdiction of Courts, 248; *Mason v. The Blaireau*, 6 U. S. 2 Cranch, 240 (2 L. ed. 266); *Baldwin v. Murphy*, 83 Ill. 485; *McCormick v. Pennsylvania R. Co. supra*; *Ralston v. Chapin*, 49 Mich. 274; *Johnston v. Testevin*, 60 Iowa, 46; *Christal v. Kelly*, 88 N. Y. 285.

Citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.

U. S. Const. art. 4, § 2, subd. 1.

Among the privileges so guaranteed to the citizens of any State within any other State, is the privilege of instituting and maintaining actions in the courts of such other States.

Corfield v. Coryell, 4 Wash. C. C. 890; *Slaughter House Cases*, 83 U. S. 16 Wall. 76 (21 L. ed. 408); *Paul v. Virginia*, 75 U. S. 8 Wall. 180 (19 L. ed. 360); *Cooley, Const. Lim.* 7 L. R. A.

p. 491; *Barrell v. Benjamin, supra*; *Davis v. Pierce*, 7 Minn. 18; *Morgan v. Neville*, 74 Pa. 52; *Story, Conf. L. § 542*; *Wharton, Conf. L. § 705*; *Miller v. Black and Great Western R. Co. v. Miller, supra*; *Gardner v. Thomas*, 14 Johns. 184.

Mr. Otto Kirchner, for respondent:

The courts have always recognized considerations of public interest and public convenience as paramount, and refused to entertain suits of aliens where public interest or public convenience seemed to require that they should not do so.

Bacon, Abr. title Aliens; *Gardner v. Thomas*, 14 Johns. 184; *The Belgenland*, 114 U. S. 363 (29 L. ed. 155); *Great Western R. Co. v. Miller*, 19 Mich. 313; *McCormick v. Pennsylvania R. Co.* 49 N. Y. 303; *Barrell v. Benjamin*, 15 Mass. 354; *Roberts v. Dunsmuir*, 75 Cal. 203.

Champlin, Ch. J., delivered the opinion of the court:

On the 7th day of December, 1889, the relators commenced suit in the Circuit Court for the County of Wayne by filing a declaration against Walston H. Brown, Columbus R. Cummings, Samuel Thomas and William B. Howard. On December 16, 1889, defendants appeared in said cause by their attorneys, and demanded a bill of particulars, which was furnished on the same day. The defendants also pleaded the general issue, with notice of recoupment, of which they furnished a bill of particulars. After the cause was at issue it was regularly noticed for trial by the plaintiffs' attorneys, and placed upon the docket for trial by jury at the January Term of said court. On December 23, 1889, the defendants filed an affidavit in support of a motion for a struck jury, which came on to be heard on the 7th day of January, 1890, before Hon. George Gardner, Circuit Judge for the County of Wayne. The plaintiff opposed the motion, and filed an affidavit in opposition thereto. The motion was submitted to the court, and without deciding it the said circuit judge on the 13th day of January, 1890, of his own motion made an order striking the case from the docket on the ground that all the parties to the suit were nonresidents; a copy of which order is as follows: "[Title of court and cause.] The application for a struck jury heretofore made in this cause having been duly considered, it satisfactorily appearing to the court that the parties to this action are nonresidents, and that the cause of action and the subject matter thereof arose in the upper peninsula of this State, it is ordered that said cause be, and it hereby is, stricken from the docket."

The plaintiffs are both residents of the State of Pennsylvania. Three of the defendants are residents of New York; one, of Illinois.

The controversy respecting which suit is brought arises under a contract for building a railroad in this State in the upper peninsula. Early in the year 1888 the plaintiffs commenced suit by attachment in the County of Marquette, but, for reasons stated in the petition for a mandamus, that suit was discontinued, and this commenced by mutual understanding, on the agreement of the parties. The relators pray that a writ of mandamus issue to said circuit judge, directing him to vacate the above order

striking the case from the docket. In showing cause why the mandamus should not be granted, Judge Gartner sets out the opinion rendered by him at the time he ordered the case struck from the docket, as follows: "Upon the application made for a struck jury, it was made to appear that the plaintiffs were residents of and do business in the City of Philadelphia, and the defendants in the City of New York. The subject matter of the controversy arose and is located in the upper peninsula of this State. This is shown in the affidavit of counsel, wherein it is stated: 'Affiant further says that all the parties to this suit are nonresidents of this State; . . . that the transaction involved in this suit arose in the upper peninsula of Michigan. It appears that the declaration was filed December 7, 1889, and the plea December 16 following. No process ever issued out of this court in said matter, nor was service had, and it is apparent that this forum wherein to litigate and determine this controversy is by consent of counsel, and selected for convenience.' This suit involves a large amount of money, the claim in the declaration being \$1,000,000; and several weeks will have to be consumed in the trial thereof, involving the county in expense of thousands of dollars, and in a matter wherein the county has no interest, either in the parties or the subject matter. It certainly does not seem right that the people of this county should be made to bear the burden of expense of determining controversies between foreign litigants. The docket of this court is crowded, and we have more than we can do in determining matters wherein the jurisdiction of the court is undoubted. This case has no business here, and an order will be entered striking it from the docket."

He further states as follows: "That on information and belief this respondent states the fact to be that the relators were not obliged to come into this State to prosecute their right of action against said defendants. Neither did they casually find them, or any of them, in this State, . . . nor was the appearance or plea entered by the said defendants, or any of them, in obedience to any process issued out of said circuit court, nor in obedience to any notice of rule to plead indorsed upon a copy of the declaration filed in said circuit court at commencement of suit, . . . but said declaration and plea were filed, and said appearance was entered, in accordance with the previous stipulation of the parties."

He further alleges that there are 922 cases upon the docket, of which 718 are for trial by jury at the present term, exclusive of criminal cases; that the circuit court is overcrowded with business, and that the disposition of causes in said circuit court is delayed because of the crowded state of its docket; that the trial of the alleged cause would consume at least a month of the time of the judges and jury, and in that way would seriously interfere with the disposition of the legitimate business of the court, besides entailing upon the County of Wayne an expense of many thousands of dollars; and that he made the order complained of because he deemed the same in the interest of the administration of public justice, and of the public welfare. He summarizes his reasons for striking the cause from the docket as fol-

lows: "(1) That the said circuit court has no jurisdiction of the said alleged cause. (2) That the consent of parties and their attorneys does not and cannot confer jurisdiction upon said court, inasmuch as all parties, both the alleged plaintiffs and the alleged defendants are nonresidents of this State. (3) That, if jurisdiction can be conferred by consent of parties and attorneys, it does not become obligatory upon the court to entertain jurisdiction, but whether the same shall be entertained or not by the court is a matter which rests in the sound discretion of the court; and that public convenience and interest are paramount to the private convenience of the parties. (4) That it is apparent from the facts set out that the said alleged suit is brought into the Circuit Court for the County of Wayne for the convenience of the parties and their attorneys only."

I shall consider these reasons in the order named by the circuit judge.

First, as to the jurisdiction of the circuit court. The several circuit courts in this State are courts of general jurisdiction. The cause of action stated in the declaration is transitory. It is action of assumpsit, arising out of a contract claimed to have been performed in this State; and the Circuit Court for the County of Wayne has cognizance of suits upon contracts like the one sued upon irrespective of the locality of their origin, provided the parties, by service of process or otherwise, are before the court. *Thompson v. Michigan Mut. Ben. Asso.* 52 Mich. 522.

Were the parties properly before the court? The suit was not commenced by either of the two methods authorized by § 7291, How. Stat. The petition asserts that the suit was commenced by the filing of the declaration (and a copy is attached to the petition). In so doing the plaintiffs submitted themselves to the jurisdiction of the court, as a party to the record (*People v. McCaffrey*, 75 Mich. 115), and the defendants, by appearing and pleading to the declaration, voluntarily submitted themselves likewise to the jurisdiction of the court. While it is true that no consent of parties can give a court jurisdiction of the subject matter of a suit which the court did not possess without such consent, it is equally true that a court can obtain jurisdiction over the person by the consent of such person; and service of process is always treated as waived by a general appearance in the cause, and pleading to the merits. And this is so although the defendant is a non-resident, and suable only in a particular place. *Thompson v. Michigan Mut. Ben. Asso. supra.*

There is no claim or pretense that this is a fictitious suit, or that it is not brought in good faith, to determine a genuine controversy of vital interest to the parties concerned. Section 7547 of Howell's Statutes enacts that issues of fact in actions upon contracts shall be tried in the county where one of the parties shall reside at the commencement of suit, unless, for the convenience of parties and their witnesses, or for the purposes of a fair and impartial trial, the court shall deem it necessary to order such issues to be tried in some other designated county. This provision, however, applies only to residents.

We held in *Atkins v. Borstler*, 46 Mich. 553, that the Statute does not apply to nonresident

defendants, nor to a resident plaintiff suing a nonresident defendant, from the necessity of the case; that, if a nonresident could not be sued in any county where he could be found, he could not be sued at all. In that case the plaintiff was a nonresident of the county where the suit was brought, and the defendant was a nonresident of the State. The action was transitory, and we held the court had complete jurisdiction.

Whether courts ought to take jurisdiction in suits between aliens, when the cause of action arose in a foreign country, is not the question in dispute here. If it were, I should be willing to follow the views expressed by Chief Justice Marshall in *Mason v. The Blaiveau*, 6 U. S. 2 Cranch, 240 (2 L. ed. 206). In that case the want of jurisdiction was urged, and in delivering his opinion he said: "These doubts seem rather founded on the idea that, upon principles of general policy, this court ought not to take cognizance of a case entirely between foreigners, than from any positive incapacity to do so. On weighing the considerations drawn from public convenience, those in favor of the jurisdiction appear much to overbalance those against it, and it is the opinion of this court that, whatever doubts may exist in a case where the jurisdiction may be objected to, there ought to be none where the parties assent to it."

In suits between foreigners, brought in our courts, the courts are not obliged to entertain jurisdiction. They may and usually do so upon principles of comity, and seldom decline, except through a fear that they may not be capable of doing full and exact justice through a want of knowledge of the laws of the place where the cause of action arose, which enter into and make a part of the contract, or affect the rights and remedy of the parties.

In *Great Western R. Co. v. Miller*, 19 Mich. 305, the plaintiff was a resident of Canada, and brought suit against the railroad company in Wayne Circuit Court, in Michigan, for a trespass to his person committed in Canada. The defendant appeared voluntarily. It was objected that the court erred in taking and exercising jurisdiction. This court said: "The voluntary appearance of the defendant below renders any discussion of the subject of the venue unnecessary. There can be no doubt that the locality of the trespass does not of itself oust the jurisdiction, where the court has lawfully obtained control over the parties. But where the parties are not residents of the United States, and the trespass was committed abroad, the right of action in our courts can only be claimed as a matter of comity, and they are not compellable to proceed in such cases."

In *Roberts v. Dunsmuir*, 75 Cal. 208, suit was brought by one subject of Great Britain against others of that Kingdom, upon a cause of action in tort arising in British Columbia. At the time of bringing the action the plaintiff and one of the defendants resided in the State. Two of the defendants were nonresidents, and were not served, but they filed a petition to have the cause remanded to the United States court, and had procured an extension of time to answer after such appearance. The court below dismissed the suit, on the ground of

want of jurisdiction. The supreme court reversed this ruling, holding that the court had jurisdiction. See also, as to jurisdiction over a nonresident defendant, *Peabody v. Hamilton*, 106 Mass. 217; *Molyneux v. Seymour*, 80 Ga. 440, 76 Am. Dec. 667, note; Wharton, Conf. L. §§ 788, 789; *Smith v. Gibson*, 83 Ala. 284; *Roberts v. Knights*, 7 Allen, 449; *Barrell v. Benjamin*, 15 Mass. 354; *Miller v. Black*, 2 Jones, L. (N. C.) 341; *Stramburg v. Heckman*, Bush. L. 250; *McCormick v. Pennsylvania R. Co.* 49 N. Y. 308; *Campbell v. Wilson*, 6 Tex. 379.

The case of *McCormick v. Pennsylvania R. Co.*, *supra*, was a case where a nonresident of the State of New York sued a foreign corporation upon a cause of action which was transitory in its nature, and arose in another State. The defendant had appeared voluntarily by attorney. Mr. Justice Folger said: "We hold that, where the court has the jurisdiction of the subject matter or cause of action, that consent may confer jurisdiction of the person, and that such consent may be expressed by a foreign corporation by appearing by attorney and answering generally in the action."

The next reason given by the circuit judge is that if jurisdiction is conferred by consent it does not become obligatory upon the court to entertain jurisdiction. The correctness of this position must depend upon the right of the plaintiff to seek redress in the courts of the State. If a party has a right to plant his suit in a circuit court of this State, the circuit judge has no discretion to exercise in the matter. He cannot say to one suitor, "I will retain your suit," and to another, "I will dismiss it." It is among the fundamental rights of a people under one government that they may be secured in the acquirement, possession and enjoyment of property, and for this purpose courts are instituted as part of the Organic Law, in which every person shall have his remedy by due process of law. It is secured as a privilege to which every citizen of the United States is entitled. The redress of wrongs and the means of enforcing contracts are of the greatest consequence to the citizens of every State.

Article 4, § 2, of the Constitution of the United States declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." In commenting upon this clause of the Constitution, the Supreme Court of the United States in *Conner v. Elliott*, 59 U. S. 18 How. 598 [15 L. ed. 498], said: "We do not deem it needful to attempt to define the meaning of the word 'privileges' in this clause of the Constitution. It is safer and more in accordance with the duty of a judicial tribunal to leave its meaning to be determined, in each case, upon a view of the particular rights asserted and denied therein. . . . It is sufficient for this case to say that, according to the express words and clear meaning of this clause, no privileges are secured by it, except those which belong to citizenship." The right to bring suit in the several courts of this State having jurisdiction is a privilege of every citizen of this State. Especially is this true with reference to the enforcement of contracts. A citizen of another State may come into this, and acquire and en-

joy property. He may inherit and transmit property. He may enter into contracts, to the same extent that a citizen of this State can do so, and in this his rights are guaranteed by the above provision of the Constitution; and I think that his right to bring suit in this State, in any case where a citizen of the State may, is also guaranteed and protected by this provision of the Constitution. This right does not depend upon the fact of the defendant's having property in this State which can be reached by execution. There are many cases where, in a suit between citizens of this State, there can be no property found out of which to satisfy an execution; nevertheless the plaintiff has a right to plant his suit, litigate his claims and obtain judgment. *Wilson v. Martin-Wilson Automatic Fire-Alarm Co.* 140 Mass. 24.

The fourth reason set out by the circuit judge affords no excuse for his declining to hear the case. None of the reasons alleged appear to me to be valid reasons for refusing to hear the case, or for striking it from the docket. No court or judge has a lawful right to deny to suitors the privilege of bringing and prosecuting their suits, upon the ground that to entertain them will entail expense upon the county. The parties were rightfully before the Circuit Court for the County of Wayne. The court had full jurisdiction of the parties and the subject matter, and the circuit judge was in error in holding that the court had no jurisdiction, or that it had a discretion whether to entertain the suit or not.

A *mandamus* must issue as prayed for, directing Hon. George Gartner, Circuit Judge for the County of Wayne, to reinstate said cause upon the calendar of said court.

Morse and Grant, JJ., concurred.

Campbell, J., dissenting:

Relators are assignees of a firm consisting of Oliver W. Barnes, of New York City, Joseph W. Crawford, of Philadelphia, and Francis C. O'Reilly, of Orange, N. J. Relators both live in Pennsylvania. Their assignors had a contract for building a railroad in three of the upper peninsula counties, with Walston H. Brown and Samuel Thomas, of New York City, and Columbus R. Cummings and William B. Howard, of Chicago. None of these defendants have been in Michigan during the transactions to be referred to. Relators appear to have brought a suit of foreign attachment against the defendants in the upper peninsula, at Marquette, on which issue was joined. Subsequently, for reasons of convenience, this suit was discontinued, and by mutual understanding they attempted to bring a suit in the Circuit Court for Wayne County, filing a declaration on December 7, 1889. Defendants, by attorney, put in a plea to the merits on December 16, 1889. No service, or attempt at service, was made on any one of the defendants. Relators early in January, 1890, the case being on the term calendar for trial as a jury cause, applied to the respondent for a struck jury, setting up the circumstances of the controversy, and the wide range of inquiry necessary, and the residence of the parties, and the locality of the work done and in litigation, and claiming that all of the facts made it unsafe

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and undesirable for trial by an ordinary jury. Defendants opposed this motion, and insisted there was no reason for having a special jury. On these facts appearing, the respondent refused to have the case kept in court at all, as one which the Wayne Circuit Court was not bound to try, and dismissed it. Relators seek a *mandamus* to restore the cause to the court and calendar.

Several reasons were discussed on the hearing before us, depending on very grave questions. In the view I take of the motion, it is not necessary to consider them all. The jurisdiction, in my view, depends entirely on the policy of the statutes of Michigan. Without passing on the point directly, I am inclined to think that, if the suit had been begun in the statutory way, the controversy might be litigated in our courts somewhere against the parties reached. But the controversy is fairly presented, not whether our courts can entertain proceedings between nonresidents, but whether this suit is brought at such a place and in such a way that the Wayne Circuit Court is legally bound to hear it, and has no option on the subject. If not legally bound to do so, we have no right to review its discretion in declining to hear it. While we have statutes which to some extent, at least, raise distinctions arising out of residence, I do not propose to consider them all particularly. There are some incidents of territorial jurisdiction which are universally recognized. Among these is the constitutional and elementary doctrine that, while every State may reach property actually within its borders, no personal judgment has the least validity unless made against a person actually served with process, or else appearing voluntarily to respond to a suit. It is equally well settled that no one, whether partner or in any other relation of joint interest, can subject any of his associates to such personal jurisdiction, either by suit or by arbitration. No one can be brought into court personally, without personal service or personal waiver of service. In order, therefore, to get a personal judgment against all these defendants, they must all be served or appear; and a judgment which does not bind them all personally is not entitled to faith and credit, under the Constitution of the United States. *D'Arcy v. Ketchum*, 52 U. S. 11 How. 165 [18 L. ed. 648].

It is plain that so long as these defendants are outside of Michigan, no court in Michigan can reach them. Service of Michigan process beyond the State is not due process of law, and is void for any jurisdictional purpose. *Bischoff v. Wethered*, 76 U. S. 9 Wall. 813 [19 L. ed. 829]; *McEwan v. Zimmer*, 38 Mich. 765.

Under our statutes, no service of process is valid outside of the county, upon any defendant, until jurisdiction has been obtained by service on some defendant within it. *Turrill v. Walker*, 4 Mich. 177; *Denison v. Smith*, 33 Mich. 155.

When a suit has been so far instituted as to fix the jurisdiction against any defendant, although the authorities are not entirely clear, there is usually no obstacle to a waiver of strict procedure by voluntary action under appearance. But I have found no support anywhere for the doctrine that jurisdiction itself can be given in any way or in any case not provided

for by law; and there is no provision in statute or common law which allows jurisdiction to depend on the mere will of parties. The only provision in our laws which allows litigation to be commenced without process applies only to courts of justices of the peace, and its express authorization is not without significance, as creating a new method for the first time. By section 6823 of Howell's Statutes it is provided that suit may be instituted before a justice either by the voluntary appearance of "parties or by process." It may be remarked that there is no statutory or common-law rule which allows the original jurisdiction of any court to be called into exercise except by or through the party in person. It is not within the power of an attorney to represent his client in litigation not already pending. By section 6825, a voluntary suit is to be commenced "at the time when the parties shall appear before the justice and join issue." The statute also allows a debtor, with the consent of a creditor, to appear in person before a justice, and confess judgment without process. Section 6816. But this can only be done by a strict compliance with the Statute, and a judgment by confession in any way varying from the statutory method is void. *Spear v. Carter*, 1 Mich. 19; *Wilson v. Davis*, 1 Mich. 156; *Beach v. Boleford*, 1 Doug. (Mich.) 199; *Clark v. Holmes*, Id. 890.

The same rule applies to stay of execution of justice's judgment. If given for any more than the statutory amount, it is absolutely void. *Shadbolt v. Bronson*, 1 Mich. 85. It is also held in *Soper v. Fry*, 37 Mich. 236, in accordance with many other cases, that a partner has no authority to confess judgment.

There has been some doubt at common law whether an appearance can be entered at all before the time expires under the process served, and it seems then to be confined to cases where it is necessary for some purposes for the defendant; as, for example, to discharge appearance bail. But there is nowhere any recognition of the validity of a proceeding not commenced by legal process. It is not profitable to attempt to surmise all the reasons for legal rules, but courts have no right to disregard them. The government is interested in controlling litigation, and in preventing it, except under its own regulations. It involves many considerations which none but the Legislature can pass upon. Due process of law, under which property may be seized and sold, or whereby the public machinery is used at public expense, cannot depend on mere private will. Our laws have removed most of the merely formal impediments to suing, but they have not allowed parties to get into court, except through the ways indicated. There is but one method left to the parties for litigating disputed facts in any but the regular way, and that is by arbitration. That is allowed to be done, not in court, but out of court; but it may be submitted by acknowledgment before some public officer, and, if regularly executed, may be by the submission entitled to be entered as a judgment in a court designated. How. Stat. § 8474.

But, if not executed in strict accordance with law, such award cannot be received by any court as the foundation of a judgment (*Gibson v. Burrows*, 41 Mich. 713); and the arbitrator

cannot cover questions of landed title. § 8475.

Provision is also made for confession of judgment by virtue of power executed out of court, but the attorney's power to file a *cognovit* must be found in a special and separate appointment in writing, outside of the evidence of debt, and is strictly limited by its terms. § 7682.

Parties are also allowed to agree upon a case stating only facts, and submit it to the circuit court for judgment on the law, without suit brought, if the controversy might be made the ground of an action; but it must be shown by affidavit that the controversy is real and in good faith. How. Stat. § 6469.

But it was held in *Goodrich v. Detroit*, 12 Mich. 279, that such a case must leave no inference of fact to be drawn by the court, and that no further facts or evidence can be permitted to be introduced. No other cases of voluntary jurisdiction have been provided for, and none of these include any litigation of issues of fact.

When we look at the judiciary laws, we shall find them as precise in their directions as the common-law practice, but simplified in details. They provide both where and how suits shall be begun, and of what the courts shall have cognizance. It is declared that the circuit courts shall have power, and it shall be their duty, to hear and determine all such matters "as may be lawfully brought into said courts." It is further declared that the rules regulating their practice "shall govern the practice and proceedings in the circuit courts, until altered by the supreme court, or by their authority." § 6467.

The venue may be changed on good cause shown, which is a matter of judicial discretion, and which is in no case allowed to be done by act of parties. § 6468; *Greeley v. Stilson*, 27 Mich. 154.

The only specified case in which it is done, except by the local judge, is where that judge is disqualified; and then it must be done by regular proceedings before another public officer, which must conform to the Statute to be valid. § 6495; *Shannon v. Smith*, 31 Mich. 452.

Section 7291 provides two ways for beginning suits for debt or damages, which are (1) by original writ, and (2) by filing and service of declaration. It has been settled by our decisions that the suit is not begun till the declaration is served. *Detroit Free Press Co. v. Bagg* (Mich.) 44 N. W. Rep. 149 (Jan. Term, 1890).

And, as already suggested, service cannot be made on any defendant out of the county until it has been served and proof of service filed in the county where the suit is pending. *Dentson v. Smith*, 33 Mich. 155; *Clark v. Lichtenberg*, 33 Mich. 307; *Turrill v. Walker*, 4 Mich. 177.

And it has been settled that service cannot be made within the original county on anyone who is there as a witness, or on any other legal errand, which exempts him from process while away from his residence. *Jacobson v. Hoerner*, 76 Mich. 284.

By section 7547 it is provided that all transitory actions shall be tried in the residence of one or the other of the parties.

It was held in *Haywood v. Johnson*, 41 Mich.

598, that this is jurisdictional, and requires suits to be commenced there. It is only when a defendant is not a resident of the State that he may be served where he can be found. This is a rule of necessity, and results from the doctrine that all persons temporarily in any county become subject to its jurisdiction, and, if they have no fixed residence, must be treated as commorant wherever they are found. Under our statutes it is impossible to hold that any circuit court has jurisdiction without either process or service of declaration. Those are the only methods recognized. Until a suit is pending, no attorney has official authority to appear for a client, and when a suit is actually pending no party can answer for any other party. No court can be compelled to assume the burden or authority of jurisdiction, unless in cases authorized by law. It is not in the

power of private persons, whether citizens or not, to impose duties on courts, except by following the legal rules. The public officers, judicial or otherwise, cannot have duties laid on them by private action. The return before us indicates the great public inconvenience which would follow the assumption of jurisdiction in this case. That would be no answer to the application before us, if the legal duty exists. But it indicates, perhaps, some of the reasons which have induced the law-makers to so apportion the jurisdiction of courts as to make the burdens fall where they ought to fall, and to prevent parties from choosing their own forum at their own pleasure. I do not think the suit is legally before the Wayne Circuit Court, and I think the mandamus should be denied.

VERMONT SUPREME COURT.

H. Henry POWERS *et al.*, Exrs. of Alden E. Judevine, Deceased, *Appts.*,
v.
Malvina M. JEDEVINE *et al.*

(.....Vt.....)

1. A remainder over in a will is void for repugnancy where the estate has been given generally or indefinitely with an absolute power of disposition.

2. A devise to testator's wife for her sole use, control and enjoyment during her life, to use and dispose of it as she may desire, and to give the residue by will to such persons as she may desire, but giving what is left to certain other parties in case she leaves no will, is a gift of the fee to the wife, and the remainder over is void.

(Ross, J., *dissents.*)

3. Where one article of a will provided for a certain fund to aid deserving col-

NOTE.—Estate in fee conveyed by will.

In wills, the rule that words of inheritance are necessary to convey a fee is entirely subordinate to the testator's intention. *Lambert v. Paine*, 7 U. S. 8 Cranoh, 97 (2 L. ed. 577); *Melick v. Pidcock*, 13 Cent. Rep. 300, 44 N. J. Eq. 525.

A devise of land to a wife, "to have and to hold for her benefit and support," is not a condition or limitation on her estate therein, but merely a statement of testator's reason for the gift; and the wife takes the fee, under the New York statute providing that words of inheritance are not necessary, unless there is an intent, expressed or to be necessarily implied, to grant a less estate. *Crain v. Wright*, 114 N. Y. 307.

Under the Kentucky statute providing that an estate shall be deemed a fee simple, although no words of inheritance are used, unless a different purpose is imposed or necessarily implied, a will directing the sale of certain realty for the interest of testator's wife, the proceeds to be invested in her name and for her use, prohibiting her from loaning them, but allowing her the interest as she may require, and the rents as she should desire, if the land was not sold, and making no provision as to remainder in the property,—gives her a fee simple. *Robbins v. Robbins* (Ky.) 9 S. W. Rep. 254.

When a testator devises land without legal words of limitation, but adds that the devisee "may sell or do therewith as he pleases," he is presumed to have intended to give a fee. *King v. Ackerman*, 67 U. S. 2 Black, 406 (17 L. ed. 292).

Because the testator used the phrase "to do and dispose of as he may think proper," as regards the farm, and, in devise of the homestead, has omitted it, such omission as to the latter is not equivalent to an express limitation of it to the life of the devisee. *Ibid.*

A devise providing that the devisees shall not sell or mortgage the land, but that the same shall go to 7 L. R. A.

their heirs after them, vests the fee in the devisees. *Hagemann v. Hagemann* (Ill.) 21 N. E. Rep. 814.

Conditions against alienation are strictly construed. *Warfield v. English*, 11 Ky. L. Rep. 263.

Not cut down by subsequent terms.

Where an estate is given in one part of the will in clear and decisive terms, such estate cannot be taken away or cut down by subsequent words that are not as clear and decisive as the words of the clause giving the estate. *Re Surrogate of Cayuga Co.* 46 Hun, 657; *Hockstedler v. Hockstedler*, 7 West. Rep. 75, 108 Ind. 500; *Goudie v. Johnston*, 7 West. Rep. 589, 109 Ind. 427; *Bailey v. Sanger*, 6 West. Rep. 556, 108 Ind. 264; *Allen v. Craft*, 7 West. Rep. 516, 109 Ind. 476; *Byrnes v. Stillwell*, 5 Cent. Rep. 406, 108 N. Y. 453.

Such words, being repugnant to the gift originally made, are treated as of no effect. Authorities cited. *Sherburne v. Sischo*, 3 New Eng. Rep. 432, 143 Mass. 439.

Superadded words which merely describe or specify the incidents of the estate created by such a word of limitation as the word "heirs" do not cut down the interest of devisee. Authorities cited. *Allen v. Craft*, 7 West. Rep. 516, 109 Ind. 474.

A limitation to a designated class of heirs does not cut down the estate of the first taker to less than a fee. *Ibid.*

Where quantity of estate of taker is expressly defined to be for life, and words adapted to creation of a power of disposal, without restriction as to mode of execution, are added, the superadded words will be construed to be the mere gift of a power of disposition. *Lienau v. Summerfield*, 3 Cent. Rep. 506, 41 N. J. Eq. 381.

The common-law rule that a provision in the will disposing of real property to A in such terms as to convey a fee and with power to dispose of it in his lifetime, was inconsistent with a further provision

lege students, and the next clause provided that the rest of the estate should be held as a fund to aid students "in the same manner and with the same restrictions as prescribed" in the preceding article, "and at any time after five years" the executors might, in their discretion, appropriate "whatever may remain" to certain towns, the interest to be used for school purposes in the education of all classes, the fund referred to in the latter article is not to be kept for accumulation during the five years but used for the purposes specified.

4. **Taxable costs** of all parties in a suit for the construction of a will may be ordered to be paid out of the funds of the estate before distribution.

(November 14, 1889.)

APPEAL by complainants from a decree in chancery of the Caledonia County Court dismissing a bill to obtain construction of certain portions of the will of Alden E. Jeudevine, deceased. *Reversed.*

The bill was filed by Jeudevine's executors, and his widow, Malvina M. Jeudevine, the University of Vermont and State Agricultural College and the Town of Concord were made defendants.

The portions of the will necessary to an understanding of the case are as follows:

"*Article Fifth.* I grant and devise to my beloved wife, Malvina M. Jeudevine, one half of the residue of my estate, both real and personal, and it is my will that the proceeds of any policy of insurance on my life which my wife may receive shall be computed as part of the share given her by this will and subject to the conditions specified in article number 8 of this will,

that in case A did not dispose of it during his lifetime, then, and in that case, the estate should go to B, and that the limitation over was for that reason void, was altered by the adoption of the Revised Statutes. The possibility of enjoying the estate, on the failure of the precedent owner to dispose of it, is "an expectant estate" within the meaning of that term, as used in § 83, 1 Rev. Stat. 725, 3 Rev. Stat. 7th ed. 2178. *Greyston v. Clark*, 41 Hun, 125.

A fee will not be out down by ambiguous words. *Sherburne v. Sischo*, *supra*.

By the following clause, "The interest of one fourth aforesaid of my daughter H., I will shall be so secured to her that she shall enjoy it during her natural life, and after her decease, then to her right heirs forever; and in like manner do I wish the one-fourth interest secured to my grandchildren J. and E.;" and clothing his executors with power to secure his daughter and grandchildren in their respective interests, with power to manage his estate for the best interest of all concerned, until a division is made, and that they may sell and relinvest what they deem proper,—It is not clear that the intention of the testator was to limit or out down the fee, which he had already given by a preceding clause, to a mere life estate; and in the absence of such clear intention, the clause should not be given that effect. *Wicker v. Ray*, 5 West. Rep. 495, 118 Ill. 472.

Instances; late decisions.

A devise to a daughter of certain land, with the further clause that "she will not have power to sell, but may leave the same to her children," gives her an estate in fee, the attempted restraint upon alienation in the first part of the clause quoted being void, and the remaining clause being merely an expression of permission to leave the land to her children, but without a prohibition of any other dis-

relating to my home premises. The foregoing grant and devise to my wife is for her sole use, control and enjoyment during her life; trusting and expecting that she will use and dispose of the whole thereof as she may desire, and that she will give the residue, if any remains at her death, by her will to such persons and for such purposes as she may desire. But inasmuch as I desire that such residue at her decease shall in no event pass to her legal heirs if undisposed of by her, I give, grant and devise one half of the same to the University of Vermont and State Agricultural College in the same manner as named in article number six of this will, and the other half to be held and expended by said executors for the purposes named in article number seven in this will, meaning what is unappropriated by my wife before her decease.

"*Article Sixth.* To perpetuate the memory of my late beloved son, Cornelius Alden Jeudevine, who died without receiving that liberal education which I intended he should have, I desire to create a fund to be known as the Cornelius A. Jeudevine memorial fund, for the purpose of aiding poor and deserving young men in Vermont in obtaining the advantages of a liberal education. To this end I give, grant and devise one half of the remaining half of the residue of my estate, both real and personal, meaning one half of the residue left after discharging the gifts specified in articles 1, 2, 3, 4 and 5, and subject to the conditions respecting my home place, named in article 8 of this will, to the University of Vermont and State Agricultural College, located in Burlington, Vermont, upon the trusts and in the manner

position thereof. *McIntyre v. McIntyre*, 123 Pa. 329.

If one seized in fee grants a life estate with remainder to his heirs, the limitation to his heirs is simply void, and he will have a perfect legal reversion. *Miller v. Fleming* (D. C.) 17 Wash. L. Rep. 102.

A direction to a trustee to convey to grantor's heirs to whom he has given a remainder will not change the rule which makes such a remainder operate merely as a reversion to himself. *Ibid.*

Adding the words, "as tenants in common, and not as joint tenants," to a clause in which a grantor directs that the remainder in fee shall be given to his heirs, does not prevent the operation of the rule which makes such a gift operate as a reversion to himself. *Ibid.*

Where testator by his will gave and devised all his estate, real and personal, to his wife, "the same to be held and enjoyed by her fully and absolutely and without restriction of any kind, with full power to alienate, convert or dispose of the same in such manner as she may deem best;" and provided subsequently, in the same instrument, that upon the death of his wife all his estate, "or so much of it as remains the property of my wife on her death," should go to his children,—the devise to the wife is of a fee simple, and the devise over to the children is void. Also, without regard to the wife's estate, the will, expressly and by implication, gives her a power to sell testator's lands. *McClellan v. Larchar*, 45 N. J. Eq. 17.

A devise to one person, and, in case of his death, to another, gives the first named an absolute estate if he survives the testator. *Johnes v. Beers*, 57 Conn. 285.

A gift to a daughter and her issue of a sum of money, the interest to be added to the principal while her present husband lives, but to be paid to her annually in case she becomes a widow, and if

following: I direct my executors, as soon as it can be done to the best advantage, to convert said real and personal estate into money or safe moneyed securities and pay over one half of my estate, after articles numbers 1, 2, 3, 4 and 5 have been complied with, to the University of Vermont and State Agricultural College, and that the trustees of said institution shall apply the income thereof, and such part of the principal as shall become necessary, to be expended from time to time in paying the expenses, in whole or in part, of poor and deserving young men pursuing their studies in the academical department of said institution, or in loaning to such young men such sums, and in such manner and on such security as said trustees may determine. The bequest or legacy I here make not to be expended in the education of young men who themselves or parents are pecuniarily able to pay for their education, unless on a loan well secured to be refunded to said trustees, and held as a fund as far as practicable for the education of poor young men, as this bequest is intended; herein giving preference to applicants residing in the Towns of Hardwick in Caledonia County and Concord in Essex County, Vermont, and after these to applicants residing in any town in Vermont. No discrimination to be made against applicants on the ground of sect, religion or society. Though intemperate young men are to be excluded from the benefit of this my bequest. All loans when paid shall be held by the trustees for the same purpose. It is my desire that said trustees establish proper regulations and conditions for the expenditure of the fund hereby

created, and for the investment of so much thereof as may at any time be unused or unexpended, so that the fund may be preserved and increased so far as practicable, and that said trustees, each and every year as long as said fund exists, shall give public notice in at least three weekly newspapers printed in the State of Vermont, one of which shall be in Caledonia County and one in Essex County, at least three weeks each year, stating the existence of the fund and briefly stating to what class of young men the fund is made available by the terms of this will. Same to be paid to said university and college in sums not to exceed \$1,000 each for the first five years. The trustees of said institution are to report semi-annually to each of my executors the amount of the funds expended and to whom, and should the said trustees fail at any time to carry out the provisions of this will on the part of said university and college, in all particulars, my said executors are directed to withdraw the payment of further funds to said Vermont University and Agricultural College, and said executors are directed to (invest?) the remainder of said funds in some other institution of learning in Vermont that my executors in their discretion shall select, under the same provisions and restrictions the grant or bequest is made by this will to the Vermont University and State Agricultural College.

"Article Seventh. It is my will that my executors shall hold the other fourth-part of my estate, both real and personal, not heretofore appropriated, as a fund to be known as the Cornelius A. Jeudevine memorial fund, for the

she leaves issue or descendants, the principal sum, with accumulated interest, to be paid to them,—gives an absolute title to the daughter. *Brubaker's App. (Pa.) 15 Atl. Rep. 708.*

A devise, in 1847, of certain land to a daughter and her children, free from the disposition of any future husband, the daughter then having no children, gave her an absolute fee under the statute, enlarging an estate tail to a fee simple, and the children born to her after testator's death take no estate by way of remainder or otherwise. *Lofton v. Murchison, 80 Ga. 891.*

A will giving to the three daughters of testatrix certain land to be jointly used while they remained unmarried, any one of them marrying to forfeit the use, the survivor having the right to dispose of the property by will or otherwise, the share of any one of them dying unmarried to descend to the survivors, the daughters to sell the property and divide the proceeds, if they all marry, and giving them all the residue of her property, if any,—gives the three daughters an estate in fee simple in the property, so that two of them, on the death of the other unmarried, may convey their entire interest by deed. *Myers v. Bentz, 127 Pa. 222.*

The fee simple given by a devise to a son, his heirs and assigns forever, is not cut down by a subsequent clause, after a devise to a daughter, providing that the lands before devised to the son, if he should die without a descendant, should be disposed of in various ways, dependent on certain contingencies, leaving a possible intestacy as to such lands, where the will shows a clear determination to make a final disposition of the whole estate. In such case the rule applies that an estate given in clear and decisive terms in one clause cannot be taken away or cut down by subsequent words that are not equally clear and decisive. *O'Boyle v. Thomas, 116 Ind. 242.*
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Testator bequeathed the residue of his estate to his nephews and nieces, share and share alike, except one nephew; and in a subsequent clause provided: "At the decease of either said nephews or nieces I give and bequeath such one's half portion and interest on the trust fund to his or her legal heirs; and at the decease of all my nephews and nieces I give and bequeath the principal of said trust fund to their legal heirs, including W's heirs," the nephew above excluded. It was held the subsequent clause did not cut down the estates given by the prior clause, and the word "all" should be construed "each" or "every one," and the word "on" should be construed "in." *Sherburne v. Sisocho, 3 New Eng. Rep. 431, 143 Mass. 439.*

So an estate given in clear words cannot be cut down by subsequent words, unless they are equally clear and decisive. An estate created by clear words cannot be enlarged by words less clear and decisive. *Goudie v. Johnston, 7 West. Rep. 559, 109 Ind. 427.*

Thus a devise of real estate to a wife, "to remain hers so long as she shall remain unmarried after my decease," confers life estate only; a subsequent provision authorizing her to sell so much as she may find necessary does not enlarge the estate to a fee. *Nash v. Simpson, 1 New Eng. Rep. 699, 78 Ma. 142.*

Precatory words not to affect estate granted.

After an unqualified devise by a testator of his property, no precatory words addressed to his devisee can defeat the estate previously granted. *Hopkins v. Glunt, 2 Cent. Rep. 63, 111 Pa. 287.*

A will giving testator's wife all his property, both real and personal, with the further provision that, in case of her death "before the settlement of" his estate, his property should be equally divided between two nephews; and adding: "I have full con-

education of poor deserving young men in the same manner and with the same restrictions as prescribed in article 6th, that the Vermont University and State Agricultural College are to perform as named in said article 6th, and at any time after five years from my decease, should my executors in their discretion judge best, whatever may remain of the one-fourth part of my estate they have the right to appropriate one half of said fourth part remaining unexpended to my native Town of Concord, in Essex County, Vermont, and the other half to the Town of Hardwick in Caledonia County, both bequests to be known as the Cornelius A. Jeudevine memorial fund, the interest of which to be used in each of said towns for school purposes in the education of all classes in the several school districts in each town without discrimination, though in the latter town some parents are not deserving any assistance from me to educate their children or aiding them in paying their school-district taxes.

"Article Eighth. It is my will that my home place in said Hardwick where I now reside, or any other place where I may reside at my decease, including the new house and out buildings and so much of the land connected as my wife may desire to occupy, to be kept for the use of my wife and occupancy during her lifetime, unless my wife desires it sold, and while she thus occupies it it is to be kept in good repair by said executors, taxes and insurance also to be paid out of my estate before a division of said estate and to be no charge to my said wife for its occupancy by her, and when sold the avails of which to be divided and to go as other parts of my estate as willed in articles 6, 6 and 7, half to my wife, one fourth to the Vermont University and State Agricultural College, and the other fourth to be appropriated and expended by my executors as named in article number seven. . . ."

Codicil. "I, Alden E. Jeudevine, make the following additions and explanations of my wishes in addition to my last will and testament, dated Nov. 16, 1883, to which this is attached. It is my wish and will that my real estate in particular shall not be sacrificed by an immediate sale, and that my timbered lands in Hardwick shall be held by my said executors until my other real estate in Hardwick is disposed of, and to carry out my wishes and ideas would suggest that my executors shall advertise my whole real estate in Hardwick and

Woodbury for sale, in view that some capitalist would purchase the whole for the sake of operating the timbered lands, and would further suggest an additional executor to be appointed, who resides in Hardwick, to particularly have charge of my real estate and, with the advice of the other executors named, to dispose of all my real estate, and would suggest as such additional executor either Loren C. Foss or L. H. Warren (as my other executors may think advisable) for one of them with the other executors named in my will to see to said real estate and personal property and also to see that each provision of my will is carried out, and that the probate court, at the decease of the executors named, continue to appoint an executor and sufficient funds retained to pay for his services and expenses, to see that the Burlington University and Agricultural College and the Towns, viz., Hardwick and Concord, shall use the funds as specified here and in my said will and bonds duly executed and filed in the Probate Court in Caledonia County for the faithful performance of each.

"Each of said Towns to receive what is paid each Town as a memorial fund in the name of my deceased son, Cornelius Alden Jeudevine, the interest of which, at 6 per cent annually, to be expended for school purposes as named in said will. The sum paid to each Town may be used to pay the indebtedness of each Town, and should either Town, or both, neglect to carry out the provisions set forth by me, the funds delivered and paid to such Town by my executors, to be collected from said Town and placed in some other town or towns that will receive it and carry out my desires, wishes and will as set forth by me.

"I would suggest as appraisers and commissioners to my estate, P. K. Gled of Morrisville, Abel Gile of Walden and Isaac P. Titus of Hardwick, if living at my decease.

"And to further explain my wishes say I prefer that what is necessary to pay my executors for their services to see that the provisions of my wishes and will are carried out rather than have that amount paid to the University and Towns and they not carry out the provisions of my will.

"If anything in this conflicts with my will dated November 16, 1883, it is my will that this explanation of my wishes and will shall take precedence to that will wherein it conflicts. . . ."

fidence in my beloved wife, Mary, that she will do what is best and proper with my effects, and that she would do with my property the same as I would wish to have done, that she will take care of the proceeds. She is by this gift free from all restraint to do as may seem to her best and proper;" and also appointing her executrix,—gives to her, after her final settlement and discharge as executrix, all the property absolutely, without any trust in favor of the nephews. *Giles v. Anslow*, 128 Ill. 187.

The rule is well settled that words in a will merely expressive of desire, recommendation and confidence, are not sufficient to convert a devise or bequest into a trust. *Re Pennoek's Estate*, 20 Pa. 283; *Jaureche v. Proctor*, 48 Pa. 466; *Second Ref. Presb. Church v. Disbrow*, 62 Pa. 212; *Bowly v. Thunder*, 105 Pa. 173.

Expressions of a desire or a wish of the testator
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as to a specific disposition of his property, standing by themselves alone, may constitute a valid devise or bequest thereof, but not when such expressions are used after an absolute disposition of the property has been made. After an unqualified devise by the testator of his property, no precatory words to his devisee can defeat the estate previously granted. *Burt v. Herron*, 66 Pa. 400; *Bowly v. Thunder*, *supra*.

The precatory form of a testamentary writing is immaterial, where it has the essential element of being a disposition of property to take effect after death, although it is in form merely a request, instead of a command, addressed to no specified person by name, but plainly to those who should have possession or control of the property. *Knox's App.* (Pa.) 6 L. R. A. 353.

Mr. P. K. Glead for appellants.

Messrs. Wales & Wales for the defendant College, appellee.

Messrs. Wilson & Powers, for Malvina M. Jeudevine, appellee:

The estate conveyed by article 5 of the will is a fee; and if a fee is thus conveyed, the gift over is void for repugnancy. Nothing but a clear intention to cut down the estate thereby conveyed will be allowed to do so.

1 Jarman, Wills, 480, and cases cited; *Campbell v. Beaumont*, 91 N. Y. 464; *Damrell v. Harth*, 137 Mass. 218; *Parker v. Iasigi*, 188 Mass. 416.

The absolute power of disposal, at all times, and for all purposes, as distinguished from a power to use in a particular way, or dispose of to a particular person, constitutes a fee.

1 Roper, Leg. 642, and cases cited; *Hughes v. Ellis*, 20 Beav. 193; *Perry v. Merritt*, L. R. 18 Eq. 152; *McDonald v. Walgrove*, 1 Sandf. Ch. 274; *Jackson v. Coleman*, 2 Johns. 392, 3 Co-ops. C. L. 425; *Jackson v. Robins*, 16 Johns. 537, 6 Co-ops. C. L. 284; *Van Horne v. Campbell*, 100 N. Y. 287; *Kendall v. Kendall*, 36 N. J. Eq. 91; *McClellan v. Larchar*, 45 N. J. Eq. 17; *Id. v. Id.*, 5 Mass. 500; *Davis v. Mailey*, 184 Mass. 588; *State v. Smith*, 52 Conn. 557; *Stowell v. Hastings*, 59 Vt. 494.

The remainder over is void for repugnancy. *Chaplin v. Doty*, 60 Vt. 712.

The intention of the testator, gathered from the will itself when "taken by its four corners," must govern its construction, unless well-established rules of law would thereby be violated.

Fintlay v. King, 28 U. S. 8 Pet. 377 (7 L. ed. 712).

The language used shows that the testator did not use the words "during her life" in a technical sense; their technical meaning will therefore be over-ridden by such intention.

1 Redf. Wills, 435, 496; 4 Kent, Com. 638, note 4; *Doe v. Stenlake*, 12 East, 517; *Doe v. Thomas*, 3 Ad. & El. 123; *Robertson v. Johnston*, 24 Ga. 102; *Louvy v. Muldrow*, 8 Rich. Eq. 241; *Lasher v. Lasher*, 18 Barb. 106; *Post v. Hoer*, 80 Barb. 312.

Mr. Harry Blodgett, for the Town of Concord, appellee:

The court will carry into effect the declared intent of the testator if it is clearly expressed and is consistent with the general rules of law.

"The intention must be gathered from the words of the testator, and the words construed according to the letter and legal effect of them."

"The intent is to be collected from the will itself, giving effect to every word and part."

See notes, with cases cited, in *Pray v. Bell*, 26 U. S. 1 Pet. 670 (7 L. ed. 309).

The express bequest to Mrs. Jeudevine is for "her sole use, control and enjoyment during her life," which are apt words and limit the grant to a life estate only. The gift of the "remainder" shows that the intention of the testator was that if Mrs. Jeudevine left any part of the one-half interest undisposed of at her decease, such "remainder," instead of descending to her heirs, would become a part of the "Cornelius A. Jeudevine Memorial Fund" and inure to the benefit of the "University of Vermont" and "Town of Concord."

The fact that Mrs. Jeudevine is given the absolute power of disposal does not render the 7 L. R. A.

gift over "inconsistent with this power," and therefore void.

See *Richardson v. Paige*, 54 Vt. 378; *Smith v. Bell*, 81 U. S. 6 Pet. 63 (8 L. ed. 322); *Brant v. Virginia Coal & Iron Co.* 98 U. S. 333 (23 L. ed. 928); *Bradley v. Westcott*, 13 Ves. Jr. 445; *Boyd v. Strahan*, 36 Ill. 355; *Burleigh v. Clough*, 52 N. H. 287; *Dunning v. Van Dusen*, 47 Ind. 428; *Chaplin v. Doty*, 60 Vt. 715; *Shepard v. Shepard*, Id. 116; *Stowell v. Hastings*, 59 Vt. 497; *McCloskey v. Gleason*, 56 Vt. 264; *Hibbard v. Hurlburt*, 10 Vt. 178; *Brightman v. Brightman*, 100 Mass. 238; *Williamson v. Daniel*, 25 U. S. 12 Wheat. 588 (6 L. ed. 731); *Randall v. Josselyn*, 59 Vt. 557; 2 Jarman, Wills, 46; *Shaw v. Huzzey*, 41 Me. 495; *Ramsdell v. Ramsdell*, 21 Me. 288.

Veasey, J., delivered the opinion of the court:

Treating the 5th article of the will, for convenience or reference, as divided into three parts,—the first ending with the first punctuation period, the second with the next period, and the third with the last,—it is quite plain, and not disputed, that the first part standing alone would carry a fee. In the second part, there is clearly granted an unlimited, absolute power of disposal. That is not disputed; but it is claimed in behalf of the College and Town that this part indicates an intention to limit the title in Mrs. Jeudevine to a life estate, and that this import is strengthened by the third part. The contention on the part of Mrs. Jeudevine is that, as the first part makes the grant a fee, the third part must be rejected as repugnant. It is claimed for the College and Town that the intention of the testator, fairly deducible from the language of the article as a whole, was to give a life estate only to the wife, with power of disposal at her pleasure. Taking the several parts up in their order, the first one concededly imports a devise of an estate in fee, without a word indicating a different intention. The second part begins by saying the foregoing grant and devise to his wife is for her sole use, control and enjoyment during her life. This points to a life estate; but it is followed by the expression, "trusting and expecting that she will use and dispose of the whole thereof as she may desire, and that she will give the residue, if any remains at her death, by her will, to such persons, and for such purposes, as she may desire." Therefore the second part, as a whole, seems to us to negate an intention to limit the grant to a life estate. The portion quoted makes it clear that the intention was to give an absolute power of disposal, not of a life estate, but "of the whole thereof," either by deed or will.

To deduce an intention of limitation upon a previous grant in terms constituting a fee, from a clause providing for an absolute and unrestricted power of disposition, would indeed be a violent and unreasonable inference. The clause "during her life" is to be interpreted in the light of the following clauses, which unmistakably point to unrestricted power of disposition of the fee.

Therefore, until we come to the third part, we find no indication of an intention to limit the grant to a life estate. But it is upon this part that counsel mainly rely to show an inten-

tion to thus limit the grant. It is plain that the central idea in the mind of the testator in drawing the third part of this article was not to make a provision for the Town of Concord and the College, but to guard against any of the property granted to his wife from passing to her heirs unless she should give it to them. They had no living children. He provided for the Town and College elsewhere in the will. Herein is a distinction between this will and the wills in *Smith v. Bell*, 81 U. S. 6 Pet. 68 [8 L. ed. 322], and other cases cited. The language of the granting clause in *Smith v. Bell*, as in the case at bar, was adequate to carry a fee, but that was followed by a provision for a remainder, which was interpreted by the court to manifest the intention of the testator to make a future provision for his son. Therefore the court, in order to carry out such intention, and give effect to all parts of the will, regarded the remainder clause as indicating an intention in the granting clause to limit the grant to a life estate.

In the opinion of Redfield, J., in *Richardson v. Paige*, 54 Vt. 373, the learned judge, after quoting this rule, "The exclusion of the devise over depends upon whether the first taker has the absolute right to dispose of the property," says that Chief Justice Marshall disregarded it in order to construe the will according to the intention of the testator.

We think a careful reading of the opinion of the chief justice does not warrant such conclusion, but that he put the decision upon the ground above stated. That has been regarded as an extreme case, and has provoked some adverse comment; but it has been cited with approval by this court, and so far as it involves legal rules of construction it seems to be within the general line of authority, especially as adopted in this State, and lately expressed in *Chaplin v. Doty*, 60 Vt. 712, viz.: "It is an elementary rule of construction that an absolute gift in a will will not be defeated by a subsequent repugnant clause. If the subsequent clause is plainly a qualification or condition, which evidently was intended by the testator to be read as part of the preceding clause, the rule is different. It makes little difference in the construction whether the granting clause itself is in form conditional, or the condition is annexed to a clause in form absolute."

And again, in *Stovell v. Hastings*, 59 Vt. 494, viz.: "In determining what estate is given the first taker, the whole will should be considered, and all the clauses construed together. Even in those cases where an absolute estate is in terms given, if subsequent passages unequivocally show that the testator meant the legatee to take a life interest only, the prior gift is restricted accordingly. 1 Jarman, Wills, chap. 15. Such are the cases in this State of *Richardson v. Paige*, 54 Vt. 373; *McCloskey v. Gleason*, 56 Vt. 264."

If the remainder clause, the third part of the 5th article, not being for the purpose of a gift to the Town and College, but, as before stated, to keep an assumed remainder undisposed of by deed or will by Mrs. Jeudevine from going to her heirs, she having no children, shows that in the opinion of the testator the previous words had given only an estate for life, then, upon the authority of *Smith v. Bell*, *supra*, we may hold that the grant was only of a life estate.

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But, this remainder clause being only for the purpose just stated, we do not think it indicates an understanding of the testator that he had not already made a grant in fee to his wife. In this respect this case differs from that of *Smith v. Bell*, *supra*, and others of that class; and it differs, also, from *Richardson v. Paige*, *supra*, in this: that there the bequest to Paige was in express terms made subject to the provision for the contingent benefit of his wife. Neither does it fall into the category of those cases, several of which are cited in the briefs, where the testator gives to the first taker an estate for life only, by certain and express words, and annexes to it a power of disposal, in which case the devisee for life will not take an estate in fee, notwithstanding the distinct and naked gift of a power of disposition of the reversion; that is, an absolute and unqualified power of disposal annexed to an express life estate does not enlarge the *quantum* of the estate. See *Jackson v. Robins*, 16 Johns. 583, and cases there cited.

We think it was the intention of the testator to make a grant and devise to his wife of an estate in fee, and that the case falls directly within the decision in *Stovell v. Hastings*, *supra*, where the will, after disposing of a part of the estate, gave to the testator's wife the residue, "for her benefit and support, to use and dispose of as she may think proper," and then provided that, if any of the estate should be left in her possession at her death, it should be equally divided between the brothers and sisters of the testator; and it was held that the wife took an absolute estate, and that the remainder over was void for repugnancy. The proposition of law upon which the court rested the decision, as enunciated by Taft, J., in the opinion, was this: "If an estate be given to a person generally or indefinitely, with an absolute power of disposition, it carries a fee, and a remainder over is void for repugnancy;" and he then cited numerous authorities in support.

Under the 7th article, we consider that the executors are to hold and appropriate the portion of the estate therein specified for five years, for the purposes, and under the same restrictions, and in the same manner, in all respects, as prescribed and provided in the 6th article of the will, as to the portion of the estate therein granted and devised to the University of Vermont and State Agricultural College. We think the clause, "whatever may remain," etc., plainly indicates that this fund is not to be kept for accumulation during the five years, but is to be used as above stated.

All parties agree that the provision of the first codicil as to sale of timbered lands does not operate as a restraint of the sale thereof until all the other real estate in Hardwick is disposed of, but was intended to be only advisory, and that the executors may, in their discretion, effect a sale notwithstanding such other real estate is undisposed of. A majority of the court are inclined to adopt this view, all parties agreeing thereto, and being satisfied that it would be carrying out the real intention of the testator; that is, an administration of the estate in a way that would promote its best interests, and that of all parties interested therein, and that the beneficial purposes of the testator would thereby be better attained.

We also concur in the suggestion of the orators in the bill that the taxable costs of all parties, with reasonable counsel fees, should be paid out of the funds of the estate before distribution, the same to be fixed and allowed by the court of chancery.

The pro forma decree dismissing the bill is reversed, and the cause remanded, to be disposed of pursuant to the mandate filed.

ROSS, J., dissenting:

I do not concur in the construction given to the devise of the testator to his wife. All rules of construction are devised, originating in the peculiar language and circumstance of some case or cases, to aid in ascertaining the intention of the testator. Their proper use is to ascertain, and not to defeat, the intention of the testator. How far they may be helpful in determining such intention in a given case depends upon whether the language used, and circumstances to which it is applicable in the given case, are substantially identical with the language used, and circumstances of the case or cases in which the rule or rules originated. It rarely happens that the language and circumstances of two cases substantially coincide. Hence such rules should never be given undue force, or followed without reason, and should never be allowed to defeat the express intention of the testator. When such intention is clearly and unmistakably expressed on a given point, it, of itself, furnishes a safe guide to the construction which should be given to his language used in other portions of the same devise, which, if read by itself, might be of doubtful import. I think it should be the invariable endeavor of the court to harmonize all parts of a will relating to the same subject matter, so as to give meaning and effect, and consistent ones if possible, to every clause relating to the same devise. It should never create a repugnancy, if it can reasonably be avoided.

I do not think that there is necessarily any repugnancy between the different clauses of article five of the will. This article reads: "I grant and devise to my beloved wife, Malvina M. Jeudevine, one half of the residue of my estate, both real and personal; and it is my will that the proceeds of any policy of insurance on my life which my wife may receive shall be computed as a part of the share given her by this will, and subject to the conditions specified in article numbered eight in this will, relating to my home premises. The foregoing grant and devise to my wife is for her sole use, control and enjoyment during her life, trusting and expecting that she will use and dispose of the whole thereof as she may desire, and that she will give the residue, if any remains at her death, by her will to such persons, and for such purposes as she may desire. But inasmuch as I desire that such residue at her decease shall in no event pass to her legal heirs, if undisposed of by her, I give, grant and devise one half of the same to the University of Vermont and State Agricultural College, in the same manner as named in article number six of this will, and the other half to be held and expended by said executors for the purpose named in article number seven in this will, meaning what is unappropriated by my wife before her decease."

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In the first part of the first sentence of this article the testator used language, if that were all, appropriate to convey an absolute estate to the wife. He then made the proceeds of his life insurance a part of the half of the residue, and closes the sentence with, "and subject to the conditions specified in article numbered eight in this will, relating to my home premises." Turning to article 8, we find that the wife is given only a life estate in the home premises. Hence by the express terms of the will, at least in that part of the half of the residue received from his life insurance, the wife takes only a life estate. But I think it is no departure from the ordinary use of language, nor from the usual rules of construction, to make the last clause of the sentence apply to the whole devise rather than to limit its application to the proceeds received from his life insurance. By this construction only a life estate is given by the first sentence of this article.

The second sentence, in terms, is made to apply to the devise made by the first sentence, and must be read as a part of it. It reads: "The foregoing grant and devise to my wife is for her sole use, control and enjoyment during her natural life." Thus far this sentence discloses only a life estate, and is consistent with the first sentence as I have construed it. It then proceeds: "Trusting and expecting that she will use and dispose of the whole thereof as she may desire, and that she will give the residue, if any remains at her death, by her will to such persons, and for such purposes, as she may desire." By this clause the testator clearly confers upon the wife the power to dispose of what she receives, a life use under this devise, by gift *inter vivos* or by will. What need had he to make this explicit provision if he had given to her the property covered by this devise in fee absolute? The two parts of this sentence, taken together, relate, in terms, to the property devised by the first sentence, and, if need be, limit the estate granted to a life estate, coupled with the power of disposal by gift *inter vivos* or by will. On this construction no inconsistency nor repugnancy arises, thus far, in the terms creating the devise.

Then comes the third and last sentence of the article, which only emphasizes the construction already given. It is: "But inasmuch as I desire that such residue shall in no event pass to her legal heirs, if undisposed of by her, I give" etc., making a devise over of whatever she may leave undisposed of under the power conferred. Here is a clearly expressed intention that his wife shall not take absolute title to the property granted by this devise, inasmuch as it must not descend to her heirs. My brethren wholly disregard the clearly expressed intention of the testator by giving such a construction to the preceding sentences that the wife takes an absolute title to the property covered by this devise. Thus they create a war between the different provisions of the devise. It seems to me an endeavor to create by construction, rather than to avoid a repugnancy. I do not concur in that portion of the opinion of my associates.

IOWA SUPREME COURT.

T. S. STEELE *et al.*

v.

SIOUX VALLEY STATE BANK, *Appt.*

(....Iowa....)

The grantee in a quitclaim deed takes it with notice of prior equities, and is not protected against an unrecorded bond for a deed for value by Code, § 1941, which provides that "no instrument affecting real estate is of any validity against subsequent purchasers . . . without notice."

(February 5, 1890.)

A PPEAL by defendant, the Sioux Valley State Bank, from a judgment of the District Court for Woodbury County in favor of plaintiffs in an action to foreclose a bond for a deed to certain premises. *Affirmed.*

Statement by **Granger, J.:**

The issues involve a question of the priority of the liens of the respective parties, the necessary facts as to the liens of each being as follows: One B. F. Lauber, being the owner of 240 acres of land, was indebted to the plaintiffs in the sum of \$4,700, and, for the purpose of securing the debt, Lauber made to the plaintiffs a bond for a deed of the premises in question on the 8th day of June, 1887. This bond was not recorded. Lauber, being also indebted to the defendant in the sum of \$5,000, made to it a quitclaim deed of the same premises, June 14, 1887, to secure the debt. The defendant, when it received the deed, had no actual knowledge of the bond held by the plaintiffs. The bond of Lauber to the plaintiffs was placed on record June 25, 1887, prior to which time Lauber had absconded, and was insolvent.

These facts are sufficient to present the main question in the case.

The district court gave judgment for the plaintiffs, from which the defendant appeals.

Messrs. Hubbard, Spalding & Taylor, for appellant:

The case here presented is one exactly parallel to the case of *Pettingill v. Devin*, 35 Iowa, 853. That case is the law of this State. It has never been overruled, and upon this point, has been criticised but once, and then to reaffirm and justify it.

The law of the State as to the effect of quitclaim deeds is founded upon—

Watson v. Phelps, 40 Iowa, 482; *Smith v. Dunton*, 42 Iowa, 50; *Besore v. Dosh*, 43 Iowa, 212. See *Springer v. Bartle*, 46 Iowa, 688.

The quitclaim deed and warranty deed differ only in this: in the quitclaim the grantor is silent as to his title, and in the warranty he assures the purchaser that he has title. Each is equally efficient in conveying all the grantor can convey. The quitclaim is not a negation of title; it is mere silence. Under such circumstances what further burden ought to be imposed upon the purchaser than inquiry; and such seems to be the doctrine of many cases. This doctrine reconciles many of their apparent

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inconsistencies and seems to be the ground of the decisions as to purchasers with warranty from holders of quitclaims.

Winkler v. Miller, 54 Iowa, 476; *Hoyt v. Schuyler*, 19 Neb. 652; *Johnson v. Williams*, 37 Kan. 179; *Dodge v. Briggs*, 27 Fed. Rep. 167; *Mansfield v. Dyer*, 131 Mass. 200; *Knapp v. Bailey*, 4 New Eng. Rep. 147, 79 Me. 195.

Messrs. Ernest C. Herrick and Marsh & Henderson, for appellees:

One holding title under a quitclaim deed is not to be regarded as a bona fide purchaser, without notice of equities held by others.

May v. LeClair, 78 U. S. 11 Wall. 217, 230 (20 L. ed. 50, 53); *Oliver v. Piatt*, 44 U. S. 3 How. 333 (11 L. ed. 622); *Bragg v. Paulk*, 42 Me. 592; *Smith v. Mobile Branch Bank*, 21 Ala. 125; *Boone v. Chiles*, 35 U. S. 10 Pet. 177 (9 L. ed. 388); *Vattier v. Hinde*, 32 U. S. 7 Pet. 252 (8 L. ed. 675); *Watson v. Phelps*, 40 Iowa, 483; *Smith v. Dunton*, 42 Iowa, 50; *Besore v. Dosh*, 43 Iowa, 212; *Springer v. Bartle*, 46 Iowa, 680; *Winkler v. Miller*, 54 Iowa, 477; *Wightman v. Spofford*, 56 Iowa, 147; *Tremaine v. Weatherby*, 58 Iowa, 620; *Ballou v. Lucas*, 59 Iowa, 24; *Kaiser v. Waggoner*, Id. 41; *Laraway v. Larue*, 63 Iowa, 412; *Fogg v. Holcomb*, 64 Iowa, 627; *Butler v. Barkley*, 67 Iowa, 493; *Bradley v. Cole*, Id. 653; *Postel v. Palmer*, 71 Iowa, 159; *Uiley v. Fee*, 33 Kan. 683; *Alexander v. Rodriguez*, 79 U. S. 12 Wall. 323 (20 L. ed. 406); *Dickerson v. Colgrove*, 100 U. S. 584 (25 L. ed. 620); *Runyon v. Smith*, 18 Fed. Rep. 579; *Woodward v. Jewell*, 25 Fed. Rep. 691; *Dodge v. Briggs*, 27 Fed. Rep. 167; *United States v. Sliney*, 21 Fed. Rep. 895; *Hastings v. Nissen*, 31 Fed. Rep. 600; *Gest v. Packwood*, 34 Fed. Rep. 372; *McAdow v. Black*, 6 Mont. 601; *Martin v. Morris*, 62 Wis. 418; *Richardson v. Levi*, 67 Tex. 359; *Johnson v. Williams*, 37 Kan. 179; *Snowden v. Tyler*, 21 Neb. 199; *Oliver v. Piatt*, 44 U. S. 3 How. 410 (11 L. ed. 657).

Granger, J., delivered the opinion of the court:

1. It will be observed that the question is fairly presented as to the effect of a quitclaim deed given for a consideration, without actual notice of, and after the execution and delivery of, an unrecorded bond for a deed for value. Counsel for appellant commence their argument with this statement: "The case here is one exactly parallel to the case of *Pettingill v. Devin*, 35 Iowa, 853;" and we think the statement true. Appellees do not, as we understand, controvert it, but urge that the *Pettingill Case* has been repeatedly overruled, and is no longer the law of the State. The arguments in the case are mainly devoted to the question of how the case of *Pettingill v. Devin* is affected by subsequent rulings. It may be said that the case is nowhere in terms overruled. As to the necessary or legal effect of other decisions upon it, we must inquire.

A reference to the *Pettingill Case* will show how nearly the facts of the two cases are alike as to the particular question involved. Coffin held an unrecorded bond, of which the defendant Devin had no actual notice. Devin afterwards obtained a quitclaim deed, for which he

paid a consideration. It was held that the quitclaim deed took precedence of the unrecorded bond. The holding was based largely on section 2220 of the Revision of 1880, as follows: "No instrument affecting real estate is of any validity against subsequent purchasers, for a valuable consideration, without notice, unless recorded in the office of the recorder of deeds of the county in which the land lies, as hereinafter provided." Section 1941 of the Code is identical in its language.

This court has repeatedly held that the holder of a quitclaim deed takes it charged with knowledge of prior equities; that he is not an innocent holder. To a proper disposition of the question before us, it is important that we consider, to some extent, at least, the particular facts under which these holdings were announced; and we think it may be done in a general way, without referring to each particular case. Appellant, recognizing the fact that, including the *Pettingill Case*, two rules have been announced as to the effect of a quitclaim deed, makes this statement: "The cases decided by this court, in which the broad doctrine is announced that a purchaser taking a quitclaim takes subject to equities, are all of them based upon one of two thoughts,—either all the right, title and interest of the person executing the quitclaim have been previously conveyed, so that he has no right, title and interest to convey, or some equity not at all dependent upon a written instrument, or the record thereof, has arisen against the land." We do not see how the fact that the grantor in the quitclaim deed had, before its execution, disposed of all his interest in the land could make or justify a different rule; and we find no intimation in any of the cases that that fact is made the basis for a distinction. Under such a rule, if A, being the owner of land, should dispose of it to B, and, without actual or constructive notice, should quitclaim to C, the latter would, by operation of law, be charged with notice of B's interest. Now, if instead of conveying the entire estate to B, A should convey an undivided one-half, and a quitclaim should be made to C, with the facts as before stated as to notice, C could take the land discharged of B's equities. Before such a distinction is maintained, it should have the support of authority or strong reason, and we discover neither. The latter part of appellant's statement, that the cases are based on "some equity not at all dependent upon a written instrument, or the record thereof," has support in some of the cases; and we think, if the distinction is to be maintained, it must be on that theory.

In the case of *Springer v. Bartle*, 46 Iowa, 690, the court, having under consideration the protection afforded by a quitclaim deed as against the fraudulent title of the grantor, used this language: "Ide quitclaimed to the defendant all his right, title and interest in and to the land in controversy. It was held in *Watson v. Phelps*, 40 Iowa, 483, that 'one holding under such a deed is not to be regarded as a bona fide purchaser without notice of equities held by others.' In an argument evidencing much ability, we are asked to overrule this decision; and counsel in their zeal claim that this court has held otherwise in *Pettingill v. Devin*, 35 Iowa, 353. This is a grave mistake. No such

point was presented in that case. The point decided was that, under the Recording Act, a person holding under a quitclaim deed acquired a prior right to one claiming under a bond for a deed, of which he did not have notice. In that case the party executing the quitclaim deed owned the legal title; but in the case at bar, Ide's title was tainted with fraud, against which the quitclaim deed did not protect the plaintiff. Besides which, the Statute expressly provides that such a purchaser as Devin is protected against a prior unrecorded conveyance. Code, § 1941. The doctrine announced in *Watson v. Phelps* was approved in *Smith v. Dunton*, 42 Iowa, 48; *Light v. West*, Id. 139, and *Besore v. Dosh*, 43 Iowa, 211. These decisions meet our approbation, and we are unwilling to take, at this late day, the time and space requisite to vindicate their correctness."

In that case it will be seen that the equity as to which the quitclaim deed was held subject was not one that would have been manifest if all instruments of conveyance had been recorded.

The cases of *Watson v. Phelps*, *Smith v. Dunton* and *Besore v. Dosh* are all ruled on facts of like legal import. The record of conveyances would not have given notice of the equities involved. The following cases sustain the same legal proposition: *Winkler v. Miller*, 54 Iowa, 476; *Ballou v. Lucas*, 59 Iowa, 24; *Kaiser v. Waggoner*, 59 Iowa, 41; *Laraway v. Larue*, 63 Iowa, 412; *Butler v. Barkley*, 67 Iowa, 491; *Bradley v. Cole*, 67 Iowa, 653.

There are, however, some cases where the facts are different, and where the equities urged as against a quitclaim deed would have been apparent from the recording of the instruments under which claims were made, but where they were not recorded.

In the case of *Wightman v. Spofford*, 56 Iowa, 145, it must be taken for granted that the contracts and instruments there referred to were not recorded, as, if they were of record, the questions discussed could not have well arisen. The only equities in the case, as it was ruled, arose out of contracts and deeds of conveyance which might have been of record. There, Casaday, who owned the land and had given a contract of sale under which plaintiff indirectly claimed the title, afterwards gave to Robertson a quitclaim deed, by virtue of which Robertson claimed the title. The court, in disposing of Robertson's interest, used these words: "As he bases his title upon a quitclaim deed, he cannot be regarded as a purchaser without notice of plaintiff's equities." The facts of the case, so far as pertains to their legal significance, are not different from those of *Pettingill v. Devin*.

In *Raymond v. Morrison*, 59 Iowa, 371, Wellington had conveyed the land by deed to Downey, whose deed was not recorded. Wellington afterwards quitclaimed to Varnum, and on the trial it was sought to be established that Varnum had knowledge to put him on inquiry as to the deed to Downey; but this court practically dismissed the inquiry as immaterial, holding that, as he held under a quitclaim deed, he could not be regarded as a good-faith purchaser.

The same rule is expressed in the case of *Fogg v. Holcomb*, 64 Iowa, 621, where the controversy is based on muniments of title. It is

said that one who holds by a quitclaim deed cannot be regarded as an innocent purchaser of the land for value.

A very pointed case, upon a similar state of facts, is that of *Postel v. Palmer*, 71 Iowa, 157. Norton owned the land, and executed a conveyance to Brown in October, 1873, which conveyance was not recorded. On the 31st day of March, 1884, he conveyed the land to the plaintiff by quitclaim deed. There is no pretense of actual notice. The opinion says: "That conveyance, as we have stated, was a mere quitclaim; and by it plaintiff could acquire no right against outstanding equities which were valid as against Norton."

It thus appears that in four different cases, from 1881 to 1887, this court has held to a rule at variance with that of *Pettingill v. Devin*, and under facts which render the holdings inconsistent; and in effect they must overrule the former case, if they are to stand as the law of the State. Is there any reason why the former should remain the rule in preference to the latter? As has been said, the former case depends largely for its support on the Recording Act of the State. Of course, the Statute, in the true spirit, should prevail; and, if that spirit is reflected in the *Pettingill Case*, the holding therein announced should be sustained, even to the overruling of the other cases. As to any support the *Pettingill Case* may have independent of the Statute, we must look to other States, as the decisions of this court in all the other cases cited in this opinion are against it. It may be conceded that the courts of other States are not in harmony as to the effect of a quitclaim deed. Its effect generally has been discussed in this State, and the holding of the court is by no means doubtful.

In discussing generally the effect of a quitclaim deed, Mr. Chief Justice Adams used these words in *Winkler v. Miller*, *supra*: "Woodward, who derived title by quitclaim deed, could not be deemed a bona fide purchaser without notice. . . . Where a person purchases of another, who is willing to give only a quitclaim deed, he may properly enough be regarded as bound to inquire and ascertain at his peril what outstanding equities exist, if any. His grantor virtually declares to him that he will not warrant the title, even as against himself; and it may be presumed that the purchase price was fixed accordingly."

In the case of *Woodward v. Jewell*, 25 Fed. Rep. 691, speaking of the effect of a quitclaim deed, the court says: "This question has been adjudicated by the courts of the several States so as to leave a distressing conflict of authorities; but the Supreme Court of the United States has settled the rule for our guidance here. They hold that a grantee in a quitclaim deed cannot defend as a bona fide purchaser without notice."

A few brief extracts will indicate the views and holding of the Supreme Court of the United States as to the effect of a quitclaim deed.

In *Oliver v. Piatt*, 44 U. S. 8 How. 410 [11 L. ed. 657], the court said: "Another significant circumstance is that this very agreement contained a stipulation that Oliver should give a quitclaim deed only for the tracts; and the subsequent deeds given by Oliver to him were accordingly drawn up without any covenants

of warranty, except against persons claiming under Oliver, or his heirs and assigns. In legal effect, therefore, they did convey no more than Oliver's right, title and interest in the property; and under such circumstances it is difficult to conceive how he can claim protection as a bona fide purchaser, for a valuable consideration, without notice, against any title paramount to that of Oliver, which attached itself as an unextinguished trust to the tracts."

Also, in *May v. LeClair*, 78 U. S. 11 Wall. 217 [20 L. ed. 50], it is said: "On the 27th of July, 1859, Dessaint conveyed, by a deed of quitclaim, to Ebenezer Cook. The evidence satisfies us that Cook had full notice of the frauds of Powers, and of the infirmities of Dessaint's title. Whether this were so or not, having acquired his title by a quitclaim deed, he cannot be regarded as a bona fide purchaser without notice. In such cases the conveyance passes the title as the grantor held it, and the grantee takes only what the grantor could lawfully convey."

In *Gest v. Packwood*, 34 Fed. Rep. 372, it is said, speaking of a quitclaim deed: "Notice sufficient to prevent the purchaser from being bona fide is said to adhere in the very form of this kind of a conveyance. . . . In such a case the purchaser only takes whatever the grantor could lawfully convey,—what there is left in him." The holding is supported by a reference to *Oliver v. Piatt*.

It would be fruitless to cite largely from state decisions on this question. The rulings of the majority of the state courts are in harmony with those of federal courts on this question.

In *Johnson v. Williams*, 37 Kan. 179, it is said: "In nearly all cases between individuals, where land is sold or conveyed, and where there is no doubt about the title, a general warranty deed is given; and it is only in cases where there is a doubt concerning the title that only a quitclaim deed is given or received. Hence, when a party takes a quitclaim deed he knows he is taking a doubtful title, and is put upon inquiry as to the title. The very form of the deed indicates to him that the grantor has doubts concerning the title; and the deed itself is notice to him that he is getting only a doubtful title."

Barring the case of *Pettingill v. Devin*, the authorities in this State are in accord with those of the federal courts; and, to our minds, the reasoning of the cases cited, independent of statutory considerations, is unanswerable. Let us look to the Statute to see if it is controlling in importance. Code, § 1970, gives a form for quitclaim deeds as follows: "The following, or other equivalent forms, varied to suit circumstances, are sufficient, for the purposes therein contemplated, for a quitclaim deed: 'For the consideration of — dollars, I hereby quitclaim to A. B. all my interest in the following,' etc." It is apparent that no more is contemplated by such a conveyance than to convey the interest of the grantor, whatever it may be. It should be noticed that in this form of deed the grantor does not covenant or say that he has the title or any interest. In this respect it is in marked contrast with the ordinary deed of conveyance, which expresses exactly what the title owner can and should

express, and what the purchaser desires. It in no sense purports to convey a title, not even by inference. If it was there by legal inference, then the grantor would be liable for its failure; and such is not the effect of a quitclaim deed.

It is practically said in *Gest v. Packwood*, *supra*, that the deed is itself a notice of a want of or a defect in the title. These deeds are generally taken upon a venture. The idea is: "I may get something, or I may not." This court, in the cases cited, has many times said that the holder of the quitclaim deed takes it with notice of prior equities. Looking to Code, § 1941, its language makes it inapplicable to such a state of facts. Its language is that "no instrument affecting real estate is of any validity against subsequent purchasers . . . without notice," etc. If the representation of such a deed is notice of a defect in or a want of title, then the holder cannot take without notice, and stands unprotected by the Statute. We think the case of *Pettingill v. Devin* must be regarded as overruled by subsequent decisions.

2. A question is made in the case as to the dower interest of Mrs. Lauber, it appearing

that when she signed the bond to plaintiffs she had no information that it was intended as security, instead of an actual sale. We do not see how, under the state of this record, this fact would change the result. The actual consideration, \$4,700, was paid, and if the property is taken for that consideration, even by the process of foreclosure, how can she complain? She has merely parted with what she intended to, for the consideration intended. No prejudice has resulted to her from a variance as to facts, nor does she complain. Neither can the variance as to facts prejudice the defendant.

3. It is urged that the defendant was in fact a good-faith purchaser, or parted with its money in good faith, relying upon the record as to the condition of the title. Of this we have no doubt; but, with our holding as to the legal status of the holder of such a deed, the legal presumption must prevail as against the facts as claimed.

We think the judgment of the District Court right, and it is affirmed.

NEW YORK COURT OF APPEALS.

Owen DONNEGAN, *Appt.*,

v.

Joel B. ERHARDT, Receiver of the New York City & Northern R. Co., *Resp.*

(....N.Y....)

1. **Independently of any statutory requirement** a railroad company is chargeable with the duty to fence its track if required by reasonable prudence and care to keep the track free from obstructions, animate and inanimate.
2. **Injury to a brakeman from collision of the train with an animal** which has come upon the railroad track through a defective fence, makes the company liable for the damages under the General Railroad Act of 1850, § 44, which imposes upon railroad companies the absolute duty to fence their tracks.

(February 25, 1890.)

A PPEAL by plaintiff from a judgment of the General Term of the Superior Court of the City of New York, reversing a judgment of the Trial Term entered upon a verdict in favor of plaintiff in an action to recover damages for personal injuries alleged to have resulted from defendant's neglect to obey the provisions of the Statute requiring it to fence its track. *Reversed.*

The case sufficiently appears in the opinion.

Mr. Hector M. Hitchings, for appellant:

The Statute compelling railroad companies to erect and maintain fences and cattle-guards was passed for the benefit of the traveling public as well as farmers contiguous thereto, and is not limited in its scope and effect by the penalty set out therein.

NOTE.—Duty of railroad companies to fence their tracks. See note to *Gallagher v. New York & N. E. R. Co.* (Conn.) 5 L. R. A. 737.
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Corwin v. New York & E. R. Co. 13 N. Y. 42; *Shepard v. Buffalo, N. Y. & E. R. Co.* 35 N. Y. 641; *Brown v. New York Cent. R. Co.* 34 N. Y. 404; *Staats v. Hudson River R. Co.* 3 Keyes, 196; *Purdy v. New York & N. H. R. Co.* 61 N. Y. 353; *Graham v. Delaware & H. Canal Co.* 46 Hun, 386; *Boone, Corp.* § 253; *Suydam v. Moore*, 8 Barb. 358; *Waldron v. Rensselaer & S. R. Co.* Id. 390.

The statute imposes upon railroad companies the duty not only to erect proper fences of the height and strength of division fences, but also to maintain and keep the same in perfect repair.

Staats v. Hudson River R. Co. supra; *Spinner v. New York Cent. & H. R. Co.* 6 Hun, 600; *Boone, Corp.* § 253.

Entirely irrespective of any statute the railroad company was bound to build and maintain fences and cattle-guards for the safety of its passengers and employes.

Durkin v. Sharp, 88 N. Y. 225; *Pantzar v. Tilly Foster Iron Min. Co.* 99 N. Y. 363; *Kain v. Smith*, 89 N. Y. 375; *O'Donnell v. Allegheny Valley R. Co.* 59 Pa. 239; *Snow v. Housatonic R. Co.* 8 Allen, 441; *Ryan v. Fowler*, 24 N. Y. 410; *Hawley v. Northern Cent. R. Co.* 82 N. Y. 370; *Mehan v. Syracuse, B. & N. Y. R. Co.* 73 N. Y. 585; *Bushby v. New York, L. E. & W. R. Co.* 107 N. Y. 374.

A failure by any person or corporation to obey a statute, by or through which failure a person is injured, is negligence *per se* giving an action.

Willy v. Mulledy, 78 N. Y. 314; *Jetter v. New York & H. R. Co.* 2 Keyes, 163; *Graham v. Delaware & H. Canal Co. supra*; *Massoth v. Delaware & H. Canal Co.* 64 N. Y. 531; *Beisegel v. New York Cent. R. Co.* 14 Abb. Pr. N. S. 29; *Knuffle v. Knickerbocker Ice Co.* 84 N. Y. 491; *Thomas v. Utica & B. R. Co.* 97 N. Y. 248.

Mr. Sherman Evarts, for respondent:

At common law there was no duty imposed upon a railroad company to fence the sides of its tracks or use any means for keeping cattle from its property, and the plaintiff would have no right against the company for such failure.

Corwin v. New York & E. R. Co. 13 N. Y. 42; *Spinner v. New York Cent. & H. R. R. Co.* 67 N. Y. 153; *Munger v. Tonawanda R. Co.* 4 N. Y. 849; *Langlois v. Buffalo & R. R. Co.* 19 Barb. 864.

The Statute does not impose a general liability for failure to fence.

Munger v. Tonawanda R. Co. supra.

Where a statute creates a new right and prescribes the remedy, that remedy alone can be followed.

Stevens v. Jeacocke, 11 Q. B. 781; *Stafford v. Ingersoll*, 8 Hill, 41; *Almy v. Harris*, 5 Johns. 175.

Where a statute creates a new duty and a liability to one class of individuals, the liability is confined to the class mentioned, and there is not a general liability.

Knight v. New York, L. E. & W. R. Co. 99 N. Y. 25; *Langlois v. Buffalo & R. R. Co. supra*; *Moore v. Gadsden*, 93 N. Y. 12; *Atkinson v. Newcastle & G. Waterworks Co.* L. R. 2 Exch. Div. 441.

Earl, J., delivered the opinion of the court:

While the plaintiff, in 1887, was in the employ of the defendant, as a brakeman upon a train of cars, in the night-time, the train came in collision with a horse upon the railroad track, and was thereby wrecked, and he was seriously injured. He brought this action to recover damages for his injuries, claiming that the horse got upon the railroad track because the defendant had carelessly and negligently permitted the fence along the railroad to become ruinous, broken down and out of repair, and that it had therefore violated the duty imposed upon it by section 44 of the General Railroad Act of 1850, which requires railroad companies to build and maintain fences on the sides of their roads of the height and strength of division fences, and that so long as such fences and cattle-guards shall not be made, and when not in good repair, such railroad corporation and its agents shall be liable for damages which shall be done by the agents or engines of any such corporation to any cattle, horses, sheep or hogs thereon. The claim of the defendant was that at common law, independently of the Statute, the railroad company would not have been liable for the accident which happened to the plaintiff, and that the Statute specified the extent of the liability imposed upon a railroad corporation for its omission to build or maintain fences, and that thus it was liable only for damages done to animals coming upon the railroad track through a defective fence. The trial judge, however, submitted the case to the jury, and instructed them that if this horse came upon the railroad through a fence which the defendant was bound to maintain and keep in repair, and which was negligently permitted to be out of repair, the plaintiff could recover; and the jury rendered a verdict in his favor. From the judgment entered upon the verdict the defendant appealed to the general term, and there the judgment was reversed upon the 7 L. R. A.

ground that the only responsibility of a railroad company for defective fences is that mentioned in the Statute, and that at common law, independently of the Statute, a railroad company would not have been liable to the plaintiff for the injuries sustained by him.

We think the learned general term fell into error. A railroad company, for the safety of its passengers, as well as its employes upon its engines and cars, is bound to use suitable care and skill in furnishing not only adequate engines and cars, but also a safe and proper track and road-bed. The track must be properly laid, and the road-bed properly constructed, and reasonable prudence and care must be exercised in keeping the track free from obstructions, animate and inanimate; and if, from want of proper care, such obstructions are permitted to be or come upon the track, and a train is thereby wrecked, and any person thereon is injured, the railroad company, upon plain common-law principles, must be held responsible. Experience shows that animals may stray upon a railroad track, and that, if they do, there is danger that a train may come in collision with them, and be wrecked; and adequate measures, reasonable in their nature, must be taken to guard against such danger. Independently of any statutory requirement, a jury might find, upon the facts of a case, that it was the duty of a railroad company to fence its track, to guard against such danger. But, whatever the rule would be, independently of the Statute, there is no reasonable doubt that it imposes the absolute duty upon a railroad company to fence its tracks. That duty, it is reasonable to suppose, was imposed not only to protect the lives of animals, but also to protect human beings upon railroad trains. It is made an unqualified duty; and for a violation thereof, causing injury, the railroad company incurs responsibility. The sole consequence of an omission of the statutory duty is not specified, and was not intended to be specified in the Statute. Responsibility for injuries to animals was specially imposed, because in most cases there would, independently of the Statute, have been no such responsibility, as at common law the owner of animals was bound to restrain them; and, if they trespassed upon a railroad there was no liability for their destruction, unless it was willfully or intentionally caused. We are therefore of the opinion that the Railroad Company was responsible to the plaintiff for the injuries which he received, without any fault on his part; and for this conclusion there is much authority in judicial utterances to be found in the books. *Corwin v. New York & E. R. Co.* 13 N. Y. 42; *Jetter v. New York & H. R. Co.* 2 Keyes, 162; *Staats v. Hudson River R. Co.* 3 Keyes, 196; *Brown v. New York Cent. R. Co.* 84 N. Y. 404; *Shepard v. Buffalo, N. Y. & E. R. Co.* 35 N. Y. 641; *Purdy v. New York & N. H. R. Co.* 61 N. Y. 353; *Jones v. Seligman*, 81 N. Y. 190; *Graham v. Delaware & H. Canal Co.* 48 Hun, 386. The case of *Langlois v. Buffalo & R. R. Co.*, 19 Barb. 864, so far as it holds a different doctrine, does not meet with our approval.

The order of the General Term should therefore be reversed, and the judgment entered upon the verdict affirmed, with costs.

All concur.

MINNESOTA SUPREME COURT.

George W. HALL, *Respt.*,

v.

George A. PILLSBURY *et al.*, *Appts.*

(....Minn.....)

*1. A deposit of grain for storage is a bailment, the title remaining in the depositor so that he is deemed to be the owner of grain in the warehouse to the amount of his deposit, although the identical grain he deposited has been removed, and other grain, of like kind and quality, substituted in its stead.

2. The holders of receipts for grain so deposited, of the same kind and quality, are tenants in common in the mass of grain of that kind and quality in the warehouse, the interest of each being limited to the amount called for by his receipt.

3. The warehouseman may also be tenant in common with them in such mass, as where he puts his own grain in the warehouse or purchases from a depositor. His interest in the

*Head notes by GILFILLAN, Ch. J.

mass is limited to the excess above what is necessary to meet his outstanding receipts.

4. He may remove, and dispose of as his own, such excess.

5. If he sell as his own any grain beyond such excess without express consent of the depositors, his sale passes no title, and the owners, the depositors, may follow the grain into the hands of the purchaser, and recover of him for a conversion.

(February 18, 1890.)

APPEAL by defendants from an order of the District Court for Hennepin County overruling a demurrer to the complaint in an action to recover the value of certain grain which had been purchased by defendants from a warehouseman with whom plaintiff had deposited it for safe keeping. *Affirmed.*

The case is sufficiently stated in the opinion.

Mr. Ralph Whelan, for appellants:

All that the law requires is that upon presentation of the receipt the warehouseman will have forthcoming a like quantity of grain of

NOTE.—Warehousemen as bailees.

A warehouseman cannot have possession of another man's property, with its accompanying duties and responsibilities, forced upon him against his will. *Delaware, L. & W. R. Co. v. Central Stockyard & Transit Co.* 45 N. J. Eq. 60.

A warehouseman is responsible for the safety and security of goods after delivery in the warehouse on Sunday, although all labor on Sunday, except that of necessity or charity, is prohibited by statute in Virginia, the safe keeping of the goods being a work of necessity. *Powhatan Steamboat Co. v. Appomattox R. Co.* 65 U. S. 24 How. 247 (16 L. ed. 682).

The implied undertaking of a warehouseman is not that he will at all events keep the goods safely, but that he will use reasonable and ordinary care and diligence in keeping them. *Willett v. Rich*, 2 New Eng. Rep. 672, 142 Mass. 366.

In an action of replevin for the possession of goods receipted for by an elevator proprietor, parol evidence is competent to show whether the contract was intended as a sale or a bailment. *Lyon v. Lenon*, 4 West. Rep. 481, 108 Ind. 597.

A receipt by a warehouseman for wheat delivered to him, providing that it is stored at the owner's risk, where nothing is charged for storage, and no time fixed during which it was to be left, except until the owner was ready to sell it, and no agreement that it should be mixed, or that the warehouseman might sell, ship or consume it,—constitutes a bailment, and not a sale. *O'Dell v. Leyda*, 46 Ohio St. 244.

Legislative control over business of warehousing.

The Legislature has power to declare what service warehousemen shall render to the public, and to fix the compensation that may be demanded for such service; but until such power is exercised, warehousemen are at liberty to use their warehouses as they please. *Delaware, L. & W. R. Co. v. Central Stockyard & Transit Co.* 45 N. J. Eq. 50.

A state statute fixing the maximum of charges for the storage of grain is not unconstitutional as a regulation of commerce, although the warehouses affected are used by those engaged in interstate commerce, as well as in commerce within the State. *Munn v. Illinois*, 94 U. S. 113 (24 L. ed. 77).

The remedies provided by Minn. Gen. Laws 1876, chap. 86, §§ 3 & 4, regulating the storage of grain (Minn. Gen. Stat. 1878, pp. 1012, 1013), are not exclu-

sive, but are in addition to such as previously existed at common law or by statute in case of the conversion of personal property by a bailee. *Danels v. Palmer* (Minn.) 42 N. W. Rep. 855.

The Revised Statutes of Indiana, defining the rights and liabilities of warehousemen, do not affect the rights of innocent purchasers. *Preston v. Witherspoon*, 7 West. Rep. 71, 109 Ind. 457.

The duty of the warehouseman is performed when he gets the property into his own possession before he issues the receipt and transfers the possession, when demanded, to the lawful holder of the receipt. He does not guarantee the title of the holder of the receipt. *Mechanics & T. Ins. Co. v. Kiger*, 103 U. S. 352 (26 L. ed. 433).

The Factors' Act (N. Y. Laws 1830, chap. 179) has no application to a case where protection would be secure to a wrong-doer the fruits of a fraud. *Dorrance v. Dean*, 7 Cent. Rep. 695, 106 N. Y. 203.

Warehouse receipts.

Under Act 1875, a warehouse receipt is negotiable, unless it is marked "non-negotiable" across its face; and the indorsement thereof by the party to whose order it is issued passes the absolute title to the property mentioned therein to the indorsee. *Blashop v. Fulkerth*, 68 Cal. 607.

An indorsement of a warehouse receipt which is payable to bearer is necessary to convey the legal title. But delivery of the receipt without indorsement is sufficient to create a valid pledge as to persons not having acquired intervening rights. *Alabama State Bank v. Barnes*, 32 Ala. 607.

A warehouseman may issue receipts for his own property stored in his warehouse, and by their delivery pledge it for his own debts. *Ibid.*

A warehouseman may pledge wheat by delivering his warehouse receipt to the pledgee; and if, in the course of his business, he sells the wheat and purchases other, the latter becomes appropriated to the contract as the property of the pledgee or depositor. *National Exch. Bank v. Wilder*, 84 Minn. 149.

The owner of goods may recover them in replevin from a warehouseman to whom they had been pledged by a broker who procured possession of them fraudulently for the purpose of selling them to an undisclosed principal, when in fact there was no principal, although a sale had been entered on the owner's books as a sale directly to the broker. *Rodliff v. Dallinger*, 1 New Eng. Rep. 608, 141 Mass. 1

the same kind and grade as that deposited. Grain subsequently purchased and stored by the warehouseman takes the place of that originally placed in store by the depositor, and is appropriated to the contract contained in the warehouse receipt, so as to become his property.

Nat. Exch. Bank v. Wilder, 84 Minn. 149; *Fishback v. Van Dusen*, 88 Minn. 111.

After the delivery of said wheat to be stored, therefore, respondents Ehle & Co. were under no obligations, contractual or imposed by law, to respondent concerning said identical wheat, but they became the absolute owners of the same.

Appellants' intermeddling with plaintiff's property is excusable on the ground that it was done under a reasonable, though mistaken, supposition of lawful title or authority.

Pollock, Torts, 272.

Ehle & Co. were engaged in buying wheat for and on account of appellants as their agent. The right of possession and the actual possession of all wheat so purchased passed to Ehle & Co., subject to divertment pursuant to the terms of their contract of agency with appellants.

Story, Ag. § 34; *Cool v. Phillips*, 66 Ill. 216.

After Ehle & Co. had purchased and received such wheat, the relation between them and appellants assumed the nature of the contractual relation of bailment.

Edwards, Bailm. § 2; Schouler, Bailm. 340.

These rights and obligations give to appellants the right to have delivery of certain wheat made to them, out of said warehouse, pursuant to the terms of their contract of agency with Ehle & Co.

Under this state of facts, any exercise of dominion over or any intermeddling with said "certain wheat" by appellants in the exercise of their right of receiving delivery from said warehouse of said "certain wheat" or as bona fide purchasers for value from Ehle & Co., without notice of respondent's property rights, would certainly be "done under a reasonable, though mistaken, supposition of lawful title or authority" in appellants.

Preston v. Witherspoon, 7 West. Rep. 71, 109 Ind. 457.

Wherever one of two innocent persons must suffer by the acts of a third, he who has en-

The fact that a warehouse receipt of goods deposited to secure a debt is made as if received from the creditor for whose benefit the deposit is made does not pay such debt or give the creditor or his agent a right to the possession of the goods, where it is never delivered to him, as against a third person loaning money thereupon to the person making the deposit. *Lowrie v. Salz*, 75 Cal. 349.

Under the Minnesota Grain-Warehouse Law of 1876, no distinction can be made between a person who makes an actual delivery of his grain at a public warehouse, and a pledgee of the grain of the warehouseman (actually upon deposit in the warehouse), who leaves it in store with the proprietor as his bailee, taking a warehouse receipt therefor. *Eggers v. National Bank of Commerce*, 40 Minn. 182.

Obligation to return the thing bailed.

A bailee for safe keeping must return the thing bailed to the bailor, or according to the bailor's directions. He cannot require proof that the bailor is also the owner. *McCafferty v. Brady* (Pa.) 7 Cent. Rep. 597, 19 W. N. C. 553.

A failure or refusal, by a warehouseman, to deliver on demand goods intrusted to him is prima facie evidence of negligence, sufficient to cast upon him the burden of accounting for nondelivery. *Burnell v. New York Cent. R. Co.* 45 N. Y. 184, 6 Am. Rep. 61; *Coleman v. Livingston*, 4 Jones & S. 32, 45 How. Pr. 433; *Fairfax v. New York Cent. & H. R. R. Co.* 11 Jones & S. 18, 67 N. Y. 11; *Schwerin v. McKie*, 6 Robt. 404, 51 N. Y. 180, 10 Am. Rep. 581; *Steers v. Liverpool, N. Y. & P. Steamship Co.* 57 N. Y. 1, 15 Am. Rep. 453.

Delivery to a third person, by mistake or negligence, makes a warehouseman liable for conversion. *Devereux v. Barclay*, 2 Barn. & Ald. 702; *Jeffersonville R. Co. v. White*, 6 Bush, 251; *Collins v. Burns*, 63 N. Y. 1; *Willard v. Bridge*, 4 Barb. 361; *Alabama & T. R. R. Co. v. Kidd*, 35 Ala. 209.

An agent lawfully in charge of the business of a warehouse in which goods, the title to which is in dispute, are deposited, is the proper party upon whom to make demand for their delivery. *Lundburg v. Northwestern Elevator Co.* (Minn.) 43 N. W. Rep. 685.

A bailee of grain held in store may waive the formal requisites of a tender of charges and grain receipts required by Minn. Gen. Stat. 1878, chap. 124, § 15; and a refusal, solely on the ground that it be-

longs to a third person, is a waiver of objection as to tender of charges and tickets. *Wallace v. Minneapolis & N. Elevator Co.* 37 Minn. 464.

Where personal property is in the hands of a bailee, a transfer by bill of sale alone is good and valid, even as against the creditor of the vendor. *Kell v. Harris* (Pa.) 5 Cent. Rep. 865.

If a warehouseman to whom grain was delivered by a commission merchant as security for advances knew that the commission merchant was using property consigned to him for sale, he cannot hold the grain, as against the true owner. *Dorrance v. Dean*, 7 Cent. Rep. 695, 103 N. Y. 208.

Warehousemen who have given receipts for grain stored with them for hire cannot be heard to dispute the title of an indorsee who has loaned money in good faith upon the receipts, or aver that they did not receive the property on the terms specified in the receipts. *Babcock v. People's Sav. Bank*, 118 Ind. 212.

Warehousemen in Alabama who deliver up cotton stored with them to a third person, producing their receipt therefor, may be held liable to the mortgagee of such cotton, whose mortgage is properly recorded in another county, although they have no actual notice of the mortgage. *Hudmon v. Du Bose*, 2 L. R. A. 475, 85 Ala. 446.

A warehouseman with whom goods are stored, who, upon demand of the goods by an officer by virtue of a writ of attachment against a third person, unlocks the room where they are stored, pointing them out to the officer who attaches them, is not liable for their conversion, notwithstanding the seizure by the officer was illegal. *Clegg v. Boston Storage Warehouse Co.* 149 Mass. 454.

Where property is taken from warehousemen by judicial process, without fraud or collusion on their part, and they thereupon give immediate notice to their principal, this is a substantial compliance with their obligation to their principal not to deliver without a surrender of their receipts. *Mechanics & T. Ins. Co. v. Kiger*, 103 U. S. 352 (26 L. ed. 483).

Warehouse receipts void for indefiniteness.

Where a wool merchant leases part of his store to warehousemen, who, without going into possession, issue warehouse receipts to him for wool which he stores on the premises and of which he retains control, the wool not being marked or set apart, and

abled such third person to occasion the loss must sustain it.

Lickbarrow v. Mason, 2 T. R. 70.

Mr. B. S. Lewis for respondent.

Gillilan, Ch. J., delivered the opinion of the court:

Appeal from an order overruling a demurrer to the complaint. From the complaint it appears, in brief, that the firm of G. W. Ehle & Co. operated and conducted, for the storage of grain, a grain warehouse at Stewart, in this State. Fifteen different owners of grain, plaintiff being one of them, deposited at different times with said Ehle & Co., in said warehouse, for storage, different quantities of wheat, the aggregate amount so deposited being 2,647½ bushels, and upon each of such deposits each depositor received from Ehle & Co. the usual warehouse or elevator receipt for the amount so deposited, with, however, this clause (unusual, we think): that if, for any reason, it should become necessary to remove such grain, Ehle & Co. reserved the right to deliver the grain from any other warehouse operated by them, etc. As the mere desire on the part of Ehle & Co.

to sell the grain so deposited could not be regarded as a reason for removal under this clause, and no reason of necessity for its removal appears, we need not further consider that clause. None of the receipts so issued were redeemed. Ehle & Co., without the knowledge or consent of the receipt holders, sold and shipped to defendants, and they converted to their own use, so much of the wheat so deposited that there was left in the warehouse, to meet the outstanding receipts, amounting to 2,647½, only 1,144 bushels. This latter quantity was then distributed *pro rata* to the outstanding receipts. All the receipts other than those received by him have been sold to plaintiff. He brings the action to recover for a conversion of the wheat so sold and shipped to defendants.

It being a general rule of law that a purchaser of personal property gets ordinarily no better title than his vendor has, it will be necessary to consider what was the right or title of Ehle & Co. in or to the wheat; that is to consider what are the rights in respect to grain stored in a general grain warehouse of the depositor and deposittee. This must be determined by the Statute regulating such warehouses and deposits,

being of various grades not specified in the receipts, such receipts are void for indefiniteness, as against the other creditors of the merchant, upon his making a voluntary assignment. *Union Trust Co. v. Trumbull* (Ill.) 23 N. E. Rep. 355.

A warehouse receipt issued by a person who is not a public warehouseman does not give the holder any lien against the receiptor's creditors. *Union Trust Co. v. Trumbull* (Ill.) 23 N. E. Rep. 355.

Assignment and sale of property.

One who sells personal property to be paid for in cash on delivery of a warehouse receipt, the seller retaining the receipt, has priority of lien over the assignee in insolvency of the purchaser. *Rhodes v. Mooney*, 2 West. Rep. 384, 43 Ohio St. 421.

Where barrels of flour and pork lying in a warehouse were purchased and paid for, and the purchaser received a written memorandum of the sale and a receipt for the money from the warehousemen, with an engagement to deliver them on board of canal boats soon after the opening of canal navigation, these documents transferred the property to the possession of the purchaser. *Gibson v. Stevens*, 49 U. S. 8 How. 384 (12 L. ed. 1123).

The indorsement of a delivery order upon warehouse documents of title is a sufficiently formal assignment of the property. *Ibid.*

A warehouse receipt given to persons in pursuance of an agreement that they were to advance on the property, dispose of it, and receive their pay therefrom, confers on them full power to dispose of the property for advances under such contract. *McCullough v. Roots*, 80 U. S. 19 How. 349 (15 L. ed. 681).

A license to the person giving such receipt, to prepare the property for market and select the markets and purchasers, was an indulgence to him, and did not diminish the rights of the plaintiffs in the property, or their powers under the contract. Whatever sales were made by him were made as agents of plaintiffs, and they were entitled to the price. He was not in condition to dispute plaintiffs' title; and his authority to a purchaser to appropriate the price as a credit upon another demand was fraud upon plaintiffs' rights. *Ibid.*

Tenancy in common in mass or bulk.

The deposit in a warehouse of wheat which becomes mingled with the wheat of other persons is a 7 L. R. A.

ballment, and the depositor does not, by reason of such mingling, lose his right to reclaim his wheat. *McBee v. Cesar*, 15 Or. 62.

Where several depositors have wheat stored in a warehouse, in a common mass, and a deficiency occurs, from whatever cause, not occasioned by the fault of any such depositors, the loss must be borne by each of them who were depositors at the time the loss occurred in the proportion which the amount of his wheat bears to the whole amount deposited. *Brown v. Northcutt*, 14 Or. 529.

Where depositors of wheat with an elevator company knew that it was commingled with wheat purchased by the company, and that the latter was selling from the common mass, such deposit clothed the company with an apparent ownership and authority to sell, which estops the depositors to assert their title thereto, as against an innocent purchaser for value believing the ownership to be in the elevator company; and the purchaser cannot be affected by any private negotiations between the depositors and the company. *Preston v. Witherspoon*, 7 West. Rep. 71, 109 Ind. 457.

Where a warehouseman gave a receipt for wheat which he did not receive, it did not pass the title to any specific wheat in his warehouse; and where the wheat actually on deposit there was afterwards divided among the respective depositors, an assignee of the fictitious receipt could not maintain replevin for any part of such wheat. *Jackson v. Hale*, 55 U. S. 14 How. 525 (14 L. ed. 526).

Where a depositor has received the full quantity of the wheat deposited by him, or a larger proportion than his ratable share in view of such deficiency, he is bound to account to the other depositors for such excess, according to the proportion of the loss. *Brown v. Northcutt*, 14 Or. 529.

Liability of warehousemen for negligence.

A warehouseman is liable for injuries to goods stored by him for hire, from his want of ordinary care under the circumstances. *Doyle v. Mays* (Pa.) 6 Cent. Rep. 185.

Warehousemen are to be charged only upon proof of their negligence or that of their servants. *Aldrich v. Boston & W. R. Co.* 100 Mass. 31, 1 Am. Rep. 76; *Finucane v. Small*, 1 Esp. 315; *Gilbert v. Dale*, 5 Ad. & El. 548.

The keeper of a private bonded warehouse is only liable as an ordinary warehouseman, notwithstanding

which is found in chapter 124, Gen. Stat. 1878, §§ 13-20, inclusive. In several cases we have considered some of the features of that Statute, but, although in *Leuthold v. Fairchild*, 35 Minn. 99, we assumed, rather than fully determined, that a warehouseman who, without the consent of the depositors, disposes of so much of the grain deposited with him that there is not enough left in the warehouse to meet his receipts outstanding, is liable to the holders of the receipts as for a conversion of their property, the question of the respective rights and relations of the depositor and deposites in such cases, and of the rights of a purchaser from the deposites, has never before been squarely brought before us.

The Statute was passed for the better protection of depositors in such general grain warehouses. The evils to be cured were those which were supposed to follow the prior rule of law,—the rule of the common law. That rule was that where a deposit was made of grain, or other like property, with the expectation that it would be commingled in a common mass of similar kind, deposited by different persons, so that its identity would necessarily be lost, and the undertaking of the deposites was not to redeliver the identical property deposit-

ed, but to deliver, in lieu thereof, an equal amount of the same kind of property, the title to the property deposited passed to the deposites. The deposit had the effect of a sale. The Statute changes this rule, and provides (§ 13, Gen. Stat. 1878) that "such delivery shall in all things be deemed and treated as a bailment, and not as a sale." Of course, it cannot be understood from this that the depositor's title to the identical grain remains. The Legislature must be taken to have had in view the way in which the business of such warehouses is, and of necessity must be, conducted. They are constantly receiving deposits of grain, and issuing receipts for it, and as constantly taking up outstanding receipts, and removing the amounts of grain called for by them, so that perhaps the same identical grain may not remain in the warehouse a week, though the amount in store is not diminished. The declaration that the delivery shall be deemed and treated as a bailment must be taken as meaning that the depositor shall be deemed to be the owner of, and to have on bailment in the warehouse, the amount of grain that he deposits, although its identity may have been lost by commingling with other, the like kind of grain, and although not a kernel of the identical

ing there is a government store-keeper in charge. *Macklin v. Frazier*, 9 Bush, 3; *Schwerin v. McKie*, 5 Robt. 404, 51 N. Y. 180, 10 Am. Rep. 581; *Claflin v. Meyer*, 11 Jones & S. 1, 75 N. Y. 280, 31 Am. Rep. 467.

In an action against a railroad company to recover for a loss of goods through the negligence of the defendant as a warehouseman, a judgment in favor of the plaintiff, if supported by the evidence, will not be reversed merely because the complaint alleged that the defendant was liable as a common carrier. *Boyt v. Nevada County N. G. R. Co.* 68 Cal. 644.

Where goods deposited with a warehouseman were stolen, and the depositor demanded payment for them from him, and he finally agreed to pay a less sum than that claimed, in settlement, but paid only a part of it and suit was brought for the balance,—it was immaterial to the issue that he was not originally liable as warehousemen, the suit being brought upon the compromise agreement. *Swen v. Green*, 9 Colo. 358.

The assent of a shipper to delay by a warehouseman in forwarding cotton, which by reason of its surroundings was in unusual danger from fire, does not preclude the shipper from recovery for loss by fire during the delay, unless he knew of the danger. *Merchants Whariboat Asso. v. Heidingsfelder*, 64 Miss. 673.

Liability for torts.

A warehouseman wrongfully shipped wheat deposited by others for storage and delivered the bills of lading to a bank, together with drafts on the consignee. The bank discounted and indorsed the bills in blank and on payment of the drafts delivered the bills to the drawee. It was held that the bank is not liable to the owners of the wheat for conversion. *Leuthold v. Fairchild*, 35 Minn. 99.

Action is maintainable for falsely representing in a circular that defendant's warehouse was fire-proof on the outside, whereby plaintiff was induced to store therein certain property which was destroyed by fire communicated from the outside. *Hickey v. Morrill*, 3 Cent. Rep. 651, 102 N. Y. 454.

A consignee's indorsement and delivery of an elevator receipt is a conversion of the grain therein described, as against the holder of a draft drawn

against it with transfer of bill of lading, of which the consignee had notice. *Thompson, J.*, dissents. *Hamlin v. Carruthers*, 2 West. Rep. 423, 19 Mo. App. 567.

That the consignee may not have intended to act in violation of the rights of other persons is immaterial. *Ibid.*

A cause of action for a violation of the provisions of chapter 326 of 1853, as amended by chapter 440 of 1863, prohibiting any warehouseman from issuing any receipt for or upon any goods, wares or merchandise, to any person purporting to be the owner thereof, unless such goods, wares or merchandise shall have been actually received, is given by the concluding portion of § 7 of the said Act. *Dean v. Driggs*, 44 Hun, 480.

It is not necessary to prove that the defendant has willfully violated the provisions of the Act, but only that he has in fact violated them. *Ibid.*

Criminal Liability.

The Illinois Warehouse Act was intended for the protection of the public; and the issuance, by a warehouseman, to a bank, of receipts transferable by indorsement, purporting to be for property in store belonging to the bank, when in fact no such property was in store, and delivered by him to the bank as security for loans made by it to him, renders such warehouseman liable criminally, under § 25 of the Act, although he had no intent to thereby defraud the bank. *Sykes v. People*, 3 L. R. A. 461, 127 Ill. 117.

Section 25 was not repealed by implication by the passage of Ill. Crim. Code, §§ 124, 125, the provisions of the two Acts being distinct and not repugnant,—the offense created by the former consisting solely in issuing a receipt from which a fraudulent result may occur, and that created by the latter consisting in the making or uttering of a receipt for a fraudulent purpose or with fraudulent intent. *Ibid.*

That there was no intention to defraud is immaterial on the question of guilt under that section; the only intent necessary to be found to constitute the offense relates only to whether the warehouseman intended to issue the receipt knowing it to be false. *Ibid.*

grain deposited still remains. As fast as grain is removed, and other grain is put into the common mass, the new grain takes the place of that originally deposited, and is appropriated to the contract of bailment, so as to become the property of the depositor. *National Exch. Bank v. Wilder*, 84 Minn. 149.

The grain, of like kind and quality, of different depositors, not being kept separate, but put into a common mass, and each depositor owning the amount called for by his receipt, the different owners, owning the entire mass, own the mass as tenants in common, the interest of each being measured by the amount called for by his receipt. So, if the owner of the warehouse put his own grain into the mass he becomes a tenant in common of the entire body of the grain with the other owners. Ordinarily, the partition is to be made by the warehouseman, who, when a receipt is presented, and the grain it calls for demanded, and the conditions of the right to a delivery of it complied with, delivers to the holder, as his share of the entire body of grain under that receipt, the amount that it calls for. If the receipt holder is put to his action of replevin, the sheriff makes the separation. Section 16 of Statute.

But, while the interest of the depositor in the mass is measured by the amount he deposits, and mentioned in his receipt, the interest of the warehouseman, by reason of putting his own grain into the mass, is not necessarily measured by what he puts in; for if from any cause for which he is responsible, as by his taking grain out from the mass, the whole amount is diminished below what is required to fill the outstanding receipts, what he puts in is appropriated at once, so far as may be necessary, to the receipts, and becomes at once the property of the holders. Thus if there is a shortage thus arising of 200 bushels, and he puts in 400 bushels of his own, his interest in the mass after that is equal to 200 bushels, just the excess above what is required to fill the receipts. That amount, and no more, he has a right to take out and sell. It is true, it may be the practice—probably is—of warehousemen to take out and dispose of grain without reference to the relation which the amount in warehouse bears to the amount of the outstanding receipts. In other words, it may be their

practice to dispose of the depositor's property. When this is done with the consent (such as the Statute requires) of the depositors, it is, of course, rightfully done; and in that case a sale by the warehouseman would pass the title. No presumption of consent on the part of the depositor could arise from the existence, however general, of such a practice. Such a practice is made unlawful.

Section 18 of the Statute provides: "No person receiving or holding grain in store shall sell, or otherwise dispose of, or deliver out of the storehouse or warehouse where such grain is held or stored, the same, or any part thereof, without the express authority of the owner of such grain, and the return of the receipt given for the same, except as herein provided."

If the warehouseman be also a dealer in grain, his right to dispose of, as his own, the grain in the warehouse, is limited to that which belongs to him, which he has purchased and put in, or, when deposited by others, which he has purchased from them, and to the excess above what is required to meet his outstanding receipts. The Statute clearly enacts that he shall not sell or otherwise dispose of grain on deposit. Its purpose is to provide that the grain shall remain in the warehouse where deposited, to meet the call of the owner. *Ehle & Co.* were not the owners of, they had no title to, the grain which they sold, or assumed to sell, to the defendants. It belonged to the holders of the receipts.

Much argument has been expended to show the inconvenience to commerce in grain if in such cases the owner of the grain may, notwithstanding a wrongful sale by the warehouseman, follow the grain into the hands of the purchaser. As touching the matter of convenience, the argument has much force. It might tend greatly to facilitate traffic in grain if we had, in respect to it, such a rule as in England pertains to property sold in markets overt. But there is no such rule in this country. The general rule is that an owner of personal property cannot be deprived of his right to it through the unauthorized act of another. That rule applies as well to grain or other property on deposit for the purpose of storing as to property in any other situation.

Order affirmed.

MARYLAND COURT OF APPEALS.

Henry C. ROCHE *et al.*, *Appts.*,

v.

William Francis WATERS *et al.*

(....Md.....)

1. **Taxes upon city property** and assessments thereon for street improvements must be paid by the life tenant, and he cannot compel the remainderman to contribute towards such payment.
2. **The court of chancery had no jurisdiction** in 1859 to order the sale of city real estate for the payment of taxes and street assessments, upon the joint petition of the life tenant and the infant remainderman suing by next friend, but for whom no guardian was appointed, and who was not made defendant nor

summoned to answer the bill, although it was alleged that "it would be for the interest and advantage of all parties concerned."

3. **The Legislature has no power to validate**, by retroactive legislation, a judicial sale of real estate which was void for want of jurisdiction in the court to make it; at least not without making provision for compensating the owners of the property.

(March, 1890).*

*An opinion was handed down in this case on December 18, 1889. A reargument was subsequently ordered, after which the opinion printed herewith was filed, which supersedes the other and renders it of no practical importance, and it is therefore omitted. [Rep.]

APPPEAL by plaintiffs from a decree of the Circuit Court for Baltimore City dismissing the bill in a suit brought to ratify and confirm a judicial sale of certain real estate, and to procure a decree for the sale thereof. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Samuel D. Schmucker, George Whitelock and John S. Tyson*, for appellants:

If the case of *Hitch v. Davies* was an ordinary suit in equity, subject to the principles and regulations applicable thereto, the jurisdiction over the appellees was complete, when, as infants, they filed the bill by next friend.

Bush v. Linthicum, 59 Md. 356; 1 Daniell, Ch. Pr. 68, 69; Story, Eq. Pl. §§ 57-60, 70; Mitford & Tyler, Eq. Pl. 120; Calvert, Parties, chap. 8, § 29, pp. 315, 318; Edwards, Parties, 182 *et seq.*; *Monumental Build. Assn. v. Herman*, 33 Md. 132.

When an infant thus comes into court as plaintiff, he is completely bound by the proceedings. To put the infant on both sides of the docket would be to make him sue himself, which this court has designated as a solecism.

Owens v. Crow, 62 Md. 497; *Tilly v. Tilly*, 2 Bland, Ch. 436; *Watson v. Godwin*, 4 Md. Ch. 25.

The powers of a *prochein ami* to represent and bind an infant plaintiff are of the broadest and most complete character.

Alex. Brit. Stat. 121, 123; *Gregory v. Molesworth*, 3 Atk. 627; *Brook v. Hertford*, 2 P. Wms. 518; *Davis v. Jacquin*, 5 Har. & J. 110; *Deford v. State*, 30 Md. 199; *Baltimore & O. R. Co. v. Fitzpatrick*, 36 Md. 619; *Wainwright v. Wilkinson*, 62 Md. 146.

In behalf of purchasers at judicial sales every reasonable intentment will be made to support their titles, and the proceedings are not collaterally impeachable for mere errors or irregularities that may be apparent.

Davis v. Helbig, 27 Md. 466; *Cockey v. Cole*, 28 Md. 284; *Downes v. Friel*, 57 Md. 536; *Long v. Long*, 62 Md. 62; *Newbold v. Schlens*, 7 Cent. Rep. 449, 66 Md. 589.

Mr. Thomas S. Baer, for appellees:

The failure to make those whose property rights are to be affected parties to the cause in the manner provided by the statute renders the whole proceeding a nullity.

Hunter v. Hatton, 4 Gill, 115.

Inasmuch as the infants were not summoned and had no guardians appointed for them, the decree, so far as they were concerned, was without jurisdiction and void.

Gill v. Wells, 59 Md. 492; *Hunter v. Hatton*, *supra*.

Bryan, J., delivered the opinion of the court:

The appellants filed a bill in equity in the Circuit Court of Baltimore City for the sale of certain real estate lying in said city. The land in question was devised by the will of one Solomon Betts, and the appellants set up a title to a portion of it, by virtue of certain proceedings in the Superior Court of Baltimore on the equity side of the court. The appellees are devisees under the said will. The circuit court dismissed the bill of complaint.

As the appellants' title is founded on these

proceedings, it is necessary to examine them with particularity. Solomon Betts, who died in the year 1841, devised a tract of land in the City of Baltimore to certain trustees for the sole and separate use of his daughter, Sarah Hitch, for the term of her natural life, without being subject to the control of her husband and without being liable for his debts; and after her death for the sole and separate use of the testator's granddaughter, Augusta Hitch, for the term of her natural life; and after her death for the use of her lawful issue and for the heirs and assigns of such issue forever, if any child or descendant of hers should be living at the time of her death, and if none, then in trust for the sole and separate use of the testator's daughter, Mary Davies, for the term of her natural life, and after her death for the use of his grandson, Solomon Betts Davies, his heirs and assigns forever. By appropriate proceedings William George Krebs was substituted in the place of the trustees named in the will. In May, 1859, a bill in equity was filed in the Superior Court of Baltimore City in which Sarah M. A. Hitch, Augusta Waters, William Francis Waters, Mary Augusta Waters and Edmund C. Waters (the last three mentioned being infants) and William George Krebs, trustee, were named as complainants; Sarah Hitch and Augusta Waters were married women, the said Augusta being the Augusta Hitch named in the will of Solomon Betts. The defendants were Mary Davies and Solomon Betts Davies. The bill alleged that an ordinance had passed for the opening of certain streets through the land devised by the will of Solomon Betts, and that the paving and grading of one of them had been commenced; that the property was liable for the expenses of paving and grading, that a large arrearage of taxes had accrued on the property from the year 1849 until the filing of the bill; and that Mrs. Hitch and Mrs. Waters had effected a loan of \$1,700, secured by their life interests, to prevent a sale of the property and a sacrifice of the rights of all persons interested therein. It was further alleged that it would be for the interest and advantage of all parties concerned that a sale should be made of such part of the property as would be necessary to make the required payments.

The prayer of the bill was that the sale might be made under and by virtue of the provisions of the Acts of Assembly in such case made and provided. The bill was signed by "Hugh Davey Evans, *prochein ami* of Infants," and by the trustee, and the married women, and by complainants' solicitor. The defendants in their answer denied the right of the life tenants to encumber the property by their failure to pay the taxes, and by allowing assessments to accrue which were alleged to be uncalled for at the time; and also maintained that the sale of the property was not sanctioned by any Act of Assembly. A sale was decreed in March, 1860, of so much of the property as might be required to pay the paving and grading taxes and assessments, and all other claims due and owing to the City of Baltimore, and also of so much of the property as would repay the money borrowed to pay arrearages of taxes. Sales were made to George Pressman and George U. Porter, and ratified by the court. (The land sold to Pressman has been acquired

by the appellants, and is that to which they claim title in the bill of complaint in this suit.) After the ratification of the sales, a petition was filed in the names of Mrs. Hitch and her husband, Mrs. Waters and her husband, and the three infants by their next friend, reciting the above-mentioned proceedings, and praying for a decree or order authorizing the mortgage of the property for a sum sufficient to pay the taxes and sums due for grading and paving. A subpoena was issued for the infants and a guardian *ad litem* appointed for them, who filed an answer in the usual form. No further proceedings under this petition appear in the transcript of the record sent to this court.

We shall pass by without special comment the irregularity of a suit by married women in their own names, and without making their husbands parties on either side of the record. Matters of more serious moment now demand our consideration. The city taxes were due by the life tenants, and they were bound to pay them in full without contribution from these infants. The prayer of the bill is that the property in question may be sold for the purpose of paying certain paving and grading taxes, and also of reimbursing the life tenants for the expenditure which they made in payment of their own debt. The reason alleged for the sale, the sole ground on which it is asked,—the special jurisdictional fact which is supposed to authorize it,—is that it would be “for the interest and advantage of all parties concerned.” We shall proceed to inquire into this ground of jurisdiction.

It is aside from the present purpose to consider the question whether by virtue of its general care and superintendence of infants and their property, the Chancery Court of England has power to sell their inheritance, when it appears to be manifestly to their interest that it should be sold, because it is firmly held in this State that a court of equity had the right to convert the real estate of an infant into money previously to the legislation on the subject of these sales. But the jurisdiction has been very greatly enlarged by a series of statutes. Of course, we have no concern with any of these statutes which were passed subsequently to the decree in question. The Act of 1785, chap. 72, is entitled “An Act for Enlarging the Power of the High Court of Chancery.” By the 12th section the court is authorized on the conditions therein named to sell lands in which an infant, idiot or person *non compos mentis* has a joint interest in common with any other person or persons.

In *Gill v. Wells*, 59 Md. 499, it was held that the jurisdiction thus given does not exist where the parties hold separate consecutive interests in the land, but is confined to cases where they hold concurrent interests. The Act of 1816, chapter 154, was entitled “An Act to Authorize the Chancellor and the Several County Courts of this State to Order and Decree the Sales of Real Estate of Minors in the Cases therein Mentioned.” The effect of this Statute, so far as the present question is concerned, is neatly summarized in the opinion in the case just cited, and we will quote an extract from it. Speaking of the decree passed in that case, the court says: “But the Act of 1816, chap. 154, and § 9 of the Act of 1831, chap. 311,

exactly meet the case, and it is to them the jurisdiction to pass this decree must be referred. By the first section of the Act of 1816 power was given to the equity courts to decree a sale of an infant's real estate upon petition of his guardian or *prochein ami*, provided the infant be summoned and appear by guardian *ad litem*, and it be made to appear to the court that it will be for the interest and advantage of the infant that the sale should be made. And by section 18 of the same Act, as amended and enlarged by section 9 of the Act of 1831, it was provided that the whole estate might be sold with the consent of the life tenants where the infant was the reversioner.” 59 Md. 499.

The decree cannot be supported under this Statute, because the essential preliminaries required by the first section were not observed. The bill ought to have been filed by *prochein ami* or guardian, and the infants should have been summoned, and there ought to have been an appearance for them, by guardian *ad litem* appointed by the court. The Statute does not require that an infant should sue himself, as has been suggested by the appellants' counsel; but it directs that the guardian or *prochein ami* should file a petition and bring the infant before the court as a defendant, and that the allegations of the petition should be proved as facts are proved against defendants,—a most wise and salutary provision, as the present case may well serve to illustrate.

It is vain to argue that the decree can be maintained under the jurisdiction which chancery had prior to the passage of these Statutes. While the court had power under some circumstances to sell an infant's land, when his interest demanded it, no precedent or analogy justified a sale where an adult had a part interest in the land. It was contrary to the theory and practice of chancery to sell a man's interest in land on the ground that it would benefit somebody else, or even that it would benefit himself. Even in cases of partition, sales could not be decreed until a statute gave the jurisdiction. The Act of 1785 and the Act of 1816, and their supplements, authorized sales where adults and infants owned interests in the same land; and the Act of 1831, chap. 311, § 7, first conferred power to decree a sale where all the owners were of full age, in case it was to the advantage of all of them. As a matter of course, infants may sue both at law and in equity, when their rights are invaded, and they may be sued, and their responsibilities (as recognized by the law of the land) may be enforced against them. But in this case the infants were not asserting a right against an adversary. On the contrary, they were alleging that certain liens existed against their own property; they were setting up a burden upon themselves, and they were praying that their own property should be sold, because it was for their benefit, and that of the other owners, that the sale should be made. No interests whatever were involved in the case except those of the owners, and the only question proposed for the court's consideration was whether these interests would be promoted by a sale. The only jurisdiction of the court over such a question was conferred by the Act of 1816 and its supplements; and the infants were not subjected to this jurisdiction in the mode made necessary by this Statute. It may

be worth while to remark that under the Act of 1816 the infants' benefit alone was made the ground of sale; while under the Act of 1785 the benefit of all persons concerned was the inducement to the sale. It could not in this case be for the interest of the infants that the land should be sold to reimburse the life tenants for paying taxes, which it was their duty to pay without contribution from the infants. The bill was filed before the adoption of the Code of 1860, but the decree was passed after it went into effect. But the first section of the first article of this Code provided that all suits and actions pending should be prosecuted to final determination, as if the Code had not been adopted. Legislation since the passage of the decree has extended considerably the powers of the court in regard to sales alleged to be advantageous to the parties in interest; for instance, there are the Acts of 1862, chap. 156, and 1868, chap. 278. We have not alluded to the statutes authorizing sales of land under bills for partition, because we are at a loss to conceive how they can affect the present question. It will be perceived that we think that the decree of the superior court was void for want of jurisdiction.

The subsequent petition contains statements in the name of the infants, made by the *prochein ami*; these do not bind them and can have no influence on their rights.

It has been maintained that the sale under the decree may now be ratified by virtue of the Act of 1868, chap. 249.* Twenty-nine years elapsed between the passage of this void decree and the filing of the bill to induce it with validity. The proposition in the abstract is rather startling. The Act of 1868, by its terms, has a retroactive operation, and it authorizes the court to change the effect of decrees which had become final. It is an exercise of judicial power by the Legislature.

In *Dorsey v. Dorsey*, 37 Md. 64, it was held that an Act of Assembly authorizing and empowering this court to re-open and re-hear cases, decided at a term already passed, was unconstitutional and void; and the decision was well warranted by a great number of very high authorities.

In *Griffin v. Cunningham*, 20 Gratt. 52, it was said: "But it is well settled that an Act of the Legislature directing a court to rehear a cause or to grant a new trial, or any legislative action which retroacts upon past controversies, is an invasion of judicial power which is arbitrary and unconstitutional."—and a large number of decisions were cited to the same effect, including one from our own reports, — *Miller v. State*, 8 Gill, 145.

In *Denny v. Mattoon*, 2 Allen, 379, it is said: "The Legislature have no power to grant a new trial or direct a re-hearing of a cause which has been once judicially settled. The right to a

review, or to try anew facts which have been determined by a verdict or decree, depends on fixed and well-settled principles, which it is the duty of the court to apply, in the exercise of a sound judgment and discretion. These cannot be regulated or governed by legislative action." And the court founds its opinion on well-established principles and well-considered adjudications.

The Act of 1868, in its retrospective effect, would enable the court, by new proceedings, to give validity to a decree which, when pronounced, was beyond its jurisdiction. An Act of the Legislature of Illinois of the same character came under consideration in *McDaniel v. Correll*, 19 Ill. 226. A short passage from the opinion will show the views of the court: "If it was competent for the Legislature to make a void proceeding valid, then it has been done in this case. Upon this question we cannot for a moment doubt or hesitate. They can no more impart a binding efficacy to a void proceeding than they can take one man's property from him and give it to another. Indeed, to do the one is to accomplish the other."

It is true, as stated in *Cooley on Constitutional Limitations*, that "a retrospective statute curing defects in legal proceedings where they are in their nature irregularities only, and do not extend to matters of jurisdiction, is not void on constitutional grounds unless expressly forbidden." Marg. p. 371.

But it is also true, as stated in the same work, that in judicial proceedings, if there was originally a failure of jurisdiction, no subsequent law can confer it. Marg. p. 333.

In *Dorsey v. Gilbert*, 11 Gill & J. 87, land of a deceased debtor had been sold by a trustee under a creditor's bill. One fifth of the land belonged to the minor children of the deceased debtor in right of their mother, and of course was not bound for debts, and could not be validly sold under the decree. An Act of Assembly was passed authorizing the chancellor to confirm the sale, provided a petition was filed by the purchaser and the answers of the infants were taken in the ordinary way, and provided he was satisfied by proof that the sale was fair and advantageous to the infants; under these circumstances he was required to award to the infants one fifth of the purchase money of the whole tract. The court says that this Act furnished infants with substantially the same safeguards as are provided by the Act of 1816, chap. 154, p. 91. The purchase of the land at the sale was simply an offer by the purchaser which could have no effect unless accepted by the court. The Act of Assembly authorized the court to accept this offer, provided it was shown to be advantageous to the infants in a manner similar to that required by the Act of 1816; and on the acceptance of the offer and confirmation of the sale, the infants

*That Act, which is now § 62 of art. 16 of the Code of 1888, vol. 1, provides that where, upon the petition of any infant by his guardian or next friend, a decree has been passed for a sale of the land of the infant and a sale has been made and confirmed, and "it shall appear that there was a failure to summon said infant and to have him answer by a guardian duly appointed, it shall be lawful for the court to confirm said sale and all proceedings had thereon, upon the petition of the guardian or next friend of the infant, or upon the petition of any

party having an interest in said sale, and after summoning such infant and his appearance by guardian to be appointed by the court, and such other proceedings had as required for a decree of sale of infants' real estate: provided upon a hearing and examination of all the circumstances it shall appear to said court that said sale was fairly and bona fide made, and that at the date of the decree it was for the benefit and advantage of said infant to sell said real estate," etc. [Rep.]

were to be awarded their due proportion of the purchase money. This case has been very earnestly pressed upon us, but it cannot be tortured into an authority that it is competent for an Act of Assembly to authorize by retroaction the ratification of a void sale, simply and absolutely, without requiring compensation to the owners of the land.

This case was decided at the last term of the court and was ordered to be reargued. We have endeavored to be very explicit in the statement of our views, as the former opinion was

very much misapprehended. At the reargument something was said about the appellants' claim for improvements made on the land, but there is nothing in the transcript of the record showing that improvements have been made, or in any way referring to the subject. We are not to be understood as saying that they will not be entitled to the value of any betterments which they may have made on proper proceedings to that end.

Decree affirmed, with costs.

ILLINOIS SUPREME COURT.

Henry SIEGEL *et al.*, *Appts.*,

v.

CHICAGO TRUST & SAVINGS BANK.

(.....ILL.....)

1. **A statement or recital in a note that it is given for the privilege of hanging advertising signs in street cars for three months from a certain subsequent date will not destroy its negotiability.**
2. **Indorsees of a note are not put upon inquiry as to a subsequent failure of consideration by a statement or recital in the note that it is given for the privilege of hanging advertising signs in street cars after a certain future date.**

(January 21, 1890.)

A PPEAL by defendants from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of plaintiff in an action upon an alleged negotiable promissory note by a bona fide indorser for value. *Affirmed.*

The case sufficiently appears in the opinion.

Mr. John C. Richberg for appellants.

Messrs. Flower, Smith & Musgrave, for appellee, cited—

Davis v. McCready, 17 N. Y. 230; *Daniel*, Neg. Inst. § 790; *Wade*, Notice, § 94 a; *First Nat. Bank v. Michael*, 96 N. C. 58; *State Nat. Bank v. Caason*, 39 La. Ann. 865; *Goodloe v. Taylor*, 8 Hawks (N. C.) 458; *McCarty v. Howell*, 24 Ill. 341; *Comstock v. Hannah*, 76 Ill. 530; 1 Edwards, Bills and Notes, 3d ed. p. 19; 1 Parsons, Notes and Bills, 261; 2 Randolph, Com. Paper, 715; 1 Wait, Act. and Def. p. 616; *Patten v. Gleason*, 106 Mass. 439; *Gage v. Lewis*, 68 Ill. 604.

NOTE.—Promissory note; requisites to negotiability.

A negotiable note is a courier without luggage, whose countenance is its passport. *Keck v. Sedalia Brewing Co.* 4 West. Rep. 888, 22 Mo. App. 187; *Heaton v. Myers*, 4 Colo. 59; *Pentz v. Stanton*, 10 Wend. 271; *Thurston v. Mauro*, 1 Greene (Iowa) 231; *Kenyon v. Williams*, 19 Ind. 45.

To constitute a promissory note, the instrument must be certain as to payment, and not dependent on a contingency. *Chapman v. Wight*, 5 New Eng. Rep. 787, 79 Me. 596; *Jennings v. Colorado Springs First Nat. Bank* (Colo.) 22 Pac. Rep. 777.

If an instrument, whether it calls for money or property, be not payable unconditionally and at all events, it is not negotiable under the Colorado statute. *Jennings v. Colorado Springs First Nat. Bank*, *supra*.

7 L. R. A.

See also 12 L. R. A. 483.

Shope, Ch. J., delivered the opinion of the court:

This was an action of assumpsit, by appellee against appellants, upon the following instrument:

Form B.

Dalziel's Railway Advertising.

\$800.00. Chicago, March 5, 1887.

On July 1st, 1887, we promise to pay D. Dalziel, or order, the sum of three hundred dollars, for the privilege of one framed advertising sign, size— \times —, in one end of each of 159 street cars of the North Chicago City Railway Co., for a term of three months from May 15, 1887.

No. ——— Siegel, Cooper & Co.

—which was indorsed by Dalziel, the payee, to appellants, for value, on the day of its execution.

The first question presented is, Is this instrument negotiable? And this question has been answered affirmatively by the circuit and appellate courts. The appellate court having affirmed the judgment in favor of the plaintiff, the case is brought here by appeal, upon certificate of importance, granted by that court. It appears that, before the time when the privilege of advertising was to commence, Dalziel forfeited any right he may have acquired to use the cars in the manner indicated, and the privilege specified never was furnished appellant; and it is insisted that the instrument is a simple contract only, and that therefore the same defense, failure of consideration, is available against the indorsees of the paper for value and before due, as might be interposed against such paper in the hands of the payee. It is also insisted that the instrument shows on its face that payment depended upon a condi-

A promissory note containing an unconditional and absolute promise to pay a certain sum of money creates an absolute liability for such payment, although the consideration is further described to be certain property the title to which is not to pass until the note is paid; and the destruction of such property before the note is paid does not destroy the liability. *Burnley v. Tufts*, 68 Miss. 43.

But a writing, "Two years from date, for value received, I promise to pay J. S. K. or bearer, one ounce of gold," is not a negotiable promissory note. *Roberts v. Smith*, 2 N. E. Rep. 468, 56 Vt. 462. See *notes to Wright v. Traver* (Mich.) 3 L. R. A. 50; *Bowie v. Hall* (Md.) 1 L. R. A. 544.

tion precedent to be performed by the payee, and therefore the indorsees took it with notice, and, by the failure of the payee to perform the condition, no right of recovery exists in the indorsees.

It is not contended that the indorsees had any other notice than that contained in the instrument itself; and it is apparent that at the time of its indorsement, which was the day of its execution, no right to the consideration had accrued to the maker. It is a promise to pay a certain sum of money at a day certain, for a consideration thereafter to be rendered, and depends for its validity upon the implied promise of the payee to furnish the consideration at the time and in the manner stipulated; that is, it is a promise to pay a sum certain on a particular day, in consideration of the promise of the payee to do and perform on his part. A promise is a valuable consideration for a promise.

But the question remains whether the statement, or the recital of the consideration, on the face of the instrument, impairs its negotiability, and in this instance amounted to a condition precedent. The mere fact that the consideration for which a note is given is recited in it, although it may appear thereby that it was given for or in consideration of an executory contract or promise on the part of the payee, will not destroy its negotiability, unless it appears through the recital that it qualifies the promise to pay, and renders it conditional or uncertain, either as to the time of payment or the sum to be paid. *Daniel, Neg. Inst.* §§ 790, 797; *Davis v. McCready*, 17 N. Y. 230; *State Nat. Bank v. Cason*, 39 La. Ann. 865; *First Nat. Bank v. Michael*, 96 N. C. 53; *Goodloe v. Taylor*, 8 Hawks, 458; *Stevens v. Blunt*, 7 Mass. 240.

In *State Nat. Bank v. Cason*, *supra*, it is said: "Plaintiff received the note before maturity, and before a failure of the consideration. Even if it were known to him taking it that the consideration was future and contingent, and that there might be offsets against it, this would not make him liable to the equities between defendants and payee. It cannot affect the negotiability of a note that its consideration is to be hereafter realized, or that from some contingency it may never be enjoyed."

The most that can be said of a recital in the instrument itself of the consideration upon which it rests is that the indorsee, taking it before maturity, is chargeable with notice of the recital. Such recital, however, is not sufficient of itself to advise him that there was, or would necessarily be, a failure of consideration, but that, if at the time of the indorsement the consideration has in fact failed, the recital might be sufficient to put him upon inquiry, and, in connection with other facts, amount to notice. *Henneberry v. Morse*, 56 Ill. 394.

The case at bar does not, however, fall within the rule just stated; for the assignment was made the same day the note was made, and by the terms of the recital it was apparent the payee was required to do no act till the 15th of May following, an interval of seventy days.

There is a distinction, clearly recognized in the authorities, between an instrument payable at a particular day and one payable upon the happening of some event; and the rule is that

where the parties insert a specific date of payment the instrument is then payable at all events, and this although, in the same instrument, an uncertain and different time of payment may be mentioned, as that it shall be payable upon a particular day, or upon the completion of a house, or the performance of other contracts, and the like. *McCarty v. Howell*, 24 Ill. 841, and authorities *supra*.

But the doctrine of this and kindred cases, where there is both a certain day of payment and one more or less contingent, need not be here invoked; for the time of payment in the instrument under consideration is not made to depend upon the happening or not happening of any event, but is specific and certain, and must occur by the efflux of time alone.

If, therefore, it be conceded, as it must, that a condition inserted in a promissory note postponing the day of payment until the happening of some uncertain or contingent event will destroy its negotiability, and render the instrument a mere agreement, yet, under the authorities, if by the instrument the maker promises to pay a sum certain, at a day certain, to a certain person, or his order, such instrument must be regarded as negotiable although it also contains a recital of the consideration upon which it is based, and although it further appear that such consideration, if executory, may not have been performed. Here the money was payable absolutely on the 1st day of July, 1887, a time when the contract for the advertising could not have been complete. If the instrument had remained the property of the payee, and upon its maturity suit had been brought, it is clear that no plea of partial failure of consideration could have been sustained, for the reason that the entire term had not then expired, and for the reason that the promise of the makers was based upon the promise of the payee to perform his undertaking at a time subsequent to the day fixed for payment. No analysis of the instrument itself is necessary. The most careful examination of it will fail to disclose a condition precedent to the payment of the money at the time stipulated. Nor is there anything in the recital of the consideration to put the indorsees upon inquiry at the time indorsement was made. Indeed, it is clear that at that time no inquiry would have led to notice that Dalziel would fail to comply with his contract on the 15th of May thereafter, when the term was to commence. All that the recitals would give notice of was that the note was given in consideration of an agreement on the part of the payee that the privilege of advertisement named should be enjoyed by the makers for three months from May 15, 1887. Giving to the language employed its broadest possible meaning, it cannot be construed as notice to the indorsees of the future breach of the contract by Dalziel. The presumption of law would be that the contract would be carried out in good faith, and the consideration performed as stipulated. The makers had put their promissory note into the hands of Dalziel upon an expressed consideration which they were thereafter to receive, and for the performance of which they had seen fit to rely upon the undertaking of Dalziel; and we are aware of no rule by which they can hold these indorsees for value, before due and before the time of performance was to begin, charge-

able with notice that the promise upon which the makers relied would not be kept and performed. Wade, Notice, § 94a; *Loomis v. Mowry*, 8 Hun, 312; *Davis v. McCreedy*, *supra*.

It is also contended that the court erred in giving the eighth instruction,* in behalf of appellee, as to the meaning of the words "good

*That instruction was as follows:

"In answer to your question as to the meaning of the words 'good faith' used in the instructions heretofore given, the court instructs you that they mean the opposite of 'bad faith'; that 'good faith' means 'honesty' and 'bad faith' means 'dishonesty.'" [Rep.]

faith." Without pausing to discuss the instruction, we think it clear that appellants were not prejudiced thereby, and that no inference unfavorable or prejudicial to them could have been drawn therefrom by the jury. While, therefore, the instruction may be regarded as inaccurate, it worked no injury, and appellant cannot complain.

Other minor objections are urged which, it is sufficient to say, we have examined with care, but we find no prejudicial error.

The judgment of the Appellate Court will be affirmed.

NORTH CAROLINA SUPREME COURT.

Claudia REDMOND, *Appt.*,

Board of Commissioners of the TOWN OF TARBORO.

(....N. C....)

1. All property of whatever description, and not merely that selected for taxation by the Legislature, must be taxed, under Const., art. 7, § 9.
2. The word "property" in Const., art. 7, § 9, relating to taxation, includes moneys, credits, investments and other choses in action.
3. Although the power of a municipal corporation to tax is not conferred by the Constitution, when such power is exercised the Constitution compels the taxation of all property therein, and that it shall be taxed according to its true value in money and by a uniform rule.

(*Merrimon, Ch. J., dissents.*)

(March 8, 1890.)

APPEAL by plaintiff from a judgment of the Superior Court for Edgecombe County in favor of defendant in a suit to recover back money paid under protest in satisfaction of certain taxes alleged to have been illegally assessed. *Affirmed.*

Statement by *Shepherd, J.*:

This is a controversy submitted without action, as allowed by the Statute (Code, §§ 567-569), and the following is so much of the case submitted as need be reported:

"(1) That the plaintiff, Claudia Redmond, is a resident of the Town of Tarboro, and has been for a number of years. (2) That in 1888, at the time required for listing property for taxation in said Town, she refused to give in to the list-taker of said Town \$43,312, which she owned in solvent credits. (3) That by an order of the board of commissioners of said Town the said solvent credits were ordered to be placed by the list-taker on the list, and were ascertained from the county list-taker's list, and were accordingly returned by the town list-taker on his list for taxation in said Town against the protest of the said Claudia, as was done in other like cases of solvent credits owned by persons resident in said Town. (4) That of said solvent credits of plaintiff so placed upon the town list, \$39,978.97 were owing by parties resident outside of the Town, 7 L. R. A.

and such amount is secured on property not located within the limits of said Town; and \$3,328.08 or thereabout were owing by parties residing within and citizens of said Town, with the exception of a few dollars, which she cannot accurately determine. (5) That the said board of commissioners, at their regular meeting of 1888, levied a tax of one half of 1 per centum, or fifty cents on the one hundred dollars' worth of property, including solvent credits; in the words of the order, 'that an assessment of fifty cents on the one hundred dollars valuation be levied on all property in the Town of Tarboro, not exempt from taxation, both real and personal, including all moneys, credits in bonds, stocks, joint-stock companies or otherwise.' (6) That the tax-list for said years 1888-89 was put in the hands of John W. Cotton, tax collector for said Town, who made demand upon plaintiff for the sum of \$216.56, which said sum was for taxes on the solvent credits placed as aforesaid upon the list of taxables against the protest of plaintiff, at the rate levied aforesaid, and the plaintiff under protest paid the said sum for said taxes on solvent credits, and holds therefor the receipt of the tax collector. (7) That said plaintiff has made demand in writing on the defendant board for the return of said taxes, and they refused to pay over to her the same. The question presented to the court is whether the solvent credits so listed, or any part of them, are liable to the levy so made by the Town of Tarboro."

The court gave judgment as follows: "It is considered and adjudged that the solvent credits listed by the plaintiff are liable to the levy as made by the Town of Tarboro. It is further adjudged that the plaintiff pay the costs of this proceeding;" and the plaintiff, having excepted, appealed to this court.

Mr. John L. Bridgers, with *Messrs. H. L. Staton* and *Jas. Norfleet*, for appellant.

Messrs. H. A. Gilliam and *Donnell Gilliam* for appellee.

Shepherd, J., delivered the opinion of the court:

The very important question presented by this appeal is whether the Town of Tarboro has the power to levy a tax upon the solvent credits of its citizens. It is necessary to an in-

telligent discussion of the question that we should review the several decisions of this court in reference to municipal taxation, and extract from the conflict of authority and confusion in which the subject is involved the true principles governing such taxation. Section 9, art. 7, of the Constitution, provides that "all taxes levied by any county, city, town or township shall be uniform and *ad valorem* upon all property in the same, except property exempted by this Constitution." Does this provision simply apply the rule of uniformity and equality to the particular subjects which may be selected by the Legislature for taxation, or does it command that all property, of whatsoever description, shall be taxed, and taxed according to the said principles? If the latter be the correct view, and "moneys, credits, investments," etc., are embraced in the said section, it necessarily follows that all general laws, and the special provisions of the charters of these various municipalities which conflict with the said provision of the Constitution, are void, and that the refinements of construction which are sought to be applied to their particular phraseology become wholly impertinent to the present discussion.

1. We will first inquire, then, whether the said provision of the Constitution commands that all property shall be taxed. "Taxes" are defined to be burdens or charges imposed by the legislative power of a State upon persons or property, to raise money for public purposes (Blackw. Tax Titles, § 10); and the power to levy them is one of the essential attributes of sovereignty, and is inherent in and necessary to the existence of every government. *Knowlton v. Rock Co.* 9 Wis. 418; *McCulloch v. Maryland*, 17 U. S. 4 Wheat. 316 [4 L. ed. 579].

In the absence of constitutional limitations, there is, it is said, no restraint whatever upon the Legislature, and it may discriminate in favor of or against a particular class of persons or property, and pass laws in violation of every principle of just government, by an unequal distribution of the public burdens. The check upon such an abuse of power is in the influence of constituents over their representatives, and the weight of authority is that the courts have no right to interfere with this exercise of the legislative will. Thus it is seen that a wide field is open for a war between different classes of property, in that one class may be taxed to the exclusion or to the prejudice of another, and that under the forms of a free government an excited partisan legislative majority may commit wrongs against the rights of property as flagrant and oppressive as those which have disgraced the reigns of the most despotic rulers.

But it is said that the General Assembly will be influenced by proper motives, and will levy taxes upon a just basis. Experience in many of the States has shown that the principles of taxation should not be left to the uncertainty or caprice of successive Legislatures, but that they should be fixed and immutable, and embodied in the fundamental law, under whose broad shield all property, of whatsoever species, may be equally protected. This, we think, was the purpose of the framers of our Constitution in inserting therein the section re-

ferred to, as well as section 3, art. 5, relating to state taxation. No one who reads these and other provisions of the Constitution will fail to be impressed with the earnest effort there made to ingraft upon our Organic Law the great principle of equality in taxation. "The subjects of every State ought to contribute to the support of the government as nearly as possible in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the State. The expense of government to the individuals of a great nation is like the expense of management to the joint tenants of a great estate, who are all obliged to contribute in proportion to their respective interests in the estate. In the observation or neglect of this maxim consists what is called the equality or inequality of taxation."

Such are the words of the author of "The Wealth of Nations" (book 4, chap. 2), quoted with approval by Judge Cooley (Taxn. p. 9); and we think that they well illustrate the true spirit and purpose of our constitutional provisions upon the subject.

We are of opinion that section 9, art. 7, was not intended to apply the rules of uniformity and equality to the subjects which the Legislature might alone select for taxation, but that it requires that all property shall be taxed, and taxed in accordance with the said rules. A contrary view was taken by the court soon after the adoption of the Constitution, in the case of *Prullen v. Raleigh*, 68 N. C. 451. The charter enumerated eight subjects of taxation, "beginning with real estate situate in the city, and ending in encroachments on the streets by porches," etc.; but it did not include moneys, credits, etc. The court affirmed the opinion of the superior court judge that the Constitution was "intended to declare simply the manner in which municipal corporations should levy taxes, to wit, that they should be uniform and *ad valorem*, and not to declare the subjects to be taxed by them." The decisions in which this case has been cited (such as *Winston v. Taylor*, 99 N. C. 210; *State v. Bean*, 91 N. C. 551; *Latta v. Williams*, 87 N. C. 126, and perhaps others), have reference only to the taxing of trades, professions and the like, and these, not being property, are correctly placed within the principle declared therein.

Under the construction of the Constitution as declared in *Prullen's Case*, it would be in the discretion of the Legislature to unequally distribute the burdens necessarily incident to government, and the worst species of class legislation would be tolerated. It would (says Dixon, Ch. J., in *Knowlton v. Rock Co.*, 9 Wis. 422) "make the Constitution operative only to the extent of prohibiting the Legislature from discriminating in favor of particular individuals, and would reduce the people, while considering so grave and important a proposition, to the ridiculous attitude of saying to the Legislature, 'You shall not discriminate between single individuals or corporations, but you may divide the citizens up into different classes, as . . . the owners of different species or descriptions of property, and legislate for one class, and against another, as such as you please, provided you serve all of the favored or unfavored classes alike;' thus affording a direct

and solemn constitutional sanction to a system of taxation so manifestly and grossly unjust that it will not find an apologist anywhere, at least outside of those who are the recipients of its favors."

Such a construction, in our opinion, not only offends the true spirit of the Constitution, but has been distinctly and solemnly repudiated by the uniform decisions of this court in subsequent cases. These cases decide that, when the taxing power is exercised for a public purpose, the Constitution, and not the Legislature, declares what property shall be taxed; and that it requires that all shall be taxed, and by a uniform rule, and *ad valorem*. This construction is conceded as to state and county taxation, under section 3, art. 5, and we are unable to conceive why the same rule should not apply to section 9, art. 7, as the language of the latter is even more imperative than that of the former.

In *Cobb v. Elizabeth City*, 75 N. C. 1, Rodman, J., after quoting section 9, art. 7, says: "All taxes, therefore, must be levied as well on personal as on real property, notwithstanding any contrary provision in the charter."

In *Kyle v. Fayetteville*, 75 N. C. 445, it was decided that "shares of stock in a national bank are proper subjects of state, county and municipal taxation." The court said (Bynum, J., delivering the opinion) that, "in our view, it was unnecessary for the Revenue Act or the charter of the Town of Fayetteville to tax specifically the national-bank shares of either residents or nonresidents. . . . The Constitution seizes them and exacts from them their proportional share of the public burdens. Neither the Legislature nor the town corporation can exempt them from taxation without doing violence to the Constitution." "It is the provision and was the purpose of the Constitution that thereafter there should be no discrimination in taxation in favor of any class, person or interest; but that everything real and personal, possessing value as property, and the subject of ownership, shall be taxed equally, and by a uniform rule. In this respect the present Constitution shows no favors and allows no discretion. If, then, the Town of Fayetteville has the power to tax, the Constitution steps forward, and commands that all property shall be taxed, and by a uniform rule." To the same effect are *Young v. Henderson*, 76 N. C. 420; *London v. Wilmington*, 78 N. C. 109, and *Puitt v. Gaston County*, 94 N. C. 709.

The language of the court in these decisions can admit of no question, and, if anything further were needed to sustain the principles there laid down, we have the high authority of the late distinguished chief justice (Smith) in *Vaughan v. Murfreesboro*, 96 N. C. 317, who says that the Constitution, art. 7, § 9, "commands that all taxes levied in any county, city, town or township shall be uniform and *ad valorem* upon all property in the same, except property exempt by this Constitution; by force of which, notwithstanding the omission in the charter, personal as well as real [property] must be assessed and subjected to the same public burden."

This overwhelming weight of authority, so consonant with the principles of equality in taxation everywhere pervading the fundamen-

tal law, conclusively establishes the proposition that, wherever the taxing power is exercised for a public purpose, all property shall be taxed, notwithstanding any contrary provisions in the General Law or the charter.

2. It only remains, therefore, for us to consider whether the word "property" in said section 9, art. 7, includes moneys, credits, investments and other choses in action. Considering the essential justice of the principles we have mentioned, and which are so plainly recognized in the several provisions of our Constitution, the mind naturally rejects in their interpretation any narrow or strained rules of construction which may be relied upon to defeat their beneficent purpose. These provisions should be construed in the light of their general spirit and intention, and thus full effect be given to the will of the people as expressed in their fundamental law. Clear and convincing, indeed, then, must be the reasoning which gives a restricted meaning to the word "property," when used in reference to municipal taxation, while as to all other taxation it is to be taken in its natural and general sense. Upon what principle can it be contended that one who has no tangible property, but who owns \$100,000 in solvent credits, may enjoy all of the conveniences, safeguards and other benefits of town life, and contribute nothing whatever to the payment of the common expenses? Yet such will be the effect, if the restricted interpretation contended for is to prevail. It is clear that all who enjoy these privileges should pay their part of the expenses. For instance, the evidences of these very solvent credits receive greater protection by the police of a town, and yet the police are to be paid only by those who own tangible property. No good reason can be assigned in support of such an unjust discrimination, while every principle of justice and common fairness sternly forbids it.

In support of this restricted interpretation of the word "property," the plaintiff relies upon the case of *Vaughan v. Murfreesboro*, *supra*. The charter provided that the tax should be levied "upon all persons and property within the town subject to taxation for county purposes, under the General Laws of the State." Under sections 3, 6, art. 5, of the Constitution, there can be no question but that choses in action were taxable for county purposes, but it was held that under the charter they were not included. It is not easy to understand how the language of the charter was material to the decision of the case, as the opinion, as we have seen, fully committed the court to the principle that the Constitution, and not the charter, determines what property shall be taxed. While the opinion lays much stress upon the "localizing" words ("within the town") which are used in the charter, it seems to approve of the following dictum in *Pullen v. Raleigh*, *supra*: "In regard to that word ['property'], by the bye, we see that the Constitution does not make it include 'money, credits, investment in bonds,' etc." These words are spoken of in *Vaughan's Case* as an "adjudication," when, from an examination of the opinion, it will appear that the decision rested entirely on the ground that the objects to be taxed depended "upon the charter," and the charter having enumerated eight specific subjects, in none of

which were embraced "debts and securities for money," the latter were excluded. So far from adjudicating the meaning of the word, the learned chief justice is careful to say that "the word 'property,' about which so much was said on the argument, is not used in that enumeration of the subjects of taxation." The dictum is founded solely upon the supposed distinction made in the use of the words "real and personal property," in section 3, art. 5, which words, it is said, are "used in a sense to exclude such credits and investments." The section is as follows: "Laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise; and also all real and personal property, according to its true value in money." The suggestion is (for, after all, it is but a suggestion) that by the verbal arrangement of this section the words "real and personal property" are so restricted in their meaning as to exclude moneys, credits, etc., and that this limited sense is to be attached to the word "property," as used in section 9, art. 7.

It therefore becomes material that we should examine § 3, art. 5, and ascertain whether there is in fact such a distinction as is contended for. It is true that the meaning of the section is not very happily expressed, but it must be construed with reference to the context and spirit of all of the constitutional provisions upon the subject, and their general intent and purpose cannot be defeated by the confused arrangement of words, or, as is suggested, by the presence of a semicolon between the two first clauses, since, even in the interpretation of an ordinary deed, punctuation must be disregarded, and words may be transposed to "bring them to the intent of the parties." *Bunn v. Wells*, 94 N. C. 67. Let us now see whether such a distinction exists, or has ever been recognized and acted upon by this court. If there be such a distinction, the argument founded upon it must be followed to its logical results, and it cannot be used in the construction of one section of the Constitution and abandoned as to others. Now, if the words "real and personal property" are used in the second clause in such a sense as to exclude "moneys, credits," etc., and the two clauses are divorced, as is argued, by a semicolon and the words "and also," and are therefore entirely independent of each other, upon what rule of construction has this court so often applied the principle of *ad valorem*, mentioned in the second clause, to the "moneys, credits," etc., mentioned in the first clause? Clearly, this cannot be done but by holding that the words "real and personal property" include "moneys, credits," etc. Again, if these clauses are independent of each other, how, we may ask, has this court so frequently applied the rule of uniformity contained in the first clause to the real and personal property contained in the second clause? These considerations alone ought to be sufficient to meet the supposed distinction upon which the dictum is founded.

We are not without aid, however, in the construction of this provision of the Constitution. It seems to have been taken from the Constitution of Ohio, as the language is precisely the same. In that State, in the case of *Columbus Exch. Bank v. Hines*, 8 Ohio St. 1, an effort

was made to draw the very distinction which we have been discussing, and the court said: "But it is argued that the uniform rule in taxing, required by the Constitution, applies only to moneys, credits, investments in bonds, . . . Why should so important a rule as that of uniformity in taxation be established by the Constitution, and then limited in its operation to a few specific classes of personal property? It is said that all other property is to be taxed 'according to its true value in money.' This requirement, however, only fixes the standard for ascertaining the taxable valuation, and does not necessarily imply equality and uniformity either in the rate and mode of assessment, or in the different localities throughout the State. The taxable valuation may be fixed according to the true value of property in money, and yet discriminations may be made between different classes of property, and between different localities in the State, imposing unequal and unjust burdens of taxation."

In speaking of the first clause, it is said that "this provision, arising out of abundant caution, was not intended to give these enumerated things any new distinctive classification, nor does it in fact exclude them from the denomination of 'personal property,' to which, by their nature and legal incidents, they belong. Mr. Broom, in his *Selections of Legal Maxims* (p. 415), says 'that the maxim, *expressio unius est exclusio alterius*, requires always great caution in its application. Thus, where general words are used in a written instrument, it is necessary, in the first instance, to determine whether these general words are intended to include other matters besides such as are specifically mentioned, or to be referable exclusively to them; in which latter case only can the above maxim be properly applied.' In the interpretation of legal instruments, words used out of abundant caution are often to be tolerated, at the expense of tautology. The object of the language of the Constitution under consideration was comprehension, not exclusion. The words, 'all real and personal property,' therefore, in the second clause of this second section, are to be taken in their most comprehensive legal import, including every kind of real and personal property whatsoever, not excepting the several classes of personal property expressly mentioned in the first clause of the section. If this interpretation be in any sense liable to the charge of tautology, it certainly is not to that of repugnancy. If this had not been the meaning intended by [the framers of] the Constitution, there would have been added to the words, 'all real and personal property,' these words, 'other than that above mentioned.' It is more in harmony with the settled rules of construction to convict the law-makers of some inelegancies in rhetoric and the use of unnecessary words, than to depart from the leading object and intent of the instrument. . . . Any other interpretation than this would lead to consequences at variance with the manifest spirit and true intention of the Constitution. If moneys, credits, investments in bonds, stocks, joint-stock companies, etc., may be subjected to a different rate of taxation from that imposed on other kinds of property, or if moneys, credits, investments in bonds, stocks, etc., may be

taxed at less than their true value in money, while all other property is required to be taxed at its true value, in either case great and unfair inequalities may be created by legislative discretion. . . . There can exist no sound reason why a person whose property consists of moneys, credits, stocks, etc., should bear a less burden of taxation than that which is imposed on the lands and chattels of the agriculturist, the implements, machinery and materials of the manufacturer, or the goods and wares of the merchant; and the Constitution, truly interpreted, recognizes no such distinction."

This case was decided in 1858, and has been cited with approval by this court in *Worth v. Petersburg R. Co.*, 89 N. C. 301, in which it is said that the provision under consideration "was copied from the Constitution of Ohio." The construction put upon it, therefore, by the Supreme Court of that State, is entitled to great weight. "Where the terms of a statute which has received judicial construction are used in a later statute, whether passed by the Legislature of the same State or country or by that of another, that construction is to be given to the latter statute. *Com. v. Hartnett*, 3 Gray, 450; *Ruckmaboye v. Mottichund*, 32 Eng. L. & Eq. 84; *Bogardus v. Trinity Church*, 4 Sandf. Ch. 653; *Rigg v. Wilton*, 13 Ill. 15; *Adams v. Field*, 21 Vt. 265.

"It is presumed that the Legislature which passed the latter Statute knew the judicial construction which had been placed on the former one, and such construction becomes a part of the law." *Potter's Dwar. Stat.* 274, note; *Bridgers v. Taylor*, 102 N. C. 89.

The foregoing rule, while not absolutely binding, is used as a valuable aid in the construction of laws.

This high authority determines, we think, that the words "real and personal property," as used in the said section, comprehend moneys, credits, investments, etc., and that there exists no such distinction as that relied upon to sustain the argument which seeks to place a restricted meaning upon the word "property," when used in other parts of the Constitution, and especially in section 9, art. 7. If the latter construction prevails, much obscurity, confusion and conflict will be introduced into the Organic Law, which can easily be avoided by holding, as we do, that section 9, art. 7, is but a concise form of expressing the principles contained in section 3, art. 5; the difference in the language employed being attributable to the probability that the two sections were framed by different committees of the convention. A contrary construction would lead to results which were little contemplated by the framers of the Constitution. For instance, if the word "property," in section 9, art. 7, does not comprehend "moneys, credits," etc., they are without the pale of constitutional protection, and municipal corporations may tax them without regard to the rule of uniformity and equality. Thus it will be in the power of the Legislature to put the entire or an unequal part of the burden of municipal government upon moneys, credits, investments in bonds, stocks, etc., and in this way indirectly confiscate this species of property. Such an abuse of the taxing power would, in the language of Miller, J. (in delivering the opinion of the Supreme Court of the United States in the case of

Citizens Sav. & Loan Assn. v. Topeka, 87 U. S. 20 Wall. 655 [22 L. ed. 455]), be "none the less a robbery because it is done under the forms of law, and is called 'taxation.'" And it is manifest that such an unlimited power of discrimination was not intended to be permitted by the Constitution. It should therefore be a matter of serious consideration to the owners of this species of property that, in attempting to escape the payment of their part of the public municipal burdens, they are invoking a principle which excepts them from the protecting power of the limitations contained in the Organic Law.

Another incongruity growing out of the construction contended for is presented by section 6, art. 5, which provides that county taxes "shall be levied in like manner with state taxes." State taxes, as we have seen, must be levied on money, credits, etc., by a uniform rule and *ad valorem*. The word "county" is for some purpose inserted in section 9, art. 7, preceding the words "city, town or township." Now, if this section is to have any effect upon county taxation, and the word "property" is to be taken in its restricted sense, we have a direct conflict with section 3, art. 5, both in respect to the subjects of taxation, and the principles by which such taxation is governed. Again, if such an interpretation is correct, it must be followed in section 1, art. 5, which provides that "the General Assembly shall levy a capitation tax on every male inhabitant of the State, . . . which shall be equal on each to the tax on property valued at \$300 in cash; . . . and the state and county capitation tax, combined, shall never exceed \$2 on the head." As the word "property" alone is used, moneys, solvent credits, etc., constituting, it is estimated, one eighth of the taxable values of the State, would be excluded from the benefit of the limitation in the above section, and would not enter into the calculation of the amount to be raised at any given per cent on the equation system for state or county purposes. In passing, we will remark that the importance of imposing some restriction upon city and town authorities as to this species of property is enhanced by the fact that this court has held that the constitutional limitation as to the per centum on the value of property does not apply to such municipal corporations. *Young v. Henderson, supra*; *French v. Wilmington*, 75 N. C. 482.

It does not follow, however, that because there is only a legislative limitation, the principle of equation shall not be enforced, nor that the municipality may not collect from polls an amount equal on each to the tax imposed, for municipal purposes, on property worth \$300; in which case there would be no obligation to devote it to the support of schools and the poor, as section 2, art. 5, only directs the application of the capitation tax collected for state and county purposes.

These views are presented to illustrate how the whole system of taxation growing out of the construction we have given to the Organic Law could be made to operate harmoniously, as well as justly, whether imposed by the State or a municipal corporation, under the powers conferred upon it. Just here we will

notice an argument derived from the language of the foregoing provision of the Constitution. It is said that, because property is there required to be valued at its true value in cash, it is a recognition of the distinction in section 3, art. 5. This is a *petitio principii*, as the existence of such a distinction is the very point in question. We have shown, we think, both by reason and authority, that no such distinction exists, and that the said section means that all property, of whatsoever description, must be taxed at its true value, and by a uniform rule. Upon this we have also a legislative construction in chapter 218, § 18, Acts 1889, where solvent credits, investments, etc., are required to be taxed at their "true current or market value." We will also add the remark of Rodman, J., in *Wilson v. Charlotte*, 74 N. C. 752, that such a construction of the word would place this class of property outside of the Bill of Rights in respect to jury trial and other privileges guaranteed therein, as the word "property" only is there used. It must be apparent to everyone that if such a finely drawn distinction is to be deduced from an involved sentence, and made the basis of a limited definition of the word "property," we will meet with nothing but confusion and incongruities in many parts of the Constitution; whereas, if the general and legal meaning of the word is adopted, all of its provisions will be in perfect accord, working out together the benign principles of equality and uniformity in taxation.

For the foregoing reasons, we think that the dictum in *Pullen's Case* was unfounded, and it is singular that it should still be quoted as authority. It was clearly not so regarded by its author, the distinguished chief justice, as we find the same court, over which he presided with such great ability, declaring in *Wilson v. Charlotte*, *supra*, that "such an inference is hasty, and cannot be fairly drawn," and unanimously deciding that the word "property," as used in section 2, art. 7, does include money, credits, etc.

Again, in *Cobb v. Elizabeth City*, *supra*, the court held that the word "property" includes bonds, stocks, solvent notes," etc. In *Kyle v. Fayetteville*, *supra*, the court said (Bynum, J., delivering the opinion): "For wherever the power to tax is exercised, all taxes, whether state, county or town, by force of the Constitution, must be imposed upon all the real and personal property, money, credits, investments in bonds, stocks," etc.

In *Pruitt v. Gaston Co.*, *supra*, the late learned chief justice in delivering the opinion of the court quoted the foregoing language with unqualified approval. These well considered cases, it seems to us, establish, as well as judicial authority can establish anything, that the word "property," used in said section, is not to be taken in the restricted sense as suggested, but that it includes moneys, credits, investments or any other chose in action. But the opinion in *Vaughan's Case* does not rest alone upon the "hasty" inference alluded to, but apparently seeks the aid of the common-law definition of the word "property." The cases referred to are where it is used in residuary clauses of wills, in which a sale and division of the proceeds were directed. It was held, says Judge Reade in *Hogan v. Hogan*, 68

N. C. 223, "that money on hand and choses in action did not pass, the prominent reason being that they are not ordinarily the subjects of sale, and in all the cases a sale was directed, and a division of the proceeds." Judge Rodman, in *Wilson v. Charlotte*, after examining one of the cases, and showing that the decision was controlled by the context of the will, remarks: "There can be no doubt, I suppose, that a bequest of 'all of my property' to A. would pass bonds belonging to the testator."

It is hardly necessary, however, to pursue this phase of the discussion further, as the opinion in *Vaughan's Case* admits that these decisions "are not in harmony, and are referred to as showing how the usual import of words may be restrained in their operation by the context."

While we do not for an instant concede that the manifest spirit and intent of the Organic Law of a State is to be controlled by the strict technical definitions of the common law as applied to wills and other dispositive instruments, we will insert some authorities which plainly show that at common law the word "property," when not limited by the context of the instrument in which it is found, includes choses in action. It is a *nomen generalissimum*. "Standing alone, the term includes everything that is the subject of ownership." Anderson, Law Dict.

"Property" includes not only ownership, estates and interests in corporeal things, but also rights, such as trademarks, copyrights, patents and rights in *personam*, capable of transfer or transmission, such as debts. See *Birchall v. Pugin*, L. R. 10 C. P. 897; 2 Aust. Jur. 817, *et seq.*

"Property," in a policy of insurance, has been held to include current bank-bills owned by the assured. *Whiton v. Old Colony Ins. Co.* 2 Met. 1.

The terms "goods and chattels" include choses in action. *Ford and Sheldon's Case*, 12 Coke, 1; *Ryall v. Rolle*, 1 Atk. 182.

The word "property" includes choses in action as well as choses in possession. It includes money due as well as money possessed. *Carlton v. Carlton*, 72 Me. 116; *Ida v. Harwood*, 30 Minn. 195.

"A credit," says Judge Reade in *Lilly v. Cumberland Co.*, 69 N. C. 307, "is property, and as such is liable to taxation as any other property."

In *Adams v. Jones*, 6 Jones, Eq. 221, Manly, J., speaking for the court, said that "the share of stock in the R. & G. Railroad Company is property, to be sold under the eleventh clause of the will. The word is among the most comprehensive of those in use, to signify things which are owned and subject to be owned and enjoyed."

Speaking of constitutional provisions similar to ours, Cooley on Taxation, 184, says: "These provisions preclude discrimination in favor of or against any classes of property or persons whatsoever. They require the taxation of loans or any other credits, these being property as much as lands or chattels in possession."

Moreover, we have a legislative interpretation of the word which is to be used "in the construction of all statutes," and which reflects much light upon its meaning, when used in the Constitution. Code, § 3765, provides that "the words 'personal property' shall include moneys,

goods, chattels, choses in action and evidences of debts, including all things capable of ownership, not descendible to the heirs-at law. The word 'property' shall include all property, both real and personal."

To the suggestion that this view of the subject will discourage the investment of capital in towns and cities, we reply that such a consideration should have no weight in a legal discussion, but that it is not true that such a result will follow, as the owner of solvent credits, etc., is only taxed as to them at the place of his domicile.

After this lengthy discussion, made necessary by the doubt and obscurity into which the subject has fallen, and sustained, as we are, by the general intention of the Constitution as interpreted by the repeated decisions of this court and other weighty authorities, we conclude that, although the power of a municipal corporation to tax is not conferred by the Constitution, yet, when such a power is exercised, the Constitution "steps in," and, without regard to the provisions of its charter, commands that all property therein, real and personal, including moneys, credits, etc., shall be taxed, and that it shall all be taxed according to "its true value in money," and by a uniform rule. This, we feel sure, is in accord with the true spirit and meaning of the fundamental law, whose evident purpose is not to be defeated by a construction based upon a supposed distinction growing out of "inelegancies in rhetoric" and the improper punctuation of one of its provisions.

For the reasons given it is unnecessary that we should examine into the provisions of the charter. We are of opinion that his honor properly held that the solvent credits of the plaintiff were liable to taxation by the defendant corporation.

Affirmed.

Merrimon, Ch. J., dissenting:

I do not concur in the decision of this case, and, as it is one of moment, I will state some of the grounds of my dissent.

The decision of the question raised by the assignment of error must depend upon the proper interpretation of several important provisions of the Constitution, affecting, as they do, materially the whole subject of taxation. Their true meaning is not entirely free from doubt, and to settle this is the more embarrassing, as such provisions have come before this court repeatedly, and its decisions in respect to some aspects of them are not, as will be seen, in harmony with each other. Article 5 of the Constitution is entitled "Revenue and Taxation," and is devoted mainly to the designation and classification of the several subjects of taxation, as to the particular kinds and character of them, and the methods of levying taxes. These distinctions and classifications are fundamental, and must be observed and prevail in all proper connections. Moreover, terms used must be strictly applied in the sense in which they are employed. The first section of the article just cited provides and declares that "the General Assembly shall levy a capitation tax" as therein prescribed, which shall be equal, on each person subject to it, "to the tax on property valued at \$300 in cash," and "the state and county

capitation tax combined shall never exceed \$3 on the head." The third section thereof provides that "laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise; and also all real and personal property, according to the true value in money. The General Assembly may also tax trades, professions, franchises and incomes, provided, that no income shall be taxed when the property from which the income is derived is taxed."

These sections are general, leading and controlling as to the subjects of taxation for general purposes, and as to how the same shall or may be taxed. It will be observed that there are four distinct classifications of subjects.

First, that of "capitation tax," which is defined and limited, and the limitation is based on the prescribed valuation of property, classified as such property, as we shall presently see, must be taxed according to its value, and thus it has the quality of definiteness. This is important for such purpose, and as tending to show the meaning to be attributed to the term "property."

A second classification is that of moneys, credits, investments in bonds, or however made as such, all of which must be taxed "by a uniform rate,"—not necessarily according to their value in money,—but each of the subjects so enumerated must be taxed in the same way as the other, and in the same measure, whatever this may be. Thus they may be taxed according to their value, or a fixed per cent or otherwise, "by a uniform rate," in the wise discretion of the General Assembly. It must pass laws taxing such things, but it is left to judge of the expediency of taxing them more or less, and the particular method of taxing them by uniform rule as indicated. Money, in general, passes from one person to another. Credits, bonds and investments are very variable and uncertain, and often precarious in their values, and therefore considerations of justice and public policy might induce the Legislature to tax them at a greater or less rate, as a class of subjects of taxation, than other like subjects. Such seem to have been the reasons, or some of them, for such classification. Anyhow, the Legislature is invested with such power. The classification distinctly appears. The constituent parts of it are enumerated, and must be taxed, and it is particularly prescribed that they must be "by a uniform rule." There is no other limitation or restriction on the power of taxation as to them. This classification is distinctly separated from that which next follows it in sense and application, by a semicolon, while the succeeding one specifies another subject, designated as "real and personal property," as distinguished from the next preceding one, which must be taxed "according to its true value in money." The distinction so prescribed would be unnecessary and nugatory if the subjects embraced by it were put on the same footing and in the same classification with "real and personal property." The distinction specified can and must mean something,—serve some purpose,—and it is difficult to see that it means anything else than the clear classification indicated.

A third classification is that of "all real and personal property" (with specified exceptions),

which must be taxed "according to its true value in money." Thus a clear and important fundamental distinction, for the purposes of taxation, is made between "moneys, credits and investments," as specified, and "property." The latter term is used in the limited sense of "realty,"—land,—and "personalty,"—tangible things other than such as are specified in the second and fourth classifications prescribed. While the term "property," in its broadest and most general signification, embraces all kinds of property, including choses in action, rights and credits, and the like things, it is very often and conveniently used in its limited sense, as in the connection under consideration, and this is so notwithstanding the statutory provision. Code, § 8765, par. 6. This provision could not affect the meaning of terms employed in the Constitution; indeed, it purports to apply only to statutes, and not to them, when the meaning is manifestly otherwise than as therein provided and defined. "Real and personal property," thus classified, is such property as is most durable, less transitory, more uniform and steady in its value, and more generally owned and used by individuals of all classes and conditions, than any other. It constitutes, ordinarily, the most certain and leading subject of taxation in every respect. Hence the Constitution classifies it, and prescribes a just and reasonable rule of taxation as to it, that puts it beyond the control of the Legislature, except as to the measure of the taxes levied. The rule as to it is, in effect, that it must be taxed uniformly and *ad valorem*, because all lands must be taxed.

A fourth classification is that of "trades, professions, franchises and incomes." It is not made mandatory upon the General Assembly to pass laws taxing these subjects of taxation. It is left to it to determine when it is just and expedient to do so. There might be reasons of justice and public policy that would render it unwise to impose a tax on them; and, for the like reason, the tax, when levied, is not necessarily to be uniform. It might be wise to tax some trades, professions, franchises and incomes, and not others, and at one time, and not at another. The subject is intentionally left to the wisdom and discretion of the Legislature. Thus the subjects of taxation, and the methods of taxing them for the purposes of raising the general revenues of the State, are prescribed and established by the Constitution. In section 6 of the same article of the Constitution, it is provided that "the taxes levied by the commissioners of the several counties for county purposes shall be levied in like manner with the state taxes, and shall never exceed the double of the state tax except for special purposes, and with the special approval of the General Assembly." The several counties are constituent parts of the State, and are political instrumentalities thereof, intended to promote and aid in the administration of the government, particularly in the localities where they are situate. It is in and through them, to a very large and material extent, that the government is administered, and the public revenues necessary for that purpose are correspondingly large. Hence the provisions just recited find an appropriate place in the article of the Constitution on the subject of "Revenue

and Taxation," and hence, also, the General Revenue Laws of the State embrace counties, and the raising of revenue through them for their proper county purposes. Hence, too, the provision in the section last recited, that "the taxes levied for county purposes shall be levied in like manner with state taxes," implies that they shall be levied "in like manner" in all respects, including the subjects of taxation; otherwise, the "like manner" would be partial, and not to the whole extent as intended.

The article of the Constitution cited above makes no reference to taxation of cities and towns. In another article—that entitled "Municipal Corporations" (§ 9 thereof)—it is provided that "all taxes levied by any county, city, town or township shall be uniform and *ad valorem* upon all property in the same, except property exempted by this Constitution." The term "property," thus employed, is used in the same restricted sense, and for the like purpose, that it is in the third classification of subjects of taxation, already adverted to above. It applies to the same subject of taxation, and must be taken in the same sense, nothing to the contrary appearing, and nothing does so appear. By the third classification mentioned, "all real and personal property," as pointed out above, must, in effect, be taxed uniformly and *ad valorem*; and thus it likewise appears that the word "property" is used in the same sense in both of the sections recited. Indeed, the intention of the last-recited section is to exclude the possible inference and conclusion that "municipal corporations" could levy taxes on "property"—real and personal property—otherwise than as the Legislature might do for the general purposes of the State, and to prevent the Legislature from allowing them by statute to do so. Moreover, the use of the word "property" in the exceptive provision of the section last recited also tends to show that it is used in the restricted sense. Such corporations shall not levy taxes upon "property" exempt by the Constitution, and all such "property" is real and personal, in the restricted sense of that term. See article 5, § 5. Besides, to use the term "property" in the last recited section in its broadest sense would render that section as to counties incompatible with article 5, § 6, above recited. This section requires that taxes for county purposes must be levied in "like manner with the state taxes." It is certainly unreasonable and unwarranted to merely infer, in the face of what so appears to the contrary, that cities and towns may—must—levy taxes uniform and *ad valorem* upon all "property" embraced by that term, used in its broadest sense. Cities and towns cannot levy taxes at all, except as the Legislature may allow them to do; and when they are allowed to levy taxes on property simply, this implies property in the limited sense, and taxes levied upon the same must be "uniform and *ad valorem*." They cannot tax one sort of such property, and not another, nor can they levy a tax otherwise than *ad valorem*. The Constitution has fixed the meaning of the term "property," when used in connection with the subject of "Revenue and Taxation," and that meaning must be accepted and acted upon. The Legislature can only levy taxes on the subjects of taxation accordingly as classified, and

in the way prescribed and allowed by the Constitution.

There is no provision of the Constitution that requires or allows cities and towns, where they already exist, or shall be created, to levy taxes for their purposes on all or any property, of any kind whatever, within them; nor is there any such provision that requires the Legislature to confer upon them power or authority to do so. The single provision as to them in respect to taxation is that "all taxes levied by" them "shall be uniform and *ad valorem* upon all property in the same." This must imply when they shall be allowed by appropriate enactment of the Legislature to levy taxes on "property," as explained above. The purpose of the provision is to prevent cities and towns from taxing one species of property they may be allowed to tax, and not another, and one kind more than another, and likewise to prevent the Legislature from allowing them to do so. The Constitution does not regulate the subject of taxation in cities and towns otherwise than as just explained. It is left to the Legislature to allow them to tax property, moneys, credits, investments, trades, professions, franchises and incomes as it may deem wise and expedient; but it is not bound to do so, nor is it required to allow them to tax all such subjects of taxation or none.

Moreover, it is unreasonable and unwarranted to make article 5, § 8, of the Constitution, apply to cities and towns, and not, also, section 1 thereof, in respect to the equation of taxation. What reason can be suggested for such discrimination? Taxation may be unlimited as to towns; it must be limited as to the State and counties. The power of the Legislature to confer upon cities and towns powers of taxation grows out of its power to create and invest them with such powers as it may deem proper, and not inconsistent with the Constitution. The power to create them implies the power to effectuate the purpose by proper, pertinent means. It is wisely left to the Legislature to determine what powers of taxation they shall exercise, and what subjects thereof they may tax. They are not regular instrumentalities of government, like counties. Their purposes are special in a large degree. They afford the people who live in them special advantages, oftentimes varied and peculiar in their nature. They possess more corporate powers and functions than counties, and serve the purpose of the corporators, as such, much more than the same of the public and government. Hence their powers of taxation and what they ought to tax may depend largely upon their circumstances and conditions,—the population; the kinds and character of their business; their industries; the volume of business done in them; their locations, and like considerations.

In *Pullen v. Raleigh*, 68 N. C. 451, it is distinctly held that the power of city authorities to levy tax upon "debts and securities, for money held by the citizens, depends upon the charter," and that they can only levy taxes on such subjects of taxation as are specified therein; and therefore the City of Raleigh could not levy a tax upon money and credits of its citizens, as such subjects of taxation were not specified in its charter. The court says, in re-

spect to the word "property," that the Constitution (art. 5, § 8) does not make it include "money, credits, investments in bonds," etc.; and that "real and personal property" is used in a sense to exclude such "credits and investments." The opinion is brief, and not very satisfactory, but the case has been cited with approval in numerous cases. *Wilson v. Charlotte*, 74 N. C. 752; *Latta v. Williams*, 87 N. C. 126; *State v. Bean*, 91 N. C. 554; *Winston v. Taylor*, 99 N. C. 210.

In *Vaughan v. Murfreesboro*, 96 N. C. 317, a recent case, it is cited and commented on at considerable length, and approved as good authority, and it was held in that case (the latest) that, where a statute allowed a town to levy a tax upon all persons and property within the same, it did not authorize a tax on solvent credits, money or bonds. This case, that of *Pullen v. Raleigh*, *supra*, and other like cases, are necessarily overruled by the present one.

In *Wilson v. Charlotte*, *supra*, it is strongly suggested that the term "property," as used in art. 7, § 9, is not confined "to tangible property;" but this was no more than a suggestion, because in that case the charter of the defendant in terms expressly allowed it to tax all subjects of taxation. This case is cited in *Cobb v. Elizabeth City*, 75 N. C. 1, as authority to support the decision therein that under the Constitution (art. 7, § 9) all taxes "must be levied, as well on personal as on real property, notwithstanding any contrary provision in the charter. The word 'property' includes bonds, stocks, solvent notes," etc. This is an extreme view, and the court gives no reason for it,—it simply so decided.

In *Kyle v. Fayetteville*, 75 N. C. 445, it is broadly held, without citing any authority, that inasmuch as the Town of Fayetteville possessed the power of taxation, therefore, perforce of the Constitution (art. 5, § 8; art. 7, § 9), the town must tax all the real and personal property, money, credits, etc., situate in the town. In such a state of conflict and confusion of authorities in a respect so important, I deem it the duty of the court to put an end to doubt and such conflict, as far as practicable, by its decision in this case. It will be observed that I have followed, mainly, *Pullen v. Raleigh*, *supra*, and the cases in harmony with it. It seems to me that the interpretation I have given the clauses of the Constitution cited and commented upon is reasonable, and, as well, necessary to the free and efficient operation of the Organic Law in respects of serious moment to the people. Moreover, what I have said and decided is sustained in material measure by a line of decisions already cited.

In the present case, the charter of the defendant Town allowed it to levy a tax "on all the real and personal property not exempt under the state laws in said Town," etc. As has been seen, such provision did not confer on the defendant power to tax money and solvent credits. It therefore had no authority to tax the credits of the plaintiff, as it undertook to do, unless it had such authority by virtue of the General Statute (Code, § 3900), which provides, among other things, that the commissioners of towns may "lay taxes for municipal purposes on all persons, property, privileges and subjects within the corporate limits which

are liable to taxation for state and county purposes." I think it had no authority thus conferred, because its charter specified particularly the subjects of taxation it might tax, and the same Statute (Code, § 8827) provides that "this chapter shall apply to all incorporated cities, towns and villages, where the same shall not be inconsistent with special Acts of incorporation, or special laws in reference thereto," etc. The limited power to tax "real and personal property" is not consistent with the larger power to tax all subjects of taxation. For some reason the Legislature limited the defendant's power in such respect. It is not to be presumed that nothing was intended by such limitation. If the General Statute would apply, then the limitation was useless,—served no purpose. I think there is therefore error. The judgment ought to be set aside, and judgment entered in favor of the plaintiff in accordance with the stipulation in the controversy submitted.

J. C. MOOSE *et al.*, *Appls.*,

v.

O. J. CARSON *et al.*

(....N. C....)

An abutting owner has an easement in a street which had been dedicated to the public

NOTE.—Streets; ownership of fee in streets.

The Act of the Legislature granting a fee of streets in Astoria to the city only contemplated such streets as were in existence, and not such as had been vacated. *Hobson v. Monteith*, 15 Or. 251.

A city holds the fee of its streets in trust for the public's benefit. Authorities cited in *Hunt v. Chicago*, H. & D. R. Co. 11 West. Rep. 45, 121 Ill. 638.

The City of Chicago owns its streets in fee. *Lorie v. North Chicago City R. Co.* 32 Fed. Rep. 270.

An abutting lot owner has no other interest or right in the streets or tunnels in Chicago than an easement in common with the public. *Ibid.*

The City of Denver has only a qualified fee in the streets for the use of the public. *Denver Circle R. Co. v. Nestor*, 10 Colo. 403.

Streets and sidewalks of a city belong in common to the inhabitants, who, as well as strangers, are entitled in common to the use thereof. Authorities cited in *Ibid.*

A city can do all acts appropriate or incidental to a beneficial use of the streets and sidewalks by the public; and an adjoining proprietor cannot complain unless such acts are not done in a proper and careful manner. *Ibid.*

With respect to the purchaser of lots described as bounded on a street, the vendor is estopped from shutting it up so as to prevent his vendee from making use of it, for his own accommodation, in the enjoyment of his purchase. *Plumer v. Johnston*, 5 West. Rep. 753, 63 Mich. 165.

The construction and operation of a steam railway in a city street cannot be allowed except by the consent of the abutting lot owners or by right of eminent domain, whether such owners possess the fee to the street or only an easement therein. *Theobald v. Louisville, N. O. & T. R. Co.* 66 Miss. 579.

A railway company occupying a street under a license and authority from the city government is not a trespasser as to an abutting owner. *Iron Mountain R. Co. v. Bingham*, 37 Tenn. 622.
7 L. R. A.

when his lot was purchased, his right to which cannot be taken away even by the Legislature without compensation; a sale for the benefit of the town cannot be made of all of it except an alley, even if it owns the fee.

(December 21, 1889.)

APPPEAL by plaintiffs from a judgment of the Superior Court for Alexander County in favor of defendants in an action of ejectment. *Affirmed.*

This was a civil action for the recovery of land, tried at the Spring Term, 1889, of the Superior Court of Alexander County, before Clark, Judge.

The land on which the Town of Taylorsville, the county seat of Alexander, is situated, was conveyed to James Thompson, chairman of the Court of Pleas and Quarter Sessions, and his successors in office, on the 11th of June, 1847. On the 28d of January, 1898, A. A. Hill, mayor of the Town of Taylorsville, and W. R. Sloan, chairman of the board of county commissioners of Alexander, "in consideration of \$100 to A. A. Hill paid by said parties of the second part (the said Sloan joining in the conveyance, to convey any interest the county may have)," conveyed to the plaintiffs, J. C. Moose, W. L. Moose and J. F. Teague, a portion of said land, including all of East Back Street lying between North Main Street and North Back Street (both of which streets East

Abutting owners; rights of.

Where original proprietors conveyed lots along a projected street, title to the centre of the street passed. *Hamilton v. Chicago*, B. & Q. R. Co. 14 West. Rep. 123, 124 Ill. 235.

Streets and sidewalks of a city are not subject to any proprietary right or interest on the part of abutting proprietors. Authorities cited in *Tisot v. Great Southern Tel. & Teleph. Co.* 39 La. Ann. 999.

An abutting lot owner without more than an easement of way, and not owning the ultimate fee in the soil, has no right in the street except the free and unobstructed use thereof for the purpose of ingress and egress, for which purpose he may use the whole street or so much of it as may be necessary; but in so doing he cannot have the exclusive use for himself at all times, or recover damages for the use of it by others, unless such use be excessive or incompatible with his right of ingress and egress. *Smith v. East End Street R. Co.* 37 Tenn. 625.

He cannot maintain an action for damages for an obstruction of the opposite side, unless that part of the highway was necessary to afford access to or egress from his property. His injury is no greater than that suffered by the community in general. *Indiana, B. & W. R. Co. v. Eberle*, 9 West. Rep. 205, 110 Ind. 542.

A lot owner may object to and prevent the unlawful use of his land; but he cannot set up grievances for his neighbors in a private action, or oppose the laying out of a street that does not take his land. *Goodell v. Kalamazoo*, 5 West. Rep. 147, 63 Mich. 416.

An owner of lands to the outer line of a public street cannot recover damages for nuisances caused by the obstruction of the same in front of his lot, without showing special damages differing in kind from those suffered by others owning lands fronting on the street. *Hogan v. Central Pac. R. Co.* 71 Cal. 83.

Main crosses), except an alley of sixteen feet wide, next to defendants' lots. The defendants, and those under whom they claim, bought lots bordering on and bounded by the portion of East Back Street covered by deed of plaintiffs, and in controversy, in 1848, under the county authorities, and have occupied the lots since the year 1853. When the ancestor of defendants bought, East Back Street had been laid off 66 feet wide. The plaintiffs claim in this action all of the original street covering the front of the defendants on East Back Street, except the alley in their immediate front, mentioned in the case agreed. The defendant C. J. Carson is the only heir-at-law of J. M. Carson, deceased, and D. P. Carson is the widow of J. M. Carson; and they claim title through the deeds which they produced in evidence. A copy of the old town plat or survey was also shown in evidence. It is admitted that the town was located and laid off, as indicated, in lots and streets, in the year 1847, and the *locus in quo* was conveyed in deed, and that many of the streets remain unused to this day. The land in controversy is that part of East Back Street described in plaintiffs' deed, and embraced between North Main Street and North Back Street. The width of East Back Street

is admitted to be 66 feet, and that defendants are now in possession of all East Back Street lying between North Main Street and North Back Street, except a small part inside of lot fences Nos. 85 and 86, not in controversy; but defendants claim no advantage by reason of possession of the street. At the time plaintiffs purchased, the town authorities left an alley of sixteen feet adjoining defendants' lots Nos. 15 and 18, and running back from North Main Street to North Back Street. It is also admitted that lots Nos. 15 and 16, abutting said East Back Street, were purchased by the defendants, and those under whom they claim, after the town was laid off into lots and streets, as indicated in the plat, and have been in possession of the defendants, and those under whom they claim, ever since the purchase in 1848, and the defendants' deeds cover the said lots. Upon the facts, the court was of opinion that the plaintiffs were not entitled to recover, and gave judgment, accordingly, that defendants go without day, and recover costs. The plaintiffs except to the judgment, and appeal.

Mr. E. C. Smith for appellants.

Mr. R. Z. Linney, for appellees:

An abutting lot owner has a right in the

To entitle a property owner to recover damages for obstruction to a highway, he must show that the damages are peculiar to him. *Rude v. St. Louis*, 12 West. Rep. 238, 98 Mo. 408.

The abutting owners have such an easement in a street as to enable them to insist, as against a railway company, that it shall be devoted to such use only as is consistent with its purposes as a public street. *Hussner v. Brooklyn City R. Co.* 114 N. Y. 438.

The owner of property abutting on an alley obstructed by the construction of a railroad track over it is not authorized, on his own motion, to enter thereon for the purpose of changing the track or repairing the alley, and thus lessen the injury and reduce the damages to which he is entitled by reason of such obstruction. *Central Branch U. P. R. Co. v. Andrews (Kan.)* 21 Pac. Rep. 276.

Interest in highway cannot be taken without compensation.

A man's interest in a public highway is a right which even the Legislature cannot take from him without compensation. *Ross v. Thompson*, 78 Ind. 94; *Indianapolis v. Croas*, 7 Ind. 9; *Haynes v. Thomas*, 7 Ind. 38; *Butterworth v. Bartlett*, 50 Ind. 537; *State v. Berdetta*, 78 Ind. 185. Commented on, *Story v. New York Elevated R. Co.* 90 N. Y. 155, 158.

Applied to the owner of a dwelling-house fronting on a town common or public square. *Wheeler v. Bedford*, 2 New Eng. Rep. 831, 54 Conn. 244; *Brown v. Manning*, 6 Ohio, 298; *Hills v. Miller*, 3 Paige, 254.

Every serious encroachment on the width of a street narrows the right to have vehicles stand in front of an owner's premises, which is a special injury to him. *Atty-Gen. v. Morris & E. R. Co.* 19 N. J. Eq. 333.

For examples of encroachments upon public parks, squares and the like, see *Hills v. Miller*, *supra*; *Watertown v. Cowen*, 4 Paige, 510.

Equity protects abutting owners' rights.

A threatened nuisance tending to deprive the owner and others of the full and free use of the street is a recognized ground of equitable interposition, where the injury would be permanent. *Zearing v. Baber*, 74 Ill. 412; *Rowan v. Portland*, 6 B. 7 L. R. A.

Mon. 233; Hills v. Miller, 3 Paige, 254; *Green v. Oakes*, 17 Ill. 249; *Mohawk Bridge Co. v. Utica & S. R. Co.* 6 Paige, 554; *Crenshaw v. Slate River Co.* 6 Rand. 245.

But the injury must be real, and such that the legal remedy of damages would not be adequate. See *Soltan v. DeHeld*, 2 Sim. N. S. 133; *Atty-Gen. v. Sheffield Gas Consumers Co.* 3 DeG. M. & G. 304; *Atty-Gen. v. Cambridge Gas Consumers Co.* L. R. 4 Ch. 71, 80; *Atty-Gen. v. Gee*, L. R. 10 Eq. 131; *Original Hartlepool Collieries Co. v. Gibb*, L. R. 5 Ch. Div. 718; *Pettibone v. Hamilton*, 40 Wis. 402; *Coast Line R. Co. v. Cohen*, 50 Ga. 451; *Thayer v. New Bedford R. Co.* 125 Mass. 253; *Osborne v. Brooklyn City R. Co.* 5 Blatchf. 369; *Hartshorn v. South Reading*, 3 Allen, 501; *Central Bridge Corp. v. Lowell*, 4 Gray, 474; *Rowe v. Granite Bridge Corp.* 21 Pick. 344; *Bigelow v. Hartford Bridge Co.* 14 Conn. 565; *Frink v. Lawrence*, 20 Conn. 117; *Milhau v. Sharp*, 27 N. Y. 611; *Knox v. New York*, 55 Barb. 404; *Smith v. Lookwood*, 13 Barb. 209; *New York v. Baumberger*, 7 Robt. 219; *Hudson River R. Co. v. Loeb*, 7 Robt. 418; *Manhattan Gaslight Co. v. Barker*, 7 Robt. 623; *Peck v. Elder*, 3 Sandf. 126; *Sparhawk v. Union Pass. R. Co.* 54 Pa. 401; *Black v. Philadelphia & R. R. Co.* 58 Pa. 249; *Philadelphia v. Collins*, 68 Pa. 106; *Buck Mountain Coal Co. v. Lehigh Coal & Nav. Co.* 50 Pa. 91, 92; *Higbee v. Camden & A. R. Co.* 19 N. J. Eq. 276; *Allen v. Monmouth Co.* 18 N. J. Eq. 63, 74; *Zabriske v. Jersey City & R. R. Co.* 13 N. J. Eq. 314; *Delaware & M. R. Co. v. Stump*, 8 Gill & J. 479; *Hamilton v. Whittridge*, 11 Md. 123; *Savannah, A. & G. R. Co. v. Shiels*, 33 Ga. 601; *Columbus v. Jaques*, 30 Ga. 508; *Green v. Oakes*, *supra*; *Bulloch v. Smith*, 15 Ga. 399; *Ellwell v. Greenwood*, 26 Iowa, 377; *Sheboygan v. Sheboygan & F. du L. E. Co.* 21 Wis. 667.

An adjoining lot owner is a proper party complainant to a bill in equity to enjoin appropriation of private property to public use. Such a complainant, being one of the inhabitants of the town, and holding property contiguous to the square, is not a mere volunteer assuming to protect the rights of others, but is injured in his individual rights, and is entitled to the aid of equity to protect his own interests. See *Brown v. Manning*, 6 Ohio, 298; *Hills v. Miller*, *supra*; *Watertown v. Cowen*, 4 Paige, 510.

street that cannot be taken away except by giving compensation.

Adams v. Chicago, B. & N. R. Co. 1 L. R. A. 493, 39 Minn. 286.

The judgment in ejectment for a street can never be enforced, because the exclusive use by anyone of a street is a crime.

New Orleans v. U. S. 85 U. S. 10 Pet. 717 (9 L. ed. 594); *Cincinnati v. White*, 81 U. S. 6 Pet. 431 (8 L. ed. 452).

Avery, J., delivered the opinion of the court:

It is a well-settled principle that where a corporation, acting through its properly-constituted authorities, or an individual, sells or conveys a town or city lot, bounded by streets or alleys, marked out on a plat, and the grantee enters upon it, and expends money in improving it, he is entitled to a right of way over such street or alley, as appurtenant to the land; and any subsequent conveyance by his grantor, or those claiming under him, of the portions of such streets or alleys by which the grantee's lot is bounded, will be held void. *Pratt v. Law*, 18 U. S. 9 Cranch, 456 [8 L. ed. 791]; 8 Meyer, Fed. Dec. § 1046, *Contracts*; *Chapin v. Brown*, 15 R. I. 579, 4 New Eng. Rep. 918; *Sarpy v. Municipality No. 2*, 9 La. Ann. 597; *Port Huron v. Chadwick*, 53 Mich. 320; *Harrison v. Augusta Factory*, 73 Ga. 447.

The grantor thus dedicates the land covered by a street to the use of the public, and will be precluded by such appropriation from reasserting any right to the actual possession of the land, or at least so long as it remains in the public use. *Kennedy v. Jones*, 11 Ala. 68; *Proctor v. Lewiston*, 25 Ill. 153; *Adams v. Saratoga & W. R. Co.* 11 Barb. 414; *Penny Pot Landing v. Philadelphia*, 16 Pa. 79; *Re Pearl St.* 111 Pa. 565.

When, by laying off streets, third parties have been induced to buy lots adjacent to them, and build on the lots, by an individual grantor, the dedication to the public use has been held irrevocable, although the streets may not have been formally accepted by the authorities of a town in which they lie. *Grogan v. Hayward*, 4 Fed. Rep. 161.

No one can acquire, as a general rule, by adverse occupation, as against the public, the right to a street or square dedicated to the public use. *Hoatley v. San Francisco*, 50 Cal. 265; *People v. Pope*, 53 Cal. 437.

We may deduce from the rules of law already stated the further principle that the owners of a lot having a property or easement appurtenant in the adjacent streets, with reference to the advantages of which they expended their money for the land and the improvements put upon it, cannot be deprived of their rights by a sale for the benefit of the town that was in effect, though not nominally, one of the grantors through whom they claim title, nor has the Legislature the power to deprive them of such appurtenant rights by authorizing such grantor, whether a person or a corporation, to again enter upon and sell such streets to others. The General Assembly cannot, without a violation of the Constitution, divest, or provide for divesting, by law, the right of a person to his property, for the purpose of vesting such right in another person or corporation, merely for

private use, at all; and it has no power, under the Organic Law, to provide for taking private property for public purposes without just compensation, to be ascertained in a mode pointed out by the law. The appurtenant right of the owner of a lot in the street that formed its boundaries at the time when he, or those under whom he claims, bought it originally, with reference to such outlets, is protected against the reassertion of the grantor's claim to it just as fully as is his title to the lot conveyed, even though the State may undertake by law to sanction the re-entry on the streets by one claiming under his title.

Neither the mayor of the Town of Taylorsville nor the County Commissioners of Alexander County, by virtue of the authority derived from section 1, chap. 86, Priv. Laws 1887, to hold lands conveyed to the town, nor under the more explicit power to sell streets, that in terms is given by chapter 8, Priv. Laws 1889, are empowered to make a valid conveyance to any part of a street with reference to which, as a boundary, the defendants, or those under whom they claim, bought lots in the year 1848, and improved them in 1858. *Pratt v. Law, supra*; *Adams v. Chicago, B. & N. R. Co.* 39 Minn. 286, 1 L. R. A. 493; *Brooks v. Riding*, 46 Ind. 15.

The said mayor or commissioners cannot diminish the width of such streets from 66 feet, as laid off when the lots were originally sold, to 16, by conveying 50 feet of East Back Street, extending from North Main to North Back Street, and leaving an alley of only 16 feet, as a passway for the defendants, along their front. Their ancestor took with his title all the appurtenant advantages of a street 66 feet wide; and the tendency of converting it into an alley would, or might be, to impair the value of their property for the benefit of the town and without compensation to them. *Adams v. Chicago, B. & N. R. Co. supra*; 2 Dillon, Mun. Corp. § 675, p. 674, note 1.

The defendants do not own the fee in the street or their front, but hold only an appurtenant easement therein, and the municipal corporation that sold the lots occupied the same relation to them as would an individual grantor who had originally sold to them, or to those under whom they claim, and he could, neither with nor without authority purporting to be derived from the Legislature, have reasserted his right to the streets laid out by him before selling. *New Orleans v. United States*, 35 U. S. 10 Pet. 717 [9 L. ed. 594]; *Grogan v. Hayward, supra*.

The plaintiffs have shown no such title as would warrant the court in granting a writ of possession. If the fee were vested in the town, which is not conceded, there would still be wanting in the plaintiffs, its grantees, the right to prevent possession and occupancy of a street dedicated to the public. *Cincinnati v. White*, 81 U. S. 6 Pet. 431 [8 L. ed. 452].

It is not necessary to decide whether the mayor of the Town of Taylorsville, by joining the chairman of the board of county commissioners, could, by virtue of a private sale, make a valid conveyance of any land belonging to the town, when the Statute (Code, § 3824) gave the power to the "mayor and commissioners of any incorporated town to sell at public outcry after thirty days' notice." If the original con-

veyance did not operate to pass the title to the street when executed, the Legislature could not, pending this suit, impart to it such vitality as to relate back to the commencement of the action, and establish plaintiff's right to recover. The municipality derives its powers from the express grant of the Legislature, and exercises and enjoys them subject to the legislative right of revocation; but, in controlling the property of the corporation, the General

Assembly is restricted by the fundamental principle that private property cannot be taken for public use without just compensation, nor can a town be invested with authority to violate its implied contract (either directly or through its grantee, who is in privity with it), to provide a street 68 feet wide for the advantage of a lot conveyed by one who held in trust for the benefit of the town. There is no error.

Judgment must be affirmed.

ARKANSAS SUPREME COURT.

Albert R. SHATTUCK *et al.*, *Appls.*,

v.
John W. WATSON and Wife.

(.....Ark.....)

1. **Borrowing from a forger** money which he had obtained upon the security of a forged mortgage upon property of the borrower will not estop the latter from setting up the forgery to defeat the collection of the mortgage unless he participated in or was privy to the illegal acts.
2. **Papers executed to shield the maker's son** from a threatened prosecution for a felony of which he is guilty are not executed under duress so as to require their cancellation.
3. **Equity will not relieve from securities** executed to shield a person from prosecution for a felony of which he is guilty upon the ground that execution for such purpose rendered them void.
4. **One who has executed and delivered**

securities in consideration of a promise to refrain from the prosecution for felony of a person guilty thereof, cannot, after his illegal purpose has failed from causes other than a breach of the contract, and a prosecution has been commenced by third parties, rescind the contract and recover back the securities.

(April 12, 1900.)

A PPEAL by defendants from a decree in chancery of the Circuit Court for Johnson County in favor of plaintiffs in a suit to obtain the cancellation of certain mortgages and to enjoin the sale of lands thereunder. *Reversed.*

The facts are sufficiently stated in the opinion.

Messrs. McKennon & Reding for appellants.

Messrs. A. S. McKennon and J. N. Sarber for appellees.

NOTE.—Duress, what constitutes.

Duress is that degree of constraint or danger, either actually inflicted or threatened and impending, sufficient to overcome the mind and will of a person of ordinary firmness. *Anderson, Law Dict.; Brown v. Pierce, 74 U. S. 7 Wall. 214 (19 L. ed. 136); Baker v. Morton, 79 U. S. 12 Wall. 157 (20 L. ed. 264); French v. Shoemaker, 81 U. S. 14 Wall. 322 (20 L. ed. 356); United States v. Huckabee, 83 U. S. 16 Wall. 431 (21 L. ed. 484); 1 Chitty, Cont. 11th Am. ed. 239; 2 Greenl. Ev. § 301, 302; 1 Wharton, Cont. Pref. IV.; 3 Wharton, Ev. § 331, 1099; 1 Story, Eq. § 239; 2 Pom. Eq. Jur. § 950.*

Duress is an actual or threatened violence or illegal restraint of a man's person, to compel him to enter into a contract or to do some act which, in the absence of such violence or restraint, might be valid or legally effective. *Dimmitt v. Robbins, 74 Tex. 441.*

To constitute duress by threats, it is sufficient that they do in fact compel the person threatened to do an act which otherwise he would not have done. *Parmentier v. Pater, 13 Or. 121.*

A deed, obligation or contract procured by means of threats to take the life of the person executing it is inoperative and void. *Baker v. Morton, 79 U. S. 12 Wall. 150 (20 L. ed. 262); Brown v. Pierce, 74 U. S. 7 Wall. 205 (19 L. ed. 134).*

Moral compulsion, produced by threats to take life or to inflict great bodily harm, is sufficient to constitute duress. *French v. Shoemaker, 81 U. S. 14 Wall. 314 (20 L. ed. 352).*

Although where a person who is attacked by robbers borrows money of another to comply with their demands he is liable for the debt, yet where the lender is shown to be a confederate and conspirator with the pretended robbers, the loan is 7 L. R. A.

made under duress, and is void. *Dimmitt v. Robbins, supra.*

To constitute duress by threats of illegal arrest, the act which the party seeks to avoid must have been done by him through fear of such threatened arrest. *Flaigan v. Minneapolis, 36 Minn. 406.*

There can be no binding contract where the physical act of concurrence thereto has been coerced through duress of imprisonment. *Turley v. Edwards, 1 West. Rep. 450, 18 Mo. App. 689, distinguishing Kitchen v. Greenbaum, 61 Mo. 110.*

Where there is no arrest made nor force used, but simply threats uttered, the question of duress is ordinarily one of fact, and it must be shown that the will of the promisor was constrained thereby. *Dunham v. Griswold, 100 N. Y. 225, 1 Cent. Rep. 305; Fisher v. Bishop, 36 Hun. 114.*

Regard should be had to the age, sex and condition of the parties, and a fear which would not be deemed sufficient to influence a man in the prime of life, might be sufficient in respect to a woman, or a man in the decline of life. *Eadie v. Slimon, 28 N. Y. 12.*

A case of duress is sufficiently stated by alleging the circumstances, a threat of prosecution and the fear of its execution, from which the jury may determine its effect. *Turley v. Edwards, supra.*

It is not necessary to specially allege that, by reason of the threat, free will and agency were overcome. *Ibid.*

Where evidence is not preserved by bill of exceptions, and the averments contain strong elements of a coercion, a verdict based upon a finding of duress will not be disturbed. *Ibid.*

What not duress sufficient to invalidate contract.

It is not duress for one who believes himself wronged to threaten the wrong-doer with a civil

Hemingway, J., delivered the opinion of the court:

The appellant had advertised for sale, and was about to sell, lands of the appellee, under the power contained in two mortgages, purporting to have been executed by him and his wife to secure the payment of certain notes therein described.

One mortgage bears date March 15, 1886, and recites that it was given to secure one note given for borrowed money and six notes for the interest thereon. The other is dated December 8, 1886, and was given to secure the same notes, except one interest note which had been previously satisfied. The appellee's son paid it.

The appellee brought this suit to cancel both mortgages and to restrain a sale under them.

The complaint alleges that the prior deed and the notes therein described are forgeries, and that the plaintiff was entirely ignorant of their existence until the day that he executed the latter deed. That appellant's agent visited his residence on the 8th day of December, 1886, for the purpose of obtaining the deed and notes of that date. That Mangum showed him the forged instruments and told him they had been forged by his son J. E. Watson and that he had thereby obtained the amount of money therein indicated. That he, Mangum, only wanted the money secured, and if that was done the liberty and good name of the son would be saved; but that if it was not done he would be vigorously prosecuted and sent to the penitentiary and lose his standing at the bar and in society. That in order to prevent the prosecution and ruin of the son, the deed of trust and notes,

all of which Mangum brought ready for signature, were executed and the deed acknowledged before a justice of the peace, who had accompanied Mangum for that purpose.

The appellee testified that the only consideration for the deed and notes was Mangum's promise not to prosecute his son.

The court found that the material averments of the complaint were true, and that the deeds and notes executed by appellee on the 8th of December were void because they were made upon an illegal and invalid consideration; and it decreed that the appellant should surrender for cancellation said deed and notes and be forever enjoined from selling the land or collecting the notes.

From this judgment the appellant has appealed; he insists that the first mortgage and notes were executed by the appellee and are valid, and that the second mortgage and notes were given as a further security for the first, to remove all doubts as to their validity. He asked no affirmative relief in his answer and we have not considered what his rights would be if he had done so.

The evidence shows that the appellee did not execute the mortgage of March 15, and fails to satisfy us that he was a party to a conspiracy to obtain money by means of it. As the deed was forged, the appellee is not estopped to set it up, although the son obtained money upon the faith of it and loaned a portion of it to him, unless he participated in the illegal acts. A sale under the power in that deed would cast a cloud on the appellee's title and was properly restrained.

suit or a criminal prosecution. *Hilborn v. Bucknam*, 3 New Eng. Rep. 268, 78 Me. 483; *Harmon v. Harmon*, 61 Me. 227.

Where an officer threatens to take the execution debtor to jail, unless he secures the debt by a chattel mortgage, when the officer has process requiring him to do so, it is not duress. *Bunker v. Steward* (Me.), 2 New Eng. Rep. 424.

A mere threat to sue and to arrest defendant in a suit, or by virtue of an execution which could be issued upon a judgment, would not be such duress as would avoid a promise induced by the threat. *Dunham v. Griswold*, 1 Cent. Rep. 307, 100 N. Y. 224; *Higgins v. Brown*, 2 New Eng. Rep. 450, 78 Me. 473; *Shepherd v. Watrous*, 3 Calnes, 166 b; *Knapp v. Hyde*, 60 Barb. 80; *Farmer v. Walter*, 2 Edw. Ch. 601.

Mere threats of criminal prosecution, when no warrant has been issued or proceedings commenced, do not constitute duress. *Bunker v. Steward*, *supra*.

Where a son, convicted and awaiting sentence with his father for conspiracy to defraud the latter's creditors, gives them a bond to secure their claims; and the court afterwards sentences defendants to pay a merely nominal fine and costs,—he cannot avail himself of the circumstances under which the bond was given as a defense to a suit on it. *Avery v. Layton*, 12 Cent. Rep. 159, 119 Pa. 604.

Money paid upon a promissory note given by the plaintiff to prevent the prosecution of his son for larceny cannot be recovered, if both parties intended the compounding of the felony; and it is immaterial that the plaintiff was influenced by the duress of the defendant, since both were *in pari delicto*. *Haynes v. Rudd*, 3 Cent. Rep. 449, 102 N. Y. 82; *Williams v. Bayley*, 35 L. J. N. S. Ch. 717.

Where both parties to a settlement compounding a felony stand on an equality, they are *in pari delicto*, 7 L. R. A.

and neither can recover the consideration. *Haynes v. Rudd*, *supra*.

Whether both parties stood *in pari delicto* depends upon the fact whether the note was given for compounding the felony. *Ibid*.

So where a note and mortgage were made by a mother to protect her son from prosecution for embezzlement it will be canceled as without consideration and obtained by undue influence. *Foley v. Greene*, 1 New Eng. Rep. 17, 14 R. I. 618.

In such a case the maxim, *in pari delicto potior est conditio defendentis*, does not apply.

A deed for real estate, given in part consideration of the withdrawal of a criminal complaint for embezzlement, is not void, in the absence of proof of any unconscionable advantage taken. *Wilcox v. Daniels*, 2 New Eng. Rep. 499, 15 R. I. 261.

A note for an amount actually due, executed to prevent the maker from being put out of possession of land under valid legal process, is not executed under duress. *Davis v. Rice* (Ala.) 680, 467, 751.

Threats and intimidation by the judgment creditor, which secured the execution of a bond, if true, render the bond void. *Mills v. Hodewald*, 17 Hun. 304; *Whelan v. Whelan*, 8 Cow. 537; *Sears v. Shafer*, 1 Barb. 408, 6 N. Y. 272; *Ellis v. Messervie*, 11 Paige. 467; *Evans v. Ellis*, 5 Denio, 640.

Threats to one party by a stranger to the contract (e. g., the husband of that party), without the knowledge of the party, will not avoid the contract. *Fairbanks v. Snow*, 5 New Eng. Rep. 190, 145 Mass. 153; *Gardner v. Case*, 10 West. Rep. 800, 111 Ind. 494.

Duress cannot be set up by a stranger. *Oak v. Dustin*, 3 New Eng. Rep. 614, 79 Me. 23.

The surety on a bail bond cannot offer as a defense the fact that the principal was compelled by duress to give the bond. *Ibid*.

The question whether the appellee, on the case made by him, is entitled to any relief as against the latter mortgage and notes, is not free from difficulty. His case in effect is, that his son had forged a mortgage, on the faith of which he had obtained money from the appellant. That appellant desired to obtain security for that money and appellee desired to suppress the criminal prosecution of the son. That appellant proposed to appellee, that if he would execute the mortgage and notes tendered, appellant would not prosecute his son. That the proposition was accepted and the papers executed and received accordingly. That the son was prosecuted through other agencies and the appellee at no time sought to withdraw from the compact or to recover the securities given in pursuance of it, until the sale was advertised, —an interval of over two years,—and never released the appellant from his promise except as it may be implied by bringing this suit.

Upon this state of case, can the appellant invoke equitable relief?

The allegation of duress is not sustained. It seems to be conceded that the son was guilty of a felony and the appellant threatened only to prosecute him for his crime unless the amount obtained was secured. It was not a threat to prosecute on a simulated charge in order to extort money. *Marvin v. Marvin* (Ark.) 12 S. W. Rep. 875.

It is a practical principle that guides equity courts in their administration of justice that he who invokes their aid must come with clean hands—that he who hath committed iniquity shall not have equity. It is the policy of the law that crime shall be prosecuted, and it prohibits, under severe penalties, the suppression of prosecution. An injured party, who agrees with the felon who robs him that he will not prosecute him on condition that he return the stolen goods, or who takes a reward on such condition, violates the spirit as well as the letter of the law. The party who gives a reward and the party who receives it, on such condition, stand *in pari delicto*.

Mr. Story, treating the subject as to the rights of parties to such an agreement, states the law as it is generally approved: "The general rule is that, where an illegal contract has been made, neither courts of law nor of equity will interfere to grant any relief to the parties, but will leave them where they find them, if they have been equally cognizant of the illegality." 2 Story, Cont. § 486; 2 Parsons, Cont. 746; 2 Addison, Cont. pp. 715, 724; 1 Pom. Eq. Jur. § 402.

There are some exceptions to the rule where the contract is *malum prohibitum*, as also where

public policy is considered as advanced by allowing the parties or the less culpable one to sue for relief; but it is not material to consider the exceptions now, for cases like this have been considered to fall within the general rule.

In the case of *Atwood v. Fisk*, 101 Mass. 868, Atwood sued to compel the surrender and cancellation of the notes, and a mortgage given to secure them, on the ground that they were given upon the consideration that the defendant would not prosecute him for a felony. The bill was dismissed because the plaintiff was not in a position to claim the equitable relief prayed for.

Compton v. Bunker Hill Bank, 96 Ill. 801, is a case in which a wife sought to cancel a conveyance executed by her to the defendant in consideration of its promise not to prosecute her husband for embezzlement; the court reviewed the authorities and concluded that the bill should be dismissed, saying: "But though the deed may be void for such reason, equity does not relieve the party who executed it upon or for such illegal and immoral consideration and purpose."

We might add many citations to the same effect: *Allison v. Hess*, 28 Iowa, 389; *Worcester v. Eaton*, 11 Mass. 877; *Smith v. Rowley*, 66 Barb. 503; *Swartzerv. Gillett*, 1 Chand. (Wis.) 207.

Nor can he derive benefit from the rule, that a party to an executory, illegal contract may rescind it while it is executory and unperformed, and recover back money paid under it. The contract was to give notes and mortgage in consideration of a promise not to prosecute for a felony. When the papers were delivered and the promise given, there was nothing more to be done by either party, and the contract was fully executed.

It was held in *Atwood v. Fisk*, *supra*, that the delivery of securities was the same in effect as the payment of money. But conceding that there was a time when the appellee might have withdrawn from his illegal compact, removed the obstacle he had placed in the way of justice and recovered the securities, he never sought to do it, until the illegal purpose failed from other causes, and his agreement no longer thwarted justice. Both parties, following impulses of their own, willfully contracted to violate the law. The law will lend no aid to either of them but leave them where they have placed themselves.

The judgment will be reversed, and a judgment rendered here canceling the mortgage of March 15, 1886, and enjoining any sale under it; but no relief will be given as against the second mortgage.

NEW YORK COURT OF APPEALS.

S. Skiddy COCHRAN *et al.*, *Respts.*,
v.

Franz O. MATTHIESSEN *et al.*, *Exrs.*, etc.,
of William A. Wiechers, Deceased, Im-
pleaded with the American Opera Co., Lim-
ited, *et al.*, *Appts.*

(....N. Y.....)

A stockholder's liability to creditors of the corporation because of the failure to make
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and record a certificate of the payment of all the capital stock as required by the Act of 1875, is not penal and survives his death.

(February 25, 1890.)

APPEAL by the executors of William A. Wiechers, deceased, from an order of the General Term of the Supreme Court, First Department, reversing an order of the New

York Special Term denying a motion to revive against such executors an action to enforce the liability of said Wiechers, as a stockholder of the defendant corporation, for corporate debts. *Affirmed.*

The facts are sufficiently stated in the opinion.

Mr. Henry Schmitt, with Messrs. Abbott & Fuller, for appellants:

Wiechers' only liability is under § 37, chap. 511, Laws 1875, and an action to enforce it is a penal action and does not survive.

An action against the trustees of a corporation for failure to file a report, as required by the Statute, is penal in its character and does not survive against the executors of a deceased trustee.

California Bank v. Collins, 5 Hun, 209; *Easterly v. Barber*, 65 N. Y. 252; *Reynolds v. Mason*, 54 How. Pr. 218, affirmed, 6 N. Y. Week. Dig. 531; *Stokes v. Stickney*, 96 N. Y. 323.

In cases where an action does not survive by express statute the survivorship of actions is confined to actions *ex contractu*, express or implied.

People v. Starkweather, 8 Jones & S. 460.

So far as the executors of a deceased stockholder who had paid in the full amount of his subscription are concerned, the action in any event is in the nature of a penalty, and does not survive.

Irvine v. McKeon, 23 Cal. 472; *Erickson v. Nemith*, 4 Allen, 233; *Halsey v. McLean*, 12 Allen, 442; *Andrews v. Callender*, 13 Pick. 490; *Ripley v. Sampson*, 10 Pick. 372; *Dane v. Dane Mfg. Co.* 14 Gray, 488; *Woodruff & B. Iron Works v. Chittenden*, 4 Bosw. 406; *Vincent v. Sands*, 42 How. Pr. 235; *Gregory v. German Bank*, 3 Colo. 333; *Victory Webb Printing & F. Mach. Mfg. Co. v. Beecher*, 26 Hun, 52.

Mr. Henry D. Hotchkiss, for respondents:

The individual liability of the stockholder is an essential element in the contract by which the stockholders become members of the corporation. The liability arises from the fact that the individual is a member of the body corporate, and as such is responsible for the debt.

Chase v. Lord, 77 N. Y. 38; *Corning v. McCullough*, 1 N. Y. 47; *Story v. Furman*, 25 N. Y. 214; *Lowry v. Inman*, 46 N. Y. 119; *Wiles v. Suydam*, 64 N. Y. 178.

Everyone who becomes a member of the company by subscribing to its stock assumes this liability, which continues until the capital stock is all paid up and a certificate of that fact is made, published and recorded. The fact that the liability ceases when these events take place does not change its nature and make that a penalty which would, without such limitation, be a liability founded on contract.

Flash v. Conn, 109 U. S. 371 (27 L. ed. 966).

A cause of action to enforce such liability survives the death of the stockholder.

Basley v. Hollister, 26 N. Y. 112; *Chase v. Lord*, 77 N. Y. 1, 6 Abb. N. C. 258; *Richmond v. Irons*, 121 U. S. 27 (30 L. ed. 864).

O'Brien, J., delivered the opinion of the court:

The plaintiffs are judgment creditors of the
 ▼ L. R. A.

American Opera Company, Limited, a domestic corporation formed under chapter 611 of the Laws of 1875, for the incorporation of business corporations with limited liability. The capital stock of the company was fixed at \$500,000, only \$148,000 of which was ever paid in, and no certificate that the capital stock had been paid in has ever been made or recorded, as prescribed by the Statute under which the company was incorporated. The plaintiffs' action is in the nature of a creditors' suit to settle the affairs of the American Opera Company, Limited, and to distribute its assets, as well as the proceeds of the stockholders' individual liability, among the company's creditors. *Pfohl v. Simpson*, 74 N. Y. 187.

The complaint alleges the incorporation of the company; the amount of its capital stock; the amount paid in, as above stated; and the fact that no certificate of the company had been made or filed as required by the Statute. Numerous persons have been joined as defendants with the opera company, as to whom it is alleged that they are either creditors or stockholders of the company, and among these William A. Wiechers was named as a defendant as to whom it was claimed that he was a stockholder holding twenty-five shares of the stock of the company. It is also alleged in the complaint that several of the parties defendant who were stockholders were indebted to the company for their stock. This allegation is general, and the particular persons claimed to be so indebted are not named. Wiechers was served with the complaint, and appeared and answered. On or about December 14, 1888, he died, leaving a last will and testament wherein he appointed executors. The will has been admitted to probate by the surrogate of New York County, and letters testamentary issued to the executors, who have qualified and taken upon themselves the execution of the will. After the death of Wiechers the plaintiffs applied to the special term to revive and continue the action against the executors, and the special term denied the motion, upon the ground that the cause of action stated in the complaint against the deceased was of a penal character, and did not survive. Upon appeal to the general term from this order, it was reversed, and the court directed that the action be revived and continued against the executors of Wiechers, and that the plaintiffs have leave to serve a supplemental summons and complaint on the executors. From the order of reversal the executors have appealed to this court.

The cause of action stated in the complaint against the stockholders is twofold: *first*, it is alleged that many of them are indebted to the company for their capital stock; and, *second*, that as the capital stock was never fully paid in, and no certificate thereof ever made or filed, the defendants who were stockholders are liable for its debts to the extent of their stock. The question is whether a liability of this character on the part of a stockholder to the creditors of a corporation survives. If the liability is penal in its nature, it is conceded that it does not survive; while if the liability is in the nature of a contract obligation it is conceded that it does.

The provision of the Statute of 1875 (chap. 611, § 37), upon which this action is based, so

far as the stockholders are concerned, is as follows: "In limited-liability companies all the stockholders shall be severally individually liable to the creditors of the company in which they are stockholders to an amount equal to the amount of stock held by them, respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company has been paid in, and a certificate thereof has been made and recorded as hereinafter prescribed."

We think the liability created by this Statute survived the death of the stockholder, and continues against the executors. It is not like the liability of a trustee for neglecting to make a report, or for declaring dividends out of capital stock, or acts of a kindred character. These are breaches of duty on the part of the managing agents of the corporation for which the Statute has made them liable, and this liability cannot be said to rest upon or grow out of a contract. The liability of a stockholder in the present case is different. Upon becoming the owner of the stock, he voluntarily assumes the obligations imposed by the Statute, and the creditors of the corporation who trust it may be said to do so upon the faith of the Statute, which is part of the contract. The statutory obligation is inherent in and forms a part of every contract that the corporation makes with creditors prior to the time that the certificate required by the Statute is filed.

In *Lowry v. Inman*, 46 N. Y. 119, Allen, J., stated the principle (pages 125, 126) as follows: "A personal liability of stockholders for the debts of a corporation, in virtue of the charter, is not in the nature of a penalty or forfeiture, and does not exist solely as a liability imposed by statute. It is not enforced simply as a statutory obligation, but is regarded as voluntarily assumed by the act of becoming a stockholder. By such act he assents to be bound, or that his property shall be charged with debts of the corporation, to the extent and in the manner prescribed by the Act of Incorporation."

In *Wiles v. Snyder*, 64 N. Y. 173, it was sought to hold the defendant as a stockholder in a manufacturing company on his liability under § 10 of the Act of 1848, chap. 40,—a section which, in substance, is almost identical with the one now under consideration; and also as a trustee on his liability for all the debts, because of a failure to file a report. A demurrer on the ground of the improper joinder of causes of action was sustained. The court, distinguishing between the two kinds of liability, said (Church, Ch. J.): "The cause of action against the defendant as a stockholder consists of the debt, and the liability created by statute against stockholders when the stock has not been paid in, and a certificate of that fact recorded. . . . The first cause of action against the defendant as a stockholder is an action on contract. The six-years' Statute of Limitations applies. The defendant is entitled to contribution."

The liability of Wiechers, therefore, being in the nature of a contract obligation, it survived his death, and the action can be continued against his personal representative.

In *Bailey v. Hollister*, 28 N. Y. 112, the court expressly recognized this principle. Gould, J., said: "It will be conceded that, when a stock-

holder in any corporation dies, his estate succeeds him in the title to, and the rights in, the stock he held. Of necessity, it must take that title and those rights subject to any liability then existing upon them; and so long as the estate is, by operation of law, the holder of such stock, the estate must become responsible for any obligations accruing during that time, which the law may impose upon any holder of the stock, as such. Such liability proceeds, not from any new contract, made by or on behalf of the estate, but is inherent in the property itself; . . . or, calling it a 'contract liability,' it arises out of a contract made by the stockholder, and binding his personal representatives as it bound him, as long as the relation of stockholder existed." The liability of the estate of the deceased stockholder under the Statute is so well established upon principle and authority that further discussion is unnecessary. *Chase v. Lord*, 77 N. Y. 1; *Flash v. Conn.*, 109 U. S. 371 [27 L. ed. 906]; *Richmond v. Irons*, 121 U. S. 27 [80 L. ed. 864].

The order of the Special Term denying the motion to revive and continue the action against the executors was properly reversed by the General Term, and its order of reversal should be affirmed, with costs.

All concur.

Byron J. STROUGH, *Appt.*,

George WILDER, Impleaded, etc., *Resp.*

(.....N. Y.)

1. The possession of a deed by the grantee is prima facie evidence of delivery where there is nothing to impeach the bona fides of his possession.
2. The grantee of the heirs of one who has made an unacknowledged deed is not a "purchaser" within 1 Rev. Stat., p. 738, § 137, declaring that an unacknowledged and unattested deed "shall not take effect as against a purchaser or incumbrancer until so acknowledged."

(March 11, 1890)

APPEAL by plaintiff from a judgment of the General Term of the Supreme Court, Fourth Department, affirming a judgment entered in Jefferson County upon the report of a referee dismissing the complaint in an action brought to secure the partition of certain real estate. *Affirmed.*

Plaintiff claimed to have acquired from the heirs-at-law of Susannah Wilder, deceased, the title to a portion of the real estate of which she died seised, she having died intestate. He brought this action to procure the partition of such real estate among those entitled to the several portions thereof. George Wilder filed a separate answer to the complaint denying that plaintiff had any interest in the property, and denying that Susannah Wilder died seised of the portion thereof claimed by plaintiff, but

NOTE.—Deed; delivery. See notes to *Taylor v. Street* (Ga.), 6 L. R. A. 121; *Stokes v. Anderson* (Ind.), 4 L. R. A. 313; *Standiford v. Standiford* (Mo.) 3 L. R. A. 209.

alleging that before her death she had conveyed the premises to him, the said defendant, in fee.

The case further appears in the opinion.

Mr. Wayland F. Ford, for appellant:

If not duly acknowledged previous to its delivery, the execution and delivery of a deed must be attested by at least one witness; or if not so attested, it shall not take effect as against a purchaser or incumbrancer until so acknowledged.

3 Rev. Stat. 7th ed. p. 2194; *Chamberlain v. Spragur*, 86 N. Y. 605, 22 Hun. 487; *Roggen v. Avery*, 63 Barb. 65, affirmed, 65 N. Y. 592.

There is no presumption of delivery in the case of instruments not acknowledged or attested as required by statute.

Genter v. Morrison, 81 Barb. 158; *Elsey v. Metcalf*, 1 Denio, 823.

The term "purchaser" includes a purchaser from an assignee, heir or anyone in privity with the grantor.

4 Rev. Stat. 8th ed. p. 2469.

The Statute is made to protect the grantor (*Chamberlain v. Spragur*, 86 N. Y. 608); and the heirs need the protection as effectually as the grantor.

The evidence will not warrant the finding of any delivery of the instrument by Susannah Wilder to George Wilder. A deed does not become operative until it is delivered with the intent that it shall become effective as a conveyance.

Ford v. James, 2 Abb. App. Dec. 159; *Best v. Bronon*, 25 Hun. 224; *Brckett v. Barney*, 28 N. Y. 840; *Knolls v. Barnhart*, 71 N. Y. 474; *Stewart v. Stewart*, 50 Wis. 445; *Genter v. Morrison*, 81 Barb. 158; *Elsey v. Metcalf*, 1 Denio, 823; *Wilsey v. Dennis*, 44 Barb. 354; *Hilberd v. Smith*, 67 Cal. 547; *Jackson v. Roberts*, 1 Wend. 478; *Fitzgerald v. Goff*, 99 Ind. 28; *Stillwell v. Hubbard*, 20 Wend. 47; *Graves v. Dudley*, 20 N. Y. 76.

Mr. Watson M. Rogers, for respondent: The deed, though unacknowledged, was good and effectual to pass title as between the parties to it.

Wood v. Chapin, 18 N. Y. 509-514.

The deed being good as against the grantor, her heir took nothing, and had nothing to convey.

Possession by the grantee under the grantor's imperfect deed is adverse to the grantor.

La Frombois v. Jackson, 8 Cow. 589; *Briggs v. Prosser*, 14 Wend. 227; *Hoopes v. Auburn Water-Works Co.* 87 Hun. 568-578; *Abrams v. Rhoner*, 44 Hun. 507-510; *Sands v. Hughes*, 53 N. Y. 287-296; *Reformed Church v. Schoolcraft*, 65 N. Y. 184-144; *Broadstreet v. Clark*, 12 Wend. 603-675; *Jackson v. Newton*, 18 Johns. 355-362.

Every grant of land shall be absolutely void, if at the time of the delivery thereof such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantor.

4 Rev. Stat. 8th ed. p. 2453; *Jackson v. Newton and Reformed Church v. Schoolcraft*, *supra*; *Hilton v. Bender*, 4 Thomp. & C. 270; *La Frombois v. Jackson*, *supra*; *Clapp v. Bromagham*, 9 Cow. 530; *Bogardus v. Trinity Church*, 4 Sandf. Ch. 739; *Sands v. Hughes*, *supra*; *Munro v. Merchant*, 28 N. Y. 9; *Pearce v. Moore*, 114 N. Y. 256.

7 L. R. A.

Andrews, J., delivered the opinion of the court:

The finding of the referee that Susannah Wilder executed and delivered to the defendant the deed of June 20, 1853, is supported by evidence and has been confirmed by the general term. The execution of the deed by the grantor was proved by two witnesses who were present at the time, and no attempt was made on the trial to show that the signature to the deed was not genuine. The fact of delivery was not directly proved by an eye witness. But the defendant produced the deed, and the possession of a deed by the grantee is *prima facie* evidence of delivery, where there is nothing to impeach the bona fides of his possession. The other circumstances proved on the part of the defendant confirm the presumption of delivery arising from possession of the deed. It was shown that it was drawn by a scrivener, pursuant to the directions of the grantor. The sister of the defendant testified to declarations of her mother, the grantor, to the effect that she intended that the son should have the lot in question. She also testified that from the time of the execution of the deed until the mother's death, several years thereafter, the deed was in the custody of the defendant and was kept by him in a box with his other papers.

The defendant's wife was permitted, without objection, to testify to the same fact. The defendant rented the house, paid taxes and made repairs on the premises, and during his mother's life, after the deed had been executed, exercised such control of the property as usually attends ownership.

If the evidence on the part of the plaintiff can be regarded as casting any doubt upon the point whether there was an absolute delivery of the deed, with intent to pass the title to the property, we are concluded by the finding in favor of the defendant. The plaintiff claims title to an undivided part of the premises in question under deeds from some of the heirs of Susannah Wilder, who died intestate July 15, 1868, executed after her death. The deed from Susannah Wilder to the defendant was neither acknowledged by her nor was its execution attested by a subscribing witness. The plaintiff insists that for this reason the deed was void as to the plaintiff under the Statute (1 Rev. Stat. 738, § 137), which declares that an unacknowledged and unattested deed "shall not take effect as against a purchaser or incumbrancer until so acknowledged."

The conclusive answer to this claim is that the plaintiff is not a purchaser within the meaning of the Statute. The word "purchaser" in this Statute means one who derives title by purchase from the grantor in the unacknowledged and unattested deed, or from one who, himself, is mediately or immediately a purchaser from such grantor. The word "purchase," as designating the origin and nature of title to real property, has a technical but well settled meaning. It includes every mode of acquisition of an estate in land known to the law, except that by which an heir on the death of his ancestor becomes substituted in his place as owner by operation of law. Burrill, Dict. title *Purchase*.

The heir who takes by descent is not a purchaser in the eye of the law, and does not hold the estate descended by purchase. He may,

when he has come into the inheritance, originate a title by purchase, upon his conveyance to another, but his own title is not such. The Statute uses the word "purchase" in its legal sense. It is well settled that the title under an unacknowledged and unattested deed duly delivered is good as between the parties. This is so both under the Statute and at common law. *Wood v. Chapin*, 13 N. Y. 509; *Dole v. Thurlow*, 12 Met. 157.

The grantor cannot reclaim the estate conveyed, in contravention of his deed, nor can his heirs. Both are bound by it. The Statute does not aid the grantor's heirs, for the reason that they are not purchasers, and as to them the Statute has no application.

On the death of Susannah Wilder she was neither seised nor had she any title to the land in question, and the heirs took no other estate by descent than such as was vested in her at her death. Their conveyance to the plaintiff conveyed nothing, because they had no interest to convey. The defendant's deed, which was good as against Susannah Wilder, was good also against her heirs or those claiming title from them.

This disposes of the case. We think it unnecessary to consider whether the exception taken to the question put to the defendant, as to the time during which he had possession of the deed, was well taken. It would be difficult to sustain the ruling under our recent decision in *Clift v. Moss*, 112 N. Y. 426.

Excluding, however, the defendant's evidence on this point, there is left the uncontradicted evidence of two unimpeached witnesses to the fact that the deed was in his possession after its execution, during his mother's life.

We find no error in the record prejudicial to the plaintiff, and the judgment should be affirmed.

All concur.

YATES COUNTY NATIONAL BANK,

Resp't.,

v.

Zeno T. CARPENTER, Impleaded, etc.,

Appl.

(....N. Y.....)

1. Where the receipts from a pension can be directly traced to the purchase of property necessary or convenient for the support and maintenance of the pensioner and his family, such property is exempt from execution under Code Civ. Proc., § 1393, which exempts a pension.
2. Where the proceeds of a pension have been embarked in trade, commerce or speculation, and become mingled with other funds so as to be incapable of identification or separation, the pensioner loses the benefit of the statutory exemption.

(March 18, 1890.)

APPEAL by defendant, Zeno T. Carpenter, from an order of the General Term of the Supreme Court, Fifth Department, reversing

NOTE.—Exemption from execution of property purchased with pension money. See *Holmes v. Talada*, 3 L. R. A. 219, and *note*, 125 Pa. 133. 7 L. R. A.

See also 8 L. R. A. 552.

an order of the Yates County Court setting aside an execution levy upon certain property alleged to be exempt because purchased with pension money. *Reversed.*

The facts are fully stated in the opinion.

Messrs. James C. Smith and Arthur C. Smith for appellant.

Mr. William T. Morris, for respondent:

The exemption of pensions from levy under an execution does not apply or extend to property not exempt from levy and sale, purchased with pension money.

Wygant v. Smith, 2 Lana. 185; *Youmans v. Boomhower*, 8 Thomp. & C. 24.

Ruger, Ch. J., delivered the opinion of the court:

In March, 1882, the Yates County National Bank recovered a judgment in justice's court against Zeno T. Carpenter and others, for about \$111, and caused a transcript thereof to be filed in the county clerk's office, July 17, 1884. In June 1884, the United States government issued and delivered an invalid pension certificate to Zeno T. Carpenter, as a soldier in the United States army, which was deposited by him in the First National Bank of Yates County, for collection, in July, 1884. In October, 1884, Carpenter purchased and took a conveyance of a dwelling-house and lot in the Village of Penn Yan, his place of residence, from one Hurford, for \$1,300, paying the sum of \$700, cash, upon the purchase price and securing the balance by a mortgage to the grantor upon said lot. The cash payment was made from moneys received by him from the First National Bank, as part of the collection of his pension certificate. Carpenter was a married man, having a wife and five infant children, and the house and lot were purchased for the purpose of securing a home for himself and family. He had no other means, or property, liable for the payment of debts. In February, 1885, the Yates County National Bank caused an execution upon such judgment to be issued and levied upon said house and lot, and advertised the interest of said Carpenter therein for sale at public auction to satisfy said execution.

Upon proof of these facts Carpenter moved the county court for an order setting aside the said levy and enjoining the plaintiff from taking any proceedings to enforce said execution by the sale of said real estate, upon the ground that such property was exempt from levy and sale upon execution. That court granted the order asked for; but, upon appeal to the general term this order was reversed and such motion was denied. The defendant, Carpenter, appeals to this court from the order of reversal.

At the time of the levy, the only interest Carpenter had in such real estate was an equity of redemption, which we must assume, on the facts in this case, did not exceed in value the sum paid for it, and it therefore represents, to the extent of his interest, the proceeds of his pension. Was this interest liable to levy and sale on execution? The plaintiff insists that it is, and such is the judgment of the court below. The question presented involves the construction of § 1393 of the Code of Civil Procedure, which, so far as the matter here concerned is affected, reads as follows: "A pension heretofore, or hereafter, granted by the

United States . . . for military . . . services . . . is also exempt from levy and sale by virtue of an execution, and from seizure for non-payment of taxes, or in any other legal proceeding." That statutes of this character are to be liberally construed, with the view of promoting the objects of the legislation, is established by a uniform course of authority; and that their force and effect are not to be confined to the literal terms of the Act has also been held in numerous cases.

In *Hudson v. Plets*, 11 Paige, 180, it was held that a creditor's bill would not reach the right of action of a judgment debtor for the conversion of exempt property.

In *Andrews v. Rowan*, 28 How. Pr. 126, it was held that a receiver of the property of a debtor, appointed in supplementary proceedings, did not take a claim or a judgment thereon for damages accruing to such debtor from one who had wrongfully taken and sold his exempt property on execution for debt.

Justice Grover, writing the opinion of the supreme court in that case, says: "If the judgment rendered for the injury may be acquired by a judgment creditor, by proceeding supplemental to execution, there would be nothing to prevent seizing exempt property, selling it upon execution, and, when the debtor had sued and recovered a judgment therefor, compelling the application of such judgment to the payment of the debt for which the property was seized, thus entirely depriving the debtor of the exemption, and enabling the creditor in this way to collect his debt from property that the law has declared not liable for its payment."

The only case in this court bearing upon the subject is that of *Tillotson v. Wolcott*, 48 N. Y. 188, where it was held that the exemption of a team, provided for a householder, should also apply to a judgment recovered by such householder against one who had tortiously taken and converted it to his own use. It was said by the court that "the judgment when recovered by the debtor for the wrongful invasion of his privilege of the exemption of his property from levy and sale, represents the property for the value of which it was recovered." While the language of the Statute did not, in terms, cover a judgment, it was held that it came within its spirit and could not be taken by creditors. The opinion of Justice Grover in *Andrews v. Rowan*, 28 How. Pr. 126, is referred to and approved in the opinion of Judge Leonard.

The General Exemption Laws of the State provide for the protection of specific articles or classes of property with a view of alleviating the condition of the poor by securing to them the use or consumption of the property exempted; but the present law has departed from the ordinary form of exemption and, while seeking to accomplish the same object, provides, in terms, for the exemption of money or its equivalent. It is quite obvious that such an exemption can produce no beneficial effect, unless it is extended beyond the letter of the Act, and given life and force according to its evident spirit and meaning. Like other statutes, the section in question must be construed according to the meaning and intent of the law-makers and so as to effectuate their intention, so far as the language of the Act will permit it to be

done. Did the Legislature intend to limit the force of their exemption to a pension so long only as it remained an obligation of the government, or consisted of cash in the hands of the pensioner; or did they also intend to protect it after it had been expended in the purchase of articles of property designed to administer to the comfort and support of such pensioner and his family.

If the latter was not intended, we must ascribe to the law-makers the absurd intention of granting pensions for the purpose of satisfying claims against pensioners, and not to provide for the care and comfort of invalid or aged soldiers. If the soldier is not protected in the act of exchanging his pension for the necessities of life, its only effect would be to enable his creditors to take it in satisfaction of their claims. No benefit is conferred if the protection is not extended beyond the possession of the money itself, for its only value consists in its purchasing power, and if the soldier is deprived of that, the pension might as well, so far as he is concerned, have remained ungranted. The plain purpose of the Act was to promote the comfort of the soldier; to secure to him the bounty of the government free from the claims of creditors, and to insure him and his family a safe, although modest, maintenance so long as their needs required it. In the case of an exemption of specific articles from levy and sale upon execution, it seems to be well settled that it extends not only to the protection of such articles while in use or possession, but also to any claim arising out of their conversion by a wrong-doer, or their destruction by fire or otherwise, when insured. Freeman, Executions, § 235.

The rule seems to be just and reasonable and within the spirit of the exemption. In the case of the exemption of money, or its equivalent, there has been some controversy in the courts with reference to the extent to which the exemption shall be carried. In such case it is somewhat difficult to lay down a rule in precise terms by which it may be determined in all cases what property is liable and what exempt from levy and seizure upon legal process for the payment of debts, but we entertain no doubt that where the receipts from a pension can be directly traced to the purchase of property, necessary or convenient for the support and maintenance of the pensioner and his family, such property is exempt under the provisions of this Statute.

Where such moneys can be clearly identified and are used in the purchase of necessary articles, or are loaned or invested for purposes of increase or safety, in such form as to secure their available use for the benefit of the pensioner in time of need, we do not doubt but that they come within the meaning of the Statute; but where they have been embarked in trade, commerce or speculation, and become mingled with other funds so as to be incapable of identification or separation, we do not doubt but that the pensioner loses the benefit of the statutory exemption. These propositions, we think, are fully supported by the cases in this and other States. See Freeman, Executions, § 235, title *Proceeds of Exempt Property*.

In *Burgett v. Fancher*, 35 Hun, 647, and *Stockwell v. Malone Bank*, 36 Hun, 583, it was

held that moneys received from a pension and deposited in a bank in the name of the pensioner were not subject to proceedings on the part of creditors to have them applied in payment of debts, although the relations between the depositor and the bank were those of creditor and debtor. The debt represented the pension and that was exempted by the Statute.

The case of *Wygant v. Smith*, 2 Laus. 185, when limited, as it must be, to the facts appearing in the case, is not an authority for the plaintiff here. In that case the pensioner had

embarked his pension in business or trade, and in some transactions had made a profit. It was impossible to identify the fund in the various articles of property in which, through numerous and successive changes, it had become invested, and it was held that the pensioner had lost his right of exemption.

The order of the General Term should be reversed and that of the County Court affirmed, with costs to defendant in all courts.

All concur.

NEW YORK COURT OF APPEALS (2d Div.).

CORN EXCHANGE BANK, *App't.*,

v.

FARMERS NATIONAL BANK of Lancaster, Pennsylvania.

(118 N. Y. 443.)

1. A bank which has charged up to the drawer, canceled and sent a draft in payment of a check received through the agency of two other banks, which had successively received it for collection, the latter of which, not knowing that the former was not the owner thereof (the payee's indorsement being in blank), having given credit therefor, reserving the right to charge it back if dishonored, and sent it on for collection and remittance, cannot, at the request of the drawer and payee of the check, stop payment of the draft to the correspondent bank, because the bank first receiving the check for collection had become insolvent. The insolvent bank only is the agent of the payee of the check, and the drawee, after signing the draft, is not justified in refusing payment for the benefit of such payee, even assuming that he is entitled to the proceeds thereof.

2. Only the first of several banks successively receiving a check for collection is the agent of the payee.

(Bradley and Brown, JJ., dissent.)

(February 23, 1890.)

A PPEAL by plaintiff from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the New York Circuit dismissing the complaint in an action to recover from the drawer the amount alleged to be due upon a dishonored draft. *Reversed.*

The facts sufficiently appear in the opinions.

Messrs. Platt & Bowers, for appellant:

The defendant cannot set up a claim of a third party, where it is not affected by such claim.

City Bank of New Haven v. Perkins, 29 N. Y. 554; *McKay v. Draper*, 27 N. Y. 256; *Aubery v. Fiske*, 26 N. Y. 47; *Ilays v. Southgate*, 10 Hun, 511; *Ilays v. Hathorn*, 74 N. Y. 480; *McGriffin v. Baird*, 62 N. Y. 329; *O'Brien v. Jones*, 91 N. Y. 193; *Gray v. Johnston*, L. R. 8 H. L. 1; *Brown v. Thayer*, 12 Gray, 1.

In the absence of *mala fides* in a plaintiff's possession of promissory notes indorsed in

NOTE—Banking; receiving paper for collection. See notes to *Freeman v. Citizens Nat. Bank* (Iowa) 4 L. R. A. 423; *Pittsburgh Fifth Nat. Bank v. Ashworth* (Pa.) 2 L. R. A. 491; *Manufacturers Nat. Bank v. Continental Bank* (Mass.) 2 L. R. A. 690. 7 L. R. A.

blank or specially to himself or his own order, the legal title is in him and he is really the party in interest and can maintain an action on the same even though it appears that the transfer is merely colorable between the parties.

Freeman v. Falconer, 12 Jones & S. 132; *Case v. Hall*, 24 Wend. 103; *King v. Orser*, 4 Duer, 431; *Rogers v. Crandall*, 26 Hun, 388.

In remitting the draft defendant paid the check and thereby discharged all the indorsers. This payment could not be retracted.

Whiting v. Rochester City Bank, 77 N. Y. 363.

Messrs. Clark & Sanborn, for respondent: Cameron delivered the check to the Harrisons only for collection. The Harrisons having indorsed it to plaintiff expressly for collection, plaintiff held it only as agent for that purpose, and had no other interest in it. While the check was in plaintiff's possession, Cameron could have demanded and recovered it, or its value, from plaintiff.

Potter v. Merchants Bank, 28 N. Y. 641; *Van Amee v. Troy Bank*, 8 Barb. 312.

If the money had been collected by plaintiff on the check, Cameron could have claimed and recovered the money immediately from plaintiff.

Dickerson v. Wason, 47 N. Y. 439.

The fact that the proceeds of the check, instead of having been paid to plaintiff in current money, took the form of the draft payable to plaintiff's order, cannot make any difference as to the right to those proceeds. The agency of plaintiff constituted the only consideration for the draft, and the only right of plaintiff to receive payment of the debt represented by the draft; and it matters not whether plaintiff be considered the direct agent of Cameron, or a sub-agent, for in either case Cameron, the principal, had the power to revoke the agency, and when that power was exercised, that consideration at once failed, and that right terminated, and the draft was thereafter of no effect in plaintiff's hands.

Comstock v. Hoag, 5 Wend. 600; *Atkinson v. Stafford*, 20 N. Y. Week. Dig. 49; *Sickles v. Gillies*, 8 Jones & S. 14; *Barker v. Prentiss*, 6 Mass. 430.

Defendant, by receiving and retaining the check and returning it to the drawer, became indebted to the owner of the check in the amount named in it.

People v. Merchants & M. Bank, 73 N. Y. 272.

Follett, *Ch. J.*, delivered the opinion of the court:

In July, 1884, Mary C. Melson resided at Lancaster, Pa., where the Farmers National Bank of Lancaster was located, with which she kept an account. July 9, 1884, she drew a check on this bank for \$1,871.84, payable to John J. Cameron or order, and mailed it to him at Indianapolis, Ind., who, July 15, 1884, indorsed it in blank and delivered it to a firm of private bankers doing business at Indianapolis under the name of "Harrisons' Bank." The check, though indorsed in blank, was in fact delivered and received for the purpose of collection only. The Corn Exchange Bank was the New York City correspondent of Harrisons' Bank, and they exchanged collections and kept mutual accounts, Harrisons' Bank being accustomed to draw sight bills or checks against its balance with the Corn Exchange Bank. The view we take of this case makes it unnecessary to further consider the manner in which these accounts had previously been kept.

July 15, 1884, Harrisons' Bank indorsed the check to the Corn Exchange Bank for collection and credit and forwarded it by mail. It was received July 17, and credited by the Corn Exchange Bank to Harrisons' Bank, reserving, however, the right to charge it to Harrisons' Bank if it should be dishonored. It was not found by the court, nor was it asserted, that the Corn Exchange Bank knew or had the slightest reason to suspect that Harrisons' Bank did not own the check and was acting only as a collecting agent for Cameron or some undisclosed owner, and so the Corn Exchange Bank became the holder of the check in good faith, and could, had it been dishonored, have maintained an action thereon for its collection. July 17, the Corn Exchange Bank indorsed the check "for collection and remittance" to the Farmers' National Bank of Lancaster, the drawee, with directions to remit by draft, payable in the City of New York. July 18 the check was received by the Farmers' National Bank of Lancaster, was charged to the account of the drawer, Mary C. Melson, and canceled. For this service the Farmers' National Bank of Lancaster charged the Corn Exchange Bank \$1.84, and on the same day drew its check, or sight draft, payable to the Corn Exchange Bank or order, on the First National Bank of New York for \$1,870, and mailed it to the Corn Exchange Bank. The check was no longer a valid contract. The liability of the drawer and indorsers thereon was ended and could never be restored. The Lancaster Bank had legally and in good faith discharged its duty to the drawer, the indorsers and the holder of the check, and the Corn Exchange Bank had accepted of the draft of the Lancaster Bank in discharge of the liability of the drawer and indorsers. The Lancaster Bank accepted of the agency tendered by the Corn Exchange Bank, performed the services and received payment therefor. The relation of principal and agent was established, and in discharge of its liability thus assumed the Lancaster Bank mailed the draft. July 17, 1884, Harrisons' Bank failed, and on the 18th, but after the check had been paid and canceled, and the draft given in payment mailed, the drawer of the check, Mary C. Melson, and the payee, John J. Cameron, requested the Lan-

caster Bank to stop payment of its draft, which it did, and the draft was dishonored.

The Corn Exchange Bank brings this action to recover the amount of the draft, which the Lancaster Bank defends on the ground that the plaintiff did not hold the check for value and is not entitled to its proceeds as against John J. Cameron, the payee. The defense is not placed on the ground that it is necessary to protect the defendant from any present or future liability, for it is conceded that it has exactly performed all of its duties in respect to the check. It does not deny that it became the agent, for a consideration, of the Corn Exchange Bank, and promised by its draft to pay the plaintiff \$1,870.

By the law of this State Harrisons' Bank was the agent for Cameron, but neither the plaintiff nor defendant was his agent; and had either neglected to take the necessary steps to collect the check, to Cameron's injury, he would have had no right of action against either, but would have had a cause of action against Harrisons' Bank. *Allen v. Merchants Bank*, 22 Wend. 215; *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 459; *Commercial Bank of Pa. v. Union Bank*, 11 N. Y. 203; *Ayrault v. Pacific Bank*, 47 N. Y. 570; *Pittsburg Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276 [28 L. ed. 722]; *Morse, Banks and Banking*, 3d ed. § 272.

In *Montgomery Co. Bank v. Albany City Bank and the Bank of the State of New York*, *supra*, the plaintiff indorsed and sent a draft to the Albany City Bank for collection, which in turn indorsed and sent it to the Bank of the State of New York for collection, but the latter bank negligently omitted to present the draft for payment, and the drawer and indorsers were discharged. The plaintiff sued both banks and recovered against both at circuit, and the judgment was affirmed by the general term; but it was reversed in the court of appeals as to the Bank of the State of New York, and affirmed as to the Albany City Bank. It was said: "The New York State Bank was the agent directly guilty of the neglect. That bank was employed to do the service by the plaintiff's agent, the Albany City Bank, as its agent, to which it was alone responsible for its acts and neglect, and for which the latter, according to the settled rule, was alone responsible to the plaintiff, there being no agreement to the contrary, expressed or implied."

It is unnecessary to specially consider the cases which were decided in this State prior to *Allen v. Merchants Bank*, *supra*, or those of States in which it is held that the bank receiving payment of the paper is the agent of the owner notwithstanding it may have passed through several banks before reaching the bank making the collection.

The ground upon which the defendant seeks to justify the refusal to perform its contract with its principal seems to be that if the plaintiff receives the money, it ought to pay it to John J. Cameron, but may not, and therefore this defense.

Assuming, but not deciding, that Cameron could maintain an action against the Corn Exchange Bank to recover the amount of the check, such fact would in no wise support this defendant's contention. No contract relation

exists between it and Cameron, nor is there any privity between them.

When the owner of commercial paper delivers it for collection to bank A, which forwards it for collection to bank B, which, in turn, forwards it for collection to bank C, to which it is paid, it has been held that if bank C, instead of paying the money to bank B, retains and applies it on a debt due from bank B, the owner (bank A being insolvent) may recover of bank C; but we are unable to see that these cases justify this defendant in resisting the payment of its draft, to which it has no defense, for the benefit of a third person, who may have a right to recover the money represented by it.

The check which the defendant received from the plaintiff having been paid, charged to the account of the drawer and surrendered, the account closed, and the draft therefor delivered to the Corn Exchange Bank, the defendant cannot now assert as against its principal the legal rights or equities of a third person. *McKay v. Draper*, 27 N. Y. 256; *Aubery v. Fiske*, 36 N. Y. 47; Wharton, Ag. § 242, and cases there cited.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

Potter, Vann and Parker, JJ., concur.

Bradley, J., dissenting:

I am unable to concur with the majority of the court in the result or reasons given for it.

The check drawn by Mrs. Melson on the defendant was indorsed in blank by Cameron, the payee, and left with the Harrisons, the Indianapolis bankers, for collection. They indorsed it to the plaintiff's cashier for collection, and sent the check to the plaintiff, their correspondent in the City of New York, and the latter in like manner indorsed it to the cashier of the defendant, and sent the check to him with directions to remit to the plaintiff its proceeds in New York City funds. This was received by the defendant on July 18, and on the same day it drew its draft on the First National Bank of New York for the amount less exchange, and mailed it to the plaintiff. The Harrisons failed and suspended payment on July 17, and immediately after hearing of such failure and on July 19 Cameron requested the defendant not to pay it, and afterwards, before the defendant's draft was presented, requested the defendant to stop its payment, and thereupon, on the last-named day, the defendant notified the bank on which its draft was drawn not to pay the draft and asked the plaintiff to hold it. It was, however, afterwards presented to the drawee, and payment being refused, the draft was protested for non-payment. This action was brought on that draft, and the question is whether the facts, so stated, constitute a defense. They clearly would not if the plaintiff had taken the apparent and actual title to the check and become a holder of it in good faith for value, because the indorsement in blank by the payee apparently operated as a transfer of the check to the Harrisons. But the plaintiff parted with nothing on the faith of the check. While the letter in which it was received by the plaintiff stated that it was inclosed for credit, the indorsement made upon the check by the Harrisons was restrictive and purported that it was sent to the

plaintiff for collection. And it appears that this portion of the letter preceded the statement of the remittance and was printed and was the ordinary form of the letters of the Harrisons in which all their transmissions of paper to the plaintiff were made.

That fact may, in view of the manner that the indorsement was made, deny to that formal portion of the letter the significance which it might otherwise have had. But it has no essential importance upon the question here, inasmuch as the plaintiff advanced nothing upon the check. The plaintiff had for many years had an account current with the Harrisons arising from remittances of paper from each to the other for collection and credit of the proceeds, and the latter from time to time drew drafts upon the former. When the check was received by the plaintiff, the amount of it was credited to the Harrisons in such account, and, after the protest of the draft, was charged back to them in accordance with the course of dealing, as understood between those parties, that if paper received and credited was not paid it should be placed to the debit of the party sending it.

The check having been placed in Harrisons' hands for collection, the plaintiff by crediting them with it in general account acquired no title to it as against Cameron, the payee. His was the right to reclaim the check or to obtain its proceeds, if paid, or to stop its payment by the defendant to any party other than a holder in good faith for value, which position the plaintiff did not have. *Dickerson v. Waon*, 47 N. Y. 439; *Warner v. Lee*, 6 N. Y. 144; *Commercial Bank v. Marine Bank*, 1 Abb. App. Dec. 405; *Farmers & M. Nat. Bank v. King*, 57 Pa. 202.

The question now arises whether the situation in which the defendant was placed, or its relation assumed to the plaintiff, was such as to deny to it the right to make the defense which it sought to make in this action. Treating the defendant as a mere volunteer in the denial of its liability upon the draft, it clearly could not defeat a recovery. It could not in such case question the title of the plaintiff. That was the principle of the cases of the *City Bank of New Haven v. Perkins*, 29 N. Y. 554; *McKay v. Draper*, 27 N. Y. 256; *Aubery v. Fiske*, 36 N. Y. 47, and *Hayes v. Hathorn*, 74 N. Y. 486, cited by the defendant's counsel; and the same may be said of the other cases cited by him on the question of the right of the defendant to defend the action. The disability may arise out of the relation which one party assumes to another, whom he represents, and between whom, in some sense, that of principal and agent exists, and the latter may not be liable to third persons, but to his principal only while the relation exists; nor can the party who undertakes to perform a duty assumed to another, when called upon for performance, set up by way of relief from liability to do so the right in a third party with whom he is not connected and with whom he has personally no concern upon the subject. *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 459.

But that is not this case. The payee of the check never parted with the title to it. The Harrisons were employed by him to collect it, and the plaintiff was employed by them to aid

in the accomplishment of the purpose for which it was left with them by the payee. The latter had the right to step in and intercept the check in the hands of any party other than a holder in good faith for value, and reclaim it as his property, and in like manner to interrupt the transmission of the proceeds of it to the Harrisons and recover them. This right of the owner is within the doctrine of the *Commercial Bank* and *Dickerson Cases* before cited. And the cause for its attempted exercise was the insolvency of the Harrisons. The check had then been charged by the defendant to the drawer, and the draft, as directed by the plaintiff, had been mailed to it by the defendant. The latter had discharged its duty to both the drawer and the plaintiff, and nothing remained for it to do towards the accomplishment of the purpose for which the check was drawn and transmitted through the plaintiff to the defendant. The fund was represented by the draft, which the defendant had mailed to the plaintiff. The draft was the means by which the proceeds of the check were sent on their way to the destination contemplated when the check was left with the Indianapolis bankers, and they belonged to Cameron, its payee. He, as such owner, having the right to step in and control their destination, and thus countermand the authority which he had given to the Harrisons to receive the proceeds of the check, with that view requested the defendant to act for him and stay the fund from the hands of the plaintiff by stopping the payment of the draft so forwarded to it. This was done, and in doing so the defendant represented him. The facts justifying his right to do so supported the action of the defendant and afforded to it a defense in the plaintiff's action upon the draft, unless the defendant by its relation to the plaintiff was disabled from acting upon the request and direction of the owner of the fund.

The situation presented by the facts was that the Harrisons were the agents of the payee of the check and the plaintiff was their agent to aid in its collection, and by the latter the defendant was called upon for its payment. The direction of Cameron to stop the payment to the plaintiff operated as a revocation of the agency he had set in motion, and to stay, at the then stage of their progress, the means which had been adopted for its execution. It was unimportant for that purpose and such effect that the defendant had issued and forwarded its draft. The direction which he had a right to give, and the defendant, in view of the facts, had the right to observe, was that the latter should not pay his money to the plaintiff, who as against Cameron and his direction had no right to it. And thus was afforded to the defendant a defense founded upon the right of Cameron and his authority or requirement. The question would have been no different if the defendant's messenger had been on his way with the funds to the plaintiff, and his mission had been countermanded before handing over the money to the latter. The draft sent was a mere transmission in that form of the apparent liability of the defendant to pay, upon which the plaintiff probably may have realized but for the interruption caused by the direction given to the drawee of the draft not to pay it. It follows that the defendant was jus-

tified in asserting that the plaintiff had no right to the fund represented by the draft, as effectually as Cameron could have done if he had been interpleaded as a party defendant. *Comstock v. Hoag*, 5 Wend. 600; *Herriek v. Carman*, 10 Johns. 224; *Burke v. Prentiss*, 6 Mass. 480.

And in view of the facts found by the trial court, and as before stated, it is unnecessary to further consider the state of account between the plaintiff and the Harrisons, as it is quite unimportant on which side of it the balance was, since the credit of the check to the latter was on general account, and no advance was made to them on account of the check. *McBride v. Farmers Bank*, 26 N. Y. 450; *Lindauer v. Fourth Nat. Bank*, 55 Barb. 75; *Doß v. Fourth Nat. Bank*, 59 Barb. 265.

In *Montgomery Co. Bank v. Albany City Bank* the question was as to whom the correspondent of another, who had received commercial paper for collection, and sent it to him for a like purpose, was liable for failure or neglect to perform the duty assumed to charge the indorsers. It involved no consideration having relation to the fund when collected, and is not in conflict with the later cases, to the effect that the beneficial owner of the proceeds of the paper when collected may effectually assert his right to the fund as against any party receiving it in the execution of the agency. It is said in the prevailing opinion in the present case that if the check had been dishonored, the Corn Exchange Bank could have maintained an action upon it. Assuming that, if not interrupted by the payee, it might have been so, it is wholly without importance upon any question in this case. But against whom could such action be supported? Certainly not against the defendant without its acceptance of the check (*Atty-Gen. v. Continental Life Ins. Co.* 71 N. Y. 325); or against Cameron, the payee and indorser, because he was the beneficial owner of it; nor against Harrisons, the plaintiff's principal. And a further reason why plaintiff could have maintained no action in its own name upon the check is that it took no apparent title. The purpose of the indorsement by the Harrisons, as expressed in it, was that it was made to the plaintiff for collection of the check. This restriction denied to the plaintiff the apparent title, and it had none in fact to support any action in its name upon the check. *Daniel*, Neg. Inst. §§ 698, 699; *White v. Miners Nat. Bank*, 103 U. S. 658 [26 L. ed. 250]; *Sigourney v. Lloyd*, 8 Barn. & C. 622; *Hook v. Pratt*, 78 N. Y. 871.

The purpose of the suggestion that the defendant charged the plaintiff \$1.64 for the draft is not apparent. If, however, it was made to show a consideration between the parties for the draft issued by the defendant, it may be added that this amount retained by the defendant was taken from the proceeds of the check for exchange, which was legitimately within the expense of collection of the check in the usual course for that purpose, and the amount of the draft was so much less than that of the check. It seems to be without significance for any purpose in this action.

I think the judgment should be affirmed.

Brown, J., concurs; *Haight, J.*, not sitting.

CONNECTICUT SUPREME COURT OF ERRORS

Lewis DANIELS *et al.*, Appts.,

v.

CITY OF NEW LONDON.

(68 Conn. 156.)

1. An attorney has no implied authority to submit a case in which he is employed to arbitration by a submission made *in pais* without order or direction of the court, or the knowledge of his client.
2. A material change in a submission to arbitration by the parties cannot be made by an attorney, by an act *in pais*, unless he is expressly authorized to make it.
3. A change in a written submission to arbitration by which the award is to be made final instead of being returned to court for judgment by the court is a material change such as an attorney cannot make unless expressly authorized.

(September 27, 1889.)

APPEAL by plaintiffs from a judgment of the Superior Court for New London County in favor of defendant in a suit to set aside an award, and to enjoin the taking of any proceedings under it. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. S. Lucas and A. P. Tanner, for appellants:

Where no suit is pending an attorney has no implied powers to submit a matter to arbitration.

Morse, Arbitration and Award, 16; Billings, Arbitration and Awards, 53; Weeks, Attorneys at Law, § 233.

The submission by an attorney, even in a pending suit, must be with the approval of the court and appear of record.

Mitchell v. Harris, 2 Ves. Jr. 129; *Millar v. Orinell*, 8 Pa. 449; *Stokely v. Robinson*, 84 Pa. 315; *Evans v. Kamphaus*, 59 Pa. 379; *Bates v. Fisher*, 2 Cal. 355.

There is a well-recognized distinction as to the position of an attorney in relation to proceedings in and out of court.

Dervoort v. Loomer, 21 Conn. 245; *Perry v. Simpson Waterproof Mfg. Co.* 40 Conn. 317; *Rockwell v. Taylor*, 41 Conn. 57; *Tiffany v. Lord*, 40 How. Pr. 481; *Lockwood v. Black Hawk Co.* 84 Iowa, 285; *Starr v. Hall*, 87 N. C. 381; *Herbert v. Alexander*, 2 Call (Va.) 508; *Brooks v. Kearns*, 86 Ill. 547; *Sperry v. Reynolds*, 65 N. Y. 179; *San José v. Younger*, 29 Cal. 147; *Madison Ins. Co. v. Griffin*, 8 Ind. 277; *Hannum v. Wallace*, 9 Humph. 129; 2 Greenl. Ev. § 186; 1 Wait, Act. and Def. 439.

An attorney in a case in court cannot stipulate not to appeal, nor that a decision shall be final.

1 Wait, Act. and Def. 437; *People v. New York*, 11 Abb. Pr. 66; *Howe v. Lawrence*, 22 N. J. L. 99; *Jenkins v. Gillespie*, 10 Smedes & M. (Miss.) 81; *Arthur v. Homestead F. Ins. Co.* 78 N. Y. 462.

The change made in the submission was a material one. It cuts the parties off from all right of review.

6 Wait, Act. and Def. 525; *Bigelow v. Newell*, 10 Pick. 348; *Boston Water Power Co. v. Gray*, 7 L. R. A.

6 Met. 166; *Gardner v. Boston*, 120 Mass. 266; *Johnson v. Noble*, 13 N. H. 286; *Pratt v. Hackett*, 6 Johns. 14; *Allen v. Galpin*, 9 Barb. 246. *Messrs. Jeremiah Halsey and Augustus Brandegee*, for appellee:

The original submission was approved by the clients, who appeared and took their chances in the trial, and they are estopped from contesting the award.

Blakely v. Graham, 111 Mass. 8.

The authority to "submit" under such circumstances includes the authority to amend the submission, where the change is made in good faith and for the best interests of the clients.

Atling v. Munson, 2 Conn. 691; *Brooks v. New Durham*, 55 N. H. 559.

It was necessary and highly expedient for the attainment of the object sought that the change suggested, and which was for the benefit of the appellants, should be accepted by the attorney. His authority therefore is reasonably to be inferred.

Brackett v. Norton, 4 Conn. 524; *Holker v. Parker*, 11 U. S. 7 Cranch, 449 (3 L. ed. 401).

Arbitrators have authority to decide all questions of fact and of law necessary to the decision of the matters submitted, and their award is conclusive even though founded upon a mistake of law, unless the submission itself plainly reserves the legal questions involved for the review of a court of law.

Boston Water Power Co. v. Gray, 6 Met. 131, 165; *Ward v. Am. Bank*, 7 Met. 439; *Fairchild v. Adams*, 11 Cush. 550; *Smith v. Boston & M. R. Co.* 16 Gray, 521.

Their award was conclusive as well of the law as of fact.

Bigelow v. Newell, 10 Pick. 348; *Gardner v. Boston*, 120 Mass. 266; *Ennos v. Pratt*, 26 Vt. 630; 2 Parsons, Cont. 704.

In the light of these authorities the amendment to the original submission gave no new powers to the arbitrators, and deprived the appellants of no rights.

An attorney at law, having the conduct of a case, is authorized to submit it to arbitration, whenever that form of proceeding is, in his judgment, best calculated to promote the interests of his client.

Bacon, Abr. title *Arbitration and Award*; *Filmer v. Deber*, 3 Taunt. 486; *Holker v. Parker*, 11 U. S. 7 Cranch, 449 (3 L. ed. 401); Weeks, Attorneys at Law, 404, 405; 2 Parsons, Cont. 5th ed. 689; 1 Greenl. Ev. § 186; *Brooks v. New Durham*, 55 N. H. 559; *Hutchins v. Johnson*, 30 Am. Dec. 628, note, 13 Conn. 376; *Clark v. Randall*, 76 Am. Dec. 263, note, 9 Wis. 135; *Buckland v. Conway*, 16 Mass. 396; *Fail v. Conant*, 15 Vt. 321; *Dervoort v. Loomer*, 21 Conn. 256; *Gorham v. Gale*, 7 Cow. 739; *Morris v. Grier*, 76 N. C. 410; Morse, Arbitration and Award, 15; Watson, Arbitration and Award, 65; *Wilson v. Young*, 9 Pa. 101; *Eberett v. Charlestown*, 12 Allen, 93.

Torrance, J., delivered the opinion of the court:

On the 27th of August, 1887, a controversy

between the plaintiffs and defendant concerning the amount and validity of certain sewer assessments was pending before a judge of the superior court under the Statute, and on that day the parties agreed to submit the matters in controversy to arbitration. The judge before whom the matter was pending was made at first the sole arbitrator, but another judge was afterwards by agreement associated with him.

The written submission provided, among other things, that the arbitrators, in hearing and determining the controversy, and in taxing costs, should be governed by the laws applicable to such cases and by the rules of practice obtaining in the trial of causes in the superior court; that the written award to be made should be returned to the Superior Court for New London County, and that the court should render judgment pursuant thereto.

Under this submission, which was drawn up by the attorneys of the plaintiffs, and was signed by the attorneys of both parties, a hearing attended by all the parties in interest was had before the arbitrators. Some months after the hearing was finished, but before the award was published, one of the attorneys employed by the plaintiffs, without the consent or knowledge of his associate, and without the authority or knowledge of the plaintiffs, but with the consent of the attorney of the defendant, so amended the written submission as to make the award final and to give the arbitrators full power to decide the matters referred to them as they should consider right and just.

Shortly after this amendment was made the arbitrators, without further hearing, and in pursuance of the powers conferred upon them by the amended submission, published their award.

As soon as the award and amendment came to the knowledge of the plaintiffs they repudiated and disapproved of both, and of the action of their attorney in making the amendment, and brought suit to restrain the defendant from enforcing the award and to have it set aside, on the ground that the amendment materially changed the submission and had been made without their authority or knowledge. On the trial of the suit in the court below the court found that the amendment was made in good faith by the senior counsel in the case, that he believed he had full power to make it, and believed that it was for the best interests of all concerned that it should be made.

A special finding was made, and on the facts so found the plaintiffs requested the court to rule that the attorney who made the amendment had no authority to do so, but the court refused to so hold, and rendered judgment dissolving the temporary injunction and for the defendant to recover its cost. From that judgment the plaintiffs appealed, and the sole question made before this court is, whether the court below erred in refusing to rule as requested.

On the argument the defendant contended that the amendment did not materially change the original submission and so did not affect the rights of the parties, but we are satisfied that the amendment was a material one.

The main question then is, whether the attorney upon the facts found was authorized to

make the amendment to the original submission so as to bind the plaintiffs.

If he had such authority it must have been conferred upon him by the plaintiffs as a matter of fact, expressly or by implication, or he had it by virtue of his retainer and employment as an attorney in the case.

The court finds that the plaintiffs did not expressly confer such authority, but the defendant contends that the attorney had an implied authority arising out of the special circumstances of this particular case and his relations to it and to his clients. If this last claim means that the plaintiffs in fact conferred the authority by implication at least, then the court below should have so found, for this is a conclusion of fact, and not being found this court cannot draw such conclusion. Had the facts warranted such conclusion it is reasonable to suppose the court would have so found.

If, however, the claim means that the attorney had such authority by virtue of his employment in the case and not otherwise, such claim will be considered in connection with the next question in the case, which is, Did the retainer and employment of the attorney in the case confer upon him such authority?

That an attorney-at-law retained and employed in a cause pending in a court of common law has authority, without the consent or knowledge of his client, to submit such cause to arbitration by rule of court or under the direction of the court, seems to be established by numerous authorities and is not questioned by the plaintiffs in the case at bar. And if the attorney can under such circumstances bind his client by the submission, we think it would follow that he could bind him by an amendment made to the submission in good faith without the knowledge or consent of his client.

The defendant contends that the present case comes within the above rule, or, if not, he contends that an attorney-at-law, having the management of a matter in controversy, whether pending in court or not, is by law authorized to submit the same to arbitration without the consent or knowledge of his client or of the court.

Let us examine the first of these positions. At the time the original submission was executed the cause was pending before a judge of the superior court under the Statute, and when the amendment was made the matter was pending before the arbitrators; and so it seems to be claimed by the defendant that there was in either case a cause pending in court within the above rule.

Without determining whether this claim is a valid one or not, it may for the purposes of the argument be granted, and still it does not help the defendant. There is no pretense that either the submission or the amendment were made under the authority or direction of the tribunal before which the matters to which the submission or the amendment relate were pending, within the spirit and intent of the rule we are considering.

The submission was made *in pais*; with its execution the judge had nothing whatever to do; and by its terms he had nothing further to do with the submission or the matters involved therein. This is true also of the amendment, even though made at the suggestion of the arbitrators, as the court finds. We think, there-

fore, that the case does not come within either the letter or the spirit of the rule, because, even if it be conceded that at the time the submission and amendment were made there was a cause pending in court, still both submission and amendment were made *in pais* and not under nor in subjection to the authority of the tribunal in either case. As to the other position of the defendant, we are satisfied that the weight of authority is against it.

The cases establishing an attorney's authority to submit to arbitration a pending cause under the authority and direction of the court are somewhat numerous, and as is well said in *Markley v. Amos*, 8 Rich. L. 468, this of itself "affords a fair inference that he cannot submit in any other way."

We have been referred to no well-considered case, nor do we know of any, which supports this claim of the defendant. On the other hand some of the authorities cited on the plaintiffs' brief are directly against such a position. See the cases of *Jenkins v. Gillespie*, 10 Smedes & M. (Miss.) 81; *Markley v. Amos*, *supra*; *Scarborough v. Reynolds*, 12 Ala. 252; *Morse, Arbitration and Award*, 16.

In addition to the cases cited there is the case of *McGinnis v. Curry*, 13 W. Va. 29, decided in 1878, where the court holds that an attorney has no authority, before or after suit brought, to make an agreement *in pais* to submit his client's cause to arbitration without special authority of his client. So far as the reasoning and conclusions of the court in that case on the point in question here are applicable to the case at bar we adopt them, and feel justified in quoting from the opinion at some length. The court says: "The authority of an attorney at common law by a consent order made in the court to submit a pending suit to arbitration is universally admitted. And the court, in cases where such a consent order has been made at the instance of counsel, have frequently spoken of the authority of counsel to submit a controversy of his client to arbitration in general language which would be broad enough to include, not only a case of a submission of a controversy in a pending suit by an agreement of counsel *in pais*, but even in a controversy about which no suit was pending. But all the cases in which such loose and general language was used were cases where the authority of counsel was exercised not only in a pending suit, but by a consent order agreeing to the submission made in open court. See *Wilson v. Young*, 9 Pa. 101; *Holker v. Parker*, 11 U. S. 7 Cranch, 449 [3 L. ed. 401]; *Somers v. Balabrega*, 1 U. S. 1 Dall. 164 [1 L. ed. 83]; *Bingham v. Guthrie*, 19 Pa. 418.

"In England, though, so far as I know, it has never been decided that an attorney had a right to submit his client's controversy to arbitration when no suit was pending, or by an agreement *in pais*, and not by an order of court when a suit was pending, yet there are English cases from which it may be inferred that the courts may there consider the power of the attorney to submit his client's cause to arbitration as general, and not confined to pending suits or to orders of reference made in courts. See *Banfill v. Leigh*, 8 T. R. 571; *Re Jamieson & Binns*, 4 Ad. & El. 945.

"But in considering how much weight should

be attached to these dicta of English judges, it should be remembered that an attorney in England occupies towards his client a very different relation from what he does in this country. There he is frequently the general agent of the client, and transacts a great deal of his general business. But here an attorney is generally employed to attend to his client's interest in reference to some single controversy.

"In Pennsylvania, too, there are decisions which might seem to imply that the power of an attorney to submit to arbitration was not confined to the making of a consent order in a pending cause to refer it to arbitration. See *Bingham v. Guthrie*, 19 Pa. 419.

"But in considering what weight should be attached to the dicta of Pennsylvania judges, it should also be borne in mind that in Pennsylvania the authority of attorneys is more extensive than elsewhere. See *Lynch v. Com.* 16 Serg. & R. 368; *Wilson v. Young*, 9 Pa. 101.

"While I have found no case deciding that an attorney has a general authority to submit his client's controversies to arbitration, there are cases in which it has been decided that he does not possess such general authority. See *Jenkins v. Gillespie*, 10 Smedes & M. 81; *Scarborough v. Reynolds*, 12 Ala. 252.

"It is true that these were cases in which there was no *lis pendens*. But it seems to me that, as it is held that an attorney by reason of his being employed to institute a suit or defend a threatened suit has no authority to submit by an agreement *in pais* signed by the attorney the case to arbitration, that it must follow that he has no such authority though the suit be pending. An authority to act *in pais* could only be inferred, if it existed, from his employment before the institution of the suit as an attorney, and such employment as we have seen confers no such authority.

"This conclusion is not at all inconsistent with the numerous cases deciding that an attorney has authority in a pending suit by an order of court to submit the cause to arbitration. When the courts have assigned any reason for their decisions they have been based, not merely, if at all, on the employment of the counsel by the client, but on the fact that he is an officer of the court acting in the presence and under the control of the court, and as such has a right to take any legal steps he may deem proper in prosecuting or defending the suit. But this reasoning has no application to any action of the attorney *in pais*, such as agreeing to submit the case to arbitrators by an agreement signed by him without any special authority from his clients."

If an attorney cannot, without special authority from his client, submit a controversy to arbitration by an act *in pais*, we think it follows that he cannot by any like act, without such authority, materially change a submission already made or adopted by his client. To hold otherwise would give the attorney power to do indirectly what he has no power to do directly.

The case of *Jenkins v. Gillespie*, *supra*, was a case where an attorney amended the original submission without authority from his client, and the court held he was not bound by the act of the attorney. The court says: "But admitting that an attorney has in general power

to submit, has he power to change the terms of the submission made by the parties? That would be to change their contract. . . . We think it would be going too far to say his assent to the change should bind his client."

In the case at bar, although the court finds that the submission was drawn and signed by counsel who believed and were justified in the belief that the language and legal effect of the submission were intrusted to their judgment and discretion, still the submission was the contract of the parties, its language was theirs and theirs only, and in legal effect it had all the incidents of a contract of submission made by the parties out of court. They had made it theirs by ratifying and adopting what their attorneys had done, and had been heard under such contract as completed. After such hearing the plaintiffs had a right to rest in the be-

lief that the law under the circumstances gave their attorneys no binding authority to make a material change in that completed contract.

Inasmuch, therefore, as the court below failed to find that the attorney had any authority from the plaintiffs to make the amendment, and we are of opinion that the law gave him none, we are constrained to hold that he had no authority to make the amendment so as to bind the plaintiffs.

We regret that the facts and the law bring us to such a conclusion in this case, for the amendment was made and suggested in the utmost good faith, and was well adapted to promote the best interests of all parties concerned.

There is error in the judgment complained of.
In this opinion the other Judges concurred.

IOWA SUPREME COURT.

George BECK

THE GERMAN KLINIK *et al.*, App'ts.

(78 Iowa, 696.)

It is the duty of a physician who has set a broken leg to give proper instructions for the use and care of it, and for failure to do so he is liable in case of a resulting injury.

(*Robinson and Granger, JJ., dissent.*)

(October 23, 1899.)

A PPEAL by defendants from a judgment of the District Court for Scott County in favor of plaintiff in an action to recover damages for failure on the part of defendants to use due skill in treating plaintiff's broken leg.

Affirmed.

The facts sufficiently appear in the opinions.

Messrs. Heins & Hirschl, for appellants:

Defendants would be entitled to judgment notwithstanding the general verdict for plaintiff, if it appeared by the special findings that plaintiff had failed to establish some fact essential to his right of recovery.

Connors v. Burlington, C. R. & N. R. Co. 71 Iowa, 493. See also *Home Ins. Co. v. Holway*, 55 Iowa, 571; *Haird v. Chicago, R. I. & P. R. Co.* 55 Iowa, 121; *Gadbois v. Chicago, M. & St. P. R. Co.* 75 Iowa, 530.

Defendants should not be held for a premature abandonment, or for failing to give "instructions" at or after the time the bandages were removed, unless specially so pleaded.

Bemis v. Howard, 3 Watts, 257.

The law requires physicians to apply proper remedies and exercises them if these fail.

Almond v. Nugent, 84 Iowa, 803.

No presumption of negligence arises from the fact that a patient does not recover.

Haire v. Reese, 7 Phila. 133.

The special findings cover all the evidence introduced in this case, and absolve the defendants from negligence; hence judgment should have been entered notwithstanding the general verdict.

O'Donnell v. Hastings, 68 Iowa, 272.

! L. R. A.

Messrs. Bleik Peters, D. B. Nash and George E. Hubbell, for appellee:

Plaintiff employed the defendants for reward, to set, reduce, care for, cure and heal the fractured limb. Under such contract the defendants not only obligated themselves to proper, ordinary and diligent care and treatment in the performance of their professional duties, but to continue such services so long as the condition of the injured limb should require treatment.

Ballou v. Prescott, 84 Me. 305-313.

Beck, J., delivered the opinion of the court:

I. The defendant, The German Klinik, is an incorporation whose business appears to be connected in some way with the treatment of diseased and injured persons; the defendants, Gustave Hoepfner and others, are members of the incorporation and surgeons and physicians having charge of the patients treated by the corporation. Plaintiff by some accident broke the bones of his left leg, and employed defendants to treat him. After treatment according to the usual course pursued by surgeons, which was once or twice renewed by reason of the fact that the patient had not wholly recovered, the plaintiff was finally discharged from treatment by defendants or ceased further to employ or consult them. His leg not being wholly cured became bent and crooked, and finally, after this suit was commenced, it was amputated by other surgeons.

This action is brought to recover for the injuries plaintiff sustained by defendants' neglect and want of skill in the treatment of his broken limb.

The cause was upon the evidence submitted to the jury under instructions of which no complaint is made in this court. A general verdict was had for plaintiff and special findings in response to questions propounded by the court were returned by the jury. They are in the following language:

1. Did the defendants or either of them properly set the plaintiff's leg on December 21, 1885?

A. Yes.

2. Did the said defendants, Jaenicks and

Hoepfner, or either of them, properly treat the plaintiff from the day on which they set his leg up to the time at which they released him from the splint and bandages?

A. Yes, but we do not consider it a perfect cure when discharged.

Q. Were the methods and appliances which defendants used in plaintiff's treatment such as were found among the different methods and appliances used and approved of by physicians who were possessed of and who exercised at least the average skill of the medical profession as a body at that time?

A. Yes.

Q. Was plaintiff's leg when taken from the splint and bandages as crooked, or nearly as crooked, as when amputated?

A. No.

Q. Did plaintiff exercise ordinary care in the use of his leg after being released from the bandages?

A. Yes.

Defendants moved that the general verdict be set aside, and that judgment be rendered for them upon the special findings. This motion was overruled and judgment was rendered for plaintiff on the general verdict. This action of the court constitutes the only ground of complaint of defendants on this appeal.

II. It is insisted that the special findings are inconsistent with the general verdict, and are such as show that defendants are not liable in this action, and therefore a judgment thereon should have been rendered for defendants.

The instructions given to the jury are not complained of by defendants. Among others the following are given:

"When the defendants undertook the treatment of this case, the duty rested upon them to give to it such care and skill as the ordinarily educated and skilled members of their profession at the time would have given to it, and to give to the patient proper instructions for the care and use of the wounded limb. If the evidence satisfies you that they did this then they did all that the law required of them, and they would not be liable. It is for you to say from the evidence before you whether they gave to the treatment of the case such skill, care and attention or not, and to the patient proper instructions for the care and use of the wounded leg. If they did not they were guilty of negligence, and would be liable for injury resulting from such negligence, unless the evidence satisfies you that plaintiff contributed to such injury by his own negligence and want of care."

It will be observed that this instruction declares, rightly enough, that defendants were charged with the duty among others of giving plaintiff "proper instructions for the care and use of the wounded leg," and that if they omitted this duty they were guilty of negligence and would be liable for injury resulting therefrom. The rule of law is doubtless correct; at all events, it is the law of this case and so recognized by both parties, neither objecting to it.

Now if the jury found that defendants failed in the discharge of duty stated in this instruction, they rightly found for plaintiff upon the general verdict. There was evidence tending to authorize such a finding, which is sufficient to support it. A brief reference to the evi-

dence found in the original and amended abstracts fully sustains this conclusion.

The plaintiff and two or more witnesses testify that the defendants directed plaintiff to use his limb after the gypsum bandages used to keep the bones in place were removed, and to walk with crutches, and that they gave no directions further as to the manner or extent of such use. There was evidence tending to show that the broken bone had not well united, either because of improper treatment or because of its diseased condition, and that when the bandage was removed, or soon thereafter, the limb at the wounded part was crooked. These facts the jury were authorized to find from the evidence. They are shown by the testimony of physicians and surgeons and other witnesses who testified in the case. One of the surgeons, Dr. Grant, testifies upon an examination of the limb after amputation, that there was a diseased condition of the bone which might have been caused by "a splinter or a muscle getting between the bones;" and in that case walking would irritate and produce a tendency to disease." He further declares, "I would instruct my patient not to walk on a leg I found not united." "The least weight of the foot, after patient commenced walking, would tend to separate that at the top" (pointing to a portion of the bone, having the amputated limb before him). "If the bone, when set, confined in its apparatus for eight weeks, came out in that crooked condition or form, then the tendency of the use of that limb in walking would impair its efficiency and would induce disease." The recitation of other evidence in the case is not demanded to support our conclusion.

Upon the evidence we have quoted from the abstracts and other evidence found therein, the jury were authorized to find that plaintiff had no correct instructions as to the proper care and use of his wounded leg; that he had wrong instructions which directed him to use his leg; that the diseased condition of the bone was caused or aggravated by use of the leg which defendants directed, and that with proper instructions, which we will presume plaintiff would have followed, his leg would have been saved, or at least the disease of the bone would have been ameliorated and he would have escaped much suffering. There is nothing in the special findings of the jury in conflict with the finding of negligence in the failure of the defendants to give plaintiff proper instructions, or in the giving of improper instructions as to the care and use of his wounded leg, upon which the general verdict was undoubtedly based. The jury found specially that defendants properly set plaintiff's leg; that they properly treated it until he was discharged; and that they used proper and approved methods and appliances in the treatment of the leg; but it is nowhere found, directly or by implication, that they gave plaintiff proper instructions or did not give him improper instructions for the care and use of his injured leg. Defendants may have exercised proper care and used proper skill in all things, yet under the law of the case, if they omitted to give plaintiff proper instructions for the care and use of his wounded leg they were rightly held liable by the jury. As we have

said, the jury were authorized to find for plaintiff under the evidence on the ground of defendants' negligence by the omission to discharge their duty to instruct plaintiff as to the care and use of his injured leg.

For these reasons we reach the satisfactory conclusion that *the judgment of the District Court ought to be affirmed.*

Robinson, J., dissenting:

The special findings show that defendants discharged fully all duties which devolved upon them to the time when plaintiff was released from the splint and bandages. They had properly set the broken bones, and had given the injured limb their personal supervision for eight weeks. Plaintiff was young and healthy, and the uncontradicted evidence proves that under the conditions shown the broken bones should have been healed when the splint and bandages were removed. When that was done defendants instructed plaintiff to procure and use crutches in walking. The special findings show that plaintiff exercised ordinary care in the use of his leg after that time. The instructions which plaintiff admits having received from defendants necessarily informed him that the injured limb was not entirely cured; that he should use crutches in walking and should be careful in using it. What further instructions, if any, should have been given, the record nowhere discloses. No evidence whatever was offered as to the instructions which should have been given plaintiff when the splint and bandages were removed.

The jury were left wholly without the aid of evidence to determine that matter. As they were not experts, the plaintiff was as competent to determine what instructions should have been given, and consequently the care and use of his injured limb which would have been proper, as were the jury. But the jury found that he used ordinary care; therefore no damage could have resulted from the failure of defendants to give such instructions as the jury were competent to find should have been given. The fact that a perfect cure had not been effected when the splint and bandages were discarded does not alter the case, under the law as announced to the jury. They were charged that "a physician or surgeon, in undertaking the treatment of a patient, does not

thereby insure a cure." Plaintiff was not under the personal care of defendants, but was treated at his own home. The splint and bandages were removed about the 1st of February, 1886. Plaintiff did not see defendants from that time until the month of June following, when he went to them with a brother who had an injury which required surgical attention. Defendants then noticed that the limb was crooked and advised plaintiff that he should have treatment at his home or in hospital. He refused to have it so treated, but consented to have defendants place around the limb a plaster of paris bandage, which was designed as a support. That was removed in about one month; and defendants did not again see plaintiff until near the end of that year. It was then found that the limb had continued to grow worse, but defendants were refused permission to treat it further. It thus appears that plaintiff refused to follow the advice of defendants when given.

The opinion of the majority ignores the fact that even if defendants neglected to give proper instructions to the plaintiff, yet they would not be liable for such neglect unless injury resulted. The record before us contains no evidence which even tends to show that the conditions of which plaintiff complains would have been avoided had defendants given instructions which were not given.

It seems to me that the majority opinion casts upon defendants the burden of proving what instructions, if any, should have been given plaintiff; that such instructions were in fact given, or if omitted that none of the damage of which plaintiff complains resulted from such omission. That the law does not impose such burden upon defendants is evident. Defendants are presumed to have discharged all obligations which rested upon them until the contrary is shown.

A part of the relief asked by defendants is that the general verdict be set aside because not supported by the evidence, and to that I think they are entitled. This does not seem to me to be a case where there is a conflict in the evidence, but rather one where there is an entire absence of evidence on the material issues, not settled by the special findings, to support the general verdict.

Granger, J., concurs in this dissent.
Petition for rehearing denied.

ALABAMA SUPREME COURT.

GAFFORD et al., Appts.,
v.

STROUSE.

(....Ala....)

The possession by a wife of land under a parol gift from her husband is not adverse to his mortgagee while the husband resides with her upon the land.

(January 31, 1890.)

A PPEAL by defendants from a judgment of the Circuit Court for Butler County in favor of L. R. A.

vor of plaintiff in an action to recover the possession of certain real estate. *Affirmed.*

The case sufficiently appears in the opinion.
Mr. J. C. Richardson for appellants.
Mr. Charles L. Wilkinson for appellee.

Clopton, J., delivered the opinion of the court:

Both parties concede that J. M. Gafford was formerly seised and possessed of the land in controversy. Appellee, who was the plaintiff in the circuit court, derives title under a mortgage executed by him February 22, 1873. Defendants do not claim that title ever passed from Gafford to them, or either of them, by

any legal conveyance. Their defense is that Gafford, being indebted to Mrs. Sally Gafford, who was his wife, for money of her separate estate which he received and used, gave her, in February, 1872, by parol, the lands on which he then lived, including the land in controversy, in payment thereof, putting her in possession; and that she has been in continuous possession, claiming the land as her own, for the length of time prescribed by the Statute of Limitations as a bar to the entry of plaintiff. The court having given the affirmative charge in favor of plaintiff, the main inquiry arises whether, from the undisputed facts, the conclusion of law is that Mrs. Gafford did not and could not have such adverse possession as by its own mere force could ripen into a title.

The legal title in the lands, being vested in Gafford when the mortgage was executed, thereby passed to plaintiff. There is no pretense that he had notice of Mrs. Gafford's claim. The possession of the mortgagor thereafter was referable and in subordination to the mortgagee's title, unless rendered adverse by an open and positive disclaimer of his title, brought to his knowledge. *Coyle v. Wilkins*, 57 Ala. 108.

So long as the mortgagor holds in subserviency to the title of the mortgagee, the possession of his vendee under a parol contract of sale cannot become adverse to the mortgagee, unless there is a disclaimer of the title of the mortgagor, and a holding adversely to him. Counsel invoke the principle pronounced in *Collins v. Johnson*, 57 Ala. 304, and *Vandiver v. Stickney*, 75 Ala. 227, that an uninterrupted possession of a donee, under a parol gift, or by a vendee under a parol agreement to purchase when the purchase money is paid, accompanied by a claim to the lands, is adverse to the donor or vendor, and will be protected by the Statute of Limitations, maturing into a perfect title if continuous for the period prescribed by the statute. But, to have such effect, the facts essential to constitute an adverse holding must enter into and characterize the possession. The mere assertion of a hostile claim or right, and of possession, unaccompanied by adverse actual occupancy, is insufficient.

There is no dispute that Gafford entered into possession of the lands in 1862, and continued in possession, claiming them as his own, until February, 1872, the time of the alleged parol contract of sale. While Mrs. Gafford testifies that she was put into possession at that time, and thereafter claimed the possession and ownership, she also states that there was no change of possession, but she and her husband continued to reside on and occupy the lands, and he controlled them, until his death, which occurred in 1882. Ten years not having elapsed after his death before the institution of the action, the bar of the Statute can become complete only by taking her possession during the continuance of the marital relation to her possession after the death of her husband. The direct question, then, is whether the wife can hold premises adversely to her husband, which

she claims to have derived from him under a parol agreement of purchase, and on which they continued to reside and jointly occupy as husband and wife. The statement and application of a few elementary principles furnish an answer.

Possession, to be adverse, so as to vest title in the possessor after the lapse of the requisite time, must be not only open, notorious and continuous, but also exclusive. It must operate to oust or dispossess any other person who may claim title or right of possession. In order to fall within the operation of the Statute of Limitations, the possession must be sufficiently exclusive to put the dispossessed claimant to his action or entry. This can never be the case where the party having the title is in possession, though it may be joint. Two contemporaneous possessions of the same property, each adverse to the other, is a legal absurdity not conceivable. Hence when two persons are in possession, claiming under different and hostile rights, the law refers the possession to the party having the title. *Pickett v. Pope*, 74 Ala. 122; *Bragg v. Massie*, 88 Ala. 89; *Farmer v. Estava*, 11 Ala. 1028.

It may be that, under the laws in force at the time of the transaction in question, a title would vest in a married woman by the mere force of an uninterrupted possession of real estate for the statutory period under a parol gift or purchase, where the husband never had nor claimed any title, nor interfered with her possession. There is a clear distinction between a possession of that nature and a possession under a gift or purchase directly from the husband. There being no actual change of possession, the oral agreement between Gafford and his wife was void. It vested no right nor equity, and created no separate estate. It is material only to the extent it may constitute the origin and basis of an adverse possession. Had Gafford executed a conveyance directly to his wife, it would have been inoperative as a transfer of the legal title. Their continuance in joint possession thereafter, for no length of time, could have availed to divest him of the title and vest it in her. Certainly a continuance of joint occupancy, without a conveyance, merely under a parol gift or agreement of purchase, can have no greater effect. The elements essential to an adverse possession in that sense, which can ripen into a title by its own force and the lapse of time, do not and cannot exist in such case. The husband is not ousted or dispossessed, actually or constructively. The possession of the wife does not exclude or encroach upon his possession.

The possession of Mrs. Gafford during coverture was the possession of her husband, and did not become antagonistic to his rights. *Bell v. Bell*, 37 Ala. 536; *Hendricks v. Ransom*, 58 Mich. 576; 1 Am. & Eng. Cyclop. Law, 250.

It results that the Statute of Limitations did not commence to run until the death of her husband.

Affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Samuel LITTLE *et al.*, Trustees,

v.

Joseph H. CHADWICK *et al.*, and Emily Bugbee *et al.*, Appts.

(....Mass....)

1. Where an executor and trustee under a will renders a final account and charges himself with a certain amount as retained by him to pay annuities, and never sets this sum apart but uses it in his business together with his own money, and afterwards makes an assignment for benefit of creditors, the annuitants cannot impress the funds in the hands of the assignee with a trust for payment of their annuities.
2. The trust will attach to money held by a person in trust to raise annuities so long as the money can be identified or traced but no longer; and in case the trustee has so mixed the trust funds with his own that they cannot be traced, and then becomes bankrupt, the *cestus que trust* can only come in and share with the general creditors.

(February 26, 1890.)

APPEAL by defendants Emily Bugbee *et al.*, from a decree of the Supreme Judicial Court, rendered by a single justice in Suffolk County upon a bill by trustees in an assignment for creditors praying instructions as to the execution of their trust. *Affirmed.*

Plaintiffs were trustees under an assignment by Aaron D. Williams, for benefit of creditors, and filed this bill for instructions as to the execution of their trust.

Among the claims presented to them was one arising out of the following facts:

One Nancy Williams died leaving a will

which was duly probated, by which she appointed Aaron D. Williams executor and trustee, and among other provisions gave to her brother Charles Bugbee, or to his widow, in case of his death, an annuity of \$600; and to such of their children as should survive them an annuity of \$200 each.

Williams retained in his possession a sufficient fund to pay this annuity, and, Bugbee having died, his widow and children claimed that the bonds in plaintiff's hands should be impressed with a trust for the payment of such annuities, and that a fund sufficient to pay them should be set apart before a dividend was made to the general creditors of Williams. The court disallowed the claim and the claimants took this appeal.

Mr. George E. Smith, for appellants:

An assignee under a general assignment for the benefit of creditors takes no better and no higher rights than the assignor himself had, and is not to be regarded as a purchaser for a valuable consideration without notice.

Chace v. Chapin, 180 Mass. 181.

Parol evidence is admissible to identify and follow trust money laid out in land.

2 Perry, Tr. § 839; *Hopper v. Conyers*, L. R. 2 Eq. 549.

If a trustee converts trust property contrary to his duty, the *cestus que trust* has the option to hold him personally responsible or to follow the property if not held by a bona fide purchaser without notice, or to pursue the proceeds or the substituted property.

4 Kent, Com. 12th ed. p. 307; *Oliver v. Piatt*, 44 U. S. 8 How. 333 (11 L. ed. 622).

If a man mixes trust funds with his own, the whole will be treated as the trust property, ex-

NOTE.—Account of trustee; conclusiveness of.

Where trustees under a will have rendered an account which has been allowed, charging themselves with moneys of the estate, the account is conclusive between them and the *cestus que trust*, in an action on their probate bond. *Bassett v. Granger*, 1 New Eng. Rep. 433, 140 Mass. 133.

Beneficiaries of a trust are: (1) those having liens on the trust estate; (2) the creditors of the assignor in trust; (3) the assignor himself. *House v. Vinton Co. Nat. Bank*, 1 West. Rep. 155, 43 Ohio St. 344.

Following trust property.

As long as trust property can be traced and followed, the property into which it has been converted remains subject to the trust. *Baltimore Cent. Nat. Bank v. Conn. Mut. L. Ins. Co.* 104 U. S. 54 (28 L. ed. 638); *Oliver v. Piatt*, 44 U. S. 8 How. 333 (11 L. ed. 622); *May v. Le Claire*, 78 U. S. 11 Wall. 217 (20 L. ed. 50); *Duncan v. Jaudon*, 82 U. S. 15 Wall. 125 (21 L. ed. 142); *Bayne v. United States*, 93 U. S. 642 (37 L. ed. 997); *United States v. State Nat. Bank*, 96 U. S. 30 (24 L. ed. 647); *Riehl v. Evansville Foundry Asso.* 1 West. Rep. 887, 104 Ind. 72. See *Story*, Eq. Jur. § 1260; *Taylor v. Plumer*, 3 Maule & S. 562; *Pugh v. Pugh*, 9 Ind. 132; *Newton v. Porter*, 69 N. Y. 123; *Bank of America v. Pollock*, 4 Edw. Ch. 215; *Pom. Eq. Jur.* § 1051; *Swift v. Williams*, 10 Cent. Rep. 560, 63 Md. 236; *Wood v. Dummer*, 3 Mason, 813; *Long v. Majestra*, 1 Johns. Ch. 305; *Riddle v. Mandeville*, 9 U. S. 5 Cranoh, 323 (3 L. ed. 114); *Russell v. Clarke*, 11 U. S. 7 Cranoh, 69 (3 L. ed. 271).

Whenever a trustee has been guilty of a breach 7 L. R. A.

of the trust, and transferred the property, the *cestus que trust* has a full right to follow such property into the hands of such third person, unless he stands in the position of a bona fide purchaser for a valuable consideration, without notice. *Oliver v. Piatt*, 44 U. S. 8 How. 333 (11 L. ed. 622).

If, after unlawful conversion of the trust property, the trustee should repurchase it, the *cestus que trust* may either hold the original property subject to the trust, or take the substituted property in lieu thereof. *Ibid.*; *May v. Le Claire*, 78 U. S. 11 Wall. 217 (20 L. ed. 50).

Where *cestus que trust* brought a suit for the recovery of property conveyed by a trustee after his powers had ceased and the trust was extinguished, they are entitled to their property and compensation for its use, from the purchaser under the void conveyance; and the matter of the return to him of the money paid to the trustee is one with which the *cestus que trust* have nothing to do. *Young v. Bradley*, 101 U. S. 732 (25 L. ed. 1044).

On an attempt to follow trust property which has passed out of the trustee's hands, the sole question is whether or not it can be identified, either in its original or altered form. *Englar v. Offutt*, 70 Md. 73.

It is a general rule as well in a court of equity as in a court of law that in order to follow trust funds and subject them to the operation of the trust they must be identified. *Cavin v. Gleason*, 7 Cent. Rep. 287, 106 N. Y. 256; *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *Newton v. Porter*, 69 N. Y. 123; *Ferris v. Van Vechten*, 78 N. Y. 113; *Pennell v. Daffell*, 4 DeG. M. & G. 387.

cept so far as he may be able to distinguish what is his own.

Frith v. Cartland, 2 Hem. & M. 420; *Pennell v. Deffell*, 4 DeG. M. & G. 872; *Baltimore Cent. Nat. Bank v. Conn. Mut. L. Ins. Co.* 104 U. S. 54 (26 L. ed. 693).

Where money has been misappropriated, the general rule of equity is, that those wronged may pursue it as far as it can be traced, and may elect to take the property in which it has been invested, or to recover the money.

Smith v. Vodge, 92 U. S. 186 (23 L. ed. 483); *Oliver v. Piatt*, 44 U. S. 8 How. 409 (11 L. ed. 657).

Where the trust fund constitutes a part only of the purchase money of an estate, the court usually gives a lien on the land only for the amount of the trust fund invested, and interest.

2 Perry, Tr. § 842; *Bresnihan v. Sheehan*, 125 Mass. 11; *Hopper v. Conyers*, L. R. 2 Eq. 549; *Scales v. Baker*, 28 Beav. 91; *Price v. Blakemore*, 6 Beav. 507; *Re Hallett's Estate*, L. R. 18 Ch. Div. 696; *Baltimore Cent. Nat. Bank v. Conn. Mut. L. Ins. Co. supra*.

Messrs. Horace G. Allen and William R. Howland for the Roxbury Institution for Savings, one of Williams' creditors.

Messrs. Gaston & Whitney for the Trustees.

C. Allen, J., delivered the opinion of the court:

The executor and trustee under the will of Mrs. Williams having assigned his property in trust for the benefit of his creditors, the annuitants under that will seek to establish a trust in that property and to obtain a decree that \$10,000 be set apart for the assignees and appropriated to secure and raise the annuities. It was, however, found at the hearing that none of the property so conveyed was charged with any such trust, and this finding appears to be the only one that the evidence would warrant.

There is nothing to show that there was ever any distinct trust fund in the hands of Williams, the executor and trustee, which was represented by any specific property. He was also the residuary legatee, and nearly one half of the assets of the estate consisted of a debt due from himself. The rest was chiefly notes secured by mortgages. There was no real estate. The moneys received by Williams from the estate were mixed with his own. He paid the debts and other legacies and rendered an account called "fin" in which he charged himself with "balance of this account retained to pay annuity of \$600 per annum to Charles Bugbee, \$10,000." It was his duty to set apart this sum and to keep it separately invested, but he did not do so. The settlement of the account merely showed that he was held responsible for that sum, and if he had set it apart, as he ought to have done, the trust would have attached to the property thus set apart. But since this was never done, the trust was never impressed upon any specific property or money held by Williams. There was merely an indebtedness or liability on his part to account

for that sum. This indebtedness or liability might itself be the subject of a trust, just as if it had been the indebtedness of another person. The trust, however, in such case attaches merely to the indebtedness and to whatever may be realized from it, and not to any particular property held by the debtor. The view most favorable to the annuitants that could be taken is, that Williams had the sum of \$10,000 in money in his hands, which was retained for the purpose of raising the annuities. The evidence shows that this was not the case; but assume that it was, the trust would then attach to it as long as the money could be identified or traced, but no longer. When trust money becomes so mixed up with the trustee's individual funds that it is impossible to trace and identify it as entering into some specific property, the trust ceases. The court will go as far as it can in thus tracing and following trust money, but when, as a matter of fact, it cannot be traced, the equitable right of the cestui que trust to follow it fails. Under such circumstances, if the trustee has become bankrupt, the court cannot say that the trust money is to be found somewhere in the general estate of the trustee that still remains; he may have lost it with property of his own. And in such case, the cestui que trust can only come in and share with the general creditors. *Atty-Gen. v. Brigham*, 142 Mass. 248; *Howard v. Fay*, 188 Mass. 104; *White v. Chapin*, 184 Mass. 280; *Bresnihan v. Sheehan*, 125 Mass. 11; *Harlow v. Dehon*, 111 Mass. 195, 198, 199; *Andrews v. Bank of Cape Ann*, 8 Allen, 313; *Le Breton v. Peirce*, 2 Allen, 8-13; *Johnson v. Ames*, 11 Pick. 173, 181, 182; *Trecothick v. Austin*, 4 Mason, 16-29; *Ferris v. Van Vechten*, 73 N. Y. 113; *Frith v. Cartland*, 2 Hem. & M. 417; *Holland v. Holland*, L. R. 4 Ch. 449; *Isaacson v. Horwood*, L. R. 8 Ch. 225; Perry, Tr. §§ 845, 836, 842; Story, Eq. §§ 1258, 1259; *Lewin, Tr.* 8th ed. 241, 836, 892.

There is nothing to the contrary in *Baltimore Cent. Nat. Bank v. Conn. Mut. L. Ins. Co.*, 104 U. S. 54, 66, 71 [26 L. ed. 693, 698, 701], and *Re Hallett's Estate*, L. R. 18 Ch. Div. 696, 708, 721, which are chiefly relied on by the annuitants.

In Wisconsin a majority of the court has declared that it is not necessary to trace the trust fund into any specific property in order to enforce the trust; and that if it can be traced into the estate of the defaulting agent or trustee, this is sufficient. *McLeod v. Evans*, 66 Wis. 401-409.

But this seems to us to be stated too broadly.

In the present case, there is no such thing as tracing the \$10,000 into any particular pieces of property covered by the assignment by Williams for the benefit of his creditors. The most that can be said is, that he had this money and also other moneys of his own and used all the moneys together as his own for several years in buying, building and selling, and that he finally failed. There is no means of ascertaining, as a matter of fact, that the trust money, if it ever was trust money, is now represented by any property in the hands of the assignees.

Decree affirmed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

Thomas MURDOCK, Use of John M. Hare,
v.
FRANKLIN INSURANCE CO., Plff. in
Err.

(....W. Va....)

- *1. A policy of insurance provides that proof of loss shall be furnished to the insurance company within thirty days from the date of the loss, and that all claims under it shall be barred, unless prosecuted within six months from the same date, and also provides that the loss shall be paid in sixty days after proof of loss. The six months' limitation begins to run at the close of the sixty days allowed the company for payment, not from the actual loss.
2. One person chartered of another a barge to be employed by him in the conveyance of freight in a business trip for profit, and has the barge in his custody and possession. He has an insurable interest in the barge, and may insure it in his own name, not only for his own protection, but also for the protection of the owner of the barge; and if his act of so insuring it was authorized by the owner, or is ratified by him, suit may be maintained upon the policy, in case of loss, and damages recovered to indemnify the loss of the owner of the barge, not merely the loss of the charterer.
3. Statutes are to be construed to have a prospective operation, unless a contrary intention in the Legislature is manifest and plain.
4. In an action on a contract, a verdict was rendered for the plaintiff for a sum of money while § 14, chap. 131, Code 1868, as originally enacted, was in force, providing that judgment should be entered for the amount found, with interest from the date of the judgment; and judgment was not entered on such verdict until 1887, when said section 14, as amended by chapter 120, Acts 1882, was in force, providing that on verdicts judgment shall be rendered, with interest from date of verdict. Such judgment should have called for interest from its date, according to the law in force when the verdict was rendered, and not from the date of the verdict.

(November 21, 1889.)

ERROR to the Circuit Court for Ohio County to review a judgment in favor of plaintiff in an action upon a policy of marine insurance to recover for the loss of a barge. *Reversed.*

*Head notes by BRANNON, J.

NOTE.—Proof of loss; limitation clause construed.

The condition limiting the time of commencement of an action to a period less than that prescribed by the Statute of Limitations is valid, and the Statute does not operate to extend the time beyond the six months. *Virginia F. & M. Ins. Co. v. Wells*, 88 Va. 738.

The words "loss or damage," in the limitation clause, must be taken to relate to the time of the loss. *Blair v. Sovereign F. Ins. Co.* 7 Can. L. T. 410; *Lampkin v. Western Assur. Co.* 18 U. C. Q. B. 361.

Where proofs are received within a reasonable time before expiration of the period fixed by the policy for suing, the company cannot cut off the right to sue by any negligent act on its part. *Chambers v. Atlas Ins. Co.* 51 Conn. 17.

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The facts are fully stated in the opinion. *Messrs. Caldwell & Caldwell*, for plaintiff in error:

The effort of the plaintiff is to make the policy read that defendant insured Thomas Murdock on account of John M. Hare. A written contract cannot thus be varied by parol evidence.

Crawford v. Jarrett, 2 Leigh, 630; *Towner v. Lucas*, 18 Gratt. 710; *Lockwood v. Holiday*, 16 W. Va. 650; *McGuire v. Wright*, 18 W. Va. 507.

The suit was brought upon the policy, and the plaintiff sets up the policy himself and must recover on the contract he declares on or he cannot recover at all. The fact that the policy was not made in accordance with representations of the insured is immaterial since the representations had been made a part of the contract, and the insured had had an opportunity to examine what was in the representations.

New York L. Ins. Co. v. Fletcher, 117 U. S. 519 (20 L. ed. 934).

The previous verbal arrangement was merged in the written agreement.

Union Mut. L. Ins. Co. v. Mowry, 96 U. S. 548 (24 L. ed. 675); *Pacific Ins. Co. v. Catlett*, 4 Wend. 75.

If the policy is in behalf of the owners, no other person than the owners can recover.

Catlett v. Pacific Ins. Co. 1 Wend. 564; *Steinback v. Rhinelander*, 3 Johns. Cas. 269; *Bodway v. Union Ins. Co.* 1 Marsh. Ins. 478 c, note; *Toppin v. Atkinson*, 2 Mass. 865; *Dumas v. Jones*, 4 Mass. 647.

The damages assessed by the jury were excessive and the verdict should have been set aside. The policy was a contract to indemnify Thomas Murdock for his loss. Yet the jury rendered a verdict for the full amount of the policy.

Murray v. Columbian Ins. Co. 11 Johns. 313; *Dumas v. Jones*, 4 Mass. 650.

The amount judgment was rendered for was excessive as to interest. The verdict was rendered in 1873. In 1882 a statute made the amount of the verdict bear interest, not from the date when the judgment was entered, but from the date the verdict is found. The Legislature, without process of law or judicial finding, could not take away defendant's money to a large sum in interest by simply passing an Act that defendant should be liable for interest

The condition that the insured must give notice of loss is a material part of the contract, and a compliance therewith is a prerequisite to the right of recovery by the assured, and mere silence of the company is not a waiver of such proofs. *Central City Ins. Co. v. Oates*, 88 Ala. 558.

To make the condition effectual against the insured it must be specially pleaded in defense like the Statute of Limitations. *Lampkin v. Western Assur. Co.* *supra*.

Where there is a single subject of insurance which is entirely destroyed, and immediate notice of the loss is given, further detailed proof is not necessary. *Am. Cent. Ins. Co. v. Haws* (Pa.) 9 Cent. Rep. 413.

from 1873 to 1883, for which interest defendant had not been liable.

Citizens Sav. & Loan Assn. v. Topeka, 87 U. S. 20 Wall. 662 (23 L. ed. 461); *Cole v. La Grange*, 118 U. S. 1 (28 L. ed. 896); *Redfield v. Yatalyfera Iron Co.* 110 U. S. 174 (28 L. ed. 109).

Mr. W. P. Hubbard, for defendant in error:

Under the circumstances disclosed in the case at bar, the charterer of a vessel has an insurable interest.

Oliver v. Greene, 8 Mass. 183; *Bartlet v. Walter*, 18 Mass. 267; 1 Parsons, Marine Ins. pp. 174, 175.

The insurance company knew for whose benefit the insurance was intended.

Howard Fire Ins. Co. v. Chase, 72 U. S. 5 Wall. 509 (18 L. ed. 524).

If those intended to be insured are in fact not insured by this policy, it is because they have been misdescribed in the policy. The insurance company is estopped to rely on such misdescription.

Phoenix Ins. Co. v. Allen, 7 West. Rep. 407, 109 Ind. 278.

Parol evidence is admissible to ascertain the parties to be insured, although on the face of the contract there is no ambiguity concerning the same.

Daniels v. Citizens Ins. Co. 5 Fed. Rep. 425. See also *Waters v. Monarch F. & L. Assur. Co.* 5 El. & Bl. 870; *Hooper v. Robinson*, 98 U. S. 528 (25 L. ed. 219); *Eastern R. Co. v. Relief Ins. Co.* 98 Mass. 423; *Herkimer v. Rice*, 27 N. Y. 163; *Rohrbach v. Germania Ins. Co.* 62 N. Y. 47; *Fire Ins. Assn. v. Merchants & M. Transp. Co.* 6 Cent. Rep. 437, 66 Md. 839, 59 Am. Rep. 162; *Shaw v. Etina Ins. Co.* 49 Mo. 578, 8 Am. Rep. 150; *Lucas v. Liverpool & L. & G. Ins. Co.* 28 W. Va. 258; *Goodall v. New England Mut. F. Ins. Co.* 25 N. H. 169.

Where a contract not under seal is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue on it, and parol evidence is admissible to enable the principal to show that he is the real contracting party.

Wood, Fire Ins. § 279; Deits v. Providence Wash. Ins. Co. 31 W. Va. 851.

Plaintiff's right of action was not barred by the limitation in the contract.

Barber v. Wheeling F. & M. Ins. Co. 16 W. Va. 658; *Miller v. Hartford Ins. Co.* 70 Iowa, 704; *Hay v. Star F. Ins. Co.* 77 N. Y. 285, 33 Am. Rep. 607; *Friezen v. Allemania F. Ins. Co.* 30 Fed. Rep. 352; *Vette v. Clinton F. Ins. Co.* 30 Fed. Rep. 668; *Chandler v. St. Paul F. & M. Ins. Co.* 21 Minn. 85; *Ketchum v. Protection Ins. Co.* 1 Allen (N. B.) 186, 2 Bennett, F. Ins. Cas. 742.

The amount due by a policy of insurance carries interest.

Pooria Ins. Co. v. Lewis, 18 Ill. 553; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 888.

In contracts for the payment of money, interest upon the principal sum is a legal incident of the debt and a part of the contract, and courts have no more power to change the rate of interest fixed than they have to dispense with the enforcement of the contract.

Shipman v. Bailey, 20 W. Va. 146; 4 Minor, 7 L. R. A.

Inst. 820, and cases there cited; *Johnson v. Atlantic & St. L. R. Co.* 43 N. H. 410.

At the common law in actions on contracts the plaintiff is entitled to interest on the amount of his verdict during the time of delay caused by the defendant.

Bull v. Ketchum, 2 Denio, 190; *Vredenberg v. Hallett*, 1 Johns. Cas. 27; *Lord v. New York*, 3 Hill, 430, note a.

If the Legislature could confer any right to be free from the payment of interest between the dates of the verdict and the judgment, it would be a right depending solely upon statute, and which would fall with the repeal of such statute unless it had been carried into judgment.

Curran v. Owen, 15 W. Va. 203. See *Lewis v. Arnold*, 13 Gratt. 463.

Brannon, J., delivered the opinion of the court:

Thomas Murdock instituted an action of covenant for use of John M. Hare, in the Circuit Court of Ohio County, upon a policy of marine insurance, against the Franklin Insurance Company, for loss of a barge, and there was a demurrer to the plaintiff's evidence by the defendant, and a verdict assessing the plaintiff's damages subject to it, and a judgment for the plaintiff for such damages. The said Company has sued out this writ of error. The brief of appellant's counsel contends that the action is barred by the limitation provided in the policy, "that, in all cases of loss or damage, the assured shall furnish to the said Company the proofs of the same within thirty days from the date thereof, and all claims under this policy shall be barred, unless prosecuted within six months from the same date." There is a provision, also, in this policy, that, "in case of loss, such loss to be paid in sixty days after proof of loss, proof of interest and adjustment exhibited to the assurers."

The loss occurred from the sinking of the barge Joseph McDonald in the Cumberland River, April 8, 1868. Proof of loss was furnished May 23, 1868, and action was commenced November 2, 1868. Much discussion has occurred in courts of other States upon clauses in insurance policies limiting the period for bringing suits upon them for losses. The Company contends that the six months commenced to run from date of loss; the plaintiff contends that it began at the close of the sixty days given the Company for payment, which was sixty days after proof of loss.

"Where the policy provides that the loss shall be payable within sixty days, ninety days, or any other period after proof of loss is made, an action brought inside of the period limited is premature." *Wood, Ins. § 436; May, Ins. § 476.*

Some courts have held that the letter of the limitation must govern, and that the period begins from the loss. *Johnson v. Humboldt Ins. Co.* 91 Ill. 92; *Moore v. State Ins. Co.* 72 Iowa, 414, if the latter case can at all be said to hold this.

But the great weight of authority is in support of the text of *Wood, on Insurance, § 443*: "When a policy stipulates that no action shall be brought unless commenced within a certain time after loss or damage shall accrue, and there

is a provision in the policy that the company will pay in thirty, sixty, ninety or any other number of days after proofs of loss have been served, the limitation does not attach until after the period which the Company has in which to pay the loss has expired. The limitation cannot apply until a right of action has accrued, and, until the period which the company has to pay the loss has expired, no right of action exists." *New York v. Hamilton F. Ins. Co.* 89 N. Y. 45; *Chandler v. St. Paul F. & M. Ins. Co.* 21 Minn. 85; *Ellis v. Council Bluff Ins. Co.* 64 Iowa, 507; *Hay v. Star F. Ins. Co.* 77 N. Y. 285; *May, Ins.* § 479.

The case in this court, of *Barber v. Wheeling F. & M. Ins. Co.*, 16 W. Va. 658, strongly leans to, in effect sustains, this position. The policy involved in that decision contained a provision that the loss should be paid sixty days after proof, and, further, that either party might ask an arbitration, and that no suit should be brought until afterwards, and a provision that no suit should be maintained unless within six months after the loss should occur. This court held that it provided for an indefinite period before suit, and that the "intent of the parties to the contract was that the six-months' limitation should commence to run when the cause of action accrued, and not before." There that was upon the award. Here no arbitration is provided nor can we say an indefinite period is to elapse before suit; but it is provided that the Company has sixty days in which to pay after proof of loss. So, that case is authority for the position (1) that the limitation does not begin until cause of action accrues; and (2) that it does not begin from the actual loss,—thus departing from the letter of the policy. The Company insists that it denied its liability by letter from its secretary on April 25, 1868, saying: "I do not think there is any liability on this Company for the loss of said barge; hence I cannot give you any instructions in the case. Supposing that you will be here soon, we will then give you our reason for this opinion."

This is not an absolute, unqualified denial of liability, but contemplated further interview; and were it such, according to the opinion in 2 *Parsons, Marine Ins.*, 480, the insured must wait until the time for payment has gone.

It is next contended by counsel of appellant that Murdock had no insurable interest in the barge Joseph McDonald, and that at any rate, under this policy, Hare, the owner of it, could not take its benefit, because of its being expressly "on account of steamboat Charleston and owners." The policy reads: "On account of steamboat Charleston and owners, loss payable to Captain Thomas Murdock. This policy of insurance witnesseth that the Franklin Insurance Company, by these presents, do cause to be insured, lost or not lost, in the sum of \$1,000 on the barge James McDonald, towed by the steamboat Charleston, from Wheeling," etc. It is plain that it was the intention of the parties to insure against loss to the barge. Murdock's relation to it, having chartered it of its owner, Hare, and being in possession and custody of it for the trip for business for profit, gave him an insurable interest in it.

Parsons, in his work on Marine Insurance (vol. 1, p. 161), asks and answers the question: 7 L. R. A.

"What is the interest in the property which is the subject matter of the insurance which shall make the contract valid? We think the best definition to be, any such interest as shall make the loss of that property a pecuniary damage to the insured. The most common form of this is the direct interest of absolute ownership. But it is certain that the insured need not be an owner, if he be so circumstanced with respect to the property that he will derive some pecuniary benefit from the safety of the thing or its continued existence, and some injury from its destruction."

This doctrine is supported by high authority. *Lucena v. Craufurd*, 2 Bos. & P. N. R. 269; *Buck v. Chesapeake Ins. Co.* 26 U. S. 1 Pet. 151 [7 L. ed. 90]; opinion in *Hooper v. Robinson*, 98 U. S. 588 [25 L. ed. 221].

A charterer may insure. *Bartlet v. Walter*, 18 Mass. 267; *Robbins v. New York Ins. Co.* 1 Hall, 825.

The very fact that the Company, having opportunity to inquire, if it wished, as to the interest of the assured, and that it did issue to him a policy, is prima facie evidence of his insurable interest, placing the burden on it to disprove it. *Sheppard v. Peabody Ins. Co.* 21 W. Va. 868.

Thus, Murdock has relations recognized by the law of insurance to this barge, and was not a mere stranger to it. Then the further question arises, Did this policy cover only Murdock's interest, or also that of Hare? We think it covered the interest of Hare as owner of the barge. The fact that the policy is "on account of steamboat Charleston and owners," and that this barge is the thing insured, and that it was to be towed by the steamboat, leads us to the conclusion that this word "owners" was intended to cover the ownership of the barge, and, at any rate, that oral evidence may be heard to establish that fact. Murdock's evidence is that he stated, when the policy was negotiated to the Company, that the policy was to protect himself and Hare, the owner of the barge. He was the charterer or bailee of the barge, and acted herein as agent of Hare. The opinion in *Hooper v. Robinson*, *supra*, lays down the proposition that "the agent, factor, bailee, carrier, trustee, consignee, mortgagee and every other lienholder may insure to the extent of his own interest in that to which such interest relates; and by the clause 'on account of whom it may concern,' for all others, to the extent of their respective interests, where there is previous authority or subsequent ratification."

The syllabus announces that a policy to A "on account of whom it may concern, or with other equivalent terms, will insure to the interest of the party for whom it was intended by A."

It seems to us the word "owners" in this policy meets this requirement, and thus includes Hare's interest, as we do not think it was intended to refer to owners of steamboats. The words "on account of owners" mean anyone intended, who is an owner of the thing insured. 1 *Parsons, Marine Ins.* 47.

But, outside of the principle that there must be words like "or whom it may concern," or any aid from the word "owners," in this policy, this court has gone further in *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 868, hold-

ing that, "if a party has the care and custody of property, he may insure it in his own name, even though he be not responsible for its safety, if he really insured it for the owner, though this be not expressed on the face of the policy, for, in such case, he has an insurable interest; and, in general, to give a party an insurable interest in property, it is not necessary that he should have any actual right of property, either legal or equitable, in the subject insured, but it is sufficient if he, or those whom he represents, will suffer any sort of loss by its destruction."

And in *Deitz v. Providence Wash. Ins. Co.*, 81 W. Va. 851, it is held that "where a contract, not under seal, is made by an agent in his own name, for an undisclosed principal, either the agent or the principal may sue upon it, and parol evidence is admissible to enable the principal to show that he is the real contracting party."

Hare ratified Murdock's act of insurance, and this policy was assigned to him.

The courts are justly liberal to the insured in these matters, because the company has insured the property against loss, and when loss comes it is only holding it to do what it contracted to do, and it cannot harm it beyond what it contemplated when it issued the policy, that the owner take the benefit, though not named, under one who acted for him. Appellant suggests that the declaration is in the name of Murdock, in his own right, and on a policy treated by the declaration as made to him, and averring the barge to be his also; whereas the evidence shows that the ownership of the barge was in Hare, and only a mere right and possession in Murdock as a charterer, and the loss proven is thus Hare's, not, as the declaration states, a loss to Murdock by destruction of his property.

It is settled by *Deitz v. Providence Wash. Ins. Co.*, *supra*, that an agent, upon a contract made in his name, for an unnamed principal, may sue in his own name. In declaring on such a contract, he is to follow its letter, treating himself as holding the legal title under it as payee or contractor. The fact that he may sue in his own name imports that, as the contract is in his own name, he may plead on it as such. If he may sue in his own name, why, in describing the property, may he not describe it as in the contract as his, and the loss as to his property?

The case of *Deitz v. Providence Wash. Ins. Co.* says that an agent may take an insurance in the name of himself for property not owned by him, and sue on the policy in his own name. Thus, in effect, it holds that an agent may insure another's property without the words "and owners" or other equivalent words, and sue in his own name for the use of another party. If so, must he not necessarily, in declaring upon the policy, allege the property and consequent loss as his? It will be said that in *Deitz v. Providence Wash. Ins. Co.* a statement, treated as part of the declaration, averred the property to belong to the true owner, but that such is not the case here. That statement prevented any variance between the allegation of property and proof of property, both showing the property to be in the wife; but it is not perceived that it altered the right, existing without it, of the agent to sue and declare in his own name. When, in this case, the evidence came, it

showed that the absolute owner of the property was Hare, not, as the declaration alleged, Murdock; but with it was evidence that Murdock had lawful possession of the property, and as agent insured it,—facts which operated to nullify the variance, and made that no variance which without such facts would have been a variance.

"The agent's right to sue in his own name, where [as here] the instrument is in terms payable to him, is the same, whether it be a promissory note, bill of exchange, check, bill of lading, policy of insurance, bond and the like instances." 1 Wait, Act. and Def. 279.

In policies of insurance it is a common practice to bring your action either in the name of agent or principal. *Sargent v. Morris*, 3 Barn. & Ald. 277, cited, 8 Rob. Pr. (New) 35.

Again, Murdock was, as charterer of this barge, a bailee in actual possession, having thus a special or qualified property. As such bailee he could maintain trespass or trover for its injury or loss. 3 Rob. Pr. (New) 415, 416.

No proposition is better settled than that either bailor or bailee may maintain action in respect of it against a wrong-doer,—the latter by virtue of his possession; the former by reason of his property. 2 Rolle, Abr. 551; Com. Dig. *Trespass*; 8 Rob. Pr. (New) 416; 6 Wait, Act. and Def. 104; 2 Addison, Torts, § 520; 1 Hilliard, Torts, 494.

In criminal pleading property may be laid in the indictment as the property of bailee having special property. 2 Bishop, Crim. Proc. § 721.

No matter that the recovery by the agent or bailee, when effected, will be for the use of another.

The court's opinion in *Rhodes v. Blackiston*, 106 Mass. 334: "It is a well-established rule of law that when a contract, not under seal, is made with an agent in his own name, for an undisclosed principal, either the agent or the principal may sue upon it. If the agent sues, it is no ground of defense that the beneficial interest is in another, or that the plaintiff, when he recovers, will be bound to account to another. There is an additional reason for giving this right to the agent when he has a special interest in the subject matter, or a lien upon it. But the rule prevails when the sole interest under the contract is in the principal. The agent's right is, of course, subordinate to and liable to the control of the principal, to the extent of his interest. He may supersede it by suing in his own name, or otherwise suspend or extinguish it, subject only to the special right or lien which the agent may have acquired." See Wood, Ins. § 279.

Again, if the word "owners" in this policy makes it an open policy, like the words "or whom it may concern" or "owners," as I have above held, Murdock might sue on it for the use of Hare. Wood, on Insurance, 818, lays it down that "where the policy is open, and payable 'to whom it may concern,' an action may be maintained in the name of any person having an insurable interest in the property, whose interest and relation to the property is such that he can be said to have been within the contemplation of the parties, and the declaration must show such interest and relation; or the person interested may maintain an action in the name of the assured, for his benefit and such is the better practice."

I presume, in the latter case, the declaration would be on the property as that of the assured.

Again, no objection was made or exception taken to the introduction of evidence that Hare was the owner of the absolute property in the barge. Had this objection been made in the trial court, it could have been remedied under our Statute of Amendment. Not having been there made, it is too late to raise it for the first time in this court. *Harrison v. Farmers Bank*, 6 W. Va. 1; *Cook v. Hays*, 9 Gratt. 142.

The policy treated and recognized Murdock as owner of the barge, and promised him payment of the policy. When a note is made to a corporation, this estops the denial of its existence. Here the policy must be held as recognizing his title for its purposes, and the fact that the evidence showed that he had a special property while Hare had the absolute property would not seem to produce a variance. If there had been an averment of this property in Hare, would it have defeated Murdock's recovery, the policy being payable to him? If not, why is such averment necessary? To prevent surprise? That would be a fact which would not be in law a surprise, for the special property in Murdock would prevent its so operating. Will not a recovery in this action of the whole loss bar Hare from another action for the same cause?

Appellant's counsel next insists that the damages (\$1,244.85) were excessive, and for that cause the verdict should have been set aside. Not deciding whether the motion to set it aside, made March 2, 1887, was too late, or could be entertained, we cannot say that it was excessive. The policy fixes the valuation of the barge at \$2,000, the sum insured at \$1,000, and thus it was a valued policy, and there was total loss. Valued policies bind the insurer to pay the whole sum insured in case of total loss. *Wood, Ins.* § 41; *Parsons, Marine Ins.* 260, and *note*.

Murdock's evidence puts the barge's value at \$1,500 to \$2,000 at least, and Shipley's at \$2,000 at least. Taking the view we do, that this policy covers, not merely Murdock's insurable interest, but also the property of Hare as owner, we cannot say the sum is excessive. "Agents, commission merchants or others having the custody of, and being responsible for, property, may insure in their own names; and they may, in their own names, recover of the insurer, not only a sum equal to their own interest, . . . but the full amount named in the policy, up to the value of the property." *War-ning v. Indemnity F. Ins. Co.* 45 N. Y. 606.

The last point made by the brief of appellant's counsel is that the verdict having been rendered on May 25, 1873, and judgment on

May 28, 1887, it was error to make the sum found by the verdict bear interest from date of verdict, as the judgment does. We concur in this view. At the date of the verdict it was provided by Code 1868, chap. 131, § 14, that the jury should find the amount of principal and interest due at the time of the trial, and judgment should be rendered for that amount, with interest from the date of the judgment. Chapter 120, Acts 1882, amending this section, provided that judgment should be rendered for the amount of the verdict, with interest from the date of the verdict. Thus, the law in force when this verdict was rendered did not impose the burden of interest from the verdict, if any time should elapse before judgment. The matter of interest upon a sum found by a verdict is of statute regulation, and the then law at once, upon the return of the verdict, attached to it, fixing the rights of the parties to it, and by that they must be governed.

The Act of 1882 does not expressly apply (if it effectually could) to verdicts rendered before it became a law, and we should not give it a retrospective operation, and thus place a burden on the defendant, which by the law in force at the date of the verdict he would not bear. Though the Legislature may have the power to make a law operate retrospectively, it must clearly appear that such was the intention, the presumption being that it was intended to operate on future transactions. *Duval v. Malone*, 14 Gratt. 24; *Cooley, Const. Lim.* 370; *Wade, Retroactive Laws*, § 81; *McCance v. Taylor*, 10 Gratt. 585.

The language and manifest intent of this fourteenth section, as re-enacted in 1882, bear evidence that it was designed for future verdicts. Though it be hard on the plaintiff to get no interest for the long space from the verdict and judgment, such is the right of the parties. It may be true, as contended by appellee's counsel, that a policy of insurance bears interest after loss; but that policy is so far merged by the verdict—by the proceedings in the court towards final judgment—that we cannot look to it, but must go by the Statute.

Being of opinion that in this matter of interest the Circuit Court erred, the judgment must be reversed, with costs to appellant in this court; and this court, proceeding to render such judgment as the Circuit Court should have rendered thereupon, it is considered that the plaintiff recover from the defendant \$1,244.85, the damages by the jury in their verdict assessed, with interest thereon from the 28th day of May, 1887, until payment, and also his costs about his suit expended.

Snyder, P., and English, J., concurred, Green, J., being absent.

PENNSYLVANIA SUPREME COURT.

George G. STARCK, Admr., etc., of Joseph E. Starck, Deceased,

UNION CENTRAL LIFE INSURANCE CO. of Cincinnati, Ohio, App't.

(.....Pa.....)

An insurance company is not prevented
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from setting up the suicide of an insured person as a defense to its liability on the policy insuring his life by a statute providing that "all companies, after having received three annual premiums on any policy, . . . are estopped from defending upon any other ground than fraud, against any claim arising upon such policy by reason of any errors, omissions or misstatements of the assured in any application made by such

assured on which the policy was issued, except as to age."

(March 31, 1890.)

APPEAL by defendant from a judgment of the Court of Common Pleas for North Hampton County in favor of plaintiff in an action upon a policy of life insurance. *Reversed.*

The case sufficiently appears in the opinion.

Mr. Charles F. Walter for appellant.

Mr. H. J. Steele for appellee.

Sterrett, J., delivered the opinion of the court:

In his statement plaintiff claimed \$2,000, the full face value of the policy. The Company, in its affidavit of defense, averred that the insured, by reason of his having committed suicide, on July 27, 1889, violated the eighth condition of his policy and thereby rendered the same null and void, except as to the sum of \$74.52, the "reserve value" of the policy which is protected by the ninth condition thereof. The eighth condition, above referred to, provides "that in case the insured shall die by his own hand, whether sane or insane . . . this policy shall become null and void."

The plaintiff having elected to take judgment for the reserve value, admitted to be due, and proceed for the residue, entered a rule for judgment for want of a sufficient affidavit of defense. The rule was afterwards made absolute and judgment entered accordingly. From that judgment this appeal was taken, and the only question for our consideration is whether the court below erred in construing the thirteenth condition of the policy, and holding that the Company was estopped by its provisions from insisting on the bar of the eighth condition above quoted. The thirteenth condition is as follows: "Whether the insured reside in Ohio or elsewhere, this policy is issued subject to the following named section of the Ohio Revised Statutes: section 8626. All companies after having received three annual premiums on any policy issued on the life of any person in this State are estopped from defending upon any other ground than fraud, against any claim arising upon such policy by reason of any errors, omissions or misstatements of the assured in any application made by such assured on which the policy was issued except as to age."

It was conceded that the three annual premiums were paid by plaintiff's intestate, and, if the learned president of the common pleas was right in his construction of the thirteenth condition, the Company was estopped from enforcing the bar of the eighth condition of the policy, in this case; but, we are of opinion that he was mistaken as to the scope and effect of the thirteenth condition. In our opinion it has no effect whatever on the eighth condition.

The condition in question is not as clearly expressed as it might have been, and its meaning is further obscured by the omission of a comma after the words "such policy." Formerly it was unusual to punctuate legislative Acts and deeds, but in construing them the courts always read them with such stops as gave effect to the whole. 4 L. R. 65. It is well settled that neither punctuation nor the absence of points is to be seriously regarded in the construction of statutes. It was intended, by the condition under consideration, that the Company, after having received three annual premiums, should be estopped from defending, etc., on the ground that errors, omissions or misstatements were made by the assured in the application on which the policy was issued, unless such errors, omission or misstatements were of such a character as to amount to actual fraud, excepting, however, misstatements as to age, whether fraudulently made or not. In other words the thirteenth condition relates solely to defenses based on errors, omissions or misstatements in the application; and, with the exception of errors or misstatements as to age, it debars the Company from defending on either ground in case the error, omission or misstatement was inadvertently or innocently made, but it does not prohibit the Company from defending on the ground that the errors, omissions or misstatements were fraudulently made, or on the ground that error or misstatement as to age was actually made, whether fraudulently or not.

We find nothing in any of the provisions of the policy that was intended to estop the Company, in any case of suicide, from setting up the bar of the eighth condition, except to the extent of the "reserve value" of the policy, to which reference has already been made.

Judgment reversed.

McCollum and Mitchell, JJ., absent.

CALIFORNIA SUPREME COURT.

Frederick WIESE, Resp't,

v.

SAN FRANCISCO MUSICAL FUND SOCIETY, Appt.

(32 Cal. 645).

1. A judgment deciding that a mutual benefit society had no power to limit the

amount of sick benefits is conclusive against the validity of such limitation as a defense in a subsequent action for new installments which have become due to the same plaintiff by the continuance of his sickness.

2. The fact that a judgment was rendered in a suit commenced in a justice's court makes no difference with its conclusiveness, when rendered in the exercise of jurisdiction.

(January 30, 1890.)

NOTE.—*Doctrine of res judicata.*

The doctrine of *res judicata* is plain and intelligible, and amounts simply to this, that a cause of action once finally determined, without appeal, between the parties, on the merits, by a competent

tribunal, cannot afterwards be litigated by a new proceeding either before the same or any other tribunal. *Foster v. The Richard Busted*, 100 Mass. 409.

The doctrine applies to the decision of the referee

APPEAL by defendant from a judgment of the Superior Court for the City and County of San Francisco in favor of plaintiff, and from an order denying a motion for a new trial, in an action to recover certain sick benefits alleged to be due plaintiff by reason of his membership in defendant Society. *Affirmed.*

Commissioner's opinion.

Plaintiff became a member of the defendant Society at a time when there was a by-law in force providing that in case a member not specially disqualified should become sick, he should receive the sum of \$10 per week.

While this by-law was in force plaintiff became, by reason of sickness, entitled to the benefits, which he received for more than a year.

During that time the Society adopted a by-law which provided that if a member shall have received benefits continuously for six months the payment of benefits to such member shall thereafter cease.

Under this by-law payments to plaintiff were stopped and he afterwards sued in a justice's court to recover a certain amount alleged to be due and recovered judgment, which was affirmed upon appeal to the superior court.

on a question within the power of the court to direct to be determined by a reference, and which might be reviewed on appeal. *Demarest v. Daig*, 11 Abb. Pr. 16; *Outram v. Morewood*, 3 East, 346; *Gardner v. Buckbee*, 3 Cow. 120; *Burt v. Sternburgh*, 4 Cow. 559; *Wood v. Jackson*, 8 Wend. 9; *Miller v. Manice*, 6 Hill, 121; *Bouchaud v. Dias*, 3 Denio, 238; *Doty v. Brown*, 4 N. Y. 71; *Brockhead v. Brown*, 5 Sandf. 194; *Davis v. Talbot*, 12 N. Y. 184; *Castle v. Noyes*, 14 N. Y. 329.

Questions passed upon by the Supreme Court of Illinois in a former decision of the case are *res judicata*. *Hyde Park v. Corwith*, 9 West. Rep. 738, 122 Ill. 441.

In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. *Hughes v. United States*, 71 U. S. 4 Wall. 233 (18 L. ed. 303).

Where, in a former case in the same court, between the same parties, it has been adjudged that an alleged contract relied on by defendant does not exist, it is proper to strike out an answer which sets up the same contract, and to exclude evidence offered to prove it. *Kates v. Chicago, L. & D. R. Co.* 72 Iowa, 235.

A decree, sentence or judgment of a court of competent jurisdiction is conclusive in any future litigation of the same question between the same parties or those claiming under them. *Andrews v. Stelle*, 22 N. J. Eq. 479; *Ehle v. Bingham*, 7 Barb. 494; *Young v. Rummell*, 2 Hill, 478; *Kingsland v. Spalding*, 3 Barb. Ch. 341; *Lyon v. Perin & G. Mfg. Co.* 125 U. S. 698 (31 L. ed. 339); *Gelston v. Hoyt*, 1 Johns. Ch. 542; *Foster v. The Richard Busteed*, 100 Mass. 409; *Cook Co. v. Calumet & C. Canal & D. Co.* (Ill.) 23 N. E. Rep. 629.

It concludes parties and those in privity with them upon every matter actually presented and determined, and such claim and defenses as might have been presented and determined. *Kilander v. Hoover*, 9 West. Rep. 244, 111 Ind. 10; *Moburnie v. Seaton*, 9 West. Rep. 259, 111 Ind. 56; *Chicago v. Cameron*, 9 West. Rep. 507, 120 Ill. 447; *Snow v. Mitchell*, 37 Kan. 638, 639; *Hanson v. Manley*, 72 Iowa, 48; authorities cited in *Harmon v. Auditor of Public Accounts*, 11 West. Rep. 76, 123 Ill. 122; *Stockton v. Ford*, 59 U. S. 13 How. 418 (15 L. ed. 386).

But where the second suit is not upon the same causes of action, though between the same parties, the former judgment is conclusive as to matters which were in fact necessarily decided, and is not conclusive as to matters which might have been, but which were not, presented and decided. *Laird v. DeSoto*, 32 Fed. Rep. 652.

A judgment is conclusive only upon a matter within the issue and necessarily involved in the decision. *McCall v. Carpenter*, 59 U. S. 18 How. 297 (15 L. ed. 389); *Washington, A. & G. Steam Packet Co. v. Sickles*, 72 U. S. 5 Wall. 69 (18 L. ed. 650).

A final decree in chancery is as conclusive as a 7 L. R. A.

judgment at law; and both are conclusive on the rights of the parties thereby adjudicated. *Sibbald v. United States*, 37 U. S. 12 Pet. 483 (9 L. ed. 1167); *Shriver v. Lynn*, 43 U. S. 3 How. 43 (11 L. ed. 173); *Washington Bridge Co. v. Stewart*, 44 U. S. 3 How. 413 (11 L. ed. 658); *Pennington v. Gibson*, 57 U. S. 18 How. 65 (14 L. ed. 847); *Nations v. Johnson*, 65 U. S. 24 How. 195 (16 L. ed. 623); *Hornbuckle v. Stafford*, 111 U. S. 389 (28 L. ed. 468); *Bryan v. Kennett*, 113 U. S. 179 (23 L. ed. 908).

A judgment rendered on a compromise can be pleaded as *res judicata* to another suit between the same parties, embracing the same cause of action. *Culverhouse v. Marx*, 30 La. Ann. 309.

The principle of *res judicata* applies to a decision as to the custody of a child on a writ of habeas corpus, while the state of facts remains the same. *Weir v. Marley (Mo.)* 6 L. R. A. 672.

A judgment upon the ownership of property, where that is a material point in issue, is *res judicata*, in all subsequent actions between the same parties and their privies, upon the question of ownership. *Hughes v. United Pipe Lines*, 29 N. Y. St. Rep. 554.

A judgment by an equally divided court, determining title to land, is conclusive upon a question of the same title in a subsequent case between different parties, where the state of facts is the same and in the absence of the showing of the former decision was manifestly erroneous. *Koib v. Swann*, 12 Cent. Rep. 105, 68 Md. 516.

A decree in chancery may be *res judicata* as between the original parties, although other persons collaterally interested were made parties that it might be final, and not because they were legal parties to the original contract on which the litigation is founded. *Thompson v. Roberts*, 65 U. S. 24 How. 233 (16 L. ed. 648).

Conclusiveness of former judgment. See note to *Bollong v. Schuyler Nat. Bank (Neb.)* 3 L. R. A. 142; *Sharon v. Terry (Cal.)* 1 L. R. A. 572.

Judgment by default.

The rule as to the conclusiveness of judgments applies to a judgment by default. *Goebel v. Iffa*, 111 N. Y. 177; *Harshman v. Knox Co.* 123 U. S. 806 (30 L. ed. 1152).

But only as to such matters or issuable facts as are properly averred in the complaint. *Adair v. Mergentheim*, 18 West. Rep. 853, 114 Ind. 808; *Barton v. Anderson*, 3 West. Rep. 679, 104 Ind. 573; *McFadden v. Ross*, 5 West. Rep. 632, 108 Ind. 512.

Judgment on demurrer to complaint.

A judgment rendered upon demurrer to the declaration is equally as conclusive of the matters confessed by the demurrer as a verdict finding the same facts would be. *Gould v. Evansville & C. R. Co.* 91 U. S. 526 (23 L. ed. 416); *Schroers v. Fisk*, 10 Colo. 599; *Bissell v. Spring Valley Twp.* 124 U. S. 225 (31 L. ed. 411).

Judgments of other jurisdictions.

We think the rule well settled that a judgment which is conclusive between the parties and a bar

Subsequently, further benefits accrued, and he brought this action in the superior court to recover the same.

Further facts appear in the opinion.

Mr. W. H. L. Barnes, for appellant:

The justice's court is not a court of concurrent jurisdiction with the superior court in respect of the subject matter of this action.

See Code Civ. Proc. § 114.

A judgment of a justice's court upon a cause of action within its jurisdiction should not be permitted to control the judgment of the superior and supreme courts and prevent the ex-

amination and trial, in these courts, of the questions involved in a cause of action which the justice's court could not originally have entertained at all.

The money demand sued upon in this action is not the same money demand sued upon in the justice's court. It was not, and could not have been, in litigation in that action.

Bigelow, Estop. 8d ed. pp. 87-39; *Jones v. Petaluma*, 86 Cal. 230; *Hughes v. Alexander*, 5 Duer, 493.

In the case of periodically recurring liability a former judgment cannot be a bar to an

to another action for the same cause, in the State where rendered, is, by the Constitution of the United States (art. 4, § 1), and the Acts of Congress of May 26, 1790, equally conclusive in every other State in the Union. This is the declared doctrine of this court. *North Bank v. Brown*, 50 Me. 214; *Sweet v. Brackley*, 68 Me. 846. See *Peters v. Sanford*, 1 Denio, 224; *Nicholl v. Mason*, 21 Wend. 389.

The same doctrine is held by the Supreme Court of the United States. *Mutual L. Ins. Co. v. Harris*, 97 U. S. 331 (24 L. ed. 959).

A decree rendered in a court of one State is controlled by a prior decree rendered between the same parties and upon the same subject matter in another State, although the suit in which the former decree was rendered was instituted first. *Memphis & C. R. Co. v. Grayson* (Ala.) 7 So. Rep. 122.

Previous adjudication of the state court upon the meaning of a statute, in a similar case between the same defendant and the State, where the constitutionality of the Act was not drawn in question,—that it constituted a contract between the defendant and the State,—did not estop the State from denying its constitutionality in a subsequent case, or conclude the court upon that question, although the point might have been raised and determined in the first instance. *Boyd v. Alabama*, 94 U. S. 645 (24 L. ed. 322).

Where a prior judgment involved the construction of a statute, no different state of facts will authorize such construction to be subsequently changed as between the parties to it or their privies. *Western Teleg. Co. v. Baltimore & O. R. Co.* 12 Cent. Rep. 873, 60 Md. 211.

While the judgment of the Vermont court, rendered under such circumstances, is of no force against the person of the debtor, it may be binding against his property, as a proceeding *in rem*, if his property came within the jurisdiction, and was disposed of by the judgment of the Vermont court, according to the laws of that State; and if such judgment is binding and conclusive in the State in which it is rendered, it is binding and conclusive everywhere. If once executed, that execution will be respected. *Gray v. Delaware & H. Canal Co.* 5 Abb. N. C. 126; *Cochran v. Fitch*, 1 Sandf. Ch. 142; *Embree v. Hanna*, 5 Johns. 101; *Burrows v. Miller*, 5 How. Pr. 51; *Donovan v. Hunt*, 7 Abb. Pr. 29; *Andrews v. Herriot*, 4 Cow. 621; 1 Kent, Com. 260, 261, note b; 2 Kent, Com. 119.

Judgment must be final and on the merits.

A judgment, to be a bar to further litigation, must have been final and rendered as to all the merits of the cause. *Garrett v. Greenwell*, 10 West. Rep. 261, 92 Mo. 120.

Where the court has jurisdiction its judgment is final. Authorities cited in *Chicago & N. W. R. Co. v. People*, 9 West. Rep. 154, 120 Ill. 104.

A judgment of dismissal in pursuance of agreement, reciting a settlement and that nothing is due the plaintiff, is a bar to a subsequent action. *United States v. Parker*, 120 U. S. 89 (30 L. ed. 601).

An order dismissing a bill and amended bill of 7 L. R. A.

complaint, with costs taxed and execution awarded, is a final decree, and disposes of the whole case. *Campbell v. James*, 31 Fed. Rep. 535.

A judgment of dismissal, if set up as a plea in bar to a new bill for the same cause, is conclusive, if the dismissal was upon the hearing and was not in direct terms "without prejudice." *Lyon v. Perin & G. Mfg. Co.* 125 U. S. 698 (31 L. ed. 889).

A decree in these words, "The plaintiff failing to prosecute his suit, it is ordered that the same be dismissed,"—is a final decree, and therefore, after the end of the term, can be set aside only on appeal or bill of review within the statutory period. *Jones v. Turner*, 31 Va. 700.

In an action for breach of contract before a justice, he cannot, after entering a judgment dismissing the suit for failure to prove execution of the contract, by adding the words, "without prejudice to a new suit," authorize a new suit for the same cause of action; but that matter is *res judicata*. *Parsons v. Riley* (W. Va.) 10 S. E. Rep. 806.

If the decree is final then its result is to merge the original cause of action, as was remarked in the case of *Barnes v. Gibbs*, 31 N. J. L. 310.

When not final.

A dismissal of a suit for want of parties does not make the subject of controversy *res judicata*. *St. Romes v. Levee Steam Cotton-Press Co.* 127 U. S. 614 (2 L. ed. 289).

A judgment of dismissal without prejudice to another action is no bar to another action upon the same cause. *Gunn v. Peakes*, 36 Minn. 177; *Payne v. Grant*, 31 Va. 164.

The dismissal of a party defendant, at the instance of plaintiff, before trial, where no counterclaim is made, is not a judgment upon the merits. *James v. Lepout*, 19 Nev. 174.

So where plaintiff failed in his first action from the omission of an essential allegation, the dismissal was not a trial on the merits. *Gilmer v. Morris*, 30 Fed. Rep. 476.

As to what matters conclusive.

When a matter in issue between the parties has once been judicially determined by a court of competent jurisdiction, it cannot again be the subject of controversy between such parties or those in privity with them, so long as such adjudication remains in force. *Magnus v. Sleeper*, 69 Wis. 219.

A fact which has been directly tried and decided cannot be contested again collaterally between the same parties in the same or any other court. *Hopkins v. Lee*, 19 U. S. 8 Wheat. 109 (5 L. ed. 218); *Penhallow v. Doane*, 3 U. S. 8 Dall. 54 (1 L. ed. 507); *Elliot v. Piercol*, 26 U. S. 1 Pet. 223 (7 L. ed. 164); *Ex parte Watkins*, 26 U. S. 3 Pet. 193 (7 L. ed. 650); *United States v. Nourse*, 34 U. S. 9 Pet. 8 (9 L. ed. 31); *Bank of U. S. v. Beverly*, 42 U. S. 1 How. 134 (11 L. ed. 75); *Randall v. Howard*, 37 U. S. 2 Black, 585 (17 L. ed. 269); *Parrish v. Ferris*, 37 U. S. 2 Black, 606 (17 L. ed. 317); *Florentine v. Barton*, 69 U. S. 2 Wall. 110 (17 L. ed. 783); *Cromwell v. Sac Co.* 94 U. S. 351 (24 L. ed. 195); *Russell v. Place*, 94 U. S. 606 (24 L. ed. 214);

action for a sum subsequently falling due, when the former judgment was for the plaintiff.

Bigelow, Estop. 3d ed. p. 45; *Duncan v. Bancroft*, 110 Mass. 307.

The estoppel, if any, extends only to questions of fact decided, and not to questions of law.

Bigelow, Estop. 3d ed. p. 57; *Bernard v. Hoboken*, 27 N. J. L. 412; *Cromwell v. Sac Co.* 94 U. S. 851 (24 L. ed. 195); *Freem. Judgm.* §§ 253, 258.

Messrs. O'Brien & Morrison, for respondent:

Hornbuckle v. Stafford, 111 U. S. 883 (28 L. ed. 408); *Bryan v. Kennett*, 113 U. S. 179 (28 L. ed. 908).

If the first judgment involved the whole claim or the whole subject matter, and settled the entire defense to a whole series of claims, then the first judgment operates as an estoppel to the whole. *Kilander v. Hoover*, 9 West. Rep. 244, 111 Ind. 10.

The rule is well settled that a former judgment of a court of competent jurisdiction is final and conclusive between the parties, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have decided as incident to or essentially connected with the subject matter of the litigation within the purview of the original action, either as matter of claim or defense. *Pray v. Hegeman*, 98 N. Y. 351; *Jordan v. Van Epps*, 85 N. Y. 438; *Smith v. Smith*, 79 N. Y. 634; *Clemens v. Clemens*, 37 N. Y. 74; *Griffin v. Long Island R. Co.* 3 Cent. Rep. 740, 102 N. Y. 449.

To ascertain what might have been determined in the former action, it is proper to look, beyond what appears on the face of the judgment, to every allegation which, having been made on one side and denied on the other, was at issue and determined in the course of the proceedings. *Clemens v. Clemens*, *supra*.

The fact that no proof was brought on a certain question, or that point actually ruled, does not prevent it from being *res judicata* if the precise matter was involved, or had of necessity to be decided in giving judgment. *Faust v. Faust* (S. C.) 10 S. E. Rep. 362.

To constitute an estoppel by judgment, matters in issue and points actually determined must have been identical with those presented as a defense to the second suit. *Kilander v. Hoover*, 9 West. Rep. 244, 111 Ind. 10.

That the cause of action in two cases is the same is the test by which it is determined that the judgment in one is a bar to the other. *Brooke v. Logan*, 11 West. Rep. 352, 112 Ind. 183; *Williams v. Hay*, 12 Cent. Rep. 602, 120 Pa. 485.

To ascertain what might have been determined it is proper to look beyond the terms of the judgment and consider the allegation made and traversed. But the findings and the judgment generally show what was determined, and are conclusive on that subject. *Griffin v. Long Island R. Co.* *supra*.

A decree does not bar a suit for a different cause of action arising afterward. *Chapman v. Goodnow*, 123 U. S. 540 (31 L. ed. 235).

In such case the inquiry must always be as to the point or question collaterally litigated and determined in the original action. Authorities cited in *Riverside Co. v. Townshend*, 10 West. Rep. 581, 120 Ill. 9.

In a subsequent suit, parol evidence to show what was tried in the first suit is admissible, if the record leaves the matter in doubt. *Campbell v. Rankin*, 99 U. S. 281 (25 L. ed. 435); *Washington, A. & G. Steam Packet Co. v. Sickles*, 65 U. S. 24 How. 333 (16 L. ed. 650); *Miles v. Caldwell*, 69 U. S. 2 Wall. 85 (17 L. ed. 755); *Washington, A. & G. Steam Packet Co. v. Sickles*, 72 U. S. 5 Wall. 589 (18 L. ed. 550); 7 L. R. A.

A judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is, in respect to the matter directly adjudged, conclusive between the parties.

Code Civ. Proc. § 1908.

The principle is the same whether the issue is one of law or fact.

Bouchaud v. Dias, 8 Denio, 238; *Ferrer's Case*, 6 Coke, 7 a; *Aurora v. West*, 74 U. S. 7 Wall. 84 (19 L. ed. 42); *Stewart v. Stebbins*, 30 Miss. 66; *Kingsland v. Spaulding*, 3 Barb.

Cromwell v. Sac Co. 94 U. S. 851 (24 L. ed. 195); *Davis v. Brown*, 94 U. S. 423 (24 L. ed. 204); *Russell v. Place*, 94 U. S. 608 (24 L. ed. 216).

To constitute a bar, it must appear by legal evidence that the matter involved was determined by the former suit. *Smith v. Brunswick*, 6 New Eng. Rep. 417, 80 Me. 189.

It is not sufficient to show that it may have been determined by the former suit. *Ibid*.

Hence it is settled that a verdict and judgment of a court of record, or a decree in chancery, puts an end to all further controversy concerning the points thus decided between the parties to the suit. *Hopkins v. Lee*, 19 U. S. 6 Wheat. 109 (5 L. ed. 218); *Plerson v. Catlin*, 18 Vt. 77; *Nations v. Johnson*, 65 U. S. 24 How. 195 (16 L. ed. 628); *Colt v. Tracy*, 3 Conn. 268; *Foster v. The Richard Busted*, 100 Mass. 409; *Winans v. Dunham*, 5 Wend. 47; 3 Wharton, Ev. § 774; *Freeman, Judgm.* § 248.

Of what facts conclusive.

A judgment rendered, while it remains in force, is conclusive of all the facts properly pleaded by the plaintiffs. *Washington, A. & G. Steam Packet Co. v. Sickles*, 65 U. S. 24 How. 333 (16 L. ed. 650).

It is not necessary, as between parties and privies, that the record should show the question upon which the right of the plaintiff to recover or the validity of the defense depended, but only that the same matter in controversy might have been litigated. *Ibid*.

So far as the principal defendant is concerned, it is established that the judgment of a domestic court of record, proceeding according to the course of the common law, is conclusive evidence of all the facts decided in subsequent suits between the same parties; and that the only remedy of a party who has been injured by a judgment erroneously rendered is by review or by proceeding to reverse the same upon a writ of error. The party plaintiff is not allowed to treat a judgment, lawfully obtained by him, from a court of competent jurisdiction, as a nullity, nor to proceed upon his original demand as if it had not been rendered. While it exists he can only proceed by suit on his judgment or levy of execution. These principles apply to judgments rendered by courts such as the Second District Court of Bristol County. *Loring v. Bridge*, 9 Mass. 124; *Cook v. Darling*, 18 Pick. 383; *Hendrick v. Whittemore*, 105 Mass. 23; *Wood v. Mann*, 125 Mass. 319; *Fogel v. Dussault*, 2 New Eng. Rep. 331, 141 Mass. 154.

A recital in a judgment that notice has been given to all the persons interested is not conclusive of that fact. *Gilman v. Healy*, 46 Hun. 310.

A recital in a judgment that service was made on defendant is not conclusive as to such service, and defendant may show by extrinsic evidence that no service was made. *Thorn v. Salmonson*, 3 Kan. 441.

A decree reciting that defendants were duly notified by publication is conclusive that the order of publication was duly published in the designated newspaper, but is not conclusive that the order was sufficient or that affidavit for publication was

Ch. 841. See *Bloodgood v. Grasey*, 31 Ala. 575; *Goodrich v. Chicago*, 73 U. S. 5 Wall. 566 (18 L. ed. 511); 2 Smith, Lead. Cas. 8th ed. pp. 912-944; *Beloit v. Morgan*, 74 U. S. 7 Wall. 619 (19 L. ed. 205); *Wilson v. Dean*, 121 U. S. 525 (30 L. ed. 680); *Rissell v. Spring Valley Twp.* 124 U. S. 225 (31 L. ed. 411); *Freem. Judgm.* §§ 246, 253; *Love v. Walke*, 7 Cal. 252; *Gray v. Dougherty*, 25 Cal. 266; *People v. San Francisco*, 27 Cal. 655; *Garwood v. Garwood*, 29 Cal. 514; *Jackson v. Lodge*, 36 Cal. 87; *Lynch v. Kelly*, 41 Cal. 232; *McCullough v. Clark*, Id. 299; *Linehan v. Hathaway*, 54 Cal. 253;

Forbes v. Reilly, 57 Cal. 303; *Shinn v. Young*, Id. 525; *Parnell v. Hahn*, 61 Cal. 131; *Santa Cruz Gap T. Co. v. Santa Clara Co.* 62 Cal. 40; *McCreery v. Fuller*, 63 Cal. 30; *Peterson v. Weissbein*, 80 Cal. 38.

The judgments of the ordinary domestic courts of inferior jurisdiction are equally conclusive with the judgments of the superior courts, provided it appears from the record that the court had acquired jurisdiction of the cause.

Bigelow, Estop. 3d ed. p. 20; *Freem. Judgm.* 3d ed. § 524; *Wells, Res Adjudicata*, § 428;

filed. Adams v. Cowles, 14 West. Rep. 779, 96 Mo. 801.

Recitals in the record of a court of limited and special authority are prima facie evidence of the facts recited, to show the jurisdiction of the court. *Comstock v. Crawford*, 70 U. S. 8 Wall. 306 (18 L. ed. 84).

If a justice's judgment recites the due service of process, or other facts necessary to give jurisdiction of the person, the general rule will apply that in a collateral proceeding such recital in the record imports absolute verity and cannot be contradicted. *Heck v. Martin*, 75 Tex. 469.

Where a record is perfect on its face, evidence cannot be let in to contradict and overthrow it in a collateral proceeding. *Erwin v. Lowry*, 48 U. S. 7 How. 172 (12 L. ed. 655).

To make a record of a former adjudication evidence in a subsequent case, not only the subject matter, but the parties, must be the same. *Goodwin v. Snyder* (Wis.) 44 N. W. Rep. 746.

It must appear, either upon the face of the record or by extrinsic evidence, that the precise question was raised and determined in the former suit. *Russell v. Place*, 94 U. S. 606 (24 L. ed. 214); *Washington, A. & G. Steam Packet Co. v. Stickles*, 65 U. S. 24 How. 833 (16 L. ed. 650); *Cromwell v. Sac Co.* 94 U. S. 351 (24 L. ed. 193); *Davis v. Brown*, 94 U. S. 423 (24 L. ed. 304).

If there is a total want of jurisdiction, the proceedings are not merely voidable, but void, and may be rejected when collaterally drawn in question. *Rose v. Himely*, 8 U. S. 4 Cranch, 241 (2 L. ed. 608); *Griffith v. Frazier*, 12 U. S. 8 Cranch, 9 (3 L. ed. 471); *Elliott v. Peirsol*, 26 U. S. 1 Pet. 323 (7 L. ed. 164); *Thompson v. Tolmie*, 27 U. S. 2 Pet. 157 (7 L. ed. 381); *Voorhees v. Bank of U. S.* 35 U. S. 10 Pet. 449 (9 L. ed. 400); *Wilcox v. McConnell*, 36 U. S. 13 Pet. 498 (10 L. ed. 264); *Shriver v. Lynn*, 43 U. S. 2 How. 43 (11 L. ed. 172); *Hickey v. Stewart*, 44 U. S. 8 How. 750 (11 L. ed. 814); *Williamson v. Berry*, 49 U. S. 8 How. 495 (12 L. ed. 1170).

A judgment in form procured upon a mere feigned controversy is a nullity, and no writ of error will lie upon it. *Lord v. Veazie*, 49 U. S. 8 How. 251 (12 L. ed. 1067).

As to whom conclusive.

An estoppel by judgment is equally conclusive upon all the parties to the action and their privies, and may not be invoked or repudiated at the pleasure of one of them, as his interest may require. *Brooklyn City & N. R. Co. v. Nat. Bank of the Republic*, 108 U. S. 14 (26 L. ed. 61); *Commercial Union Assur. Co. v. Scammon*, 10 West. Rep. 340, 126 Ill. 361.

But the adjudication to have that effect requires that the questions be identical. *Ibid.*

Only parties and privies in blood or estate are estopped by a judgment. *Orthwein v. Thomas*, 11 West. Rep. 399, 127 Ill. 554.

Privies in blood or estate who are estopped by a judgment are those who derive title to the property by descent or purchase. *Ibid.*
7 L. R. A.

Both parties, having consented to litigate, are bound by the judgment. *Helck v. Reinheimer*, 7 Cent. Rep. 743, 106 N. Y. 470.

The judgment of a state court declaring that a debt is null and void as against a certain party, and equally void as a contract to convey, is conclusive between the parties and those in privity with them in a suit in a circuit court. *Minneapolis Agr. & M. Asso. v. Canfield*, 121 U. S. 295 (30 L. ed. 932).

A judgment is conclusive against a person who was responsible over to defendant, if he had notice of the action and an opportunity to defend. *Davis v. Smith*, 4 New Eng. Rep. 663, 79 Me. 351.

The notice may be implied when he had knowledge of the suit and participated in its defense. *Ibid.*

Where one not named as a party is represented by one who is a party and under whom he claims, and puts in an answer in the name of such party, and pays part of the expenses of litigation, he is bound by a decree therein. *Plumb v. Goodnow*, 128 U. S. 560 (31 L. ed. 268).

The fact that the United States was party to a judgment in reference to a title to land will not make it binding upon a citizen whose connection with the case is not shown. *Barton v. Long*, 13 Cent. Rep. 818, 45 N. J. Eq. 845.

A judgment is only presumptively conclusive against parties in the character in which they sue or are sued. Authorities cited in *Adair v. Mergenthelm*, 13 West. Rep. 853, 114 Ind. 303; *McBurnie v. Seaton*, 9 West. Rep. 260, 111 Ind. 56; *Lord v. Wilcox*, 99 Ind. 491; *Erwin v. Garner*, 6 West. Rep. 903, 108 Ind. 483; *Bumb v. Gard*, 8 West. Rep. 239, 107 Ind. 575; *Freem. Judgm.* 156.

Who not bound.

A judgment is not a bar against a party sought to be defrauded thereby. *Siddle v. Tomlinson*, 7 Cent. Rep. 698, 115 Pa. 239.

But a judgment cannot be assailed on the ground of fraud, by one who was not a necessary party to the action, or a party in fact. *Van Gorder v. Hanna*, 72 Iowa, 572.

In general, judgments and decrees are evidence only in suits between parties and privies. *Barr v. Gratz*, 17 U. S. 4 Wheat. 213 (4 L. ed. 559); *Tappan v. Beardsley*, 77 U. S. 10 Wall. 427 (19 L. ed. 974); *Litchfield v. Goodnow*, 123 U. S. 549 (31 L. ed. 199); *Plumb v. Goodnow*, 123 U. S. 560 (31 L. ed. 268).

As to one not a party, a judgment is an absolute nullity, and casts no cloud on his title, and affords no ground for an action by him to set it aside. *Fontaine v. Hudson*, 11 West. Rep. 463, 93 Mo. 62.

A decree against one not named in the bill, and against whom no process of relief is prayed, and who is in no wise comprehended in its general allegations, is a nullity. *Ogden v. Davidson*, 81 Va. 767.

A judgment is not binding upon persons not cited or made parties to it. *Gilman v. Healy*, 48 Hun, 310.

Where a petition prays for relief and is virtually a cross-bill, decrees based upon it are of no effect against those who were never summoned to answer

1 Herman, Estop. § 853, pp. 403-405; *Hallock v. Dominy*, 69 N. Y. 238; *Mitchell v. Hawley*, 4 Den. 414; *Bowyer v. Schofield*, 1 Abb. App. Dec. 181, 2 Keyes, 628; *Hachman v. N. Y. Deutscher Arbeiter Fund*, 12 Abb. N. C. 54, 64 How. Pr. 442; *Candee v. Lord*, 2 N. Y. 274; *Hall v. Stryker*, 27 N. Y. 603; *Burgess v. Simonson*, 45 N. Y. 237; *Carpenter v. Osborn*, 102 N. Y. 553, 2 Cent. Rep. 804; *Griffin v. Long Island R. Co.* 102 N. Y. 442; *Gates v. Preston*, 41 N. Y. 118; *Edwards v. Stewart*, 15 Barb. 67; *Doty v. Brown*, 4 N. Y. 71, 53 Am. Dec. 850; *Cumberland Coal & Iron Co. v. Jeffries*, 27 Md. 534; *Forster v. Konkright*, 70 Ind. 128; *Cooksey v. Kansas City, S. J. & O. B. R. Co.* 74 Mo. 477; *Reid v. Spoon*, 66 N. C. 415; *Brunhild v. Freeman*, 80 N. C. 212; *McClelland v. Patterson* (Pa.) 5 Cent. Rep. 784; *Reg. v. Yorkshire*, 1 Ad. & El. N. S. 625.

Hayne, C., delivered the following opinion:

This was an action to recover certain "sick benefits." The general features of the case are

it or who were not properly before the court *Pracht v. Lange*, 51 Va. 711.

One not a party, or privy to a party, to an action, cannot, as between himself and the plaintiff, be bound by the result, or claim that the plaintiff is bound by it, on the ground that he was the real defendant in interest and conducted the defense, unless he did so openly and to the knowledge of the plaintiff and for the defense of his own interests. *Cannon River Mfra. Asso. v. Rogers* (Minn.) 48 N. W. Rep. 792.

Strangers to a judgment by confession are not concluded by its date or by its recitals. They may, upon a complaint setting forth specific averments of fraud, introduce oral, as well as documentary and record, evidence. *Schuster v. Rader* (Colo.) 22 Pac. Rep. 506.

Judgments bind parties and privies, but they do not bind strangers. *Sessions v. Johnson*, 35 U. S. 247 (24 L. ed. 596); *W. B. v. Latimer*, 4 U. S. 4 Dall. Appx. 1 (Ct. Err. & App. Del.) (1 L. ed. 915); *Simms v. Guthrie*, 13 U. S. 9 Cranch, 19 (3 L. ed. 642); *Hollingsworth v. Barbour*, 29 U. S. 4 Pet. 406 (7 L. ed. 222); *Gaines v. Belf*, 53 U. S. 12 How. 472 (13 L. ed. 1071); *Smith v. Orton*, 181 U. S. App. LXXV. (18 L. ed. 62); *Nichol v. Levy*, 72 U. S. 5 Wall. 433 (18 L. ed. 896); *Ex parte Howard*, 76 U. S. 9 Wall. 175 (19 L. ed. 634); *Williams v. Bankhead*, 86 U. S. 19 Wall. 563 (23 L. ed. 184); *Humes v. Scruggs*, 94 U. S. 22 (24 L. ed. 51).

A judgment is no evidence as against a stranger to it. *Hartman v. Welland*, 36 Minn. 222.

Those who are neither parties, privies nor purchasers *pendente lite* are not bound by a former decree. *Kerr v. Watts*, 19 U. S. 6 Wheat. 550 (5 L. ed. 228).

A decree making void an agreement and a judgment operates only between the parties to the action, and does not make the agreement and judgment void as to other parties or bar the latter in another action. *Graham v. La Crosse & M. R. Co.* 70 U. S. 8 Wall. 704 (18 L. ed. 247).

Judgments, though erroneous, binding till reversed.

Where the court has jurisdiction both of the cause and the parties, and proceeds erroneously, the judgment, notwithstanding the error, is binding, until it is vacated or reversed. *Rodgers v. Evans*, 8 Ga. 143, 52 Am. Dec. 391; *Gorrill v. Whittey*, 3 N. H. 209; *The Case of the Marshalsea*, 10 Coke, 78; *Elliott v. Peirsol*, 28 U. S. 1 Pet. 340 (7 L. ed. 164); *Smith v. Shaw*, 12 Johns. 257, 267; *Latham* 7 L. R. A.

like those in *Stohr v. San Francisco M. Fund Society*, 83 Cal. 557 (filed January 22, 1890), which is against the same defendant. After the passage of the by-law limiting the amount of benefits, and the payments in accordance therewith, the defendant refused to pay anything further; and within a few months thereafter the plaintiff commenced an action in the justice's court to recover the installments then claimed to be due. Judgment was given in his favor, and the Society appealed to the superior court, where, after a trial on the merits, a similar judgment was rendered. The court below held this judgment to estop the defendant from maintaining the defense presented here, and we think that this ruling was correct. It affirmatively appears that the matters which are presented here were litigated and decided in the former action. There, as here, the main defense was that the by-law of 1883 limited the amount of benefits to be paid to the plaintiff. The court decided that the defendant had no power to impose such a limitation. The only difference between the

v. Edgerton, 9 Cow. 227; *Brown v. Compton*, 8 T. R. 424; *Hecker v. Jarret*, 8 Binn. 410; *Prescott v. Hull*, 17 Johns. 290; *Holmes v. Remsen*, 20 Johns. 268, 4 Johns. Ch. 460, and the cases there cited; *Homer v. Fish*, 1 Pick. 426; *Saxton v. Chamberlain*, 6 Pick. 422; *Minor v. Walter*, 17 Mass. 237. See also *Livermore v. Herschell*, 8 Pick. 53; *Whitcomb v. Williams*, 4 Pick. 228; *Adams v. Pearson*, 7 Pick. 841, 19 Am. Dec. 290; *New England Bank v. Lewis*, 8 Pick. 113.

A judgment of a court of general jurisdiction is conclusive until reversed upon appeal. Authorities cited in *People v. New York Catholic Protectory*, 9 Cent. Rep. 419, 108 N. Y. 604.

So a decree of a court of competent jurisdiction in a suit between proper parties is valid and conclusive until reversed on some proper proceedings in the same suit and in the same court, or on appeal, unless there be some sufficient ground of fraud or surprise to entitle the injured party to relief in some other suit. *Fox v. Cottage Bldg. Fund Asso.* 81 Va. 677.

The fact of being a party to a judgment or decree does not estop a person from obtaining, in a court of equity, relief against fraud in obtaining it. *Johnson v. Waters*, 111 U. S. 640 (28 L. ed. 547); *League v. De Young*, 52 U. S. 11 How. 185 (13 L. ed. 657); *Webster v. Reid*, 52 U. S. 11 How. 427 (13 L. ed. 761).

A determination in a statutory proceeding for the adjustment of an encroachment upon a public road is, until set aside, a bar to a subsequent investigation before the same tribunal. *State v. Briggs*, 10 Cent. Rep. 178, 50 N. J. L. 114.

A summary conviction by a magistrate is conclusive until reversed on appeal. *People v. New York Catholic Protectory*, 9 Cent. Rep. 417, 108 N. Y. 604.

The appointment of an under tutor is proof of his capacity, and is binding upon third persons until set aside by appeal or in an action of nullity. *Keller's Succession*, 30 La. Ann. 579.

When the record shows that the under tutor was appointed by a court of competent jurisdiction, an adjudicator cannot, on the ground of the alleged illegality of the appointment of such tutor, set up the nullity of the proceedings leading to the sale. *Ibid.*

Benefit and benevolent associations. See *Marsh v. Supreme Council*, Am. L. of H. 4 L. R. A. 382, and cases referred to in *note*, 149 Mass. 512; *Supreme Lodge, K. of P. v. Knight*, 3 L. R. A. 409, and *note*, 117 Ind. 499.

two cases is that, by mere lapse of time and the continuance of the plaintiff's sickness, new installments have become due.

It is quite true, as stated by Chief Justice De Grey in the *Duchess of Kingston's Case* [2 Smith, Lead. Cas. *574, 7th Am. ed. §10], that a judgment is not conclusive "of any matter to be inferred by argument from the judgment." But here the invalidity of the by-law was the ultimate point involved, and it was actually litigated and decided, which circumstance distinguishes the case from *Cromwell v. Sac Co.* 94 U. S. 351 [24 L. ed. 195], cited for the appellant. The preponderance of authority is in favor of the respondent's position that in such a case the judgment is conclusive in an action for subsequent installments. *Robinson v. Howart*, 5 Cal. 428; *Loos v. Walte*, 7 Cal. 250; *Outram v. Morewood*, 8 East, 846; *Aurora v. West*, 74 U. S. 7 Wall. 96 [19 L. ed. 47]; *Bissell v. Spring Valley Twp.* 124 U. S. 225 [31 L. ed. 411]; *Smith v. Ontario*, 18 Blatchf. 454, 4 Fed. Rep. 386; *Laird v. De Soto*, 32 Fed. Rep. 652; *Oregonian R. Co. v. Oregon*

R. & Nav. Co. 27 Fed. Rep. 278; *Kennedy v. McCarthy*, 73 Ga. 846; *Cleveland v. Oreston*, 93 Ind. 81; *Furneaux v. First Nat. Bank*, 89 Kan. 144; *Gardner v. Buckbee*, 3 Cow. 120; *Doty v. Brown*, 4 N. Y. 71; *Bouchaud v. Dias*, 3 Denio, 238.

The fact that the former case was commenced in the justice's court makes no difference. That court had jurisdiction; and, when a court which has jurisdiction renders a valid judgment, such judgment is as binding as any other. But, however this may be, the case was retried on its merits in the superior court, and the judgment relied upon was entered there, and is a judgment of that court. We therefore advise that the judgment and order appealed from be affirmed.

We concur: Van Clief, C.; Foote, C.

Per Curiam:

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

INDIANA SUPREME COURT.

William REESE, Appt.,

v.

WESTERN UNION TELEGRAPH CO.

(.....Ind.....)

1. The complaint in an action to recover the penalty provided by statute for the fail-

ure of a telegraph company to deliver a message sent to a person residing within a certain distance of its office is fatally defective if it does not state that the person to whom the telegram was addressed resided within the prescribed distance from the office.

2. Mental anguish caused by the failure to reach the bedside of a person sick unto death be-

NOTE.—Telegraph company; damages for neglect to deliver message.

Delay in delivering a telegram stating the death and time of burial of a person referred to merely as "Willie," without notice of his relation to the person addressed, will not subject the company to an action for damages based solely on injury to fraternal feelings from inability to attend the funeral. *W. U. Tele. Co. v. Brown*, 2 L. R. A. 766, 71 Tex. 723.

Telegraph companies are required to take notice of whatever the dispatch suggests, and if fuller information is needed they must seek it, or be held to possess all the knowledge such inquiries could have elicited. *Western U. Tele. Co. v. Edsall*, 74 Tex. 329.

A telegraph message as follows, "Come on first train. Bring Ferdinand. His father very low," is not sufficient to suggest a near relationship between the sick man and the person addressed, and will not authorize damages for the mental suffering of the latter's wife, in an action for delay in delivering the message whereby she was unable to reach her father before his death. *W. U. Tele. Co. v. Kirkpatrick (Tex.)* 13 S. W. Rep. 70.

Failure to disclose the relationship of the parties to a telegraph company when sending a message stating that a person named is dying, and saying, "Come quick," will not prevent a recovery of damages for suffering on account of the inability of the receiver to be with a dying brother because of delay in delivering the message. *W. U. Tele. Co. v. Adams*, 6 L. R. A. 844, 75 Tex. 581.

A telegraph message delivered for transmission, saying, "Billie is very low; come at once," is sufficient to reasonably apprise the company of the consequences of a failure to deliver the message. 7 L. R. A.

and to render it liable for damages for mental suffering in consequence of such failure. *W. U. Tele. Co. v. Moore (Tex.)* 12 S. W. Rep. 949.

Measures of damages for neglect.

Where, by a telegraph company's negligent delay in transmission and delivery to a sister of messages informing her of the serious illness, and, later, of the death, of her brother, she is denied the opportunity of attending him and making preparations for his funeral, the damages may include such sum as will compensate for the grief, disappointment and other injury to her feelings. *Wadsworth v. W. U. Tele. Co.* 86 Tenn. 696.

In case of breach of contract to deliver a message the company is liable for damages for both mental and physical suffering caused thereby. *Stuart v. W. U. Tele. Co.* 66 Tex. 580.

In the entire absence of gross or willful negligence in delaying the transmission of a telegram as the result of which a husband is deprived of seeing his wife before death, no punitive damages can be recovered. *Beasley v. W. U. Tele. Co.* 39 Fed. Rep. 181.

Grief occasioned by the death of plaintiff's wife is no element of damages for neglect to send a telegram, whereby plaintiff is prevented from seeing his wife; but he can only recover for the disappointment and mental anguish occasioned by the fault or negligence of the company. *Ibid.*

In an action against a telegraph company for a failure promptly to deliver a message, damages for mere continued anxiety caused by such failure are not recoverable. *Rowell v. W. U. Tele. Co.* 75 Tex. 28.

A verdict for \$1,000 damages will not be held excessive on appeal, in an action against a telegraph company for a mistake in a message sent by a wo-

fore death takes place, on account of the negligence of a telegraph company in not delivering a message promptly according to its contract, is a ground for the recovery of substantial damages against the company.

3. A message reading, "My wife is very ill; not expected to live," is sufficient to inform the company that mental anguish will probably result from its failure to deliver the message promptly.

(March 14, 1890.)

APPPEAL by plaintiff from a judgment of the Circuit Court for Montgomery County in his favor but for a less amount than claimed in an action to recover damages for the failure of defendant to promptly deliver a message. *Reversed.*

The facts are fully stated in the opinion.

Messrs. M. E. Clodfelter and J. A. Lindley, for appellant:

man who was far from home with the dead body of her husband, calling for a remittance of money, in consequence of which mistake she was delayed for two days before receiving the money to enable her to leave that place with his body. *W. U. Telegr. Co. v. Simpson*, 73 Tex. 422.

Statutory penalty for neglect.

The Indiana Act of 1836 prescribing a penalty for the refusal of a telegraph company to receive and transmit messages without discrimination does not make the company liable to a penalty for the mere negligent breach of duty. *W. U. Telegr. Co. v. Jones*, 116 Ind. 361.

Under Rev. Stat. 1881, § 4176, providing a penalty when a telegraph company fails to transmit a message "with impartiality and in good faith," recovery sustained where the message written was "Send seventieth Illinois," and transmitted "seventh," although the message was not repeated, and was written on a blank requiring repetition to avoid mistakes. *W. U. Telegr. Co. v. Huff*, 8 West. Rep. 376, 102 Ind. 585.

The Mississippi Act of March 18, 1886 (*Miss. Acts* 1886, p. 91), providing that any telegraph company failing to transmit and deliver within a reasonable time any message shall pay \$25 in addition to other damages to the person injured, gives the right to recover such sum to one to whom the message is addressed, although he paid nothing for its transmission and sustained no pecuniary injury. *W. U. Telegr. Co. v. Allen*, 66 Miss. 549.

The company may stipulate that the claim for penalty shall be presented within a reasonable time. *W. U. Telegr. Co. v. Wilson*, 6 West. Rep. 543, 106 Ind. 308.

Pleadings in action to recover penalty.

The penalty for failure of a telegraph company to transmit a message is not incurred unless the omission is alleged to be within reasonable office hours, both at the place of reception and the place of transmission. *W. U. Telegr. Co. v. Harding*, 8 West. Rep. 206, 108 Ind. 505.

An answer stating that the delay in delivery was caused by its not reaching the point of delivery until after the close of office hours is good on demurrer. *Ibid.*

The complaint to recover a statutory penalty for failing to transmit a message must aver facts which bring the case within both the letter and the spirit of the statute. *W. U. Telegr. Co. v. Kinney*, 4 West. Rep. 512, 106 Ind. 468.

A complaint which shows a mere neglect of duty in transmitting a message is not sufficient. *W. U.*

Section 4178, Rev. Stat. 1881, was repealed by the later Act of 1885.

W. U. Telegr. Co. v. Steele, 108 Ind. 183; *W. U. Telegr. Co. v. Wilson*, Id. 308; *W. U. Telegr. Co. v. Swain*, 109 Ind. 405.

The Telegraph Company was bound to know that wounded feelings and anxiety of mind were likely to result from the failure to properly transmit and deliver the message. This was apparent from the message itself, and damages occasioned from failure to transmit or deliver the same promptly can be recovered.

W. U. Telegr. Co. v. Fenton, 52 Ind. 1; Rev. Stat. 1881, § 4176; *W. U. Telegr. Co. v. McK.*, 49 Ind. 53.

Such damages may be recovered as naturally flow from the breach of duty complained of, or such as may fairly be supposed to have been within the contemplation of the parties as a possible result at the time the dispatch was sent. In determining what was fairly within the con-

Telegr. Co. v. Steele, 6 West. Rep. 410, 108 Ind. 163.

Averments in the complaint that defendant is a corporation, and that it was operating its line, are sufficient on demurrer. *W. U. Telegr. Co. v. Walker*, 1 West. Rep. 210, 102 Ind. 599.

A complaint which alleges that "defendant is the owner and operator of an electric telegraph, with a line of wires," running through a certain county, including stations in such county, is sufficient. *W. U. Telegr. Co. v. Scirclo*, 1 West. Rep. 214, 103 Ind. 227.

Where the exact words of the law are not used in the complaint, but words of equivalent meaning are employed, it is sufficient. *W. U. Telegr. Co. v. Walker*, 1 West. Rep. 210, 102 Ind. 599.

A company cannot escape liability by asserting its own failure to provide adequate means for transmission. *W. U. Telegr. Co. v. Scirclo*, *supra*.

To consume hours instead of minutes in the transmission is not such diligence as the statute requires. *Ibid.*

Where the gravamen of the complaint, in an action for a statutory penalty, is for failure of a telegraph company to comply with its duty, an attempt argumentatively to deny is insufficient. *W. U. Telegr. Co. v. Ferris*, 1 West. Rep. 211, 103 Ind. 91.

Proof to establish neglect.

In an action for the penalty provided by statute for the omission to send a telegram, it devolves on plaintiff to establish a neglect of duty. *W. U. Telegr. Co. v. McDaniel*, 1 West. Rep. 273, 103 Ind. 234; *Alken v. W. U. Telegr. Co.*, 60 Iowa, 31.

He makes a prima facie case when he proves that the message properly addressed was not delivered. *W. U. Telegr. Co. v. McDaniel*, *supra*.

The plaintiff was properly permitted to testify that the dispatch received, as read by him, directed him to purchase at a certain price,—for the purpose of showing his good faith in purchasing at that price, and that he acted upon the dispatch in making the purchase, but not for the purpose of showing what was the reasonable interpretation of the dispatch. *Alken v. W. U. Telegr. Co.*, *supra*.

Where the sender proves that there was unreasonable delay, the burden of explaining the delay is on the company. *W. U. Telegr. Co. v. Scirclo*, 1 West. Rep. 216, 103 Ind. 227; *W. U. Telegr. Co. v. McDaniel*, *supra*.

Facts which go to excuse the failure to transmit a telegraph message delivered during usual office hours, according to the regulations of the company, in a suit for the statutory penalty, must come from the defense. *W. U. Telegr. Co. v. Buskirk*, 5 West. Rep. 371, 107 Ind. 542.

temptation of the parties, the contents of the dispatch may be taken into consideration.

Candee v. W. U. Teleg. Co. 84 Wis. 471; *Baldwin v. U. S. Teleg. Co.* 45 N. Y. 744; *Beaupré v. Pacific & A. Teleg. Co.* 21 Minn. 155; *Barnesville First Nat. Bank v. W. U. Teleg. Co.* 80 Ohio St. 555.

Messrs. McDonald & Butler, for appellee: The Company could not, from the information it had before it when it entered into the undertaking, know that mental anguish might and most probably would result to some person in case of failure to promptly deliver the dispatch, and for this reason appellant cannot recover substantial damages.

W. U. Teleg. Co. v. Kirkpatrick (Tex.) 18 S. W. Rep. 70; *Barnesville First Nat. Bank v. W. U. Teleg. Co.* 80 Ohio St. 555; *Baldwin v. U. S. Teleg. Co.* 45 N. Y. 744; *Beaupré v. Pacific & A. Teleg. Co.* 21 Minn. 155; *Landsberger v. Magnetic Teleg. Co.* 82 Barb. 580; *Kinghorne v. Montreal Teleg. Co.* 18 U. C. Q. B. 60, Allen, Teleg. Cas. 98; *U. S. Teleg. Co. v. Gildersleepe*, 29 Md. 282; *Louery v. W. U. Teleg. Co.* 60 N. Y. 198; *W. U. Teleg. Co. v. Graham*, 1 Colo. 280; *Pullman Palace Car Co. v. Barker*, 4 Colo. 344.

Mental suffering alone, caused by simple actionable negligence, cannot sustain an action.

Wyman v. Leavitt, 71 Me. 227; *Hunt ad. D'Orval*, Dudley (S. C.) 180; *Boove v. Danville*, 58 Vt. 133; *Canning v. Williamstown*, 1 Cush. 451; *Trigg v. St. Louis, K. O. & N. R. Co.* 74 Mo. 153; *State v. Baltimore & O. R. Co.* 24 Md. 84; *Cooley*, Torts, 270-272.

Berkshire, J., delivered the opinion of the court:

The complaint is in two paragraphs. The substance of the first paragraph is that, on the 27th day of February, 1887, the appellant delivered to the appellee's agent, at its office in Jamestown, Indiana, the following message:

February 21st, 1887. Jamestown, Indiana.
To A. S. Clements:

My wife is very ill; not expected to live.
Wm. Reese.

—and paid to the appellee the sum of twenty-five cents, the usual charge for the transmission of like messages to the City of Crawfordsville, and the full amount demanded for transmitting said message, and at the same time the appellant guaranteed the payment of all expenses incurred by the appellee in the delivery of said message to the person to whom it was addressed; that the appellee undertook and agreed to transmit and deliver said message promptly; that the appellee acted in bad faith and with partiality and discrimination, in that it did not transmit and deliver said message in the order of time in which it was received, but willfully and purposely postponed the transmission of said message out of its order for more than twenty days; that after the transmission of said message from the appellee's office in Jamestown, the appellee acted in bad faith, partiality and discrimination in this, that it willfully and purposely postponed the delivery of said message out of the order of time in which it was received, and did not deliver the same for more than twenty days

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after it was so received, and never did deliver it until called for by the said Clements, at the appellee's office in said City of Crawfordsville; that during all the time said message lay in the appellee's office in Crawfordsville, the appellee transmitted messages for sundry and divers other persons, and knowingly, purposefully and willfully gave preference to others and to the delivery of messages to others; that the said messages so transmitted to the said sundry and divers persons did not contain intelligence of general or public interest, and were not communications for or from officers of justice; that the said Clements then had business rooms rented in said City of Crawfordsville, and was preparing to go into business only a few doors from appellee's office; that he had a post-office box rented in the postoffice of said city through which he received his mail during the time the said message lay in the appellee's said office (the said postoffice being but a few doors therefrom); that the said Clements was well known to the postmaster and the employés in said postoffice; that it was the appellee's custom to deliver messages promptly anywhere within five miles of said city, payment of charges being first guaranteed.

Then follows a demand for \$100, the statutory penalty, which it is claimed the appellant is entitled to recover.

The second paragraph rests upon a breach of duty because of a failure to deliver the message. It is averred that when the contract was made to send and deliver the message with the appellee, the appellant's wife was dangerously ill, in fact at the point of death; that the said A. S. Clements, to whom the telegram was sent, was a brother-in-law of this appellant, having married his sister, and that the families were on the most intimate terms of friendship; that appellant greatly desired the prompt delivery of said message, and relied on and expected that the same would be promptly transmitted and delivered in accordance with the agreement stated; that the appellee and its agents were fully informed of said facts, and well knew the importance of the immediate delivery at the time it received the message and the said guarantee.

It is averred that the said Clements resided during said time not less than one nor more than two miles from said City of Crawfordsville; received his mail at the postoffice in said city, and had a box in said office through which he received his mail; that he had resided in and within said city for several years before said date, and was well known in said city; that he had then arranged to engage in business there; that the wife of the appellant died in a few days after the said message was transmitted; that if said message had been promptly delivered, the said Clements and wife would have been present during the last sickness of appellant's wife, and in time to have conversed with her before her death, and been present until her death and burial; that by reason of their absence and of the great desire the appellant's wife had expressed to see them before her death, the appellant suffered great uneasiness, anguish and anxiety of mind.

The court at first overruled a demurrer to each of the paragraphs, and the appellee filed an answer in three paragraphs, the first of which

was a general denial. The second paragraph applied to the first paragraph of the complaint, and the third paragraph to the second paragraph of the complaint.

The court having afterwards sustained the demurrer to the first paragraph of the complaint, this carried out of the record the second paragraph of answer.

The appellant demurred to the third paragraph of answer, which the court overruled, and he saved an exception; he then filed a reply in general denial. The issues joined were submitted to the court without a jury, and, after hearing the evidence, a finding was made for the appellant, assessing his damages at fifty cents. The appellee then moved for a judgment against the plaintiff for costs; this motion was sustained, to which ruling the appellant reserved an exception. The court then rendered a judgment against the appellee for fifty cents, and against the appellant for costs.

At the time the court reversed its ruling, and sustained the demurrer to the first paragraph of the complaint, the appellant saved an exception.

The errors assigned are that the court erred in sustaining the demurrer to the first paragraph of the complaint, in overruling the demurrer to the third paragraph of answer, and in sustaining the motion of the appellee for a judgment against the appellant for costs.

There is not much to be said in reference to the demurrer to the first paragraph of the complaint. We are of the opinion that the averments in the said paragraph did not make a case within §§ 1179 and 1172, Elliott's Supplement (Acts 1885), when construed with § 4178, Rev. Stat. 1881, and the three sections must be construed together.

It is claimed that the Act of 1885 repealed by implication said section 4178. We do not think so. The repealing clause only repeals such laws as are in conflict with the said Act. In its scope it does not cover the subject matter to which said section 4178 relates. There is nothing in the Act of 1885 regulating the distance or prescribing the limits within which telegraph companies shall deliver messages. Repeals by implication are not favored, and if a reasonable construction can be found which will enable both the old and the new laws to stand, that construction will be applied. *Bush v. Hamilton Co. Comrs.* (Ind.) 23 N. E. Rep. 275.

It is not alleged that the person to whom the telegram was addressed resided in or within one-mile of the City of Crawfordsville.

Penal statutes are to have a strict construction, and to recover a penalty the facts stated in the pleading must clearly show a right to the penalty claimed, notwithstanding such strict construction. *Hadley v. W. U. Teleg. Co.* 115 Ind. 191.

The third paragraph of the answer was pleaded as a partial answer, but it was in bar of all damages except nominal damages. This paragraph, in substance, is that the appellee was not informed, when it undertook to send the message (by what appeared in the face of it or otherwise), that the appellant would suffer pecuniary loss or be damaged because of mental suffering in case of a failure to deliver the message.

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We think the answer was bad, and that the demurrer should have been sustained. The second paragraph of complaint showed a good cause of action, and the court so held. Under it the appellant was entitled to more than nominal damages, and more than the sum of 50 cents, which the court allowed.

If the facts alleged in the complaint were true, the appellant was entitled to substantial damages, and the facts set up in the answer did not avoid the appellant's right to recover substantial damages under the allegations of the second paragraph of the complaint.

The message was one of more than ordinary importance. Of its important character the agents of the Company at Jamestown and Crawfordsville had knowledge, for the reason that this information appeared on the face of the telegram. It was a message which denoted urgency for its delivery to the person to whom addressed, and of this fact the appellee had notice, and contracted with reference to it. It therefore became the duty of the appellee to make a prompt and reasonable effort to deliver the message to the person to whom it was addressed, and especially so, as the expense of delivery was guaranteed in advance. This obligation the appellee wholly and entirely failed to perform, and in such failure was guilty of negligence.

Although the telegram had no relation to any business transaction which would have involved dollars and cents merely, this did not justify the appellee in neglecting its duty. It had undertaken, for a valuable consideration, to deliver the message promptly, and its failure so to do, or to make reasonable effort in that direction, was negligence and a violation of its undertaking.

The diligence which a telegraph company is required to use in the delivery of a message will be determined, to some extent, from the character and importance of the message. Upon humane grounds messages like the one here involved should be promptly delivered, and should be regarded as of more importance to the parties concerned than mere business messages, and in promptness of delivery should have preference over messages of the latter class. It is true there was nothing in the telegram to indicate the kinship that existed between the appellant and the person to whom the message was addressed, nor did it request the presence of Mr. Clements or his wife at the bedside of the dangerously sick sister-in-law, but this affords no excuse to the appellee for its failure to deliver the telegram. The appellee was bound to know that the message pertained in some way to the serious illness of the appellant's wife, and, therefore, that prompt communication with the person to whom the message was addressed was much desired, and especially so in view of the additional fact that the appellant undertook to communicate by a telegraphic dispatch.

From the information it had before it when it entered into the undertaking the appellee was bound to know that mental anguish might and most probably would come to some person in case it failed to act promptly in transmitting and delivering the dispatch, and therefore such a result was contemplated when the message

was delivered by the appellant to the appellee's agent at Jamestown, and is within the undertaking.

Whether such mental suffering would be caused by the failure of a brother-in-law and his wife to go at once to the bedside of a dying sister-in-law, or from the failure of a physician to reach his patient while there was still hope that something might be done to bring relief and possibly a restoration of health, or for some other cause, is unimportant. It was not the particular cause but the effect which might be produced, that was contemplated by the parties, and which is to be looked to in determining the question of liability.

In *W. U. Teleg. Co. v. Sheffield*, 71 Tex. 570, a telegram was delivered to the company's operator to be forwarded, in the following language: "You had better come and attend to your business at once."

The court said that the message indicated with reasonable certainty to the telegraph operator the following facts:

1. That the plaintiffs had a claim of some pecuniary nature.
2. That the claim should be attended to at Jefferson, from whence the telegram was sent.
3. That the matter was urgent "at once."
4. Loss would probably follow the want of such attention which might be prevented by obeying the call made in the dispatch.

This was sufficient to disclose that the object was to enable the plaintiffs to attend to a claim due them, and that loss might result from a failure to transmit the message with promptness.

In *Hadley v. W. U. Teleg. Co.*, 115 Ind. 200, the court said, by Niblack, J., with reference to the following telegram:

North Salem, Ind. Oct. 14, 1886.
To Henry Hadley, Danville, Indiana.
Want your cattle in the morning; meet me at your pasture.
S. C. Clay.

"In this case the terms or contents of the dispatch sent by Clay to Hadley fairly indicated the necessity of its prompt delivery, as well as a transmission, and were such as to authorize the inference that a delay until the day following would result in confusion and possible, if not probable, injury to one or both parties to the dispatch."

In *Manville v. W. U. Teleg. Co.*, 87 Iowa, 214, Miller, J., said: "The message was 'Ship your hogs at once.' The obvious reason of this is evident on its face. It clearly imports that to meet a good market the hogs must be shipped promptly, and that by delay a good market will be lost. It is equivalent to saying, 'If you ship at once you will obtain gains on the purchase and sale of your hogs. If you delay these gains will be lost by the market price declining.' It is most obvious, therefore, that the parties contemplated this very thing."

As we have already said, the message clearly indicated its importance and the urgency for its prompt delivery. There were no pecuniary benefits contemplated as the result of the telegram, as it had no reference to any business transaction, and therefore pecuniary loss because of its non-delivery was not within the appellee's undertaking. But the appellant hav-

ing suffered great mental anguish because, as he alleges, of the failure to promptly deliver the message, it would be a harsh rule which would deny to him all redress except the mere pittance which he paid to have the telegram transmitted and delivered.

Some of the authorities seek to draw a distinction as to the right to recover damages for mental suffering between cases where there may be a recovery for pecuniary loss and cases where there is or can be no pecuniary loss, to which class the present action belongs. With this distinction we have no sympathy, and confess we can see no good reason for it to rest upon. If a telegraph company undertakes to transmit and deliver promptly a message wherein dollars and cents are alone involved, and its negligence occasions loss, it is conceded by all the authorities that it may be compelled to respond in damages. Why? Because it has negligently broken its agreement, or, as is sometimes said, failed to perform a duty which it owed to the sender of the message or the person to whom it is addressed, as the case may be. For the same pecuniary consideration it undertakes to transmit and deliver a message informing a husband of the dangerous illness of his wife, the wife of her husband, the parent of the child, the child of the parent, and it negligently fails to deliver the telegram, and as the result the sick relation dies without having the comforting presence of the husband, wife, father, mother, son or daughter, with all the benefit, physical and mental, which would follow. Is it to be said that under such circumstances the most that the telegraph company is liable for is nominal damages because of great mental anguish suffered by the sender of the telegram, who may be the father, mother, husband, wife or child? In our judgment, no such rule can or should prevail. In failing to promptly deliver a telegram the telegraph company negligently fails to perform a duty which it owes to the sender of the telegram, and should be held liable for whatever injury follows as the proximate result of its negligent conduct.

It is not a mere breach of contract, but a failure to perform a duty which rests upon it as a servant of the public.

In our opinion, upon the fact stated in the second paragraph of complaint, the appellant is entitled to recover damages for the mental suffering which he endured, and his measure of damages is the amount paid for the transmission of the message, and, in addition, what would seem to be just as a compensation for his mental anguish.

We have examined the case of *W. U. Teleg. Co. v. Hamilton*, 50 Ind. 181. That was an action to recover a statutory penalty, and what is said as to the measure of damages in an action like the one under consideration is mere dicta, as no such question was before the court. See *W. U. Teleg. Co. v. Cooper*, 71 Tex. 507, 1 L. R. A. 728, 10 Am. St. Rep. 772, and note; *Wadsworth v. W. U. Teleg. Co.* 86 Tenn. 695, 6 Am. St. Rep. 864, and note; *Beasley v. W. U. Teleg. Co.* 89 Fed. Rep. 188.

Judgment reversed, with costs. Court below directed to proceed in accordance with this opinion.

Petition for rehearing overruled.

**TERRE HAUTE & INDIANAPOLIS R.
CO., Appl.,**

Alfred CLEM.

(....Ind.....)

1. The presumption of negligence on the part of a railroad company, which prevails in case of an injury to its passenger, does not obtain in case of injuries to the horse of a traveler upon a highway, which are received while the traveler is attempting to cross the railroad track.
2. A railroad company is not required to use extraordinary care or vigilance in respect to the safety of its highway crossings.
3. Permitting incompetent evidence tending to support a finding to go to the jury over objection will cause a reversal of the judgment, where the other evidence in support of such finding is not of a satisfactory character.
4. Evidence of repairs made after an injury has been sustained is incompetent to show antecedent negligence.

(March 19, 1890.)

A PPEAL by defendant from a judgment of the Circuit Court for Carroll County in favor of plaintiff in an action to recover damages for injuries to a horse, alleged to have resulted from defendant's negligence. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. John G. Williams and S. O. Bayless, with Messrs. W. H. Russell and F. F. Moore, for appellant;

The court erred in allowing appellee to prove that long after the accident and after this case had once been tried, the appellant had rebuilt the crossing in question and put down planks with square edges next the rail.

Pierce, Railroads, 294; Dale v. Delaware, L. & W. R. Co. 73 N. Y. 471; Payne v. Troy & B. R. Co. 9 Hun, 526; Ely v. St. Louis, K. C. & N. R. Co. 77 Mo. 84; Nailley v. Hartford Carpet Co. 51 Conn. 524, 50 Am. Rep. 47; Morse v. Minneapolis & St. L. R. Co. 30 Minn. 465, 11 Am. & Eng. R. R. Cas. 168.

Messrs. L. D. Boyd and L. G. Beck, for appellee:

Appellant owed it as a duty incumbent upon it as a common carrier resting under the responsibility of exercising extraordinary care and prudence to see that this crossing was in a safe and proper condition.

Meredith v. Reed, 26 Ind. 334; Toledo & W. R. Co. v. Stoddard, 25 Ind. 185; Louisville, N. A. & C. R. Co. v. Smith, 91 Ind. 119.

When an injury occurred like the one described in this case, it was upon the defendant to prove that it was without fault.

Patterson, Railway Accident Law, pp. 348-441; Bedford, S. O. & B. R. Co. v. Rainbolt, 99 Ind. 556; Terre Haute & I. R. Co. v. Buck, 96 Ind. 347; Columbus, C. C. & I. R. Co. v. Newell, 104 Ind. 284; Louisville, N. A. & C. R. Co. v. Jones, 7 West. Rep. 33, 108 Ind. 551.

The admission of incompetent evidence which a special finding of the jury shows to have no weight with them is a harmless error.

Annas v. Milwaukee & N. R. Co. 67 Wis. 46.

By making the repairs the appellant admitted that it made a mistake when it beveled off its plank, and by thus correcting this mistake it would thus prevent similar accidents.

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Shaver v. St. Paul, M. & M. R. Co. 28 Minn. 108; O'Leary v. Mankato, 21 Minn. 65; Phelps v. Mankato, 23 Minn. 376.

It was an admission that appellant controlled this crossing, and comes within the rule laid down in—

Lafayette v. Weaver, 93 Ind. 479; Kelly v. Southern Minnesota R. Co. 28 Minn. 98; Pennsylvania R. Co. v. Henderson, 51 Pa. 815; West Chester & P. R. Co. v. McElroe, 67 Pa. 311; McKee v. Bidwell, 74 Pa. 218; Martin v. Tonela, 59 N. H. 81; Gulf, C. & S. F. R. Co. v. Leansich, 68 Tex. 54.

Elliot, J., delivered the opinion of the court:

The appellee recovered a judgment for damages for an injury to a horse which he was driving. The theory of the appellee is that the appellant was negligent in constructing a crossing at a point where its railroad crossed a public road, and that the injury to his horse was caused by the appellant's negligent breach of duty.

It is quite well settled that it is the duty of a railroad corporation to so construct and maintain its crossings that they may be safely used by persons traveling the highway, and that, for a negligent breach of this duty, it must answer in damages to one who exercises ordinary care and sustains an injury from the breach of duty by the company. *Evansville & T. H. R. Co. v. Crist, 116 Ind. 446; Evansville & T. H. R. Co. v. Carner, 118 Ind. 51; Indianapolis & St. L. R. Co. v. Stout, 53 Ind. 143.*

The appellee's counsel are in error in assuming that the same rule applies to actions for the recovery of injuries received at a crossing that applies in cases where passengers are injured while on the trains of the carrier. The presumption of negligence which prevails in such cases does not obtain in such a case as this; and the cases of *Cleveland, C. C. & I. R. Co. v. Newell, 104 Ind. 264, and Terre Haute & I. R. Co. v. Buck, 96 Ind. 347*, are not in point.

The evidence upon the question of negligence in this instance is not of that satisfactory character which authorizes us to declare that the judgment should be affirmed although incompetent evidence was admitted. If, therefore, we find that incompetent evidence was permitted to go to the jury over the objection of the defendant, we must reverse the judgment.

The appellee was permitted to prove that after the accident occurred the appellant changed and repaired the crossing. This was error. Evidence of repairs made after an injury has been sustained is incompetent to show antecedent negligence.

This question was carefully considered by the Supreme Court of Minnesota in the case of *Morse v. Minneapolis & St. L. R. Co.*, 80 Minn. 465, and three of the earlier decisions of that court were overruled. In the course of the opinion in that case it was said: "But, on mature reflection, we have concluded that evidence of this kind ought not to be admitted under any circumstances and that the rule heretofore adopted by this court on principle is wrong, not for the reason given by some of the courts that the acts of the employees in making such repairs are not admissible against their principals, but upon the broader ground that such

acts afford no legitimate basis for construing such an act as an admission of a previous neglect of duty. A person may have exercised all the care which the law required, and yet, in the light of the new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem to be unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence."

The authorities are collected and discussed in the case of *Malley v. Hartford Carpet Co.*, 51 Conn. 524, and it was there said: "The fact that an accident has happened and a person has been injured immediately puts a person on a higher plane of diligence and duty from which he acts with a view of preventing the possibility of a similar accident, which should operate to commend rather than condemn the person so acting. If the subsequent act is made to reflect back upon the prior one, although it is done upon the theory that it is a mere admission, yet it virtually introduces into the transaction a new element and test of negligence which has no business there, not being in existence at the time.

The question received consideration in the very recent case of *Hodges v. Percival* (Ill.) 23 N. E. Rep. 428, and in the course of the discussion the court said: "The happening of an accident may inspire a party with greater diligence to prevent a repetition of a similar occurrence, but the exercise of such increased diligence ought not, necessarily, to be regarded as tantamount to a confession of past neglect."

The rule asserted in the cases from which we have quoted is declared in many other cases. *Dougan v. Champlain Transp. Co.* 56 N. Y. 1; *Baird v. Duly*, 68 N. Y. 547; *Dale v. Delaware L. & W. R. Co.* 73 N. Y. 471; *Salters v. Delaware & H. Canal Co.* 3 Hun, 838; *Payne v. Troy & E. R. Co.* 9 Hun, 526; *Cramer v. Burlington*, 45 Iowa, 627; *Hudson v. Chicago & N. W. R. Co.* 59 Iowa, 581; *Ely v. St. Louis, K. C. & N. R. Co.* 77 Mo. 84.

The rule stated and enforced in the cases referred to is the only one that can be defended on principle. To declare the evidence competent is to offer an inducement to omit the use of such care as the new information may suggest, and to deter persons from doing what the new experience informs them may be done to prevent the possibility of future accidents. The effect of declaring such evidence competent is to inform a defendant that if he makes changes or repairs he does it under penalty, for, if the evidence is competent, it operates as a confession that he was guilty of a prior wrong. If it is competent, then it would be the duty of the court to charge the jury that they must regard the making of subsequent repairs as evidence of antecedent negligence, and this, certainly, would violate settled principles, for it is what occurs prior to the action, and not what happens afterwards, that determines whether there has or has not been a culpable breach of duty. If, for example, the owner of a mill or

factory repairs or improves after an accident has happened, so as to prevent the possibility of future accidents, the just inference is, not that he was previously guilty of negligence, but that, prompted by humane motives and influenced by the new information supplied by the fact that an accident has happened, he has exerted extraordinary care and taken such precautionary measures as render it impossible that anyone should be injured in the future. It is unjustly reversing the presumption to hold that such an owner improves or repairs because he was at some time anterior to the time of making the improvements or repairs guilty of an actionable wrong. True policy and sound reason require that men should be encouraged to improve or repair, and not be deterred from it by the fear that if they do so, their acts will be construed into an admission that they had been wrong-doers. A rule which so operates as to deter men from profiting by experience and availing themselves of new information has nothing to commend it, for it is neither expedient nor just.

Accidents do happen despite the utmost care and diligence, but, with very rare exceptions, the happening of an accident does not of itself supply grounds for inferring negligence. It is common knowledge that accidents occur which even the highest degree of care can neither anticipate nor prevent; but in cases where an extraordinary accident happens which ordinary prudence could not have foreseen or anticipated, neither a natural nor an artificial person is liable for a failure to exercise extraordinary care. *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404.

The law does not, as a general rule, require anyone to exercise extraordinary care or vigilance. The question in this case, and in all others like it, is whether the defendant prior to the accident used due care; and whether due care was or was not used must be determined by the precedent facts and attendant circumstances, not from what subsequently occurs. If a person does all that is reasonable under the facts as they exist and are known at the time of the injury, or at some antecedent time, he is not a wrong-doer, for no one is bound to anticipate and provide against unusual and unexpected accidents.

In *Lane v. Atlantic Works*, 111 Mass. 186, it was said: "The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which arise." Events may cast their shadows before so as to render an act wrong, but they cannot cast them backward over an act not wrong when it was performed, and make it a tortious one.

The fact that the happening of an accident may convey information producing a conviction or belief that had extraordinary precaution been taken the injury would have been prevented does not legitimately tend to prove that ordinary care and vigilance were not exercised. All may be done that ordinary care requires, and yet a person satisfied by experience that a higher degree of care may insure absolute safety may employ extraordinary means to prevent accidents in the future. In doing this he does what is commendable, and, certainly, he ought not to be restrained or checked by

the fear that if he does resort to unusual means to insure safety, he may be treated as one who confesses that he was a wrong-doer when the accident occurred. It is unjustly burdening one who, influenced by the light supplied by events, resorts to greater precautions to insure the safety of others.

The incidental remark made in the case of *Goshen v. England*, 119 Ind. 868, cannot be considered as an authoritative affirmation of the right to adduce evidence of subsequent repairs to prove precedent negligence.

Judgment reversed, with instructions to award a new trial.

George W. DICK, *Appt.*,

George W. FLANAGAN, Admr., etc., of
James McCloskey, Deceased.

(.....Ind.....)

Suit cannot be maintained on a note which has been surrendered up for a new one upon which judgment has been taken, although that new note is that of a third person and the judgment thereon is uncollected.

(February 25, 1890.)

APPEAL by plaintiff from a judgment of the Circuit Court for Cass County in favor of defendant in an action upon certain promissory notes which had been surrendered up upon the execution by a third person of a new note in place thereof. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs. McConnell & McConnell*, for appellant:

The new note was not received in payment; hence there was neither an extinguishment nor a sale of the old one.

Smith v. Bement, 17 Johns. 840; *Bristol Mill & Mfg. Co. v. Probasco*, 64 Ind. 406; *Tyner v. Stoops*, 11 Ind. 22; *Albright v. Griffin*, 78 Ind. 182.

Messrs. George W. Funk and Dudley H. Chase for appellee.

Mitchell, Ch. J., delivered the opinion of the court:

The special finding of the court shows that James McCloskey, late of Cass County, died in the year 1870, leaving a widow and children. He was indebted to the appellant, Dick, in an amount exceeding \$500, for which sum the latter held two notes, which remained unpaid at the time McCloskey died. Subsequently Rebecca McCloskey, widow of the decedent, no administrator having been appointed, paid \$175 on the indebtedness, and, at the request of the appellant, and to prevent the latter from enforcing payment from the estate, executed her note, in which she agreed to pay the amount remaining unpaid, with an enhanced rate of interest, and also executed a mortgage on real estate as security for the debt. Nothing was said at the time about taking the note of Mrs. McCloskey in payment of the debt due from the estate, but the old notes were surrendered up to her; and subsequently judgment was taken against her for the amount of the note and interest, and a decree for the foreclosure of the mortgage. Mrs. McCloskey afterwards died, leaving the judgment unpaid; and

the old notes, which the appellant surrendered up to her, were found in her possession, with the name of the payor torn off. The appellant instituted this proceeding against the estate of James McCloskey to recover the amount remaining unpaid on the original debt. Upon the facts found the court stated conclusions of law adverse to the appellant.

It is undoubtedly true that taking the note of a third person for a pre-existing debt is no payment, in the absence of an express agreement that it shall be taken as payment. *Godfrey v. Orsler* (Ind.) 22 N. E. Rep. 999 (present term); *Bristol Mill & Mfg. Co. v. Probasco*, 64 Ind. 406.

The books all agree that there must be a clear and special agreement that the creditor shall take the paper absolutely as payment, or it will be no payment if it afterwards turns out to be of no value. *Johnson v. Weed*, 9 Johns. 811; *Ontario Bank v. Lightbody*, 13 Wend. 108.

These principles are not, however, controlling in the present case. There is nothing in the special finding, nor in the evidence, to indicate that the note taken was worthless. After taking the note, the appellant elected to pursue his remedy upon the new securities which he had taken. He recovered a judgment upon the note, and foreclosed the mortgage which he took as security; and it does not appear but that his security was ample and abundant. Where the note of a third person is taken for a pre-existing debt, which is surrendered up, and the holder of the note thus taken elects to sue, and merge the note into a judgment, he will be estopped to say that he did not take the new note in substitution for, and in extinguishment of, the old debt, especially while the judgment so taken remains, so far as appears, a valid, enforceable security. After one has taken a second or substituted note, and surrendered up the original, and has cut off all defenses to the note so taken, either by transferring it to an innocent holder, or by himself putting it into a judgment, he will be estopped from taking another judgment against the original debtor on the obligation theretofore surrendered up. *Hooker v. Hubbard*, 97 Mass. 175; *Dewey v. Bell*, 5 Allen, 165; *Bigelow*, Estop. 5th ed. 681.

Where a new note and mortgage are taken as collateral security for a pre-existing debt, the new securities, in the absence of an express agreement, will not extinguish the prior debt, but if the new securities are merged into a general judgment the legal effect is to merge the original debt, and all prior securities, into the judgment, which becomes the higher security; and unless it is necessary, in order to preserve some superior equity, the original security cannot be resorted to as a cause of action. *Cisna v. Huines*, 18 Ind. 496; *Ault v. Zehring*, 88 Ind. 429. *Brown v. Darrah*, 95 Ind. 86; *Ward v. Hangard*, 75 Ind. 381.

If the appellant had been permitted to establish his claim against the estate of James McCloskey, he would have had two valid, enforceable judgments for the same debt, against two different estates. This cannot be done without showing some valid legal or equitable ground for it. There was no error.

The judgment is affirmed.

Llewellyn J. COPPAGE, Receiver of the Williamson Straw Stacker Co., *Appt.*,

v.

Milton H. HUTTON.

(.....Ind.....)

The agreement of one who signs articles of association for the formation of a corporation to take stock therein does not become enforceable until he has acknowledged the articles as required by § 3851, Rev. Stat.

(April 12, 1890.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Montgomery County in favor of defendant in an action to recover the amount due upon an alleged stock subscription. *Affirmed.*

The case sufficiently appears in the opinion.

Messrs. Kennedy & Kennedy and Ristine & Ristine for appellant.

Messrs. Wright & Sellar for appellee.

Elliott, J., delivered the opinion of the court:

The appellant sues as the receiver of an insolvent corporation, and seeks to recover a subscription which he alleges the appellee made to the capital stock of the corporation. It is alleged that the appellee, with others, signed articles of association and that he agreed to take two shares of the capital stock, and pay therefor \$100.

The introductory clause of the articles of association reads thus: "We, the undersigned, agree to take the stock in the amount set opposite our names, in a company to be organized for manufacturing and selling the Williamson Straw Stacker." There were eighty-three signers and seven of them acknowledged the execution of the articles of association before a notary public and the instrument was duly recorded. It is also alleged that \$8,000 of stock was subscribed; that the company was duly organized and board of directors elected.

There can be no doubt, under the authorities, that a valid subscription to the capital stock of a corporation may be made by signing the preliminary articles. Such a subscription becomes enforceable upon the perfection of the corporate organization according to law, under the articles of association. *Miller v. Wild Cat Gravel Road Co.* 52 Ind. 51; *Multon v. Clayton*, 54 Iowa, 425; *Phenix Warehousing Co. v. Budger*, 67 N. Y. 294; *Cravens v. Eagle Cotton Mills Co.* 120 Ind. 6.

If the promise of the appellee is not binding it must be for some other reason than that it

was made before the organization of the corporation was fully effected.

The Statute requires that the persons who desire to organize a corporation shall "make, sign and acknowledge before some officer capable to take acknowledgment of deeds, a certificate in writing," setting forth therein certain enumerated things. Rev. Stat. § 8851.

The contention of the appellee is that the promise is not effective because the complaint shows that only seven of the eighty-three signers acknowledged the certificate. It seems quite clear under the decision of this court in *Indianapolis Furnace & Min. Co. v. Herkimer*, 46 Ind. 142, that the mere signing of the paper was not sufficient to complete the obligation, and that, in order to make valid and effective articles of association against all who sign, all must acknowledge them as the Statute requires. Here it affirmatively appears that seven only of the signers acknowledged the execution of the instrument, and it cannot be inferred that those who did not acknowledge it remained bound by its terms. As to them, the instrument was incomplete, and it is quite well settled that an incomplete subscription cannot be enforced. *Dutchess & C. O. R. Co. v. Mabbett*, 58 N. Y. 397; *Reed v. Richmond Street R. Co.* 50 Ind. 842; *Richmond Street R. Co. v. Reed*, 83 Ind. 9; *Williamson v. Kokomo Bldg. & L. F. Asso.* 89 Ind. 889.

It is, however, argued by appellant's counsel that the complaint does affirmatively show that the corporation was organized, but this does not meet the question, for it may well be that it was organized with the appellee as a stockholder. The fact that he did not acknowledge the instrument as the law requires, implies that he did not become a stockholder, and there is nothing in the complaint which rebuts or opposes this implication. It devolved upon the plaintiff to remove the inference if he could. As the appellee did not acknowledge the instrument as the law requires, he did not become a stockholder, and if he were insisting that he was entitled to the number of shares set opposite his name, it is quite clear that the corporation might successfully resist his claim; since it is obvious that only those who acknowledged the articles of association as the law requires can successfully insist upon their right to stock. If the appellee cannot be regarded as a stockholder, then it seems quite clear that he did not bind himself by simply signing the articles of association.

Whether a good complaint can be framed is not the question before us, for the only question presented by the record is as to the sufficiency of the complaint as it is written.

Judgment affirmed.

NOTE.—Creation of corporation.

The mere signing of articles of association does not create a corporation. The subscribers must also sign and acknowledge the certificate of incorporation and cause it to be recorded. *Indianapolis Furnace & Min. Co. v. Herkimer*, 46 Ind. 142.

A corporation has no existence until the date of the filing of its charter; and persons named therein as directors for the first year assume or incur no obligations until it is filed. *St. Louis, Ft. S. & W. R. Co. v. Tierman*, 37 Kan. 608.

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The omission to file with the circuit clerk the certificate of organization of a special company by the holders of the special stock of the company incorporated under a special Act authorizing the same can be taken advantage of by the State alone; and a suit cannot be maintained against a stockholder, as partner, upon a corporate liability of the company. *Mo. Gen. Stat.* 1865, and *Rev. Stat.* 1865, chap. 34, § 7, do not apply to such corporation. *Granby M. & S. Co. v. Richards*, 14 West. Rep. 750, 95 Mo. 103.

NEW YORK COURT OF APPEALS.

John DANAHER, Admr., etc., of Thomas
P. Danaher, Deceased, Appt.,
v.

CITY OF BROOKLYN, Resp't.

(....N. Y....)

1. A city is not liable for injuries caused by the drinking of water from free public wells where neither failure on its part to keep the wells properly cleaned out nor notice to it that the water therein had become impure is shown, and there were no circumstances to cause suspicion as to the purity of the water, and a sufficient supply of pure water was furnished from other sources for the use of its inhabitants.

2. A city is not bound to make a chemical examination of the water of free public wells for the purpose of ascertaining whether or not it is pure and wholesome where it has no notice that the water is unwholesome and furnishes a public supply of running water in addition to the wells.

(February 25, 1890.)

A PPEAL by plaintiff from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of the King's Circuit dismissing the complaint in an action to recover damages for the death of plaintiff's intestate, which was alleged to have resulted from the use of unwholesome water negligently furnished by defendant. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. Franklin M. Danaher and

Roger A. Pryor, for appellant:

The City of Brooklyn furnishes drinking water to its inhabitants in its private as distinguished from its public capacity, and is liable for a failure to use its power well or for an injury caused by using it badly, and for negligence, the same as an individual under similar circumstances.

Dillon, Mun. Corp. 3d ed. § 58; 4 Wait, Act. and Def. 596-615; *Bailey v. New York*, 3 Ill. 531, approved and followed in *Roarvell v. Draper*, 23 N. Y. 825, and *People v. Batchellor*, 53 N. Y. 141; *McAroy v. New York*, 54 How. Pr. 245; See also *Benson v. New York*, 10 Barb. 223, 235; *Fleming v. Suspension Bridge*, 92 N. Y. 872; *People v. Civil Service of N. Y.* 17 Abb. N. C. 64; *Britton v. New York*, 21 How. Pr. 252; *Milbau v. Sharp*, 15 Barb. 193; *Louber v. New York*, 7 Abb. Pr. 251; *Rummey v. Gedney*, 57 How. Pr. 221; *Western Sav. Fund Society v. Philadelphia*, 81 Pa. 188; *People v. Hurbutt*, 24 Mich. 44; *People v. Detroit*, 28 Mich. 228; *Livingston v. Pippin*, 31 Ala. 512; *Rome v. Culot*, 28 Ga. 50; *Well v. Atlanta*, 48 Ga. 67; *McKnight v. New Orleans*, 24 La. Ann. 412; *Grant v. Davenport*, 80 Iowa, 846; *Hale v. Houghton*, 8 Mich. 454; *Indianapolis v. Indianapolis Gas Co.* 66 Ind. 396; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *Dijelow v. Randolph*, 14 Grav. 543; *Oliver v. Worcester*, 102 Mass. 500; *Eustman v. Meredith*, 86 N. H. 284; *Byrd v. Insurance Patrol*, 5 Cent. Rep. 238, 113 Pa. 269; *Jones v. New Haven*, 84 Conn. 1; *Detroit v. Corey*, 9 Mich. 165.

If the city authorities had no actual notice,
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nevertheless, if their ignorance was owing to an omission of the duty of inspection and of the degree of diligence which might reasonably be expected under all circumstances, the opportunity of knowledge stands for the purposes of the case as actual knowledge, and the City is equally chargeable as if express notice had been actually proven.

Kune v. Troy, 6 Cent. Rep. 493, 104 N. Y. 349. See also *McCarthy v. Syracuse*, 46 N. Y. 194; *Brusso v. Buffalo*, 90 N. Y. 679; *Jones v. New Haven*, 84 Conn. 6; *Rehberg v. New York*, 91 N. Y. 183; *Fort Worth v. Crayford*, 64 Tex. 2, 2, 58 Am. Rep. 753; *Vesper v. New York*, 17 Jones & S. 296; *Requa v. Rochester*, 45 N. Y. 129; *Barton v. Syracuse*, 80 N. Y. 54; *Todd v. Troy*, 61 N. Y. 506; *State v. Portland*, 74 Me. 263, 43 Am. Rep. 526; *Chicago v. Mayor*, 18 Ill. 349; *Vanderslice v. Philadelphia*, 103 Pa. 102; *Addison, Torts*, pp. 1313, 1318; *Wharton, Neg.* §§ 291, 965, 965; *Deyoe v. Saratoga Springs*, 3 Thomp. & C. 504, 505; *Morrison v. Mayer*, 67 Pa. 855; *Donaldson v. Boston*, 16 Gray, 508; *Howard Co. v. Legg*, 110 Ind. 479; *Post v. Clark*, 85 Conn. 842; *Hunt v. New York*, 20 Jones & S. 198, 12 Cent. Rep. 60, 109 N. Y. 134.

Mines v. Huddersfield, L. R. 10 Q. B. Div. 124; on appeal, L. R. 12 Q. B. Div. 443, is on all fours with the present case.

See also *Chapman v. Rochester*, 1 L. R. A. 296, 110 N. Y. 273.

The City is chargeable with notice of the operations of the natural law of decay. It was its duty to anticipate dilapidation and decay; to inspect the well, and call to its assistance those whose skill would have enabled it to ascertain its condition.

Vesper v. New York, 17 Jones & S. 296; *Howard Co. v. Legg*, supra; *Howard Co. v. Legg*, 93 Ind. 528; *Indianapolis v. Scott*, 72 Ind. 197; *Rapho v. Moore*, 68 Pa. 408; *Jones v. New Haven*, 84 Conn. 6; *Norristown v. Moyce*, 67 Pa. 855, approved in *Hume v. New York*, 74 N. Y. 273, and in *Rehberg v. New York*, 91 N. Y. 145. See also *Noyes v. Gardner*, 1 L. R. A. 354, 147 Mass. 505.

The City ought to have foreseen that an impure condition of its drinking water might occur, and the omission to provide against it is actionable negligence.

Loftus v. Union Ferry Co. 84 N. Y. 460.

The water in the well having become impure, poisonous and dangerous to human life and health, it was a public nuisance, and the municipality is liable for all damages sustained by reason of its existence, in short, for the wrongful act of maintaining it irrespective of any question of negligence or notice.

Shawneetown v. Mason, 82 Ill. 837; *Hamilton v. Columbus*, 52 Ga. 435; *Necins v. Peoria*, 41 Ill. 502. See also *People v. Albany*, 11 Wend. 539; *Wood, Nuisance*, §§ 740, 784, p. 833; *Gould, Waters*, §§ 212, 545; *Mills v. Hall*, 9 Wend. 315; *Chapman v. Rochester*, 1 L. R. A. 296, 110 N. Y. 273; *Dillon, Mun. Corp.* 3d ed. § 1048, note; 4 Wait, Act. and Def. 765; *Addison, Torts*, 1315; *Wharton, Neg.* § § 187, 259, 265; *Brown v. New York*, 3 Barb. 254.

The defendant is liable in tort for furnishing

impure and poisonous drinking water, upon the ground of a violated or neglected duty voluntarily assumed, irrespective of any question of negligence or notice, or of any privity of contract between the parties.

Reg. v. Swindall, 2 Car. & K. 282. See also *Norton v. Sewall*, 106 Mass. 143; *Bishop v. Weber*, 139 Mass. 417; *Gilbert v. Hoffman*, 66 Iowa, 205; *Fitzpatrick v. Garrisons & W. P. Ferry Co.* 49 Hun, 288.

The City erected and maintained the pump and assumed the duty of providing for the health, safety and protection of its citizens who drank of this water, and is liable for any injuries sustained by such person by reason of the poisonous condition of the water, irrespective of any question of notice or negligence.

Archer v. New York, N. H. & H. R. Co. 9 Cent. Rep. 233, 106 N. Y. 599; *Turner v. Newburgh*, 12 Cent. Rep. 830, 109 N. Y. 301; *Jetter v. New York & H. R. Co.* 2 Abb App. Dec. 458; *Weston v. New York El. R. Co.* 73 N. Y. 595; *Brassell v. New York Cent. & H. R. R. Co.* 84 N. Y. 246; *Newson v. New York Cent. R. Co.* 29 N. Y. 333; *Chaffee v. Boston & L. R. Co.* 104 Mass. 105; *Drusaco v. Buffalo*, 90 N. Y. 679; *McGuire v. Spence*, 91 N. Y. 308; *Todd v. Troy*, 61 N. Y. 510; *Barton v. Syracuse*, 36 N. Y. 55; *Chicago v. Major*, 18 Ill. 849; *Hasman v. Hoboken, L. & I. Co.* 50 N. Y. 60; *Gilbert v. Hoffman and Bishop v. Weber*, *supra*; *Howard Co v. Legg*, 9 West. Rep. 212, 110 Ind. 479; *State v. Syphrett*, 27 S. C. 29; *Barry v. Terkildsen*, 72 Cal. 254; *Dorland v. New York Cent. & H. R. Co.* 19 N. Y. Week. Dig. 76; *Barber v. Abendroth*, 20 N. Y. Week. Dig. 7; *McGuire v. Spence*, 16 N. Y. Week. Dig. 222; *Jennings v. Van Schaick*, 11 Cent. Rep. 817, 108 N. Y. 530, 87 Alb. L. J. 292; *Indiana, B. & W. R. Co. v. Barnhart*, 13 West Rep. 425, 115 Ind. 399; *Marseilles v. Howland*, 14 West. Rep. 564, 124 Ill. 547; *Requa v. Rochester*, 45 N. Y. 134; *Fitzpatrick v. Garrisons & W. P. Ferry Co. supra*.

Mr. Almet F. Jenks for respondent.

Earl, J., delivered the opinion of the court:

We entertain no doubt that this well in De Kalb Avenue was a public well, belonging to the defendant, and under its control, and that the water of the well was in August, 1882, unwholesome, and dangerous to the health of such persons as should drink thereof; and we will assume, although we would hold so with some hesitation, that the death of plaintiff's intestate was caused by drinking of the water; and yet, we think, the plaintiff was properly nonsuited at the trial. There is no claim that the well or pump was improperly constructed, or out of repair, or that the water became unwholesome from any defect in the well or pump, or from any external exposure which could by any reasonable care have been avoided. It does not appear that the City, or any of its officers, or, in fact, that any person, did anything to render the water impure. Nor does it appear that anything could have been done to purify it, or prevent its impurity. The theory of the plaintiff, as developed upon the trial, was that this well was supplied by water which fell upon the surface of the surrounding earth, and, by percolation through

the soil, reached the bottom of the well, and that the water, upon the earth, or in passing through the earth, came in contact with the unclean and deleterious substances which rendered it impure and unwholesome. The water was limpid, cold and agreeable to the taste. Its impurity could not be detected by drinking it, and its dangerous character could only be discerned by a careful chemical analysis. This water was not furnished for a compensation paid for its use, and so there was no contract relation between the City and those who used it. The well was for public, gratuitous use; and hence nothing that was said or intimated in *Milnes v. Huddersfield*, L. R. 10 Q. B. Div. 124, and L. R. 12 Q. B. Div. 443, has any pertinency here.

The City was not an insurer of the quality of the water, and bound, under all circumstances, to keep it pure and wholesome. This is not claimed. It owned this well as it owned its other property kept for public use, such as streets, parks and public buildings, and owed the duty of reasonable diligence to care for it as it was bound to care for such other property. Its liability for unwholesome water in any of its public wells must rest upon negligence, and hence we are brought to the question, Was there any proof of negligence imputable to the City? It is not claimed that the City had any notice of the unwholesome character of this water prior to the death of plaintiff's intestate; but the claim is that by reasonable diligence it could have had notice, and hence that notice must be imputed to it. This well had existed for many years, and its water had been extensively used by persons in the neighborhood; and there is no proof whatever that prior to the month of August, 1882, it had caused injury to anyone, or that there was the least suspicion by anyone that it was unwholesome.

Several persons were called as witnesses by the plaintiff, who testified that they became sick from drinking the water of this well in the early part of August, 1882. It is inferable from the evidence that the same persons drank the water previously with impunity. The plaintiff had four sons. Three of them drank the water in the early part of August and became very sick, two of them dying. They had previously, for years, drank it without injury. The fourth son drank it down to about the 1st of August, and then, in consequence of his absence from the City, he ceased to drink it; and he did not become sick. The inference therefore is, so far as there is any proof upon which to base it, that the water was wholesome—at least not dangerous, and not so impure as to cause sickness—down to the 1st of August. In view of these facts, it certainly cannot be said that there is any proof that the water was dangerous before the time it is shown to have caused any injury. The plaintiff, claiming that the water of this well had for a long time been impure and dangerous, should have given some proof to maintain his claim; and, if it were well founded, it cannot be doubted that the proof would have been readily obtainable, as many persons must have used the water for many years. So, while there is no proof that, during any considerable time prior to the drinking of this

water by the plaintiff's intestate, it had been impure, unwholesome or dangerous, there is no proof that any reasonable diligence on the part of the defendant would have discovered its impure or dangerous quality, if it existed. The plain inference is that there was some cause of contamination which had not long existed. There must have been some unobserved deposit of deleterious matter at some distance from the well, upon or under the surface of the soil, or some new vein opened in the soil, through which impure water, for the first time, percolated into the well in the early part of August. There is no proof or claim that any improper or poisonous substance had been thrown into the well, or that the well was unclean, or needed cleaning out. Assuming that the defendant was bound to make a chemical analysis of the water of its wells from time to time, how often should such analysis be made? It appears that there were 296 wells within the city limits belonging to the City. To analyze the waters of all these wells would take a long time. If the defendant were required to do it even once a quarter, it would probably take the whole time of a single chemist. But, if the chemical analysis of the water of this well had been made in June, or even early in July, there is no proof, and there can be no legal inference, that it would have been found unwholesome; and how, then, can it be said that at the precise time the deceased drank of this water, in August, the City was bound to have discovered and known that it was unwholesome and dangerous? For aught that appears in the case, the City may, from time to time, during previous months or years, have examined and tested the waters of these wells. It appears that the department of public health, about the 1st of June, 1882, ordered the chemist of that department to make an examination of the waters of the wells of the City, and he proceeded with such examination, but did not reach the water of the well in question until the last of August. Here there was a well in perfect order, clean, free from filth and *débris*, the water of which had been used with impunity and satisfaction by those living in the neighborhood for many years; and no complaint had been made of it, and no suspicion had been raised that it was in any way unwholesome or dangerous. Under such circumstances, what was there to suggest to the City the duty of analyzing and testing this water prior to the 1st day of August, 1882? We find nothing.

We have thus far assumed that the City was bound, from time to time, to make a chemical examination of the waters of the public wells, for the purpose of ascertaining whether they were pure and wholesome. But we are of opinion that such assumption is not well founded, and that no such burden rests upon the City. The City has its public water supply by running water in addition to these wells. The wells are furnished and kept for public use by the City. It was undoubtedly the duty of the City to keep the wells and pumps in good order, and to keep the wells properly cleaned out, so they would not become contaminated by anything that might be thrown into them. But these wells were to be supplied by water percolating through the

earth; and was the City bound to anticipate that such water would become impure and dangerous in the wells? There was no proof that it was the necessary, or even the natural, consequence that water in city wells, however they may be located, will become poisonous and deleterious. On the contrary, the proof showed that the waters of such wells have been used for years with impunity. These wells were furnished for the accommodation of the public. They were not obliged to use them; and most people have sufficient knowledge to know that their waters may not be as pure as water brought from pure streams, far away from the city limits, and from exposure to contamination. The public may use them; and when they are found unwholesome or deleterious, and the City has notice thereof, it is bound to protect the public health by purifying the waters, or filling up the wells. The burden upon the City is sufficient if it is held to the responsibility of keeping the wells and pumps in order, and clean, and if it is made liable for any injury resulting from the use of impure water from the wells after it has had notice of their dangerous qualities, and an opportunity to remove the danger. The higher degree of diligence as to water apparently pure and wholesome, agreeable to the taste, and in common use by the public without complaint, would be unreasonable.

These views are not in conflict with any of the authorities to which our attention has been called.

In *McCarthy v. Syracuse*, 46 N. Y. 194, it was held that, when the duty was imposed by law upon a public officer or municipal corporation of keeping a structure in repair, it involves the exercise of a reasonable degree of watchfulness in ascertaining the condition of such structure from time to time, and that where this is omitted such officer or corporation is liable for damages resulting from a dilapidation of the structure which is an ordinary result of its use, and which would have been disclosed by an examination, and that no notice of the defect is necessary, in such a case, to fix the liability. There the damage complained of resulted from a defective sewer, and the City was under obligation to use reasonable diligence to keep it in repair; and it could not escape responsibility simply because it had no notice that the sewer was out of repair. Here it was the duty of the City to use reasonable diligence to keep this well and pump in repair, and to guard against any dilapidation or danger resulting from use of the well; but as we have shown, there was no evidence which would justify a finding of culpable negligence as to the well on the part of the City.

In *Hunt v. New York*, 109 N. Y. 134, 12 Cent. Rep. 60, the plaintiff was injured by an explosion at one of the man-holes of a steam-heating company in one of the streets of the City of New York. He was defeated in his action for damages. *Andrews, J.*, writing the opinion in this court, said: "The language of the cases expressing the measure of duty resting upon municipal corporations in respect to their streets, sewers, etc., has not always been carefully guarded; but the doctrine has been frequently reiterated in this court that there is no absolute guaranty of undertaking on the

part of a municipal corporation that its streets or other constructions shall at all times, and under all circumstances, be in a safe and proper condition, and that its obligations and duty extend only to the exercise of reasonable care and vigilance. . . There must be willful misconduct or culpable neglect to create liability."

Here there was no willful misconduct or culpable neglect on the part of the City as to this well. Trees, bridges and other wooden structures will necessarily decay, and become unsafe; and, where they may thus become dangerous to human life, the duty devolves upon the municipality to make tests and examinations, using reasonable diligence to ascertain whether they are safe or not. *Vosper v. New York*, 49 N. Y. Super. Ct. [17 Jones & S.] 296; *Howard Co. v. Legy*, 110 Ind. 479, 9 West. Rep. 212; *Jones v. New Haven*, 84 Conn. 18; *Norristown v. Moyer*, 67 Pa. 355.

But this case is not analogous to those. Here there is no proof justifying the inference that the water of this well was constantly and inevitably exposed to impurities which would render it dangerous to human life. On the contrary, the evidence shows that up to about the 1st of August its waters were wholesome, and free from dangerous impurities. This is not like the cases where a city creates or permits

a nuisance, or turns a stream of mud or water upon the premises of private individuals. In such cases it is held responsible for the nuisance which it creates or permits, and for its wrongful acts. *People v. Albany*, 11 Wend. 539; *Nevins v. Peoria*, 41 Ill. 502; *Shawneetown v. Mason*, 82 Ill. 337.

There was no proof in this case that the City in any way polluted or poisoned the water of this well, or permitted others to do so; and hence the cases of *Ree v. Medley*, 6 Car. & P. 292; *Goldsmid v. Tunbridge Wells Imp. Comrs.* L. R. 1 Eq. 161; *Charles v. Finchley Local Board*, 48 L. T. N. S. 569; *Brown v. Illius*, 27 Conn. 84; *Ballard v. Tomlinson*, L. R. 29 Ch. Div. 115, —are not in point.

Without commenting upon or referring to other authorities found in the interesting and learned brief submitted on behalf of the appellant, it is sufficient to say that we have examined and considered all of them, and that we are not able to bring ourselves to the conclusion that there is any principle of law which, upon the facts appearing upon this case, imposes any liability upon the defendant for the damages claimed.

The judgment of the General Term should therefore be affirmed, with costs.

All concur.

NEW YORK COURT OF APPEALS (2d Div.).

GOSHEN NATIONAL BANK, *Appl.*,

v.
William BINGHAM *et al.*, *Recpts.*

William BINGHAM *et al.*, *Recpts.*

v.
GOSHEN NATIONAL BANK, *Appl.*

(118 N. Y. 349.)

1. The purchaser of a check, made payable to the drawer's own order, the certification

of which has been procured by fraud, who by mistake of both himself and the payee takes it without the latter's indorsement, holds it subject to all defenses which the bank would have against it in the hands of the payee, even although he pays full value for it without notice of the fraud; and a subsequent indorsement made after the purchaser has received such notice will not render the check valid in his hands, at least in the absence of an express agreement to indorse made at the time of the transfer.

2. A bank is not estopped to deny its liability on a check which it has certified, even as against a bona fide holder for value who

NOTE.—Banking check.

A check is an appropriation or assignment of the specific money called for in the check. *Stoller v. Coates*, 4 West. Rep. 602, 88 Mo. 514.

When deposited it becomes the property of the bank and is credited to the depositor. *Brooks v. Bigelow*, 2 New Eng. Rep. 360, 142 Mass. 6.

An instrument drawn upon a bank simply directing payment, to a party named, of a specified sum of money on deposit with the drawee, without designating a future day of payment, is a check. *Bull v. First Nat. Bank*, 123 U. S. 105 (31 L. ed. 97).

It is the essential characteristic of a check that it is payable on demand. *Harrison v. Nicolle* Nat. Bank (Minn.), 5 L. R. A. 746.

Whether or not a check or draft on a bank be an equitable assignment of the fund, it cannot bind the fund in the hands of the bank until notice of the check or draft is given by presentation for payment or otherwise. *Laclede Bank v. Schuler*, 120 U. S. 511 (30 L. ed. 704).

Until then other checks drawn afterward may be paid, or other assignments of the fund or part of it may secure priority by giving prior notice. *Ibid.*

A check is not due until it is demanded, and is 7 L. R. A.

not treated as overdue merely because it has not been presented as early as it might have been. *Bull v. First Nat. Bank*, *supra*.

It may be revoked by the drawer before presentment (*Kuhn v. Warren Sav. Bank* (Pa.) 9 Cent. Rep. 620, 20 W. N. C. 230), unless the bank on which it is drawn has accepted or certified it, or otherwise committed itself to its payment. *Kahn v. Walton*, 46 Ohio St. 195.

So where the drawee bank has, before opportunity of presentment, agreed with the holder, who advances the value thereon, to pay it, such drawee becomes in legal effect the acceptor of a bill of exchange, and as such primarily liable. *Farmers & T. Bank v. Allen Co. Bank* (Tenn.) 12 S. W. Rep. 545.

The certificate of a bank that a check is good is equivalent to acceptance. *Merchants Nat. Bank v. State Nat. Bank*, 77 U. S. 10 Wall. 604 (19 L. ed. 1008).

A draft for money drawn on a bank, payable at a day subsequent to its date and to the date of its issue, is not a "check," but is a "bill of exchange" and entitled to grace. *Harrison v. Nicolle* Nat. Bank, *supra*.

A check given for money lost at a game of cards is by the laws of Ohio absolutely void, even in the hands of an indorsee though a bona fide holder.

purchased upon the faith of the certification, where it has never been indorsed by the payee.

2. A bank whose certification of a check has been procured by fraud cannot maintain an action to recover possession thereof against one who has purchased bona fide and for value from the payee, but who took it without the latter's indorsement.

(January 14, 1890.)

A PPEAL by plaintiff from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment entered upon the report of a referee dismissing the complaint in an action to recover possession of a certain check. *Affirmed.*

A PPEAL by defendants from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment entered upon the report of a referee in favor of plaintiff in an action to recover the amount due upon a certain certified check. *Reversed.*

Statement by Parker, J.:

Appeals from judgments rendered by the General Term of the Supreme Court of the First Department, affirming judgments entered upon the reports of a referee.

On November 27, 1884, Benjamin D. Brown applied to the cashier of the Goshen National Bank, at Goshen, N. Y., to cash a sight draft for \$17,000, drawn by him upon the firm of William Bingham & Co. of New York, accompanied by a quantity of the bonds of the West Point Manufacturing Company, of the face value of \$17,000. Brown represented that he had negotiated a sale of these bonds at their face value with William Bingham & Co.; that they had directed him to draw upon them at sight for \$17,000, the draft to be accompanied by the bonds, and that the draft would be paid upon presentation. Such representations were absolutely false. The bonds had no market value. Brown was a bankrupt, and had no funds in the Bank, except such as resulted from the credit given him upon the faith

of the draft on Bingham & Co., accompanied by the bonds. The cashier of the Goshen National Bank, relying upon such representations, cashed the draft of \$17,000, and placed the proceeds to the credit of Brown, upon the books of the Bank. He gave Brown eight drafts on New York for \$12,000, and certified a check drawn by Brown to his own order, dated November 26, 1884, for \$5,000. On the morning of November 28, Brown called at the office of William Bingham & Co., and stated that he wanted to get some currency. Mr. Bingham passed the check to the firm's cashier, directing him to give Brown currency for the amount. The cashier gave him a check drawn on the Corn Exchange Bank for \$5,000. Brown had the check cashed at the Corn Exchange Bank. He also had the New York drafts cashed, amounting to \$12,000, which he had obtained from the Goshen National Bank. After procuring the checks and drafts to be cashed, he fled to Canada, where he remained at the time of the trial of these actions. When Bingham & Co. took from Brown the check certified by the Goshen National Bank, it was not indorsed. The referee found that, "at the time of the transfer of the said certified check by Brown to the plaintiffs, it was intended both by Brown and the plaintiffs that said certified check should be indorsed by Brown, and it was supposed by both parties that he had so indorsed it; and if the plaintiffs had known that it was not indorsed, they would not have paid the consideration therefor." He further found "that Brown made no statement to the defendants, or either of them, at the time of the transfer of the check, . . . that such check was indorsed;" and "prior to the commencement of the action of replevin, the defendants never requested Brown to indorse said check." While Bingham & Co. held the check in question unindorsed, a demand for its return to the Bank, accompanied by a full explanation of the circumstances under which the certification was obtained, was made upon Bingham & Co. in behalf of the Bank; and, upon their refusal to return it, an action to recover its possession

without notice. *Lagonda Nat. Bank v. Portner*, 21 Ohio L. J. 383.

The negotiability of a check is not affected by the fact that it is payable "in current funds." *Bull v. First Nat. Bank*, *supra*.

Checks do not generally operate as equitable assignments.

Checks and bills of exchange, whether accepted or not by the drawee, do not generally operate as equitable assignments, even when funds have been placed in the drawee's hands to meet their payment (*Kuhn v. Warren Sav. Bank* (Pa.) 9 Cent. Rep. 622; *Lynch v. First Nat. Bank*, 9 Cent. Rep. 565, 107 N. Y. 179; *Florence Min. Co. v. Brown*, 124 U. S. 385, 31 L. ed. 424; *Harris v. Clark*, 3 N. Y. 98; *Marine & F. Ins. Bank v. Jauncey*, 3 Sandf. 257; *Luff v. Pope*, 5 Hill, 413; *Pope v. Luff*, 7 Hill, 577; *Phillips v. Stagg*, 2 Edw. Ch. 108; *Sands v. Matthews*, 37 Ala. 399; *First Nat. Bank v. Dubuque*, 8 W. R. Co. 52 Iowa, 373; *Jones v. Pacific Wood, L. & F. Co.* 13 Nev. 359; *Kimball v. Donald*, 20 Mo. 577; *Hopkins v. Beebe*, 26 Pa. 85; *Greenfield's Estate*, 24 Pa. 232; *Mandeville v. Welch*, 18 U. S. 5 Wheat. 277, 5 L. ed. 87; 3 Pom. Eq. Jur. 295), unless made so by specific agreement. *Cowperthwaite v. Sheffield*, 3 N. Y. 243; *Lowery v. Steward*, 25 N. Y. 239; *Harwood v. Tucker*, 18 Ill. 544.

7 L. R. A.

If drawn on a specific fund, a bill of exchange may operate as an equitable assignment of the fund. *Kahnweiler v. Anderson*, 78 N. C. 133.

A check not accepted or certified by the cashier does not create a lien on money, which the holder can enforce against the bank. *Florence Mining Co. v. Brown*, 124 U. S. 385 (31 L. ed. 424).

It cannot bind the fund in the hands of the bank until notice of the check or draft is given by presentation for payment or otherwise. *Laclede Bank v. Schuler*, 120 U. S. 511 (30 L. ed. 704).

Until then, other checks drawn afterward may be paid, or other assignments of the fund or part of it may secure priority by giving prior notice. *Ibid.*

Acceptance of forged paper.

Where one accepts forged paper purporting to be his own, and pays it to a holder for value, he cannot recall the payment. *Cooke v. United States*, 91 U. S. 399 (23 L. ed. 237).

Where a bill of exchange is placed in circulation by the drawer with the forged indorsement of the payee upon it, and the drawee accepts and pays it to a bona fide holder, he cannot, after the discovery of the forgery, recover of such holder. The insolvency of the drawer is immaterial. *Hortsmann v. Henshaw*, 52 U. S. 11 How. 177 (13 L. ed. 688).

was commenced by the Bank against Bingham & Co. That action is firstly above entitled. Subsequently, and on December 16th, Bingham & Co. obtained from Brown a power of attorney to indorse the check. Pursuant thereto, the check was indorsed, and payment thereafter demanded of the Bank. This was refused, and thereupon the action secondly above entitled was commenced by Bingham & Co. to recover the amount of the check.

Mr. Henry Bacon, with Mr. B. R. Champion, for appellant:

Bingham & Co., having taken this certified check without having or requiring an indorsement of it by Brown, held it subject to all the defenses and equities existing between the original parties.

Harrop v. Fisher, 80 L. J. N. S. (C. P.) 288; *Culder v. Billington*, 15 Me. 398; *Osgood v. Artt*, 17 Fed. Rep. 575; *Central Trust Co. v. First Nat. Bank*, 101 U. S. 68 (25 L. ed. 876); *Franklin Bank v. Raymond*, 8 Wend. 69; *Hedges v. Sealy*, 9 Barb. 214; *Raynor v. Hoagland*, 7 Jones & S. 11, affirmed, 64 N. Y. 630; *Muller v. Pondir*, 55 N. Y. 825; *Ffreund v. Importers & T. Nat. Bank*, 76 N. Y. 852; *Davis Sewing Mach. Co. v. Rest*, 7 Cent. Rep. 68, 105 N. Y. 69; *Lynch v. First Nat. Bank*, 9 Cent. Rep. 584, 107 N. Y. 179.

The indorsement by Brown, subsequently procured after full notice and actual knowledge of the fraud perpetrated by Brown in obtaining the certificate, does not make Bingham & Co. bona fide holders for value without notice.

Harrop v. Fisher, *supra*; *Whistler v. Forster*, 14 C. B. N. E. 248; *Savage v. King*, 17 Me. 301; *Haskell v. Mitchell*, 58 Me. 464; *Clark v. Whitaker*, 50 N. H. 474; *Clark v. Callison*, 7 Ill. App. 203; *Story, Bills*, § 201; *Story, Prom. Notes*, § 120; *Lancaster Nat. Bank v. Taylor*, 100 Mass. 18; *Gilbert v. Sharp*, 2 Lana. 412.

The Bank is not estopped from asserting its rights to, and defense against, this check by reason of its certificate.

Where money is paid on a raised check by mistake, neither party being in fault, the general rule is that it may be recovered back as paid without consideration. But if either party has been guilty of negligence or carelessness by which the other has been injured, the negligent party must bear the loss. *Espy v. First Nat. Bank*, 85 U. S. 18 Wall. 604 (21 L. ed. 947).

Where bills of exchange were drawn, accompanied with a forged bill of lading, and were discounted by a bank, and subsequently accepted and paid by the acceptors, they cannot recover back from the bank the money paid by them, on the ground of the forgery of which the bank was ignorant at the time of this discount. *Hoffman v. National City Bank*, 79 U. S. 12 Wall. 181 (20 L. ed. 386). See *Corn Exchange Bank v. Farmers Nat. Bank*, *ante*, p. 559.

Where treasury notes were payable at the treasury, their redemption did not retire them, and if forged, until the order of the Secretary of the Treasury for their redemption was made, it cannot be said that the government had accepted and adopted them as genuine. *Cooke v. United States*, 91 U. S. 399 (23 L. ed. 237).

If a bank accept a forged check, and make entry therefor to the depositor's credit, it is equivalent to cash payment; and the depositor, if innocent, 7 L. R. A.

Mechanics Bank v. New York & N. H. R. Co. 13 N. Y. 599; *Clark v. Sisson*, 22 N. Y. 812; *Bush v. Lathrop*, 23 N. Y. 535; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41; *Fairbanks v. Sargent*, 5 Cent. Rep. 919, 104 N. Y. 108.

The Bank has the right to maintain an action of claim and delivery for the certified check. The action of replevin, or claim and delivery, lies in favor of an acceptor of a draft, or the maker of a note for the draft or the note itself.

8 Wait, Pr. 712; 5 Wait, Act. and Def. 477; *Graves v. Dudley*, 20 N. Y. 76; *Black River Ins. Co. v. New York S. L. & Trust Co.* 73 N. Y. 262; *Knebus v. Williams*, 1 Duer, 597; *Munsell v. Flood*, 18 Jones & S. 460.

So also trover lies.

Murray v. Burling, 10 Johns. 172; *Decker v. Mathews*, 12 N. Y. 813; *Develin v. Coleman*, 50 N. Y. 581; *Powell v. Powell*, 71 N. Y. 71; *Comstock v. Hier*, 73 N. Y. 289; *Thayer v. Manley*, 73 N. Y. 305; *Decker v. Mathews*, 5 Sandf. 439.

Whenever trover lies replevin in the detinet will lie.

Evans v. Kymmer, 1 Barn. & Ad. 528; *Jones v. Fort*, 9 Barn. & C. 764; *Barrett v. Warren*, 3 Hill, 348; *Ross v. Casnidv*, 27 How. Pr. 416; *Pierce v. Van Dyke*, 6 Hill, 613.

Messrs. Carpenter & Mosher, for respondents:

The respondents have good title to the check, as against the appellant, and have a perfect right of action upon it.

See 1 Daniel, Neg. Inst. §§ 769 *a*, 780, 781.

Through inadvertence and mistake, the formality of indorsement was omitted, but equity looks upon that as done which ought to have been done, and supplies a remedy on that theory.

1 Story, Eq. Jur. § 64 *g*.

The act which chancery decrees to be done is the same act that would have existed had it been done when it was agreed to be done.

Jordan v. Cooper, 3 Serg. & R. 564; *Atwood v.*

has a vested right to the sum credited. *Levy v. Bank of United States* (Sup Ct. Pa.), 4 U. S. 4 Dall. 234 (1 L. ed. 814).

A bank which has cashed a forged check presented by a clerk or agent having apparent authority to present it and receive the proceeds, is entitled to recover from the principal or employer, although the authority actually conferred did not extend to bank transactions. *Levy v. Hastings First Nat. Bank* (Neb.) 48 N. W. Rep. 354.

A bank which pays a forged check upon comparison of the signature with the genuine signature in its own books, and without requiring identification of the person to whom it pays, does so at its peril; and where the check is drawn upon another bank, which pays the amount to the bank cashing it, the latter will be liable to the bank upon which it is drawn, upon discovery that it is forged. *First Nat. Bank v. State Bank*, 22 Neb. 763.

If a check payable to a payee named, or order (it having been delivered to the payee), comes into the hands of one not entitled to it, who forges the payee's indorsement, and passes the check to another person, who receives the money on it, such other person is not liable for such money to the drawer, but may be liable to the payee. *Hensel v. Chicago, St. P. M. & O. R. Co.* 37 Minn. 87.

Vincent, 17 Conn. 575; *Hale v. Omaha Nat. Bank*, 49 N. Y. 626; *Husted v. Ingraham*, 75 N. Y. 251; *Gardener v. Pullen*, 2 Vern. 894; *Boardman v. Lake Shore & M. S. R. Co.* 84 N. Y. 157; *Evans v. Wood*, L. R. 5 Eq. 9; *Paine v. Hutchinson*, L. R. 3 Ch. App. 388; *Hughes v. Nelson*, 29 N. J. Eq. 547; 1 Story, Eq. Jur. § 99 b; *Smith v. Pickering*, Peake, N. P. 69; *Watkins v. Maule*, 2 Jac. & W. 237; *Bacon v. Cohen*, 12 Smedes & M. 516.

The indorsement made in pursuance of the original intention of the parties related back to the time when it should have been made, and gave to Bingham & Co., even at law, the full rights of holders by indorsement at that time.

Smith v. Pickering, *supra*; *Wallace v. Hardacre*, 1 Camp. 45; *Anonymous*, 1 Camp. 492; *Baker v. Arnold*, 8 Caines, 279; *Watkins v. Maule*, *supra*.

The Bank is estopped by its certification to dispute its liability on the check.

Merchants Nat. Bank v. State Nat. Bank, 77 U. S. 10 Wall. 604 (19 L. ed. 1009). See also U. S. Rev. Stat. § 5208; Bigelow, Estoppel, 8d ed. 388.

This estoppel is quite independent of the indorsement of the check, and operates in favor of anyone who acts upon the faith of it.

Freund v. Importers & T. Nat. Bank, 76 N. Y. 352.

Parker, J., delivered the opinion of the court:

As against Brown, to whose order the check was payable, the Bank had a good defense. But it could not defeat a recovery by a bona fide holder, to whom the check had been indorsed for value. By an oversight on the part of both Brown and Bingham & Co., the check was accepted and cashed without the indorsement of the payee. Before the authority to indorse the name of the payee upon the check was procured, and its subsequent indorsement thereon, Bingham & Co. had notice of the fraud, which constituted a defense for the Bank as against Brown. Can the recovery had be sustained? It is too well settled by authority, both in England and in this country, to permit of questioning, that the purchaser of a draft or check who obtains title without an indorsement by the payee holds it subject to all equities and defenses existing between the original parties, even though he has paid full consideration, without notice of the existence of such equities and defenses. *Harrop v. Fisher*, 80 L. J. N. S. (C. P.) 283; *Whistler v. Forster*, 14 C. B. N. S. 244; *Savage v. King*, 17 Me. 301; *Clark v. Callison*, 7 Ill. App. 263; *Haskell v. Mitchell*, 53 Me. 463; *Clark v. Whitaker*, 50 N. H. 474; *Caldar v. Burlington*, 15 Me. 398; *Lancaster Nat. Bank v. Taylor*, 100 Mass. 18; *Gilbert v. Sharp*, 2 Lana. 412; *Hedges v. Sealy*, 9 Barb. 214-218; *Franklin Bank v. Raymond*, 8 Wend. 69; *Raynor v. Hoagland*, 7 Jones & S. 11; *Muller v. Poindir*, 55 N. Y. 825; *Freund v. Importers & T. Nat. Bank*, 76 N. Y. 352; *Central Trust Co. v. First Nat. Bank*, 101 U. S. 68 [25 L. ed. 876]; *Osgood v. Artt*, 17 Fed. Rep. 575.

The reasoning on which this doctrine is founded may be briefly stated as follows: The general rule is that no one can transfer a better title than he possesses. An exception

arises out of the rule of the law-merchant as to negotiable instruments. It is founded on the commercial policy of sustaining the credit of commercial paper. Being treated as currency in commercial transactions, such instruments are subject to the same rule as money. If transferred by indorsement, for value, in good faith and before maturity, they become available in the hands of the holder, notwithstanding the existence of equities and defenses which would have rendered them unavailable in the hands of a prior holder. This rule is only applicable to negotiable instruments which are negotiable according to the law-merchant. When, as in this case, such an instrument is transferred, but without an indorsement, it is treated as a chose in action assigned to the purchaser. The assignee acquires all the title of the assignor, and may maintain an action thereon in his own name; and, like other choses in action, it is subject to all the equities and defenses existing in favor of the maker or acceptor against the previous holder. Prior to the indorsement of this check, therefore, Bingham & Co. were subject to the defense existing in favor of the Bank as against Brown and the payee. Evidence of an intention on the part of the transferee to indorse does not aid the plaintiff. It is the act of indorsement, not the intention, which negotiates the instrument; and it cannot be said that the intent constitutes the act.

The effect of the indorsement made after notice to Bingham & Co. of the Bank's defense must now be considered. Did it relate back to the time of the transfer, so as to constitute the plaintiffs holders by indorsement as of that time? While the referee finds that it was intended both by Brown and the plaintiff that the check should be indorsed, and it was supposed that he had so indorsed it, he also finds that Brown made no statement to the effect that the check was indorsed; neither did the defendants request Brown to indorse it. There was therefore no agreement to indorse. Nothing whatever was said upon the subject. Before Brown did agree to indorse, the plaintiff had notice of the Bank's defense. Indeed, it had commenced an action to recover possession of the check. It would seem, therefore, that, having taken title by assignment,—for such was the legal effect of the transaction, by reason of which the defense of the Bank against Brown became effectual as a defense against a recovery on the check in the hands of the plaintiffs as well,—Brown and Bingham & Co. could not by any subsequent agreement or act so change the legal character of the transfer as to affect the equities and rights which had accrued to the Bank; that the subsequent act of indorsement could not relate back so as to destroy the intervening rights and remedies of a third party. This position is supported by authority. *Harrop v. Fisher*, *Whistler v. Forster*, *Savage v. King*, *Haskell v. Mitchell*, *Clark v. Whitaker*, *Clark v. Callison*, *Lancaster Nat. Bank v. Taylor*, *Gilbert v. Sharp*, cited *supra*. *Watkins v. Maule*, 2 Jac. & W. 248, and *Hughes v. Nelson*, 29 N. J. Eq. 547, are cited by the plaintiff in opposition to the view we have expressed.

In *Watkins v. Maule* the holder of a note obtained without indorsement collected it from

the makers. Subsequently the makers complained that the note was only given as a guaranty to the payee, who had become bankrupt. Thereupon the holder refunded the money and took up the note, upon the express agreement that the makers would pay any amount which the holders should fail to make out of the bankrupt payee's property. The makers were held liable for the deficiency.

Hughes v. Nelson did not involve the precise question here presented. The views expressed, however, are in conflict with some of the cases cited; but we regard it, in such respect, as against the weight of authority.

Freund v. Importers & T. Nat. Bank, supra, does not aid the plaintiff. In that case it was held that the certification by the bank of a check in the hands of a holder who had purchased it for value from the payee, but which had not been indorsed by him, rendered the bank liable to such holder for the amount thereof. By accepting the check the bank took, as it had the right to do, the risk of the title which the holder claimed to have acquired from the payee. In such case the bank enters into contract with the holder by which it accepts the check and promises to pay it to the holder, notwithstanding it lacks the indorsement provided for; and it was accordingly held that it was liable upon such acceptance, upon the same principles that control the liabilities of other acceptors of commercial paper. *Lynch v. First Nat. Bank*, 107 N. Y. 188, 9 Cent. Rep. 564.

But one question remains. The learned referee held, and in that respect he was sustained by the general term, that the Bank by its certification represented to everyone that Brown had on deposit with it \$5,000; that such amount had been set apart for the satisfaction of the check, and that it should be so applied whenever the check should be presented for payment;

and that, Bingham & Co. having acted upon the faith of these representations, and having parted with \$5,000 on the strength thereof, the Bank is estopped from asserting its defense. The referee omitted an important feature of the contract of certification. The Bank did certify that it had the money, would retain it and apply it in payment, provided the check should be indorsed by the payee. *Lynch v. First Nat. Bank, supra*.

If the check had been transferred to plaintiffs by indorsement, the defendant would have had no defense, not because of the doctrine of estoppel, but upon principles especially applicable to negotiable instruments. *Mechanics Bank v. New York & N. H. R. Co.* 18 N. Y. 639.

If the maker or acceptor could ever be held to be estopped by reason of representations contained in a negotiable instrument, he certainly could not be in the absence of a compliance with the provisions upon which he had represented that his liability should depend. But it is well settled that the maker or acceptor of a negotiable instrument is not estopped from contesting its validity because of representations contained in the instrument. In such cases an estoppel can only be founded upon some separate and distinct writing or statement. *Clark v. Sisson*, 22 N. Y. 812; *Rush v. Lathrop*, Id. 535; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41; *Fairbanks v. Sargent*, 104 N. Y. 108, 5 Cent. Rep. 919; *Mechanics Bank v. New York & N. H. R. Co. supra*.

The views expressed especially relate to the action of Bingham & Co. against the Bank, and call for a reversal of the judgment.

We are of the opinion that the action brought by the Bank against Bingham & Co. to recover possession of the check cannot be maintained, and in that case the judgment should be affirmed.

All concur, except Haight, J., not sitting.

ALABAMA SUPREME COURT.

YELLOWSTONE KIT, *Appt.*,

STATE OF ALABAMA.

(....Ala....)

1. The word "lottery," within the meaning of statutes against carrying on

NOTE.—*Lottery defined.*

A lottery is a scheme by which a result is reached by some action or means taken, in which result man's choice or will has no part, and which human reason, foresight, sagacity or design cannot enable him to know or determine until the same has been accomplished. See *note* to *People v. Elliott* (Mich.) 3 L. R. A. 408, for a full discussion of the offense.

Where for a pecuniary consideration it is determined by lot or chance, according to some scheme, what and how much he who pays the money is to have for it, it is a lottery. *Hull v. Ruggles*, 66 N. Y. 424; *State v. Clarke*, 33 N. H. 336; *Wilkinson v. Gill*, 74 N. Y. 66.

It is a scheme for the distribution of prizes by chance (Conn. v. Manterfield, 8 Phila. 459; *State v. Lovell*, 99 N. J. L. 461; *Randle v. State*, 42 Tex. 836), a valuable consideration being given for the chance to draw the prize. *United States v. Olney*, 1 Dedy, 464, 1 Abb. U. S. 275. See *Anderson*, Law Dict. *Lottery*, to which we are indebted. 7 L. R. A.

lotteries, embraces only schemes in which a valuable consideration of some kind is paid directly or indirectly for the chance to draw a prize.

2. Distributing prizes by lot or chance to holders of tickets given away is not carrying on a lottery, although it may be done with the view of drawing a large crowd together in the hope of profit from such of them as may choose to buy

A game in which a price is paid for the chance of a prize is a lottery. *Com. v. Sullivan*, 5 New Eng. Rep. 712, 146 Mass. 142; *Com. v. Wright*, 137 Mass. 250.

The sale of "polioles" entitling the purchaser to receive money on the drawing of numbers in a lottery is the sale of a lottery ticket. *Smith v. State*, 10 Cent. Rep. 627, 68 Md. 163.

What constitutes a "lottery."

The word "lottery" imports a game of hazard. *France v. State*, 6 Bart. 478.

"Auction pools," "French pools" and "combination pools" upon horse races are "lotteries," within the New Jersey statutes. *State v. Lovell*, 39 N. J. L. 458.

Where chances are sold and the distribution of prizes is awarded by lot, it constitutes a "lottery." *Buckalew v. State*, 62 Ala. 334; *Bell v. State*, 5 Sneed, 507.

It is not necessary that the lot should be actually cast or drawn by the managers, or that the party

medicines from the distributor, or tickets to performances given by him, or to pay for seats in the tent where the prizes are selected, where no payment for any purpose is necessary as a condition of receiving a prize.

(January 31, 1890.)

APPEAL, by defendant from a judgment of the City Court of Mobile rendered against him after trial of an indictment charging him with the offense of setting up or being concerned in setting up or carrying on a lottery. *Reversed*

After the evidence was all in defendant requested the court to instruct the jury that, if they believed the evidence, they must find him not guilty. The court refused to give such charge and defendant excepted.

Further facts appear in the opinion.

Messrs. McCurrou & Lewis and B. M. Allen, for appellant:

paying should personally participate in the drawing. *Fleming v. Bille*, 3 Or. 236.

The distribution of prizes by lot to the holders of tickets given to subscribers to a newspaper is a "lottery" scheme. *State v. Mumford*, 73 Mo. 647.

A scheme of a benevolent association, to provide for the care and maintenance of the state insane, to distribute among ticket-holders to a public entertainment prize by raffle or other similar schemes, is a "lottery." *State v. Overton*, 16 Nev. 136.

A sale of envelopes containing, with other things, a card indicating an article to be purchased for a sum of money is a violation of the Statute against sale of lottery tickets. *Dunn v. People*, 40 Ill. 465.

The issue of bonds by a foreign government to obtain a loan, the government obliging itself to pay any additional sum over the principal and interest, and the premium named, in case the number of the bond purchased should draw a prize, is not an "illegal lottery," within the New York statutes. *Kohr v. Koehler*, 96 N. Y. 362.

A sale of certificates of subscription to a scientific and art association, which entitles holders to any articles which may be awarded to them by lot, is not a "lottery." *Boyd v. State*, 61 Ala. 177. See *Tuscaloosa Scientific & Art Asso. v. State*, 58 Ala. 54.

Keno, although a game of chance, and therefore unlawful, is not a "lottery." *Eslava v. State*, 44 Ala. 406; *United States v. Hornbrook*, 2 Dill. 229.

A raffle is not a "lottery" in the sense of the South Carolina statute. *State v. Pinchback*, 2 Mill. Const. Rep. (S. C.) 128.

For earlier decisions, see *Com. v. Thacher*, 97 Mass. 568; *Den v. Shotwell*, 23 N. J. L. 465, 24 N. J. L. 789; *Rolfe v. Delmar*, 7 Robt. 80.

Gift enterprise, a lottery.

A gift enterprise is a lottery. *State v. Bryant*, 74 N. C. 207; *State v. Shorts*, 32 N. J. L. 398.

A ticket to admit to a grand concert and to whatever gift may be awarded to its number is a lottery ticket. *Nexley v. Devlin*, 12 Abb. Pr. N. S. 210; *Ex parte Blanchard*, 9 Nev. 101.

A ticket given for \$5 in payment for a steel engraving and admission to entertainments at the close of which money in presents was to be distributed to the purchasers, is a scheme for the distribution of prizes by chance. *Thomas v. People*, 59 Ill. 160; *Almshouse v. American Art Union*, 82 How. Pr. 341, 7 N. Y. 223; *People v. American Art Union*, 7 N. Y. 240; *People v. American Art Union*, 13 Barb. 577; *Bennett v. American Art Union*, 5 Sandf. 614.

Every scheme for the distribution of prizes by 7 L. R. A.

Defendant distributed articles of value by lot or chance, but holders of tickets paid no consideration of any kind for their tickets; in other words, no consideration of any kind was paid for the right of participating in the distribution of prizes. Such a scheme is not a lottery within the letter or spirit of § 4068 of the Code of 1886.

United States v. Olney, 1 Abb. (U. S.) 275.

To constitute a lottery, there must be two elements: first, there must be something paid for the ticket or chance to draw a prize; and second, there must be a distribution of prizes by lot or chance.

Almshouse v. American Art Union, 7 N. Y. 238; *Bishop*, Stat. Cr. § 952; *State v. Shorts*, 32 N. J. L. 398; *Boyd v. State*, 61 Ala. 177; *Luckless v. State*, 63 Ala. 334; *Eslava v. State*, 44 Ala. 406; *Salomon v. State*, 28 Ala. 83; *Kohn v. Koehler*, 96 N. Y. 362, 48 Am. Rep. 628; *Com. v. Wright*, 137 Mass. 250, 50 Am.

chance is a lottery. *Randle v. State*, 43 Tex. 580. See *Hull v. Ruggles*, 56 N. Y. 424; *Swain v. Bussell*, 10 Ind. 428.

A scheme for the disposal of two lots where the chance of obtaining a reserved or prize lot forms part of the inducement of the purchase is a lottery. *United States v. Olney*, 1 Abb. (U. S.) 275.

Selling candy in boxes, each box represented as containing a prize, the purchaser to select his box, is in the nature of a lottery. *Holoman v. State*, 3 Tex. App. 610; *Eubanks v. State*, 3 Heisk. 488; *Hull v. Ruggles*, 56 N. Y. 424.

The sale of packages of candy, in some of which coupons were placed payable at the counter on presentation, is a distribution of prizes by chance, and hence a lottery. *Com. v. Sherid (Pa.)* 10 Phila. 208; *State v. Lumsden*, 59 N. C. 672.

Mailing circulars an offense under U. S. Rev. Stat.

The mailing of circulars describing a scheme for drawing prizes by chance or by lot, by which a city or foreign government induces the purchase of its bonds, is a mailing of lottery circulars, and as such unlawful. *United States v. Zeisler*, 30 Fed. Rep. 499.

The offense is complete though the circulars are sent in reply to a detective's decoy letter. *United States v. Moore*, 19 Fed. Rep. 39.

But § 3894, U. S. Rev. Stat., does not apply to the naked sending to the postoffice (*United States v. Dauphin*, 20 Fed. Rep. 635); for before the custody of the letter by the postoffice or its agents, and after their voluntary termination of such custody, the rights of the proprietor are under the protection of the local law. *Ibid*.

A letter addressed to a fictitious name is within the statute prohibiting the deposit in the mail of a lottery circular. *United States v. Duff*, 19 Blatchf. 2.

As to distinction between letter and circular, see *United States v. Noelke*, 17 Blatchf. 554.

The provisions of U. S. Rev. Stat., giving to the Postmaster-General power to return registered letters and suspend payment of money orders addressed to those conducting lotteries, are constitutional. *Dauphin v. Key*, MacArthur & Mack. 333.

An indictment for sending "500 circulars" charges but one offense. *United States v. Patty*, 9 Biss. 429.

But where it charges them as delivered on different days, it is bad for duplicity. *Ibid*.

Legislation on the subject of lotteries.

There is no law in Michigan which prohibits or punishes the receiving of a prize drawn in a lottery, if it is voluntarily paid. *People v. Watson*, 73 Mich. 582.

Rep. 806; *Den v. Shattwell*, 23 N. J. L. 465; *Johnson v. State*, 88 Ala. 65.

Messrs. William L. Martin and Leslie B. Sheldon for the State.

Somerville, J., delivered the opinion of the court:

The defendant was convicted of the offense of carrying on a lottery in this State. The case turns largely on what is to be taken as a proper definition of the word "lottery," within the meaning of the Statute and the Constitution of Alabama. Code 1886, §§ 4003, 4069; Const. 1875, art. 4, § 28. The word cannot be regarded as having any technical or legal signification different from the popular one. It is defined by Webster as "a distribution of prizes by lot or chance." This definition is substantially adopted by Bouvier and Rapalje in their Law Dictionaries. Worcester defines it as "a distribution of prizes and

blanks by chance; a game of hazard in which small sums are ventured for the chance of obtaining a larger value."

So the American Cyclopaedia thus defines a lottery: "A sort of gaming contract, by which, for a valuable consideration, one may, by favor of the lot, obtain a prize of a value superior to the amount of value of that which he risks."

In *Buckalew v. State*, 62 Ala. 334, it was said, after citing Webster's definition, that "wherever chances are sold, and the distribution of prizes determined by lot, this, it would seem, is a lottery. This, we think, is the popular acceptance of the term."

In Bishop on Statutory Crimes, § 952, it is said: "A lottery may be defined to be any scheme whereby one, in paying money or other valuable thing to another, becomes entitled to receive from him such a return in value, or nothing, as some formula of chance may determine."

But, under How. Stat. (Mich.), § 931, setting up and promoting a lottery for money is prohibited. *People v. Elliott*, 3 L. R. A. 403, and *note*.

The Louisiana Constitution of 1879, expressly recognizing as a contract, except as to its monopoly clause, the charter of the Louisiana State Lottery Company which had been previously repealed, revived that charter as therein modified. *New Orleans v. Houston*, 119 U. S. 265 (30 L. ed. 411).

The clause in the charter, limiting taxation upon it to \$40,000 per annum, is thus by constitutional provision made a contract which the Legislature cannot impair, although the subject matter would be otherwise within the police power of the State. *Ibid*.

Where the Legislature grants a lottery franchise, and authorizes its sale, the purchaser may for a valuable consideration permit others to enjoy a part of the profits, but cannot assign the franchise so as to enable each assignee to conduct a separate lottery. *Lawrence v. Simmons* (Ky.) 1 L. R. A. 172.

See, as to the history of legislation on this subject, *Anderson, Law Dict. Lottery*, 640.

Lotteries, being injurious to the public morals, cannot be made the subject of a contract; and hence a lottery franchise is not under the protection of the Federal Constitution (*Moore v. State*, 48 Miss. 147); nor the State Constitution. *Mississippi Society of Arts and Sciences v. Musgrove*, 44 Miss. 520.

The charter of a lottery company is not within the constitutional protection as to the impairment of the obligation of contracts. *Stone v. Mississippi*, 101 U. S. 814 (25 L. ed. 1079).

The right to suppress lotteries is governmental, to be exercised at all times in the discretion of the government. *Ibid*; *Boyd v. Alabama*, 94 U. S. 645 (24 L. ed. 302).

The contracts which the Constitution protects are such as relate to property rights, not governmental rights. *Boyd v. Alabama*, *supra*.

An Act granting to commissioners the right to sell lottery tickets to raise a fund for the repair of a turnpike is not illimitable as to time. *Phalen v. Virginia*, 49 U. S. 8 How. 163 (13 L. ed. 1000).

Constitutional and statutory prohibition.

A constitutional provision inhibiting lotteries or the sale of lottery tickets is prohibitive on those subjects. *State v. Woodward*, 39 Ind. 110.

Such prohibition is within the exercise of the police power, in the interest of public morals, and is constitutional. *Ibid*., following *Stone v. Mississippi*, 101 U. S. 814 (25 L. ed. 1079), and overruling *Kellum v. State*, 66 Ind. 568. See *Whitney v. State*, 10 Ind. 7 L. R. A.

404; *Riggs v. Adams*, 13 Ind. 199; *Lucas v. McHaire*, 13 Gill & J. L.

A scheme to aid a benevolent association in so far as it authorized a lottery or allowed the sale of lottery tickets is unconstitutional. *Ex parte Blanchard*, 9 Nev. 101. See *State v. Phalen*, 3 Harr. (Del.) 441.

In Texas the Constitution prohibits the authorization of a lottery by the State, and the sale of lottery tickets within the State, and renders nugatory legislation as to a gift enterprise and the license tax imposed on such business. *Handle v. State*, 42 Tex. 580.

Under the Tennessee Code the vending or attempt to vend a lottery ticket is made a misdemeanor, and a due bill given by an agent to his principal on account of money received for sale of tickets cannot be enforced. *Lanahan v. Pattison*, 1 Filipp. 410.

Early cases construing statutory prohibitions of lotteries and sale of lottery tickets. *Terry v. Olcott*, 4 Conn. 442; *Williams v. Woodman*, 8 Pick. 78; *Com. v. Lottery Tickets*, 5 Cush. 269; *Com. v. Harris*, 13 Allen, 534; *Freleigh v. State*, 8 Mo. 606; *State v. Sterling*, 8 Mo. 697; *Ridgeway v. Underwood*, 4 Wash. C. C. 129; *Van Doren v. Staats*, 3 N. J. L. 887; *Hunt v. Knickerbocker*, 5 Johns. 387; *Mount v. Waite*, 7 Johns. 434; *Butler v. Kent*, 19 Johns. 223; *McLaughlin v. Waite*, 9 Cow. 670; *People v. Warner*, 4 Barb. 314; *Phalen v. Com.* 1 Rob. (Va.) 713.

Authorization of lotteries, and regulation by statute.

No uncertain or doubtful terms or provisions in a charter will be construed to authorize a lottery scheme. *Boyd v. State*, 53 Ala. 601.

An express authorization by a constitutional law to maintain a lottery may be exercised although the general laws prohibit lotteries. *Broadbent v. Tuscaloosa Scientific & Art. Assn.* 45 Ala. 170.

A lottery franchise expires when the amount to be raised is provided for by contract, whether the whole amount has been paid to the beneficiary or not. *State v. France*, 72 Mo. 41. See *Phalen v. State*, 12 Gill & J. 18.

In such an association the designation of things which may be distributed by lot excludes other things not comprehended in the franchise; hence money cannot be substituted for the award drawn. *Marks v. State*, 45 Ala. 28.

The punitive section of the Louisiana Act as to sale of lottery tickets was not abrogated by the Constitution of that State declaring void all laws

In *Hull v. Ruggles*, 56 N. Y. 424, the New York Court of Appeals adopts the following as the result of the accepted definitions: "Where a pecuniary consideration is paid, and it is to be determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to receive for it, that is a lottery." This definition is approved in *Wilkinson v. Gill*, 74 N. Y. 63, as the popular meaning of the word, and one proper to be adopted with a view of remedying the mischief intended to be prevented by the Statutes prohibiting lotteries, and it is said: "Every lottery has the characteristics of a wager or bet, although every bet is not a lottery."

It may be safely asserted, as the result of the adjudged cases, that the species of lottery, the carrying on of which is intended to be prohibited as criminal by the various laws of this country, embraces only schemes in which a valuable consideration of some kind is paid, directly or indirectly, for the chance to draw a prize. *United States v. Olney*, 1 Deady, 461, 1 Abb. (U. S.) 273; *Almahouse v. American Art*

Union, 7 N. Y. 228; *Ehrgott v. New York*, 96 N. Y. 264, 48 Am. Rep. 622; *Bell v. State*, 5 Sneed, 507; *Com. v. Thacher*, 97 Mass. 583.

There is no law which prohibits the gratuitous distribution of one's property by lot or chance. If the distribution is a pure gift or bounty, and not in name or pretense merely, which is designed to evade the law,—if it be entirely unsupported by any valuable consideration moving from the taker,—there is nothing in this mode of conferring it which is violative of the policy of our Statutes condemning lotteries or gaming. We may go further, and say that there would seem to be nothing contrary to public policy, or *per se* morally wrong, in the determination of rights by lot. A member of the College of Christian Apostles, as sacred history informs us, was once chosen by lot. And under the law of this State a tie vote on a contested election of any state officer is required to be settled in the same mode. So our statutes authorize a distribution of property owned by joint tenants to be made by lot under the direction of the judge of probate. These are not the evils against which

contrary to its provisions. *State v. First Dist. Judge*, 32 La. Ann. 719.

An Act passed by a Territorial Legislature authorizing money to be raised by lottery to procure a library and apparatus for the university has never been repealed and is valid. *Kellum v. State*, 66 Ind. 688.

An Act of Congress empowering the corporation of Washington to authorize lotteries does not authorize it to force the sale of the tickets in States where such sales are prohibited. *Cobens v. Virginia*, 19 U. S. 8 Wheat. 284 (5 L. ed. 267).

Such power cannot be exercised so as to discharge the corporation from its liability in any manner whatever. *Clark v. Washington*, 25 U. S. 12 Wheat. 40 (6 L. ed. 544).

Where the conduct of the managers is bona fide a mere irregularity in the drawing will not vitiate it. *Brent v. Davis*, 23 U. S. 10 Wheat. 305 (6 L. ed. 360).

The corporation having promised to pay the whole prize on whole tickets was not liable for a prize drawn on a half ticket. A party cannot by his own act split a contract and make the promisor liable to holders for fragments of a share. *Shankland v. Washington*, 30 U. S. 5 Pet. 360 (8 L. ed. 166).

The person entitled to a prize has no recourse against the bond given by the manager for a true and impartial execution of his duty. *Washington v. Young*, 23 U. S. 10 Wheat. 406 (6 L. ed. 352).

Where a party fraudulently draws his own ticket he cannot defend his fraud on the ground that the lottery was unlawful. *Catts v. Phalen*, 43 U. S. 2 How. 376 (11 L. ed. 306).

A law imposing a special tax for selling lottery tickets, and, for nonpayment, liability to indictment, is constitutional. *License Tax Cases*, 72 U. S. 5 Wall. 463 (18 L. ed. 497).

See early decisions on statutes of the various States:

Connecticut.

Barnum v. Barnum, 9 Conn. 242; *Phalen v. Clark*, 19 Conn. 421.

Delaware.

Vannini v. Paine, 1 Harr. (Del.) 65; *Gregory v. Bailey*, 4 Harr. (Del.) 256; *Rogers v. Bailey*, 4 Harr. (Del.) 256.

Georgia.

Green v. Barnwell, 11 Ga. 228; *McKenny v. Comp-ton*, 18 Ga. 170; *Swan v. State*, 29 Ga. 618.
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Kentucky.

Clarke v. Havens, 1 A. K. Marsh. 198; *Wendover v. Lexington*, 15 B. Mon. 258; *Gregory v. Shelby College*, 2 Met. (Ky.) 589; *Jameson v. Gregory*, 4 Met. (Ky.) 863.

Maine.

Thomas v. Mahan, 4 Me. 513 (see 7 Me. 502); *Bishop v. Williamson*, 11 Me. 493.

Maryland.

Yates v. O'Neale, 3 Gill & J. 233; *Broadbent v. State*, 7 Md. 416; *State v. Wolfe*, 8 Har. & J. 224; *City Bank v. Smith*, 3 Gill & J. 285; *Lucas v. Lottery Comrs.* 11 Gill & J. 490; *Heckart v. McPhail*, 13 Md. 96.

Massachusetts.

Gilbert v. Williams, 8 Mass. 476; *Homer v. Whitman*, 15 Mass. 132.

Missouri.

Lottery allowed to raise money for a charity. *State v. Hawthorn*, 9 Mo. 389.

New Hampshire.

Roby v. West, 4 N. H. 285; *Udall v. Metcalf*, 5 N. H. 366.

Pennsylvania.

Passmore v. Mott, 2 Binn. 201; *Neilson v. Mott*, 3 Binn. 301; *Biddis v. James*, 6 Binn. 321; *Barton v. Hughes*, 2 Browne (Pa.) 48; *Primer v. McConnell*, referred to in 6 Binn. 320; *Seldenbender v. Charles*, 4 Serg. & R. 151; *Yohe v. Robertson*, 2 Whart. 155; *Snyder v. Wolfey*, 8 Serg. & R. 326; *Dows v. White*, 2 Miles (Pa.) 140; *McNight v. Blessecker*, 13 Pa. 323.

South Carolina.

Waddle v. Pickensville Lottery, 3 Nott & McQ. 550; *State v. Allen*, 2 McCord, L. 55.

Vermont.

May v. Brownell, 3 Vt. 466; *Case v. Riker*, 10 Vt. 432; *Catts v. Phalen*, 43 U. S. 2 How. 376 (11 L. ed. 306).

Virginia.

Madison v. Vaughan, 5 Call, 562; *Mayo v. Murchie*, 3 Munf. 366; *Com. v. Chubb*, 5 Rand. 715.

Action for recovery back of money paid and for the penalty.

The statute authorizing the purchaser to recover back double the sum paid and double cost, it is not necessary to show that the money paid was remitted to the proprietors (*Grover v. Morris*, 78 N. Y. 472;

the law is directed. The gratuitous distribution of money or property by lot has never prevailed to such extent as to require police regulation at the hands of the State, nor, so long as human nature remains as it is now is and has been for so many thousand years, is it likely ever to be otherwise. The history of lotteries for the past three centuries in England, and for nearly a hundred years in America, shows that they have been schemes for the distribution of money or property by lot in which chances were sold for money, either directly, or through some cunning device. The evil flowing from them has been the cultivation of the gambling spirit,—the hazarding of money with the hope by chance of obtaining a larger sum,—often stimulating an inordinate love of gain, arousing the most violent passions of one's baser nature, sometimes tempting the gambler to risk all he possesses on the turn of a single card or cast of a single die, and "tending, as centuries of human experience now fully attest, to mendacity and idleness on the one hand, and moral profligacy and debauchery on the other." *Johnson v. State*, 88 Ala. 65.

Gray v. Roberts, 2 A. K. Marsh. 208; and the fact that the lottery was authorized by the law of another State will not make it other than an illegal lottery here. *Grover v. Morris*, 73 N. Y. 473. See early cases: *Day v. State*, 7 Gill, 821; *People v. Gilbert*, Anth. (N. Y.) 191.

A sale of slips of paper with numbers on them, which if drawn would entitle the holder to a prize, is in fact a sale of an interest in or "portion of an illegal lottery" within the statute. *Wilkinson v. Gill*, 10 Hun, 156.

To establish the illegality of the lotteries at the time of the sale, it may be shown that previous and subsequent thereto defendants had engaged in an unlawful business of which the acts complained of are a part. *Roediger v. Simmons*, 14 Abb. Pr. 256.

The complaint must set forth the particular dates and purchases. *Ibid.*

A lottery not for the purpose of disposing of property is not illegal. *People v. Payne*, 3 Denio, 88.

"Playing policy" i. e. selecting certain numbers entitling the payer to prizes, is the purchase of an interest in a lottery for which double the sum paid may be recovered back. *Wilkinson v. Gill*, 74 N. Y. 63.

Prosecution for maintaining a lottery.

The operation of an unauthorized lottery is a punishable offense under Kentucky Gen. Stat. *Miller v. Com.* 18 Bush, 731.

In Alabama it is an indictable offense. *Salomon v. State*, 27 Ala. 28.

The indictment for selling lottery policies must show upon its face that the lottery was illegal. *Com. v. Manderfield* (Pa.) 8 Phila. 457, 1 Pa. Leg. Gaz. 37.

But the words "prize in a lottery" are sufficient for this purpose. *Ibid.*; compare *Crews v. State*, 28 Ind. 28.

That defendant had been previously engaged in the lottery business, and that a paper was found in his pocket headed "Result of race 43," is not sufficient. *State v. Sellver*, 17 Mo. App. 39.

Upon an issue involving the right to maintain a lottery the burden is on the party asserting the right to show that the amount authorized has not yet been raised. *Com. v. Frankfort*, 13 Bush, 185; *Com. v. Bierman*, Id. 245; *Com. v. Bull*, Id. 656; *Miller v. Com.* Id. 731.

Under the Texas Penal Code the establishment of 7 L. R. A.

It is in the light of these facts, and the mischief thus intended to be remedied, that we must construe our statutory and constitutional prohibitions against lotteries and devices in the nature of lotteries. *Ehrigott v. Mayor*, 96 N. Y. 264, 48 Am. Rep. 622.

The cases on this subject are very numerous, and while the courts have shown a general disposition to bring within the term "lottery" every species of gaming involving a distribution of prizes by lot or chance, and which comes within the mischief to be remedied,—regarding always the substance and not the semblance of things so as to prevent evasions of the law,—we find no decision in which the element of a valuable consideration parted with, directly or indirectly, by the purchaser of a chance, does not enter into the transaction. *Buchalew v. State*, 62 Ala. 334; *State v. Bryant*, 74 N. C. 207; *Com. v. Wright*, 187 Mass. 250, 50 Am. Rep. 806; *State v. Clarke*, 83 N. H. 329, 66 Am. Dec. 728; *State v. Shortt*, 83 N. J. L. 298, 90 Am. Dec. 668; *Wilkinson v. Gill*, 74 N. Y. 63, 30 Am. Rep. 264; *Almshouse v. American Art Union*, 7 N. Y. 228; *State v.*

a lottery or disposal of any estate by lottery is made subject to a fine. *State v. Randle*, 41 Tex. 208.

The supreme court has no jurisdiction over cases of conviction as to lotteries. *State v. Houston*, 30 La. Ann. 1174.

For publishing lottery scheme.

To advertise a lottery is unlawful where advertised although the prizes are drawn in a State where it is lawful. *State v. Moore*, 63 N. H. 9. See *Com. v. Clapp*, 5 Pick. 41; *Com. v. Hooper*, Id. 42; *Com. v. Harris*, 13 Allen, 534; *People v. Charles*, 3 Denio, 212, 610; *Charles v. People*, 1 N. Y. 180.

An advertisement by dealers, that on a certain day they will give purchasers of their goods guessing nearest the number of beans in a glass globe in their window a gold watch is an advertisement of a lottery. *Hudelson v. State*, 94 Ind. 428.

On an indictment for publishing a lottery the evidence must show the facts constituting the offense, or that the acts were done by permission or direction of the principal of the publication, here a corporation. *People v. England*, 27 Hun, 139.

For sale of lottery tickets.

The sale of a lottery ticket is illegal under the Constitution and statutes of Missouri, although the ticket had already drawn the prize. The contract is both *malum prohibitum* and against public policy, and equity will not interfere. *Kitchen v. Greenebaum*, 61 Mo. 110.

A sale of three tickets to one person constitutes but one offense. *Fontaine v. State*, 6 Baxt. 514.

In the indictment for sale of lottery tickets it is not essential to set forth the purpose of the lottery. *People v. Noelke*, 94 N. Y. 137, 29 Hun, 461.

The information need not give the name of the purchaser. *State v. Yoke*, 9 Mo. App. 552.

He is not an accomplice of the seller. *People v. Noelke*, *supra*.

An indictment is not vitiated by failure to set out the ticket or the place, name or purpose of the drawing. *France v. State*, 6 Baxt. 478.

Where the indictment sets out the instrument sold, it is sufficient as to the nature of the lottery or the manner of accomplishment of its object. *Dunn v. People*, 27 Hun, 272.

Giving a general description of the ticket, and averring that the sale was unlawful, is sufficient. *Com. v. Bierman*, 13 Bush, 245.

Mumford, 78 Mo. 647; *Hull v. Ruggles*, 56 N. Y. 424; *Thomas v. People*, 59 Ill. 160; *Dunn v. People*, 40 Ill. 485; *Seidenbender v. Charles*, 4 Serg. & R. 151, 8 Am. Dec. 682; *United States v. Oney*, 1 Dedy, 461; *Bell v. State*, 5 Sneed, 507; *Bishop*, Stat. Crimes, 2d ed. § 952; 2 Whart. Crim. Law, 9th ed. § 1491.

In this case it is not denied that the defendant has distributed presents or prizes to the holders of tickets given to the public,—eight prizes among some 8,000 ticket-holders. It is also uncontroverted that this distribution has been made by lot or chance. This was done by two children chosen from the audience, who selected by lot eight tickets from a large number of duplicates which were thrown by the defendant at random on the stage or platform. These tickets were numbered, and the persons holding the corresponding numbers were entitled to these prizes, or presents, according to their number. But we can see nothing in the evidence from which it can be inferred that anyone, present or absent, paid any valuable consideration, directly or indirectly, for these tickets, or for the chance of getting a prize. It is true that, on the day of the drawing, the defendant had held one of his customary performances, consisting of acrobatic contortions,

exhibitions of a magic lantern, and of music, dancing and song, and the like; and between the acts he always sold his medicines for which he claimed great curative virtues. These exhibitions were in a tent which would seat between 900 and 1,000 people, and would furnish standing room for about 2,500 persons. For tickets of admission to see this performance, the closing one of the season, advertised as a "Jubilee" performance, a charge of ten cents was made. But these tickets had no connection whatever with those entitling the holders to a chance for the eight prizes. For these latter tickets or chances nothing was charged. They had been distributed, free, to any and all persons present at his previous performances, and for admission to these exhibitions no charge was made. The only fee charged was for the occupancy of a seat; there was none for entrance. Nor was it necessary that a holder of a successful ticket should be present to get his prize in case he drew one. It would be delivered as well at the defendant's private house. This fact was advertised in a Mobile paper, and one of the prizes was actually delivered there. The suspicion, even though well founded, that these presents may have been given away in order to induce a larger

Early cases as to requisites of indictment. See *Boullemet v. State*, 28 Ala. 83; *State v. Sykes*, 28 Conn. 225; *Markle v. State*, 3 Ind. 535; *Com. v. Braynard*, Thach. Cr. Cas. 148; *Com. v. Pollard*, Thach. Cr. Cas. 260; *Com. v. Johnson*, Thach. Cr. Cas. 284; *Com. v. Eaton*, 15 Pick. 273; *Com. v. Horton*, 2 Gray, 60; *Freleigh v. State*, 8 Mo. 60; *State v. Kenmon*, 21 Mo. 262; *State v. Follet*, 6 N. H. 53; *Pickett v. People*, 8 Hun, 58; *People v. Sturdevant*, 23 Wend. 418; *People v. Taylor*, 3 Denio, 91, 99; *Com. v. Gillespie*, 7 Serg. & R. 408.

Evidence in action.

To convict for the sale of a lottery ticket it must be proved that the paper offered for sale represented a chance in the lottery. *State v. Russell*, 17 Mo. App. 16; *State v. Bruner*, 17 Mo. App. 274. See *Dunn v. People*, 40 Ill. 465.

Evidence that defendant sold a slip of paper bearing certain numbers which might be drawn in a lottery, then intended to be drawn, is sufficient. *State v. Rothschild*, 19 Mo. App. 137.

The character of the ticket and intent of the parties may be proved by similar sales shown to have implied a lottery venture. *State v. Ochsner*, 9 Mo. App. 216.

Conviction.

The jury has the undoubted right, in a prosecution for selling lottery tickets, to disregard the name and indorsement printed on them, and find that they really are lottery tickets, and not what they profess to be,—tickets upon a horse combination. *Boydland v. State*, 69 Md. 511.

On conviction for acting for another in disposing of tickets the solicitor's fee must be taxed. *Ex parte Tompkins*, 58 Ala. 71.

In equity.

Where the Legislature grants a lottery franchise and authorizes its sale, the purchaser may, for a valuable consideration, permit others to share the profits; but he cannot assign the franchise so as to enable each assignee to conduct a separate lottery. *Lawrence v. Simmons* (Ky.) 1 L. R. A. 172.

Bills of interpleader are maintainable where several claimants of a fund, as the amount drawn on a lottery ticket, instead of claiming the whole

fund claim different portions thereof, when the aggregate of all the claims exceeds the full amount of the fund. *Yates v. Tiscala*, 8 Edw. Ch. 71, 6 N. Y. Ch. L. ed. 575, and note; *Fargo v. Arthur*, 48 How. Pr. 198; *Newhall v. Kastena*, 70 Ill. 155; *Atchison Board of Education v. Scoville*, 13 Kan. 17.

Equity may stop the running of a lottery until an accounting is awarded, but will not appoint a receiver to take charge of it. *Lawrence v. Simmons*, *supra*.

Injunction lies against the owner to prevent him from disposing of prizes pending proceedings for their forfeiture under the statute (*People v. Kent*, 6 Cal. 89); although equity will not aid a lottery enterprise. *Commerford v. Thompson*, 2 Flipp. 611.

Yet in Tennessee a bill in equity will lie to compel the managers to adjudge a prize to the person entitled to it. *McGimpsey v. Booker*, 5 Yerg. 129. See *Dass v. Nashville*, Meigs, 421.

When property sold is to be used in aiding and assisting in a lottery, the sale is void. *Hull v. Ruggles*, 65 Barb. 432.

Every contract in aid of a lottery scheme or gift enterprise for the division of property to be determined by chance is void under a statute prohibiting such schemes. *Rothrock v. Parkinson*, 61 Ind. 89.

Securities given for the purchase of lottery tickets cannot be enforced. *Lewis v. Roberts*, 3 T. B. Mon. 406; *Morton v. Fletcher*, 2 A. K. Marsh. 137.

A lease of premises for the sale of lottery tickets is void, and the rent reserved thereon cannot be recovered. *Edelmuth v. McGarren*, 4 Daly, 467.

A note given for a ticket in a prohibited lottery is void. *Hawkins v. Cox*, 2 Cranch, C. C. 173; *Thompson v. Milligan*, Id. 207; *Eberman v. Reitzel*, 1 Watts & S. 181.

But a contract made by a ticket holder after his rights are determined, disposing to a stranger of any specified part of what he may have drawn, is valid. *Rothrock v. Parkinson*, *supra*.

And a bond to perform certain duties under a legal Foreign Lottery Act may be enforced here. *Kentucky v. Bamford*, 6 Ill. 523, 1 E. D. Smith, 218.

crowd to assemble at the defendant's performances, with the expectation that they would buy medicines, or pay a fee for occupying a seat in the tent, would be too remote to constitute a legal consideration for the tickets. So with the expectation that it would increase the attendance at the so-called "Jubilee" performance. The holders of thousands of these tickets given away as gratuities were not present, and yet stood an equal chance in the distribution with those who were. And the doors were thrown open for free admission when the distribution took place, this event occurring just after the close of the exhibition or performance proper.

The element of gaming which is wanting to constitute this transaction a lottery is the fact that no money was paid, directly or indirectly, for the chance of receiving a prize, or of participating in the distribution by lot. Nor would a jury be authorized to make a contrary inference, reasonably, from any evidence contained in the bill of exceptions. Many rulings of the court are directly opposed to these views.

It follows from what we have said that the city court erred in not giving the general affirmative charge requested by the defendant.

The judgment of conviction is reversed, and a judgment will be rendered in this court discharging the defendant from further prosecution under the present indictment.

Reversed and rendered.

MEMPHIS & CHARLESTON R. CO. *et al.*,
Appts.,
v.

William Henry WOODS *et al.*

(....Ala....)

1. A railroad company, which has acquired a majority of the stock of another

railroad company, will not be allowed, in the absence of express statutory authority, to vote such stock, either by itself or by other persons acting in its interest, in the election of officers, or in matters pertaining to the management and control of the latter company; at least where the two roads are rivals, having substantially the same field of operation, where a conflict of interest may arise in the matter of expenditures, or in the division of patronage or of earnings, or where the profits of one company may be enhanced by a diminution of those of the other.

2. An averment of refusal by the officers of a corporation, upon request, to take appropriate legal proceedings to prevent the unlawful voting of corporate stock, will authorize the entertainment of a suit by stockholders in their own names for the accomplishment of that object.

3. Averments upon information and belief are insufficient in the absence of any allegation that the information is true.

(December 12, 1889.)

APPEAL by defendants from a decree of the Chancery Court for Madison County overruling a demurrer to, and refusing to dismiss, a bill filed to enjoin the East Tennessee, Virginia & Georgia Railway Company from voting upon or transferring certain corporate stock held by it, as well as refusing to dissolve a preliminary injunction already granted. *Modified and remanded.*

The facts are fully stated in the opinion.

Mr. R. C. Breckell for the East Tennessee, Virginia & Georgia R. Co., appellant. Messrs. Humes, Walker, Sheffey & Gordon for the Memphis & Charleston R. Co.

Messrs. John W. Weed and John M. McKleroy, for appellees:

At common law one corporation cannot acquire the stock of another corporation, unless expressly authorized by statute.

Milbank v. New York, L. E. & W. R. Co. 64 How. Pr. 20; *Oregon R. & Nav. Co. v. Oregonian R. Co.* 130 U. S. 1 (32 L. ed. 837); *Frank-*

NOTE.—Corporations; restriction on exercise of powers.

Public grants are to be strictly construed; the grantee can take nothing except what his grant plainly gives. *Lehigh Valley R. Co. v. Orange Water Co.* 5 Cent. Rep. 651, 42 N. J. Eq. 205; *Jersey City Gas Light Co. v. Consumers Gas Co.* 4 Cent. Rep. 380, 40 N. J. Eq. 427; *Leslie v. Lorrillard*, 1 L. R. A. 456, and *note*, 110 N. Y. 519.

In doubtful points the construction of the grant must be against the grantee. *Oregon R. & Nav. Co. v. Oregonian R. Co.* 130 U. S. 1 (32 L. ed. 837).

Corporations possess only the powers conferred by the statute creating them, and those necessarily implied. *Huntington v. Nat. Savings Bank of D. C.* 96 U. S. 388 (24 L. ed. 777); *Beatty v. Knowler*, 29 U. S. 4 Pet. 152 (7 L. ed. 513); *Runyan v. Coster*, 39 U. S. 14 Pet. 122 (10 L. ed. 352); *Perrine v. Chesapeake & D. Canal Co.* 50 U. S. 9 How. 172 (13 L. ed. 92).

Their powers are such only as are not possessed in common with individuals and partnerships, or natural persons. *Southern Pacific R. Co. v. Orton*, 32 Fed. Rep. 457.

A corporation has no implied authority to engage in any business other than the particular enterprise for which it is chartered, or to do any act or make any contracts not in pursuance of the purposes for which it was created. *Chewacla Lime* 7 L. R. A.

Works v. Dismukes, 57 Ala. 344; *First M. E. Church v. Atlanta*, 76 Ga. 181.

Its general power must be restricted by the nature and object of its institution. *Korn v. Mut. Assur. Society*, 10 U. S. 6 Cranch, 192 (3 L. ed. 196).

A corporation cannot enter into a partnership, unless under authority expressly conferred by a statute or its charter. *Mallory v. Hanaur Oil Works*, 86 Tenn. 598.

A manufacturing corporation cannot act as agent to sell for another. *Westinghouse Mach. Co. v. Wilkinson*, 79 Ala. 312.

A promissory note taken by it from a purchaser, for the agreed price, payable to itself, is void; and the manufacturer cannot maintain an action on it, either against the maker, or against the corporation as indorser. *Ibid.*

So a mining and lime manufacturing company has no right to carry on a mercantile business and purchase goods to be resold; and a person selling goods for that purpose does so at his peril. *Chewacla Lime Works v. Dismukes*, *supra*.

Corporation cannot deal in stock of other corporations.

A corporation cannot purchase or hold or deal in the stock of other corporations, unless expressly authorized by law. *Brice, Ultra Vires*, 86.

A corporation cannot subscribe for stock, or be

lin Co. v. Lewiston Sav. Inst. 68 Me. 43; *Central R. Co. v. Collins*, 40 Ga. 582; *Hazlehurst v. Savannah, G. & N. A. R. Co.* 43 Ga. 13; *Wilks v. Georgia Pac. R. Co.* 79 Ala. 181, and cases there cited.

The provisions of a private Act, of which nature are all charters of private corporations, to be available before a court of equity, must be pleaded and proved.

Perry v. New Orleans, M. & C. R. Co. 55 Ala. 428; *McDonald v. Mobile L. Ins. Co.* 56 Ala. 468.

The laws of Alabama provide that in the case of connecting or continuous railroads, the corporations controlling them may make arrangements either by amalgamation or some other arrangement for bringing them under one control.

Ala. Code, §§ 2008-2011.

These sections would not permit even a consolidation, because these two roads have no physical connection. Such physical connection is essential to the operation of the Statute.

Wilks v. Georgia Pac. R. Co. 79 Ala. 181.

Such statutory provisions do not authorize the purchase of stock.

Mackintosh v. Flint & P. M. R. Co. 34 Fed. Rep. 582, 615.

The limitation of corporate power to own the stock of another corporation is as stringent upon a foreign as upon a domestic corporation.

Paul v. Virginia, 75 U. S. 8 Wall. 168 (19 L. ed. 357); *White v. Howard*, 46 N. Y. 144.

The complainants have a standing in court to prevent an infraction of the law of Alabama prohibiting the ownership of Memphis & Charleston stock by the East Tennessee.

Milbank v. New York, L. E. & W. R. Co. 64 How. Pr. 20; *Nathan v. Tompkins*, 82 Ala. 437; *Central R. Co. v. Collins*, 40 Ga. 582; *Hinckley*

v. Gildersleeve, 19 Grant, Ch. 212; *Langdon v. Branch*, 37 Fed. Rep. 449; *Chambers v. Falkner*, 65 Ala. 448; *Hafer v. New York, L. E. & W. R. Co.* 19 Abb. N. C. 456.

Stone, Ch. J., delivered the opinion of the court:

This suit was commenced October 27, 1887, and is prosecuted by stockholders of the Memphis & Charleston Railroad Company, representing a minority of the stock. The case was submitted in the court below on a demurrer to the bill, and on a motion to dismiss it for want of equity. From the chancellor's decree overruling the demurrer, and refusing to dismiss the bill, or to dissolve the injunction, the present appeal is prosecuted. Coming before us in this form, we must treat as true all the averments of the bill which are well pleaded, and in the further progress of this opinion they will be stated as facts.

The Memphis & Charleston Railroad was constructed under charters obtained from the States of Tennessee and Alabama, and extends from Memphis, in Tennessee, to Stevenson, in Alabama, running partly through Mississippi. One hundred and fifty miles of the track are in Alabama. The entire length of the road is not shown. The capital stock is \$5,312,725, divided into 212,509 shares, of \$25 each. Of these shares, 106,261, being a majority of the whole number, stand on the books in the name of the East Tennessee, Virginia & Georgia Railroad Company, another corporation, which does not connect with or touch the Memphis & Charleston Railroad at any point. The complainants hold 8,800 of the shares, representing \$220,000 of the capital stock; and they sue in their names, and in the names of such other of the stockholders as may join in the suit.

a corporator, of another corporation under the General Railroad Law. *Central R. Co. v. Pennsylvania R. Co.* 81 N. J. Eq. 475.

A corporation cannot vote upon the stock of another corporation without express statutory authority, even if it has acquired the shares lawfully in payment of, or as security for, a debt. *Woods v. Memphis & C. R. Co. (Ala.)* 5 R. R. & Corp. L. J. 372.

It cannot, unless authorized by statute, make a valid subscription to the capital stock of another corporation. *Valley R. Co. v. Lake Erie Iron Co.* 1 L. R. A. 412, 46 Ohio St. 44.

So a bank corporation cannot purchase the stocks of other corporations to sell them for a profit, or to raise money, except when received in good faith as security for a loan. *Talmage v. Pell*, 7 N. Y. 323.

An insurance company cannot subscribe for the stock of another insurance company. *Berry v. Yates*, 24 Barb. 200.

A general insurance, commission and brokerage agency cannot subscribe to the stock of a savings and building association. *Mechanics & W. M. Mut. Sav. Bank v. Meriden Agency Co.* 24 Conn. 159.

The power of a railroad company to buy the stock of another railroad company must be expressly given by its charter. *Hazlehurst v. Savannah, G. & N. A. R. Co.* 43 Ga. 57; *Central R. Co. v. Collins*, 40 Ga. 583.

Under the provision of the Constitution of Georgia inhibiting the purchase by one corporation of the shares of another, and thereby promoting a monopoly, a purchase by a railway company of a contract to construct a competing line, with a 7 L. R. A.

view to prevent its construction, is illegal and void. *Langdon v. Central R. & Bkg. Co.* 2 L. R. A. 120, 37 Fed. Rep. 449.

As to contracts tending to create a monopoly, see *note to Gulf, C. & S. F. R. Co. v. State (Tex.)* 1 L. R. A. 849.

A voluntary association organized to control corporations, having obtained the stock of a corporation has no power to sell or alienate such stock, as such act is inconsistent with the purposes of its creation. *Gould v. Head*, 38 Fed. Rep. 883.

A statute forbidding one corporation to subscribe for or purchase the stock or securities of another corporation does not apply where one has made advances on the mortgage bonds of the other which it is unable to redeem, and further advances are made. *Taylor Co. Ct. v. Baltimore & O. R. Co.* 35 Fed. Rep. 161.

So a railroad company cannot, without authority expressly given, lease its road-bed, rolling stock and franchises, nor release itself from its duty and obligations to the State. *Thomas v. West Jersey R. Co.* 101 U. S. 71 (25 L. ed. 950); *Black v. Delaware & R. Canal Co.* 23 N. J. Eq. 130; *Troy & B. R. Co. v. Boston, H. T. & W. R. Co.* 86 N. Y. 107; *Abbott v. Johnston, G. & K. H. R. Co.* 80 N. Y. 27; *People v. Albany & V. R. Co.* 77 N. Y. 232.

A lease made by one railroad corporation to another, neither of which is expressly authorized by law to enter into the lease, is *ultra vires* and void. *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 131 U. S. 371 (38 L. ed. 187); *Oregon R. & Nav. Co. v. Oregonian R. Co.* 120 U. S. 1 (22 L. ed. 837).

The Memphis & Charleston Railroad has been in operation for a third of a century. The profits of the corporation, if any, prior to the time of its passing under the control of the East Tennessee, Virginia & Georgia Railroad Company, hereafter shown, we have no certain means of ascertaining, further than that from June, 1858, two years after the completion of the road, to June, 1861, the net earnings were never less than 10, and once as high as 16, per cent. We have no account of any earning during the civil war, from 1861 to 1865, and suppose not only that there were no net profits, but the cessation of hostilities left the road very much out of repair. Extraordinary expenditures became necessary to repair and equip the road, and up to June 30, 1867, the expenditures exceeded the receipts. Between the years ending June, 1868, and June, 1874, surplus profits, amounts not shown, were earned by the road each year, except the two years 1871 and 1872. The sum of the deficiency for these two years was about \$150,000.

The East Tennessee, Virginia & Georgia Railroad Company obtained its charters from the States of Tennessee and Alabama, and had been many years in operation. It extended easterly far beyond Knoxville, Tenn.; and having absorbed, or otherwise obtained control of, the Selma, Rome & Dalton Railroad, an Alabama corporation, extended, in a southwesterly direction, 150 miles or more into Alabama, terminating at Selma, in this State. It also operated a line which touched at Chattanooga, in the State of Tennessee, eastward from Stevenson, and distant from it 25 or more miles. There was, however, a connecting line between the respective termini, but it belonged to another railroad corporation. The East Tennessee, Virginia & Georgia Railroad Company had probably many other extensions and connections, not necessary to be noticed here. The extent, distances and connections of the East Tennessee, Virginia & Georgia Railroad Company are stated partly on general knowledge. About 1874, one Wilson was elected president of the Memphis & Charleston Railroad Company, and was continued in the office until 1881. His election was procured through the instrumentality of the East Tennessee, Virginia & Georgia Railroad Company, and, although not exactly coterminous, the two railroads have been operated substantially under one management ever since. In the first instance, the Memphis & Charleston Railroad was let by lease to the East Tennessee, Virginia & Georgia Company, the rent agreed on being the net income of the former road above expenses. In a suit instituted for the purpose of testing the legality of that lease, it was set aside as being *ultra vires*. Another suit, between the Knoxville & Ohio Railroad Company and the East Tennessee, Virginia & Georgia Company, to which the Memphis & Charleston Company was not a party, resulted in the acquisition by the East Tennessee, Virginia & Georgia Company of a large volume, nearly one half, of the shares of stock in the Memphis & Charleston Railroad Company. Later acquisitions placed a majority—a bare majority—of the entire stock of the latter Company in the name and asserted ownership of the East Tennessee, Virginia & Georgia Company.

~ L. R. A.

The bill insinuates that each of the two suits named above was collusive, at least in part; and facts averred point in that direction. It is also averred that certain shares of the stock which were held by the Memphis & Charleston Company in its own right were transferred by the common president of the two companies to the East Tennessee, Virginia & Georgia Company, without any authority therefor. Marked bias and partiality in favor of the latter company are charged to have prevailed in these transactions; and it is also charged that the East Tennessee, Virginia & Georgia Company was without the power to acquire and own stock in another railroad company. It is expressly charged that the intent and purpose of the said purchase of stock was to give to the East Tennessee, Virginia & Georgia Company a controlling vote in the management of the Memphis & Charleston Company; and the exhibit taken from the record of the suit with the Knoxville & Ohio Railroad Company, if correctly set forth, proves this charge to be true. The bill further charges that after the agreement of lease noted above, which was in 1877, the two railroads have been operated under one and the same president, and under one and the same management. Inequality and fraud are charged in the combined management of the two roads, greatly to the profit of the East Tennessee, Virginia & Georgia Company, and to the equal detriment of the Memphis & Charleston Company. The bill makes specific charges of partiality and maladministration, as follows: *First*. When the East Tennessee, Virginia & Georgia Company acquired controlling power over the Memphis & Charleston Railroad, the repair-shops of the latter had been partially destroyed, but could have been rebuilt at a small expenditure. They were not rebuilt. The rolling stock of the Memphis & Charleston Company was carried to the shops of the East Tennessee, Virginia & Georgia Company, at Knoxville, Tenn., "where the repairing was done at extravagant prices, and mileage was charged for all the distance the rolling stock was carried over the road of the East Tennessee, Virginia & Georgia Railroad Company." *Second*. "The rolling stock [of the Memphis & Charleston Company] was unnecessarily increased, at exorbitant cost, [\$500,000 at one time,] and was used by the East Tennessee, Virginia & Georgia Railroad Company upon its own road, without any compensation" to the Memphis & Charleston Railroad Company for such use. *Third*. "The Memphis & Charleston Railroad was renewed with steel rails, iron bridges and ballast, in advance of the needs of the railroad, to keep down the apparent net earnings." *Fourth*. Less than the *pro rata* mileage share of through passenger and freight receipts from passengers and goods passing over both roads was allowed to the Memphis & Charleston Railroad Company.

The bill then proceeded to show, by tabulated statement and otherwise, that the percentage of net earnings, compared with the gross income of the Memphis & Charleston Company, was much less than that of the East Tennessee, Virginia & Georgia Company, while the former was more favorably circumstanced for cheap operation than the latter. The bill

charged that at the election of officers of the Memphis & Charleston Company, held in November, 1886, the East Tennessee, Virginia & Georgia Company succeeded in electing seven of its own directors to be directors of the Memphis & Charleston Company, seven being a majority of the board. The directors then elected Thomas to be president of their board, he being at the same time president of the board of directors of the East Tennessee, Virginia & Georgia Company. The two railroads were thus placed substantially under one and the same government.

As we have said, the bill in this case was filed on the 27th day of October, 1887; and it charges that another election of directors would be held on the 17th day of November then next ensuing—twenty-one days after the filing of the bill. It charges, further, that "if said East Tennessee, Virginia & Georgia Company, its directors, or any person on its behalf, shall be permitted to participate, or take any part, in said election, or any meeting of the stockholders of the Memphis & Charleston Railroad Company, the baneful control of the East Tennessee, Virginia & Georgia Company over its affairs will be continued for another year, and its legitimate earnings will be diverted from its stockholders, and, under various devices, absorbed by the East Tennessee, Virginia & Georgia Company." The prayer for injunction is two fold: *first*, that the East Tennessee, Virginia & Georgia Company be enjoined from voting the stock standing in its name, either in the election of directors of the Memphis & Charleston Company or in any other meeting of the stockholders; and, *second*, that it be enjoined from disposing of its stock except with the knowledge and approval of the chancery court. The reason urged in favor of the second of the above prayers is that without such restraining order the stock might, and probably would, be transferred to some other name, and still held, and its voting power exercised in the interest of the East Tennessee, Virginia & Georgia Company. Under some reorganization, the present corporate name of the latter company is "The East Tennessee, Virginia & Georgia Railway Company."

Under the Statutes of this State (Code 1886, §§ 1583, 1586, 1587) a general power is conferred to consolidate two or more railroads which, when completed, "may admit the passage of burden or passenger cars over any two or more of such roads continuously, without break or interruption." Section 1583. A railroad corporation "may at any time, by means of subscription to the capital stock of any other corporation or company, or otherwise, aid such corporation or company in the construction of its railroad, for the purpose of forming a connection with the road owned by such corporation or company furnishing aid; or any railroad corporation organized in pursuance of law may lease or purchase any part or all of any railroad constructed by any other corporation or company, if the lines of such roads are continuous or connected." Section 1586. "A corporation now existing, or which may hereafter be organized, for the building, constructing and operating a railroad, has authority, for the purpose of extending its line or forming a connection, to acquire, hold and

operate a railroad without the State; or, within the State, may extend its road, or may build, construct and operate branch roads from any point or points on its line." Section 1587.

It is not contended that any of these sections, or all of them combined, confer in terms the powers which the bill alleges that the East Tennessee, Virginia & Georgia Company claims and exercises in the management and control of the Memphis & Charleston Company. The conduct charged and complained of was not the consolidation of two or more roads; for consolidation was neither effected nor attempted, nor were any of the steps taken which the Statute prescribes as conditions precedent to lawful consolidation. Nor was it the connecting of two roads over which cars could pass "continuously without break or interruption." It was not giving aid by one corporation to another "in the construction of its railroad, for the purpose of forming a connection with" it. Neither the aid nor the purpose existed in this case, if the averments of the bill be true. It was not a lease or purchase of the Memphis & Charleston Railroad, or any part of it; and if such lease, or purchase or other arrangement had been attempted, the lines of the two roads are not connected. And the averments of the bill negative the idea that any of these arrangements, connected operation or consolidation, if claimed to be such, were agreed to or consummated by the corporations, acting as such. Nor was there any agreement, or attempted arrangement, either expressed or implied, that the one railroad should acquire, hold and operate the other. Nor is the Memphis & Charleston Railroad, in any sense, a branch road from any point on the line of the East Tennessee, Virginia & Georgia Company. It is not a branch road, according to the averments of the bill.

We repeat, the sections of the Code we have been commenting on do not expressly confer the powers which the complainants complain of as abuses, nor does the East Tennessee, Virginia & Georgia Company contend that they do. It could not so contend. Its precise contention is that those Statutes "evidence a settled policy of the State to encourage consolidations or combinations of connecting lines." It is manifestly true that long connecting lines of railroad are a benefaction. They economize time and labor, and thereby lessen expense. Common observation, and the simplest processes of reasoning, show this to be too clear to require argument in support of it. But does the conduct complained of in this case encourage or promote the consolidation of connecting lines? Is it a legitimate means of accomplishing that end? Private corporations can exercise only such powers as are conferred upon them, and such as are necessary and proper to carry the granted powers into effect. In this, however, is included the inherent incidental power of doing and performing such acts as are necessarily implied in the line of trade or business of the corporation, as shown by the charter or law of its creation. *Wilks v. Georgia Pac. R. Co.* 79 Ala. 180; 3 Brick. Dig. 159.

Based on this principle, it is contended for appellee that the East Tennessee, Virginia & Georgia Company had no power to acquire

and hold shares of stock in the Memphis & Charleston Company; that its purchase of the stock was *ultra vires* and void, and that, as a consequence, it should not be allowed to exercise the powers which the rightful ownership alone confers. In other words, that, to authorize the exercise of the privileges of a stockholder, the stock must have been lawfully acquired. On this ground it is contended that the ruling of the chancellor in continuing the injunction is free from error. May it not be answered to this contention: *First*, that, conceding the purchase of the stock by the East Tennessee, Virginia & Georgia Company to have been *ultra vires*, are the complainants in this suit in any position to raise that question? They are not stockholders in the East Tennessee, Virginia & Georgia Company, and can they be heard to complain that a corporation to which they are strangers has misapplied its funds? *Second*, Does not the bill show on its face that the East Tennessee, Virginia & Georgia Company purchased the stock, not as an investment of its funds, but in the collection of a debt due to it from another railroad corporation? The power of a corporation to acquire property, real or personal, as a means of collecting a debt otherwise doubtful, stands on a very different principle from that which determines its power to purchase such property as an investment of its funds or capital. *Charlotte First Nat. Bank v. Nat. Exchange Bank*, 92 U. S. 123 [28 L. ed. 679]; 1 Morawetz, Priv. Corp. § 431.

We come, then, to the naked inquiry, Can one corporation acquire a majority of the stock of another corporation, and, by the exercise of the voting power the majority of stock confers, govern and control the management of such corporation? This question, in its naked form, has rarely been presented to the courts, although it is generally known that such transactions are not infrequent.

In 1 Morawetz, Priv. Corp., § 431, it is said: "The right of a corporation to invest in shares of another company cannot be implied merely because both companies are engaged in a similar kind of business. A corporation must carry on its business by its own agents, and not through the agency of another corporation." And this doctrine is stated without dissent in 4 Am. & Eng. Cyclop. Law, 249, note 2.

In *Central R. Co. v. Collins*, 40 Ga. 582, will be found a very full, and somewhat pioneer, discussion of the power and right of a railroad company to acquire and hold a majority of the stock of another railroad corporation, with a view of controlling its management. It is an able discussion, and, although not presented precisely in the form in which the present bill raises it, it enunciates principles which bear on the question on hand. Among many other wise and conservative principles declared in that opinion, we transcribe and approve the following: "I am strongly impressed with the conviction that much of their [the railroads'] success in developing the resources of the country is due to the very jealousy which has ever held them strictly to their charters, and has constantly been careful to prevent an undue accumulation of interest under one management. The certainty that each stockholder has that his funds will be applied to known

and declared purposes has made them favorable investments for prudent men, while the rivalry which opposing interests engender begets an energy, economy, skill and enterprise that have had much to do with the remarkable progress which such enterprises have made. A colossal enterprise, assured of handsome dividends by the possession of a monopoly, may well rest upon its position, knowing that, however the country may suffer from its exactions, its own profits are secure. It is the rivalry of opposing interests, the struggle for success, nay, even for life, with dangerous opposition, that gives life, enterprise and success to railroad, as to other human undertakings. It has been the conflict with thirty state lines, each with its opposing interests, and with numerous seaboard cities, each seeking to attract the rich outpourings from the great interior, that has begotten the mighty network of iron which interlaces our extensive territory; and I am convinced that there is no public policy more striking than that which, while it fosters every such undertaking, is yet careful ever to keep in view the danger of a monopoly, and the good effect of rivalry and conflict between different companies. The Central Railroad is, and has long been, the pride of Georgia. The skill, energy and prudence with which its affairs have been managed reflect great credit upon the men who have had these affairs in their control; and the State may well be grateful for the success that has followed. Yet we cannot but think it would be a measure fraught with great public evil to give to that company permission to control and manage its great rival, the Atlantic & Gulf Road."

In the case of *Hazlehurst v. Savannah, G. & N. A. R. Co.*, 43 Ga. 13, the principles of the foregoing case are reaffirmed.

The case of *Milbank v. New York, L. E. & W. R. Co.*, 64 How. Pr. 20, was like the present one in most of its bearings. In that case, as in this, one railroad corporation had purchased a majority of the capital stock of another, and proposed to vote the stock so purchased in the election of directors. Certain stockholders of the latter company, owning a small minority of its capital stock, filed a bill to enjoin the purchasing company from voting the stock it had acquired, being a majority of the shares. The court, in delivering its opinion, said: "In the case under consideration, the New York, Lake Erie & Western Company have acquired by purchase the majority of all the stock issued by the Buffalo, New York & Erie Railroad. If its officers are permitted to vote thereon, they can elect a board of directors of their own choosing. It would then be for the interests of the New York, Lake Erie & Western Railroad Company to have the Buffalo, New York & Erie Company managed and controlled in the interests of the former company. This would be liable to result in injury to these plaintiffs and their fellow-stockholders; and, if so, they have a right to complain. My conclusions, therefore, are that, while the New York, Lake Erie & Western Railroad Company is the owner of the stock in question, and has the right, while it remains the owner, to collect and receive the dividends thereon, and has the right to sell and dispose of the same, it has not the right to vote thereon, and that the stock-

holders of the Buffalo, New York & Erie Railroad Company have the right to have it enjoined from so voting, in case it threatened to do so. Judgment should be ordered for the plaintiffs in accordance with the views herein expressed, with costs."

It is true that this was not a decision by the court of last resort. It was by the supreme court, an intermediate court in that State. It appears to have been acquiesced in, for no appeal is shown to have been taken. See also *Franklin Co. v. Leviston Sav. Inst.* 68 Me. 43; *Sumner v. Marcy*, 8 Woodb. & M. 105; *Mechanics & W. M. Mut. Sav. Bank & Bldg. Assn. v. Meriden Agency Co.* 24 Conn. 159.

Corporations aggregate are governed, and must be governed, and made efficient through the instrumentality of agents. These agents, in cases of pecuniary corporations, are called "directors," who are elected at stated intervals by the stockholders, for such term as the charter or regulations may prescribe. They may not be "trustees" in the technical sense; but their functions are largely and essentially fiduciary. *Hoyle v. Plattsburgh & M. R. Co.* 54 N. Y. 828.

Says Mr. Morawetz (1 Priv. Corp. § 517): The directors "impliedly undertake to give the company the benefit of their best care and judgment, and to use the powers conferred upon them solely in the interest of the corporation. They have no right, under any circumstances, to use their official positions for their own benefit, or the benefit of anyone except the corporation itself. It is for this reason that the directors have no authority to represent the corporation in any transaction in which they are personally interested in obtaining an advantage at the expense of the company. The corporation would not have the benefit of their disinterested judgment, under these circumstances, as self-interest would prompt them to prefer their own advantage to that of the company."

A director "falls within the great rule by which equity requires that confidence shall not be abused by the party in whom it is reposed, and which it enforces by imposing a disability, either partial or complete, upon the party intrusted to deal on his own behalf in respect to any matter involved in such confidence." *Hoyle v. Plattsburgh & M. R. Co. supra*, and authorities cited.

So, in 1 Morawetz, Priv. Corp., § 528, is this language: "A person who is agent for two parties cannot, in the absence of express authority from each, represent them both in a transaction in which they have contrary interests. . . . It follows, therefore, that the directors or other agents of a corporation have no implied authority to bind the company by making a contract with another corporation, which they also represent."

Section 529: "It is well settled that, if the same persons are appointed to act as directors of different companies, they have no authority to represent both companies in transactions in which their interests are opposed. It matters not that the acts of the directors are in the interest of a majority of the shareholders in each company, and have received their approval, nothing can be more unjustifiable and dishonorable than an attempt on the part of those

holding a majority of the shares in a corporation to place their nominees in control of the company, and then to use their control for the purpose of obtaining advantage to themselves at the expense of the minority. It would be a conspiracy to commit a breach of trust. The directors of a corporation are bound to administer its affairs with strict impartiality, in the interest of all the shareholders alike; and the inability of the minority to protect themselves against unauthorized acts, performed with the connivance of the majority, renders their right to the protection of the courts the clearer." *State v. Concord R. Corp.* 13 Am. & Eng. R. R. Cas. 94; *Pearson v. Concord R. Corp.* Id. 102, and numerous cases cited; *Marsh v. Whitmore*, 88 U. S. 21 Wall. 178 [22 L. ed. 483]; 1 Morawetz, Priv. Corp. § 530, and note 3; *Cook, Stock and Stockholders*, §§ 614, 615.

Although, as we have said, directors of a pecuniary corporation may not be "trustees," in the technical sense of that term, they are under the same restraints, and labor under the same disabilities, which rest on trustees proper, so far as questions raised by the present bill are concerned. When personal interest antagonizes the disinterestedness and impartiality which the law, as well as morality, exacts in the exercise of fiduciary trusts, this is, *per se*, a disqualification, not by reason of any abuse committed, but in fear that weak human nature will yield to temptation. Justice Field, speaking of the conflict between duty and interest, says: "Constituted as humanity is, in the majority of cases, duty would be overborne in the struggle." *Marsh v. Whitmore, supra*; *Nathan v. Tompkins*, 82 Ala. 43; *Great Luxembourg R. Co. v. Magnay*, 25 Beav. 536.

The averments of the bill in this case show great wrongs done to the Memphis & Charleston Company by reason of the control exercised in its management by the East Tennessee, Virginia & Georgia Company. It also charges that it is the intention of the latter company to so vote its stock as to maintain its control of the Memphis & Charleston Railroad. Whether the charges of past abuses be true or false, they bring prominently to the notice of the court the character and extent of wrong and oppression which one corporation may inflict on another, when circumstanced as these are. It is scarcely necessary that we should specify in what manner the oppression may be inflicted. The board of directors elected by and for the East Tennessee, Virginia & Georgia Company, we must suppose, owe their election to all the stockholders, representing all the stock in that company. The duties of fidelity and impartiality in administering the affairs of that company, implied in the relation they sustain to it, we have stated above. They require severe disinterestedness, as between the several shareholders, and unbiased fidelity to the prosperity and success of the corporation. Now, when the directors of the Memphis & Charleston Company, or a controlling majority of them, owe their election to the East Tennessee, Virginia & Georgia Company, and to that company alone, it is manifest that questions may and will arise on which there will be a conflict of interest between the two companies. It is but human nature that in such conflict directors thus chosen will give their votes and in-

fluence in favor of the company they represent in full, and in whose entire income and emoluments they participate, rather than to the company they represent only to the extent of a trifle above a moiety of its stock,—an integer against a fraction. Both law and reason force the implication that, in the governing body of a corporation, duty and interest shall not point in opposite directions. We hold that it is equally against public policy, and against that sound rule which disables trustees, or quasi trustees, to act when their duty and interest conflict, that the East Tennessee, Virginia & Georgia Company should be allowed to vote its majority stock in matters pertaining to the management and control of the Memphis & Charleston Company. We confine our ruling, however, for the present, to cases like this one, where a conflict of interest may arise in the matter of expenditures and their apportionment, in the division of patronage or of earnings, and to rivalships between different companies, having substantially the same field of operation, or where the profits of one enterprise may be enhanced by the diminution of those of the other. There may be other cases to which the rule will apply, but we decline to consider them now.

This case has been very ably argued; and we are not unmindful of the grave consequences that may, and probably will, ensue from our decision, not alone to the East Tennessee, Virginia & Georgia Company, but to many other corporations similarly circumstanced. We have not declared that the law does not authorize that company to acquire and hold stock, or shares of stock, in another railroad corporation. Its charters not being before us, we have no means of ascertaining what its corporate powers are, further than the implications which naturally arise from its name and its lines of business inform us. We have not declared that if the East Tennessee, Virginia & Georgia Company is without power to acquire and hold shares of stock in another railroad corporation, the complainants in this suit have shown any right to controvert the question of its rightful ownership. Hence we have not decided that the Knoxville & Ohio Railroad Company were not the rightful, lawful owners of the stock which the East Tennessee, Virginia & Georgia Company acquired from it, nor that the latter company did not acquire a good title by its purchase. We have not attempted to set aside, or to declare invalid, either of these sales. We do not controvert the general inherent right, resulting from the ownership of stock in a corporation, to exercise the elective power such ownership confers, and to exercise it wisely or unwisely, alone, or pursuant to an agreement with other stockholders; and that no one save the former owner can question the right to vote such stock, even when obtained by fraud, or other illegal means. *Moses v. Scott*, 84 Ala. 608.

This, we repeat, is the general rule; and less than this, in an ordinary case, would be an unauthorized abridgement of the stockholder's property rights.

Enjoyment and the right of disposition are general attributes of property ownership. Property rights, however, cannot be classed as absolutely independent of social and municipal regulation. "So use your own as not to invade

the equal rights of others," is a maxim as sound in law as it is in the conduct of social intercourse. Its observation and preservation are the end and aim of much wise legislation, of much judicial administration. But men must be dealt with, not as faultless, but as frail, and subject to temptation too strong for their powers of resistance. Civil liberty is but natural liberty shorn of its power to transgress the boundary which separates *meum* and *tuum*, in its comprehensive sense. Hence it is that the law, with inflexible purpose, has placed restraints on transactions in which duty and interest conflict. Hence it is that, when any relation of trust or confidence subsists, the law scrutinizes with earnest, if not severe, vigilance any pecuniary transaction that may be had between parties thus circumstanced. Hence it is that, when one man stands in a fiduciary relation to another, any contract or bargain and sale had with the beneficiary is invalid at the mere option of the latter, if seasonably expressed. The danger of abuse in such conditions dominates the power of disposition; and the power to make binding contracts, which we have classed as among the general attributes of property ownership, must submit to reasonable restraints. *Thompson v. Lee*, 81 Ala. 292; *Moses v. Micou*, 79 Ala. 561; *Uguen v. Bassey*, 14 Ves. Jr. 273.

It is contended for appellants that if a majority of the capital stock of the Memphis & Charleston Company had belonged to an individual, or to a combination of individuals, instead of being the property of the East Tennessee, Virginia & Georgia Company, the same power of control could have been exerted as is complained of in this case. It is possible that there might be an exceptional, extreme case, in which it would advance the interest of the owner or owners of a majority of the stock in a corporation to diminish its income, that the emoluments of another enterprise, in which he or they are more largely interested, may be thereby enhanced. Such case, however, is extremely improbable, and, if found to exist, might possibly present a case of wrong for which injunction could furnish no preventive relief. This is a question we need not decide. As a rule, stockholders, in voting, as in other acts which they are called to perform, attempt to promote the welfare of the corporation; for on its success depend their profits. Whether they act wisely or not, no one can be heard to complain of their conduct; for the success of the enterprise and their individual interests are presumed to be identical. In ordinary elections by stockholders, the presumption is that men will act as their interests prompt them to act, and that their aim is to benefit the corporation in which they are stockholders. Should a case arise in which there is bad faith in the management, and consequent loss to the stockholders, there would seem to be no doubt that redress could be obtained from the faithless governing body.

The case in which the votes are cast by individual stockholders, and the one in hand, are, presumptively at least, essentially different. In that, duty and interest are in complete accord. In this, if the averments of the bill be true, they are in palpable antagonism. In the one, the presumption is that the vote will be cast

solely in the interest of the corporation holding the election. In the other, that the greater opposing interest will prevail over the lesser, as it is so apt to do in all human conduct. We think it is no answer to the relief prayed in this case that in another possibly supposable case a wrong very like the one here complained of might be inflicted, and yet the same measure of redress could not be accorded.

It is contended that if relief be granted in this case it will greatly embarrass railroad corporations in the matter of maintaining continuous, connecting lines, so conducive to public convenience and to economy in transportation. It cannot be denied that steam has, in many respects, revolutionized the world, and that railroads are among the more potent instrumentalities which have effected that revolution. The nations of the earth have been brought in to closer neighborhood and better acquaintance, while Christian civilization has been much more speedily and widely diffused. So, commerce and the industrial enterprises have received a new impetus and expansion, theretofore unknown in the world's history. An instrumentality possessing such vast capabilities should be cherished and protected in the enjoyment and exercise of all its rights and privileges. The groveling or agrarian spirit which would hinder or embarrass this mighty agency in the full enjoyment of its rightful powers should receive no encouragement or countenance from right-thinking people. On the other hand, the tremendous power that may be wielded by aggregated or incorporated wealth should be kept within due bounds, and restricted to legitimate methods. The pernicious ends to which concentrated wealth may be perverted need not be mentioned here. The virtuous and patriotic utterances of many of the courts of supreme jurisdiction, re-echoed from the highest officials in the federal government, show all too plainly that the public is awakened to the wrongs inflicted through the instrumentality of combined capital. Let us accord to corporations all their rights, and restrain them in the abuse of their powers, should such be attempted.

The principle we have declared in a former part of this opinion will apply with equal force to all employes, agents and all other persons or corporations who may be acting in the interest or for the benefit of the East Tennessee, Virginia & Georgia Company. Nothing less than an absolute sale of the stock to some person or persons authorized to vote it will relieve it of the infirmity of its present ownership, or authorize the present or any pretended owner to be heard in the government of the Memphis & Charleston Company.

The bill does not charge that the East Tennessee, Virginia & Georgia Company contemplates a sale, or pretended sale, of the stock, and does not charge that the company, by any indirect means, will attempt to have its stock voted in its interest. The charge is that "if said East Tennessee, Virginia & Georgia Company is permitted to transfer said stock it will conceal its interest in the same under the name of some other party, and through such party reacquire the control it now has, with said stock standing in its own name." If such attempt

be made without an actual sale of the stock, it will be a violation of the order made in this case, and can be punished as such. Moreover, an election of directors thus procured would be a fraud perpetrated in defiance of the order of the court; and such election would be annulled on proper application. We hold, however, that in the present stage of this case, and under the averments of the bill, all of which that is pertinent we have copied, there is not enough shown to authorize an injunction against a sale of the stock. That question can be properly raised when an attempt is made, should it ever be made, to violate or evade the principles of the injunction granted in this cause. 1 Brick. Dig. p. 704, § 980; 3 Brick. Dig. p. 877, §§ 154, 155, 158.

The bill in this case avers that before filing the bill the complainants "requested the Memphis & Charleston Railroad Company, by a request addressed to its officers, to take appropriate legal proceedings to prevent the stock standing in the name of the East Tennessee, Virginia & Georgia Railway Company from being voted upon," etc., "but said corporation has neglected to comply with said request." This averment is sufficient to authorize the stockholders to sue in their own names, if any previous request was necessary to give them that right. Circumstanced as this case is charged to have been, it would seem any previous request would obviously have been denied, and therefore it was not necessary to prefer it. *Tuscaloosa Mfg. Co. v. Coz*, 68 Ala. 71; *Nathan v. Tompkins*, 82 Ala. 487; *Merchants & P. Line v. Wagoner*, 71 Ala. 581; *Green's Brice, Ultra Vires*, 673, note a; *Dodge v. Wolsey*, 59 U. S. 18 How. 831 [15 L. ed. 401]; *Haves v. Oakland*, 104 U. S. 450 [28 L. ed. 827].

We have stated above that the complainants' bill makes a case for an injunction, restraining the East Tennessee, Virginia & Georgia Railway Company, its agents, directors and all other persons representing it and in its interest, from voting the shares of stock held by that company. We have forbore to state one imperfection in the bill until this time. Many of the essential averments of the bill are stated in this form: Complainants are "informed and believe," or are "advised and believe," without any allegation or charge that the information or advice is true. This form of allegation has always been held in this court to be insufficient. It is not an averment that the information or advice is true, but that the pleader believes it to be true. A full denial of such averment would be, either that complainants had not received such information or advice, or if they received it, they did not believe it. This would not present the issue sought to be raised. 1 Brick. Dig. p. 702, §§ 907, 908. We will not, however, dissolve the injunction for this imperfection in pleading. Should it not be remedied within a reasonable time, it will become the duty of the chancellor to act upon the bill as if the imperfect averments pointed out had not been made.

The decree of the chancellor is modified, and the cause remanded. Let the appellees pay the cost of appeal.

Modified and remanded.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Levi L. WHITNEY
v.
WHEELER COTTON MILLS.

John RHODES v. SAME.

Mowry LAPHAM v. SAME.

(....Mass....)

1. The grant to a lower riparian proprietor of the right to have a quantity of water come down the stream sufficient to run two paper engines as used in the grantor's paper mill does not include a right to the amount required to run the entire mill including all the other machinery therein, although it is only such as is necessary for a mill running two engines, where the engines were run by a separate water wheel with which no other machinery was connected.
2. A provision in a deed granting lower riparian rights requiring the grantees to contribute towards the expense of maintaining the dam, flume and gate at the outlet of the reservoir does not alone give him the right to have the water held back for his benefit.
3. Although an upper riparian proprietor cannot be compelled to hold back water for the benefit of the owners below him, yet he cannot unreasonably interfere with the natural flow of the stream, and send down a great deal more than the usual quantity at times, and by so doing leave none for a long time afterwards to maintain the stream in its usual condition.
4. A grant to a riparian proprietor of the right to draw a certain quantity of water from the grantor's pond each day, and no more, confers no right to have the water held back so that there may at all times be enough in the pond to supply the given amount. The grant-

or, however, will not be permitted to unreasonably let down the water for his own convenience and thereby render nugatory the right of his grantees to obtain water.

5. An estate granted by deed cannot be expanded by recitals or statements of the grantor made in a later deed to the injury of an intervening title.
6. Riparian rights are not lost by nonuser.

(May 9, 1890.)

RESERVATION from the Supreme Judicial Court for Worcester County for the opinion of the full court, upon a master's report and exceptions thereto, of a suit to establish certain alleged riparian rights and to enjoin an interference therewith. *Judgment for plaintiffs.*

The facts are fully stated in the opinion.

Messrs. Rice, King & Rice and John Hopkins for plaintiffs.

Messrs. F. P. Goulding and D. B. Hubbard for defendant.

C. Allen, J., delivered the opinion of the court:

The several plaintiffs and the defendant are respectively the owners of mill sites and privileges upon Mill Brook, a stream which flows from Singletary Pond to Blackstone River. The defendant corporation owns the first or upper privilege. The plaintiffs own respectively as follows: The plaintiff Whitney owns the second privilege, the plaintiff Lapham the third, and the plaintiff Rhodes the fourth and the seventh. The owners of the fifth and sixth privileges are not before us. The plaintiffs complain of the manner in which the defendant regulates and manages the flow of water from Single-

NOTE.—Riparian rights.

A riparian proprietor upon a natural stream should use the water in such a manner that every riparian proprietor further down the stream should have the use and enjoyment of it substantially according to its natural flow, subject to such interruption as is necessary and unavoidable by the reasonable and proper use of the water in the stream above. *Chandler v. Howland*, 7 Gray, 348; *Ware v. Allen*, 1 New Eng. Rep. 733, 140 Mass. 513. See *Burk v. Simonson*, 1 West. Rep. 190, 104 Ind. 173.

Each riparian owner is entitled to a reasonable use of the water for domestic, agricultural and manufacturing purposes, so far as it is reasonable, conformable to the usages and wants of the community. *Ulbricht v. Eufaula Water Co.*, 4 L. R. A. 572, 86 Ala. 597.

The reasonableness of a use of land which obstructs the flow of surface water over it is determined by its operation upon the interests of all parties affected by it. *Rindge v. Sargent*, 4 New Eng. Rep. 523, 64 N. H. 294.

Every riparian owner has a private property right to the reasonable use of running water, qualified, however, by the requirement that it must be enjoyed with reference to the similar rights of other riparian owners. *Ulbricht v. Eufaula Water Co.*, *supra*.

The accustomed course of a natural stream which a riparian owner is entitled to have preserved is the natural and apparently permanent course existing when the right is asserted or called in question. *7 L. R. A.*

Withers v. Purchase, 60 L. T. N. S. 819, 40 Alb. L. J. 214.

The owner of higher land has the right to have surface water pass off through natural drains through servient lands. *Anderson v. Henderson*, 14 West. Rep. 109, 124 Ill. 164.

But he cannot remove natural barriers and let upon the lower land water that would not naturally flow in that direction. *Ibid*.

When two tracts of land are adjacent, and one is lower than the other, the owner of the upper tract has an easement of the lower land to the extent of the water naturally flowing from the upper land at and upon the lower tract, and any damage that may be occasioned to the lower land thereby is *damnum absque injuria*. *Boynton v. Longley*, 19 Nev. 69.

It is only when the flow of water on one person's land is identified with that on his neighbor's by being traceable to it along a distinct and defined course that the two proprietors can have natural relations with each other in respect of it, considered as the subject of separate existence. *Jones v. Weitershausen (Pa.)*, 25 W. N. C. 209.

When two mill owners whose mills are on the same stream, one below the other, have a mutual interest in the upper dam, used as a reservoir for storing water to propel the machinery of both mills, they are, in the absence of any contract, under a mutual duty to maintain the dam; and a court of equity will compel each to contribute to its maintenance in proportion to his relative interest, so long as he exercises his right to the water. *Webb v. Laird*, 3 New Eng. Rep. 583, 59 Vt. 103.

tary Pond, and allege that at times the defendant wrongfully keeps back the water, and at other times wrongfully sends down too much; and they pray for an injunction, and also for a decree establishing the respective rights of the parties in Singletary Pond, and in Mill Brook, and also for damages.

The cases come before us upon a master's report and numerous exceptions taken by the defendant thereto, with such portions of the evidence as the parties deemed important. We shall not be able to do much more than to declare the general rights of the parties, upon the cases as presented, leaving them to make before a single justice such further application for the settlement of the decrees, or otherwise, as may be necessary.

Many things heretofore controverted may now be briefly disposed of as conceded, or as immaterial, in the view we take of the principal questions respecting which the parties are at issue. It may now be assumed that Caleb Burbank was the owner of all the mill-sites and privileges in 1825, when he began to make conveyances, together with all the right which anybody had, by means of a dam, gate, etc., at the outlet, to regulate and control the flow of water from the pond. This is not now controverted by either party. The upper site had upon it a paper mill operated by Burbank. There has been some question which of the two outlets of the pond was the original one; but as both outlets come together before passing the first privilege, it is not material to determine which was the original one. It is also now admitted that the foreclosure of the mortgage from Burbank to Waldo, which is the foundation of the defendant's title, was valid.

It will be convenient to consider, in the first place, what rights the parties respectively acquired under their deeds; and afterwards to see

if these rights were varied by any adverse user or prescription, on one side or the other.

The first deed in the order of time was a conveyance which included the fourth privilege, now owned by the plaintiff Rhodes. This was a deed from Caleb Burbank to Benedict and Braman, dated January 8, 1825, of a described parcel of land on Mill Brook, with a right to erect mills at such place on the premises as to command a certain defined and limited head and fall of water; also with the right to the grantees, their heirs and assigns (when necessary to drive their works), to hoist the gate at said Crooked Pond [which was another name for Singletary Pond] so as to let as much water run as shall be equivalent to carrying two engines in the grantor's paper mill, when the grantor does not suffer so much to pass at his paper mill; but when the grantor, his heirs or assigns permit that quantity to pass the paper mill, the grantees, their heirs and assigns are not to meddle with said gate or draw any more water, nor are they to draw said quantity at any time except from six of the clock in the forenoon to six in the afternoon of each working day, and the grantees, their heirs and assigns are to be at their just proportion of the expense of maintaining the gate, flume, dam, etc., at Crooked Pond, and of making improvements upon the same when necessary for the common benefit.

The second deed in the order of time was a conveyance which included the seventh privilege, which is also now owned by Rhodes. This was a deed from Burbank to Timothy H. Longley, dated May 1, 1825, of a described parcel on Mill Brook, with a certain right of flowing the land above: "I also give and grant to the said Longley, his heirs and assigns, the privilege, when it may be necessary for the purpose of keeping in operation mills which

The upper owner cannot vary the flow of the stream so as to cause injury to the lower owner by any alteration in the conformation of his land, as by removing a ledge of rock. *Grant v. Kuglar*, 3 L. R. A. 603, 81 Ga. 637.

A riparian owner may grant a part of his estate, not abutting on the stream, and, as appurtenant thereto, a right to draw water from the stream through his remaining land; and for any diversion of the natural flow of the stream disturbing such right, the grantee may maintain an action. *St. Anthony Falls Water Power Co. v. Minneapolis (Minn.)*, 43 N. W. Rep. 53.

But he cannot authorize, as against a lower proprietor, a company to take water from the stream, to be conducted to a distance and sold. *Heilbron v. Fowler Switch Canal Co.* 75 Cal. 423.

The riparian owner on a non-tidal navigable stream has all the rights of a riparian owner, not inconsistent with the public easement. *Ibid.*

Upper and lower mill owners.

The owner or occupant of a water-power may lawfully pass through his dam the entire volume of water naturally flowing in the stream, but must not increase such volume to the injury of adjoining lands. *Boyington v. Squires*, 71 Wis. 276.

Where an upper mill owner detains water in his reservoir long enough to operate his mill for five hours in dry seasons, which occur for three months of the year, and thereby causes lower mills to lie idle for five days at a time, such use of the water is 7 L. R. A.

unreasonable and should be enjoined. *Mason v. Hoyle*, 5 New Eng. Rep. 629, 56 Conn. 255.

But he has the right to stop the natural flow long enough to fill up the pond or reservoir created by his dam, and keep it full for the use of his mill; and will be liable to the lower owner only when the use and detention of the water is unreasonable. *Caldwell v. Sanderson*, 69 Wis. 52.

So long as his dam stands, he must vent the waters for mill owners below, so that each shall have the natural flow of the stream, except so far as the flow is modified by successive riparian proprietors. *Stevens v. Kelley (Me.)* 5 New Eng. Rep. 871.

One owning a suitable place for a mill site cannot be deprived of it because someone else has wrongfully interfered with the stream above him, unless the interference has continued for such length of time as to bar a suit or indicate acquiescence. *Koopman v. Blodgett*, 14 West. Rep. 809, 70 Mich. 619.

A lower proprietor may set back the water in its natural state to the boundary of the upper proprietor, but he cannot by a dam or log jams so as to impede the running of his mills. *Richards v. Peters*, 14 West. Rep. 623, 70 Mich. 230.

An upper proprietor cannot, merely because at times the lower proprietor partially obstructs the operation of his mills, entirely abandon their use, and claim damages therefor, unless the obstruction renders their operation impossible with profit. *Ibid.*

Riparian rights generally. See notes to *Haines v. Hall* (Or.) 3 L. R. A. 611; *Fulmer v. Williams* (Pa.) 1 L. R. A. 304.

the grantee may have upon the premises, of raising the gate of the grantor, which is situated in the great canal, so called, at the outlet of the pond known by the name of Crooked Pond, so as to let so much water run as shall be equivalent to carrying two engines in the grantor's paper mill by means of a breast-wheel, whenever the grantor does not suffer so much to pass to the works which shall be erected upon the premises; but when the grantor, his heirs or assigns shall permit so much water to pass to the premises aforesaid, the grantee, his heirs or assigns are not to meddle with said gate, nor draw any more water, nor are they to draw said quantity at any time except from six o'clock in the morning to six o'clock in the evening of each working day, and the grantee, his heirs or assigns are to be at their joint proportion of the expense of maintaining the gate, flume, dam, etc., at Crooked Pond, and of making improvements upon the same, when necessary for the common benefit."

The third deed in the order of time was a conveyance which included the second privilege, now owned by the plaintiff Whitney. This was a deed from Burbank to Hervey Waters, dated September 1, 1828, of three lots, with a certain right of flowing the land above. "Furthermore, if the said Burbank, his heirs or assigns shall neglect to draw water from Singletary Pond sufficient to carry two engines, as now running in the grantor's mill from five A. M. to seven P. M. on each working day, said Waters, his heirs or assigns shall have a lawful right to draw so much water, at any time so neglected by the grantor or his assigns, and no more, and said Waters, his heirs or assigns shall be at equal expense in erecting, making or repairing the dam, flume or gates at Singletary Pond with the other owner of privileges from said pond."

The fourth deed in the order of time was a mortgage, which included the third mill-site, now owned by the plaintiff Lapham. This mortgage was given by Burbank to Stephen Salisbury, dated March 23, 1829, and included various other parcels of land besides the mill-site, but it contained no specific grant of rights of water in the pond or stream. This mortgage was duly foreclosed.

The titles under the above deeds all came by mesne conveyance to the several plaintiffs.

The title of the defendant is derived from Burbank, through a mortgage given by him to Sarah Waldo, dated April 16, 1820, of various parcels of land, one of which included the first or upper privilege, situated "immediately below the outlet of Crooked Pond, so called, with the mills and privileges thereon and thereto belonging." This mortgage was duly foreclosed, possession for breach of condition having been given in 1843.

In order to determine what was the extent of the rights granted by the first three of the deeds above mentioned, it is, of course, proper to read the deeds in the light of the facts which existed and were known to both parties at the time when the deeds were given; and having done this, the extent of the grant must depend upon the meaning of the word used.

Apparently having this rule in mind, the master has made a finding as follows: "I find that Caleb Burbank, when he made these

grants of water rights in said deeds of the plaintiffs' and defendant's privileges, in 1825 and thereafter, as above recited, had adapted his paper mill, as a water mill, to the capacity of the stream, so regulated in its flow from Singletary Pond as a reservoir, as to produce a constant and uniform volume of water during each working day of the year, and not being then familiar with the use of the term 'horse power,' as the measure of motive power in the operation of mills, he adopted the requirements of his paper mills, as then run, to wit, 'two paper engines' and the machinery then necessarily used therewith in making paper, as the measure of the rights of the grantees, their heirs and assigns, in their respective grants, as aforesaid, from him, in the waters of said reservoir and stream therefrom, retaining for the owner of the upper privilege the care and management of the reservoir gate, subject to the rights of the owners below, under the grants, to hoist said gate when necessary to give a regular and uniform flow of said stream in quantity or volume, so measured by the use and requirements of said paper mill—all owners of privileges on said stream to contribute equally in the expense of maintaining said reservoir for their common benefit."

Two questions arise upon this finding: (1) whether, assuming the facts to be as thus stated, the language of the deeds can be so stretched as to give to the several grantees a right to enforce such a regulation of the water as to produce a constant and uniform volume of water during each working day of the year; and (2) whether the evidence warrants a finding that such was the intention of the grantor in giving the deeds. We are unable to agree with the finding of the master in either particular.

The language of the deeds does not permit the construction put upon them by the master. It is of no consequence how Burbank operated his own mill or managed or regulated the water for his own convenience and benefit. What he conveyed to these grantees was the ordinary right of riparian owners, except that they were only entitled to have a certain specified and limited quantity of water sent down the stream during certain hours of every working day. If that quantity should come, it was expressly stipulated in the first two deeds that the grantees should not meddle with the gate, or draw any more water; while in the third deed it was specified that if the grantor should neglect to draw that quantity, the grantees might draw so much, and no more. In any event their right was expressly limited to that quantity of water, which in each deed was described as being what would be sufficient to carry or equivalent to carrying two engines in the grantor's mill, for so many hours a day, the number of hours being greater in the last deed; and thus in respect to the quantity of water which they were entitled to have flow in the stream, their right was not quite that of ordinary riparian owners. There is not in either deed anything giving to the grantee a right to have the water held back for his benefit. The only provision that looks at all like an understanding between the parties that the water should be held back for the benefit of the grantees is that which subjects the grantees to a

part of the expense of maintaining the dam, flume and gate at the outlet of the pond. If there were any other words going to indicate such a right on their part, this provision would certainly lend support to that construction. But this provision of itself alone by no means contains so much. The accumulation of water in Singletary Pond by means of a dam would naturally and almost necessarily be of some benefit to the various mill owners on the stream. The three deeds all include a recognition that the grantor in the first instance was to have the care of the gate. The matter that was stipulated for was the quantity of water that should be sent down; not the duty of the grantor in holding back water. It is possible that if the present methods of using water had been foreseen the parties might have stipulated for having the water held back, as well as for sending it down; but they did not do so. Even if it could be made to appear that they intended to do so, we are unable to find in the words which they used anything which imposes that duty upon the grantor.

But, moreover, the evidence is not sufficient, in our opinion, to warrant a finding that the grantor so intended, or that, in the words of the master's report, he "adopted the requirement of his paper mill, as then run, with two paper engines, and the machinery then necessarily used therewith in making paper, as the measure of the rights of the grantees," both as to letting down and holding back water. The paper engines, which, as we understand it, were machines for beating up pulp, were operated by water coming through a separate aperture and to a separate wheel, which did not carry other machinery. We cannot accept the conclusion that when the grantor specified two paper engines he meant to include all the other machinery in his paper mill. Nor are we able to find any sufficient evidence that he intended to be bound for all time to regulate the water for the benefit of the grantees as he was then regulating it for his own benefit. If such had been the intention, it would most likely have been expressly stated. The grantees might well expect in the natural course of things to get a benefit from the maintenance of the dam and gate; not necessarily by having the water held back and delivered with reference to their special convenience, but because the water would be so accumulated that a less proportion would run to waste. In the absence of any stipulation or acquired right to the contrary, the owner of an upper privilege may make a reasonable use of the water and obstruct and accumulate it in a reasonable way for the benefit of his own mill, whatever may be the effect upon the owners below. *Springfield v. Harris*, 4 Allen, 494; *Merrifield v. Worcester*, 110 Mass. 216, 219.

But he must not withhold or let down the water in an unreasonable manner. *Olapp v. Herrick*, 129 Mass. 292.

And the grantee of a lower privilege gets no right to the use of a reservoir owned by the grantor, unless it is so specified in the deed, even although necessary for the beneficial use of his mill. *Brace v. Yale*, 4 Allen, 833.

The grantor had a going mill, with certain machinery. As a measure of power granted, he selected a certain portion of that machinery

and agreed that if at any time he should not be sending down enough water to carry the specified portion of his machinery, the grantees might come up and raise his gate and draw that quantity of water, and he bound them to bear a proportion of the expense of maintaining the gate, flume and dam, not of managing them. There is no occasion for inferring that the grantor intended to grant any greater right in respect to the use of the water than what is according to the plain and natural meaning of the words used.

But since a riparian proprietor has a right to insist that the water shall not be unreasonably withheld or let down by an owner above, an owner of a stream at the outlet of a great pond, who by digging out the channel and erecting a dam at the edge of the pond can hold back all the water or quickly draw it down nearly to low water mark, has no right by virtue of his position unreasonably to interfere with the natural flow of the stream, so as to give the riparian proprietors below a great deal more than the usual quantity of water during a part of the year, and little or none during the remainder of the year. While he is not obliged to hold back the water for the benefit of the owners below, he cannot lawfully let it down in such a way as to leave none for a long time afterwards to maintain the stream in its usual condition.

Three of the deeds above mentioned recognize the existence of a dam, flume and gates at the outlet of the pond by which the discharge of water is to be regulated, and they give to the grantees a right to raise the gate and let down the stipulated quantity of water whenever the grantor does not suffer so much to pass at that point. While we hold that these provisions do not require the grantor to maintain the dam and gate and regulate the flow of water for the grantees and their successors, nor limit his right reasonably to use the water, even though the quantity used may exceed that required by them, and may leave in the pond too little to supply the amount mentioned in the deeds, it is at the same time manifest that he cannot under these contracts unreasonably let down the water for his own convenience, and thereby render nugatory the right of his grantees to open the gates and obtain water for their mills. If he assumes for his own purposes to regulate the discharge of water from the pond, he must do it with a reasonable regard to the rights of the owners below, having reference to the size and nature of the stream, and the uses to which it is adapted. *Olapp v. Herrick*, *supra*.

The plaintiffs introduced in evidence a deed from Caleb Burbank to Goddard and Mills, dated September 12, 1833, of the upper privilege; granting "also a right to draw water from Singletary Pond, so called, sufficient to carry two engines in the paper mill as now used, or all water that naturally runs in the stream together with all privileges."

The plaintiffs contend that, although the title conveyed by this deed has been cut off by the foreclosure of the Waldo mortgage, yet this deed may be referred to in aid of the construction to be given to the deeds under which they claim title, and that it shows that the grantor considered the quantity of water which was

sufficient to carry the two engines as equivalent to all the water that naturally ran in the stream. For some purposes, no doubt, the recitals in ancient deeds are competent evidence, as, for example, to show the position of a natural boundary (*Drury v. Midland R. Co.* 127 Mass. 571, 581); or to show pedigree. 1 Greenl. Ev. § 104.

This doctrine, however, does not extend so far as to allow the estate granted in a prior deed to be expanded by recitals or statements of the grantor in a later deed, to the injury of an intervening title. After making the mortgage to Waldo in 1889, the grantor could not impair the rights thereby conveyed by statements in a subsequent deed, or otherwise, to the effect that by grants made prior thereto he had intended to convey more than those grants of themselves would include. Moreover, it is at least open to question whether the true meaning of the words in the deed to Goddard and Mills is not that Burbank thereby grants the right to draw water sufficient to carry the two engines, in any event, or all the water that naturally runs in the stream in case such natural flow should be greater than would be sufficient for that purpose.

We are therefore of the opinion that the water rights granted by the first three deeds in the order of time were the ordinary rights of riparian owners, except that the right of each grantee to draw water was limited to a certain quantity during the specified hours of each working day, and that the grantor had no right to hold back the water so that less than that limited quantity would flow down. And if he did so the grantees might themselves raise the gate of the outlet of the pond and let down water in that quantity; but that the grantees acquired thereby no right to have the water in the pond held back for their benefit.

The plaintiff Lapham, the owner of the third privilege, derives his title under a mortgage which made no special mention of water rights, and therefore the grantee took, as riparian proprietor, a right to the whole natural flow of the stream, subject to such reasonable use of the water by upper owners as the common law allows. *Tourtelot v. Phelps*, 4 Gray, 870.

This right, as has already been stated, does not include the right to have the water held back for his benefit by means of the reservoir and dam above, which the owner of the upper privilege may have a right of using reasonably and properly for his own benefit; but it does include the right to a larger quantity of water than the owners of the other privileges had, provided the natural flow of the stream would furnish it.

The master finds that the plaintiffs have lost by nonuser and abandonment the right to have the water come down in excess of ten hours for each working day. The defendant, however, concedes in its brief that there is no evidence to support his finding, and we discover none. Moreover, the rights of riparian owners are not lost in this way. *Johnson v. Jordan*, 2 Met. 234, 239.

Lapham was merely a riparian owner, and the other plaintiffs had the rights of riparian owners, subject to the qualifications contained in their respective deeds.

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The defendant, as the owner of the upper privilege, and of the dam, flume and gate at the outlet of the pond, acquired by the conveyance the right to control the gate and manage and regulate the flow of the water, except that it must not thereby interfere with the rights of the owners below. To Lapham, the defendant was bound to send the whole natural flow of the stream, subject to such reasonable obstructions and accumulations and prior uses as might properly be made for the defendant's own benefit. To the other plaintiffs, the defendant was bound to send down the quantity of water called for by their several deeds, without reference to the convenience of operating its own mills; though this duty would probably be suspended in case a temporary stoppage should become necessary for repairs, or other emergency, outside of the usual course of the operation of the mill. *Hankey v. Clark*, 110 Mass. 262; *Gould v. Boston Duck Co.* 13 Gray, 442; *Pitts v. Lancaster Mills*, 18 Met. 156; *Drake v. Hamilton Woolen Co.* 99 Mass. 580.

Having reached these conclusions as to the rights of the respective parties under their deeds, it is further to be considered if these rights have been varied by any adverse user or prescription, on one side or the other.

The master having found that the grantees in the first three deeds in the order of time, by the true construction of their grants, were entitled to have the flow of water regulated for their benefit, did not find that they had gained any right by prescription, nor is it contended in the argument that either of the plaintiffs has gained in this manner any greater right than his deed conveyed. Nor do we see any evidence to warrant such a claim. But the defendant earnestly contends that it had gained a right by prescription to manage the flow of water from the pond for its own benefit, in the manner in which it has of late years been accustomed to do; that is, by retarding the natural flow at times, and at other times letting down more than the natural flow, as suited its own advantage. The master has found to the contrary, and an examination of the evidence fails to satisfy us that this claim of right on the part of the defendant is made out. The importance of clear evidence to sustain a claim of this description was remarked upon by Judge Story, in *Tyler v. Wilkinson*, 4 Mason, 397, 404.

It appears to us that the acts of the defendant in this direction have been gradual, and that the right now contended for has never been openly asserted till it was done by Redding, the defendant's superintendent, within a few years. The defendant has not suggested any particular time or manner in which it or its predecessors in title acquired by purchase, grant or release any additional right to that conveyed by the mortgage to Waldo. In 1836, when the depositions *in perpetuum* were taken, there was no intimation of such a claim. In 1861 and 1864, when the owners of lower privileges assert that they contributed money towards the expense of repairs, as they were bound to do under their deeds, we find no intimation of any claim by the owner of the upper privilege that their rights under their deeds had been impaired. In short, looking at the testimony which is reported, all of which has

been examined with reference to this point, though it is not necessary to refer to it here in detail, we are satisfied with the finding of the master that the defendant has not acquired the right by prescription to control the reservoir and the flow of the stream therefrom; and therefore the rights of the defendant must depend upon the deeds.

It appears by the evidence that Redding, the defendant's superintendent, while acting within the scope of his authority, has practically denied the plaintiffs' rights, and exercised in

behalf of the defendant in recent years a larger authority than it rightfully possesses to control the flow of the water. The defendant's answers contain a similar claim. The plaintiffs, therefore, are entitled to maintain their bills for relief, but the scheme proposed by the master for regulating and apportioning the flow of the water of the stream will have to be given up, and his various findings which are inconsistent with the conclusions above expressed must be disregarded.

Ordered accordingly.

TEXAS SUPREME COURT.

J. H. HILL and Wife, *Appts.*,

v.

B. B. KIMBELL.

(....Tex....)

1. A miscarriage and serious impairment of the health of a woman occupying leased premises, caused by fright produced by a boisterous and violent assault upon some negroes on the premises, and in her presence, by the landlord, who knew her pregnant condition, gives a cause of action against him.

2. The word "trespass" in the Statute allowing an action for trespass to be brought in the county where it was committed, or where the defendant has his domicile, includes actions of trespass on the case.

(February 14, 1890.)

APPEAL by plaintiffs from a judgment of the District Court for Freestone County sustaining an exception to the petition for the reason that defendant was not sued in the county of his residence, in an action to recover damages for injuries from fright caused by defendant's negligent acts. *Reversed.*

The case succinctly appears in the opinion.

Mr. J. D. Childs, for appellants:

For an injury to the wife, either intentionally or negligently caused, which deprives her of the ability to perform services or lessens that

ability, the husband may maintain an action for the loss of service and also for any incidental loss or damage (Cooley, Torts, p. 226); or they may have a joint action.

Cooley, Torts, p. 227; *Barnes v. Martin*, 15 Wis. 240; *Matteson v. New York Cent. R. Co.* 85 N. Y. 487; *Atlantic & P. R. Co. v. Hopkins*, 94 U. S. 11 (24 L. ed. 48); *Kavanaugh v. Janesville*, 24 Wis. 618; *Smith v. St. Joseph*, 55 Mo. 456; *McKinney v. Western Stage Co.* 4 Iowa, 420; *Monry v. Chaney*, 48 Iowa, 600; *Berger v. Jacobs*, 21 Mich. 215.

Injury to the wife's feelings is an element of actual damage.

Western Union Teleg. Co. v. Cooper, 71 Tex. 507.

To maintain an action on the case it is not necessary that it should be supported by instances or precedents; it is sufficient if the case in question be covered by principle.

Wait, Act. and Def. p. 99.

The law implies that the culpable party must have intended natural consequences of that which he did or neglected to do, and it holds him accountable accordingly.

Cooley, Torts, p. 84, citing *James v. Campbell*, 5 Car. & P. 872.

An action lies for an injury caused by a fright.

Canning v. Williamstown, 1 Cush. 451. See also *Gallagher v. Boria*, 67 Tex. 265; *Stuts v. Chicago & N. W. R. Co.* 73 Wis. 147, 9 Am. St. Rep. 769.

NOTE.—Trespass upon personal rights.

Whenever there is a wrong there is a remedy. *Booth v. Starr*, 5 Day, 419; *Hawley v. Bottsford*, 27 Conn. 80; *Bacon v. Thorp*, 27 Conn. 251; *Davis v. Van Sands*, 45 Conn. 600.

Actions of trespass are transitory, except for injury to real property. *McKenna v. Fisk*, 42 U. S. 1 How. 241 (11 L. ed. 117).

The distinction between trespass and trespass on the case is abolished by Rev. Stat., chap. 82, §15; and a declaration in either form is good. *Holmes v. Corthell*, 5 New Eng. Rep. 794, 80 Me. 81.

Where one in violation of the law does an act which, in its consequences, is injurious to another, he is liable, irrespective of negligence. *Van Norden v. Robinson*, 45 Hun, 567.

An injury can be voluntary only when the party is aware of the danger to which another is subject, and, realizing the inevitable result, performs the act which inflicts the injury. *Stone v. Dry Dock, E. B. & B. R. Co.* 46 Hun, 184.

In an action of trespass for personal violence, all the circumstances of the transaction may be shown, 7 L. R. A.

under the general issue, to have such effect as they merit, in determining the verdict, by mitigation or otherwise. *Sutherland v. Ingalls*, 63 Mich. 620, 6 West. Rep. 389.

So in an action of trespass for forcibly invading a plantation and carrying off some slaves and frightening away others, it was held that evidence of consequential damages to the wood and corn of plaintiff was admissible. *McAfee v. Crofford*, 54 U. S. 13 How. 447 (14 L. ed. 217).

So where a landlord unlawfully evicted a tenant. *Moyer v. Gordon*, 12 West. Rep. 145, 118 Ind. 282.

A party will be entitled to as much damages for any wrong or injury quietly endured as if he violently resisted. *Southern Kansas R. Co. v. Hinsdale*, 38 Kan. 507.

So it has been held that in a suit by husband and wife for damages for injuries inflicted upon the wife by an indecent assault, full compensatory damages may be awarded within the amount claimed. *Wolf v. Trinkle*, 103 Ind. 358, 1 West. Rep. 497. Compare *McClelland v. Patterson* (Pa.) 5 Cent. Rep. 734.

In Texas there is no distinction between "trespass" and "trespass on the case."

Wait, Act. and Def. p. 100; *Tmorer v. Sayre*, 4 Tex. 28; *Kellers v. Reppien*, 9 Tex. 443; *Smith v. Clopton*, 4 Tex. 109.

Where the foundation of the suit is some crime or offense, or trespass, for which a civil action in damages may lie, the suit may be brought in the county where such crime or defense or trespass was committed, or in the county where the defendant has his domicile.

Rev. Stat. art. 1193, ex. 8; P. & C. arts. 314, 495; *Cook v. Hartman* (Tex.) 2 White & W. Civil Cas. 770; *Armendius v. Stillman*, 54 Tex. 624; *Jacobs v. Orum*, 62 Tex. 415; *Illies v. Knight*, 3 Tex. 813; *Cahn v. Bonnett*, 62 Tex. 674; *Belo v. Wren*, 63 Tex. 720; Cooley, Torts, p. 85; Bl. Com. bk. 4, §§ 5, 120.

Meera Gammage & Gammage for appellee.

Gaines, J., delivered the opinion of the court:

The case presented by the petition in this suit being novel, we were in doubt whether the facts alleged showed a cause of action, and for that reason set aside the submission at the last term, and requested counsel to submit arguments upon that question. The question has been argued, and the cause again submitted for determination. The defendant below, the appellee here, interposed an exception to the petition on the ground that he was not sued in the county of his residence, and the exception was sustained by the court. The correctness of that ruling depends upon the nature of the suit. The petition alleges, in substance, that plaintiffs were husband and wife, and were in possession under a lease of a dwelling-house and land belonging to defendant; that the wife was well advanced in pregnancy, and that defendant knew the fact, and that he was also aware that any undue excitement to a lady in that condition was likely to produce a serious injury to her health; that, notwithstanding these facts, he came to plaintiff's house, and in the yard, and in the immediate presence of the wife, he assaulted two negroes in a boisterous and violent manner, and that the assault was accompanied with profane language, and resulted in drawing blood. It was also alleged that defendant's conduct frightened Mrs. Hill, and brought on the pains of labor, and eventually produced a miscarriage, and otherwise seriously impaired her health.

After a very careful consideration of the petition, we are of opinion that its allegations show a cause of action. We have found no exact precedent for such an action, but that is no sufficient reason why an action should not be sustained. That a physical personal injury may be produced through a strong emotion of the mind there can be no doubt. The fact that it is more difficult to produce such an injury through the operation of the mind than by direct physical means affords no sufficient ground for refusing compensation, in an action at law, when the injury is intentionally or negligently inflicted. It may be more difficult to prove the connection between the alleged cause and the injury, but if it be proved, and the injury be the proximate result of the cause, we cannot say that a recovery should not be

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had. Probably an action will not lie when there is no injury except the suffering of the fright itself, but such is not the present case. Here, according to the allegations in the petition, the defendant has produced a bodily injury by means of that emotion, and it is for that injury that the recovery is sought. If, in his assault upon the negroes, he had discharged a missile at one of them, and it had missed its aim, and had struck Mrs. Hill, and produced a miscarriage, there is no doubt that he would be liable to an action; and it seems to us he should be equally held liable for the same result, produced by the same conduct, except that in the one case the means of the injury is a material substance, and in the other a mental emotion. Of course, since there is no intent to injure Mrs. Hill alleged, it will be a question for the jury to determine whether his conduct, so far as she was concerned, was negligent or not; that is to say, whether, under the circumstances, and with the lights before him, a reasonably prudent man would have anticipated the danger to her or not. We have been cited by counsel for appellee to the case of *Renner v. Canfield*, 33 Minn. 80. In that case the defendant shot a dog near the residence of the plaintiff, and thereby frightened his wife and caused a miscarriage. The court says, in effect, that the charge to the jury was erroneous because the jury could, and would probably, infer from it that the defendant was liable in the action if the killing of the dog was unlawful; and for this error the judgment was reversed. In the opinion the court says: "If the acts of defendant amounted to any tort which, in any possible view of the case, could be held to be the proximate cause of the injuries complained of, the gist of it must be negligence in shooting in such proximity to a human residence as might naturally and reasonably be anticipated to be liable to injure the inmates by fright or otherwise. We are by no means prepared to say that upon the evidence a verdict for plaintiff could be sustained even upon that ground. But it is enough, here, to say that the case was not submitted to the jury upon any such theory."

It is evident that the court did not decide that no action would lie even under the peculiar facts of that case. Besides, it appeared in that case that the defendant was not aware of the proximity of the plaintiff's wife at the time he discharged the gun.

We think the petition in this case discloses a cause of action, and this conclusion brings us to the question originally presented in appellant's brief. The petition alleged the residence of defendant to be in Leon County, and that the injury was inflicted in Freestone County, in which the suit was brought. The defendant excepted to the petition because the action was not brought in the county of his residence. The ruling of the court in sustaining the petition is assigned as error.

Our Statute provides that no person who is an inhabitant of the State shall be sued out of the county of his domicile except in certain cases. Rev. Stat. art. 1198.

Among the exceptions is the following: "Where the foundation of the suit is some crime or offense or trespass for which a civil

action in damages may lie, in which case the suit may be brought in the county where such crime or offense or trespass was committed, or in the county where the defendant has his domicile." Rev. Stat. art. 1198 (ex. 8).

It is clear that, unless the action in this case can be classed as a trespass within the meaning of that term in the provision quoted, the suit was improperly brought in Freestone County, and the determination of that point depends upon the further question whether the word is used in that Statute in its most restricted, or in a more enlarged, legal sense. In its widest signification, it means any violation of law. In its most restricted sense, it signifies an injury intentionally inflicted by force either upon the person or property of another. But it still has a signification in law much more narrow than the first, and more enlarged than the second, meaning given, and embraces all cases where injury is done to the person or to property, and is the indirect result of wrongful force. Abb. Law Dict. *Trespass*.

In this last sense the word would include injuries to persons or property which are the result of the negligence of the wrong-doer, and it seems to us more in consonance with the purpose and spirit of the exception to hold that it was in this sense that it intended that the word should be understood. We presume the exception was made in the interest of the injured party, and not of the wrong-doer; and we see no good reason why a distinction should be made between an injury resulting from intentional violence and one resulting from negligence. It occurs to us the consideration which induced the exception was that one who had been injured in his person or his property by the willful or negligent conduct of another should not be driven to a distant forum to get a redress of his wrongs.

In the case of *Ten Eyck v. Runk*, 81 N. J. L. 428, the Supreme Court of New Jersey construed the word "trespass," as used in a statute of that State, as descriptive of a class of actions, and held that it was not used in its most restricted sense, but applied also to all actions of trespass on the case. See also *Cook v. Hertman*, 2 White & W. Civil Cas. 770.

If, as we think, the word "trespass," in our Statute, was intended to embrace, not only actions of trespass proper, as known to the common law, but also actions of trespass on the case, it is clear that the action in this case was properly brought in Freestone County, and that the court had jurisdiction over the person of the defendant.

We conclude that the court erred in sustaining the exception to the petition; and for this error the judgment is reversed, and the cause remanded.

PEREZ, *Plf. in Err.*,

v.

RAYBAUD.

(.....Tex.....)

A landlord is not liable to a servant of his tenant for injuries occasioned by a dan-

gerous condition of the premises existing at the time of the lease, although he subsequently promised, without any new consideration, to repair the premises, if there was no covenant to repair in the lease.

(February 4, 1890.)

ERROR to the District Court for Galveston County to review a judgment in favor of defendant in an action to recover damages from a landlord for personal injuries alleged to have resulted from the defective condition of the leased premises. *Affirmed*.

Commissioner's opinion.

The facts sufficiently appear in the opinion.

Mr. L. E. Trezevant for plaintiff in error.

No appearance for defendant in error.

Collard, J., delivered the following opinion:

Suit by plaintiff in error, servant of a tenant, against defendant in error, the owner of the rented premises, for damages resulting from the falling of a cistern. The petition alleged that defendant, the owner of the premises, leased them to A. Watts to use as a restaurant; that he was employed by Watts; that there was a cistern upon the premises of the capacity of 8,000 gallons, which, because of its defective supports (the same being decayed and insufficient) and because of the weight of water it contained, fell upon plaintiff while he was in the discharge of his duties, without his fault, causing serious and permanent physical injuries; that the defect in the cistern existed at and before the lease to Watts; that defendant knew of the defect in the cistern and its supports before the injury, and, at the request of Watts, had promised to have the same repaired before it fell, but had failed and neglected so to do; that plaintiff was at the time of the injury ignorant of the unsafe condition of the cistern; that its bad condition was not the result of temporary and unusual use and wear, but of age and natural decay. The court below sustained a general demurrer to the petition, and the case is here on writ of error, with a general assignment by plaintiff that the court erred in sustaining the demurrer. There is no brief on file for defendant.

It is well settled that the owner of leased premises is liable to the public or to third persons for injuries resulting from a defective structure on the premises, when the defect existed at the time the lease was made, or when he had covenanted to repair and keep in repair. *Thomp. Neg. 817; Marshall v. Heard*, 59 Tex. 267; *Owings v. Jones*, 9 Md. 108; *Grady v. Wolaner*, 46 Ala. 381; *Helwig v. Jordan*, 53 Ind. 21.

The case at bar is not an action by a stranger, but by the servant of a tenant against the owner; and in such case the rule seems to be that the landlord is liable only when he had contracted or is under obligation to keep the tenement in repair, or has been guilty of fraud or deceit which would release the tenant from his implied obligation to repair.

"It is a general rule," says Mr. Thompson

NOTE.—Negligence; dangerous premises.

Whether a building has been made unsafe by the agency of time or the acts of trespassers is immaterial as affecting the owner's liability, where it was within his power to prevent such condition, as, in either event, it is the owner's duty to keep his

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in his work on Negligence (vol. 1, p. 323, § 3) "that, in the absence of fraud or deceit, there is no implied covenant that the demised premises are fit for occupation, or for the particular use which the tenant intends to make of them. . . . Therefore the tenant has no remedy against the landlord for suffering the premises to get out of repair, . . . and this rule extends to servants and others entering under the tenant's title."

In *Jaffe v. Harteau*, 56 N. Y. 401, the court states the doctrine as announced in the foregoing quotation, and says: "The question must be regarded as settled by authority." The action in that case was against the landlord for an injury of the wife of the sub-lessee, and, referring to the case of *Godley v. Hagerty*, 20 Pa. 387, which held a contrary doctrine, says that, in that case, "some importance was attached to the fact that the building was erected by the defendant. This may have been regarded as proper in that case, as tending to show him guilty of fraud;" and the court proceeds to show that cases where one erects a nuisance on his premises, and afterwards parts with the possession, have no application to the case under consideration; and then concludes, that "there is no reason for holding the lessor, in the absence of any agreement or fraud, liable to the tenant for the present or future condition of the premises, that would not be equally applicable to a similar liability sought to be imposed by a grantee in fee upon his grantor." The following cases, besides those cited in the foregoing case, assert the same doctrine, that there must be an express covenant or agreement by the lessor to keep in repair, in order to make him liable to the tenant. *Scott v. Simons*, 54 N. H. 431; *Brewster v. De Fremery*, 33 Cal. 341; *O'Brien v. Capwell*, 59 Barb. 497.

The last case cited is, in principle, like the one before us. The action was by a washerwoman in the employ of the tenant, against the landlord, and the court held that where there is no fraud, false representations or deceit, and, in the absence of an express warranty or covenant to repair, there is no implied covenant in favor of the tenant; and, as the plaintiff stood in his place, there was no liability on the part of the landlord to her.

The authorities are abundant sustaining the doctrine that the owner cannot create a nuisance on his premises, and relieve himself of liability to a third person injured thereby, by leasing. It is also the law that he would be liable to a stranger where the defective structure causing the injury is on the premises when they are leased; but such liability would not exist in favor of the tenant, where there is no contract by the landlord to repair, and no

fraud, because he does not owe the tenant the duty of repairing, as he does the public and strangers.

The cases cited by plaintiff, holding the landlord liable, are cases where the injury was to third persons lawfully upon the rented premises, or where the landlord owed a duty to the public to repair. The cases cited are *Albert v. State*, 66 Md. 325, 6 Cent. Rep. 447; *Rankin v. Ingwersen*, 49 N. J. L. 481, 8 Cent. Rep. 371; *Joyce v. Martin*, 15 R. L. 558, 4 New Eng. Rep. 796; *Delay v. Savage*, 145 Mass. 83, 4 New Eng. Rep. 863. The first case was a suit by a minor for damages for death of parents who were drowned in consequence of the negligence of the owner of a wharf leased. The next case was a suit by a tenant of one part of a building for damages resulting from the bursting of water pipes in another part of the building, occupied by another tenant, who had covenanted to repair, where it was held that the landlord of the tenant on whose premises the pipes were defective was liable. The next case was where the owner of a defective wharf leased it in a defective condition. It was held that he was liable to one lawfully using it for the purposes for which it was intended. The court held both lessor and lessee liable.

Delay v. Savage, the next case cited, was an action for damages by a person who, while lawfully using a way abutting leased premises, fell into a coal-hole upon the way.

In none of these cases was the suit by the tenant, or the servant of the tenant, of the premises, having the defective structure upon them, and none of them is authority for the proposition that the landlord would be liable to such tenant or servant, where he was under no obligation or contract to repair. The mere fact that there was a nuisance on the premises at the time the property was rented would ordinarily render the lessor accountable for damages to a stranger lawfully passing thereon, whether he contracted to repair or not; and, in case he had not so contracted, both the lessor and lessee would be liable.

It is alleged, however, in plaintiff's petition, that he did not know of the defects in the supports of the cistern, but that defendant did know the fact at and before the injury, and that at the request of her tenant, Waits, she had promised to make the necessary repairs, but had failed and refused to do so. This allegation may have been set up to show that defendant was liable, because she had so promised and contracted. The promise was merely gratuitous, not made at the time of the lease, and was no part of the original contract. It was without consideration, and could not be enforced.

building in a safe condition. *Tucker v. Illinois*, Cent. R. Co. 7 So. Rep. 124.

One who enters the private apartments of another at the mere license of the latter does so subject to all the attendant risks. *Schmidt v. Bauer*, 5 L. R. A. 560, and note, 80 Cal. 565.

Placing an iron railing with pointed top around an area in front of a house is not negligence such as to create a liability for injuries by one of such points to the hand of a traveler, which he puts out to save himself from falling when he slips on an icy pavement. *Kelly v. Bennett* (Pa.) 7 L. R. A. 120, and note, 25 W. N. C. 368, 7 L. R. A.

Where a tenant who has long lived in the building, and knows that the cellar stairs are rickety and dangerous, goes down them for a mere trifle, and is injured, she is guilty of contributory negligence; and the fact that her landlord has had notice to repair the stairs and has failed to do so is immaterial. *Town v. Armstrong*, 75 Mich. 580.

Owner of private premises not liable for neglect to keep them in repair. See note to *Schmidt v. Bauer* (Cal.) 5 L. R. A. 560.

If nuisance is created by owner, damages are recoverable. See note to *Wasson v. Pettit* (N. Y.) 5 L. R. A. 794.

There is a case similar to this, where the suit was brought by the tenant. He had requested the landlord to repair a privy attached to the tenement, and the landlord agreed to do so. He, with some common laborers, attempted to make the repairs. Reported to the tenant's wife that the privy was safe. She went into it the same evening, when the floor fell through, and she was precipitated into the vault, and injured. The court, discussing the case says: "In the ordinary contract between landlord and tenant, there is no implied warranty on the part of the former that the demised premises are in tenantable condition. He is under no obligation to make repairs, unless such a stipulation makes a part of the original contract; and any promise to do so, founded merely on the relation of the parties, and not one of the conditions of the lease, would be without consideration, and for that reason would create no liability. But, although a gratuitous executory contract of that kind would not be binding upon him, he would

place himself in a very different position, if he should see fit to treat it as binding, and actually enter upon its fulfillment. He is at liberty to repudiate it, or to perform it at his option; but, if his choice should be to perform it he comes under some degree of liability as to the manner of its performance. *Gill v. Middleton*, 105 Mass. 478, 479, and authorities cited.

We have quoted freely from this case, because it is the law of the point under consideration in the case before us, and is decisive of it. The reasoning is sound and well presented, and saves us the trouble of further discussion. We think the plaintiff's petition was bad on general demurrer, and that there was no error in the ruling of the court so holding, and that the judgment should be affirmed.

Stayton, Ch. J.:

Report of Commission of Appeals examined, their opinion adopted, and judgment affirmed.

CALIFORNIA SUPREME COURT.

RILEY, Resp't.,

v.

SIMPSON et al., App'ts.

(.....Cal.....)

The owners of a leased building who consent to the erection of an awning by the tenants, and contribute lumber for its construction, are liable to a person injured by the falling of the awning and a portion of the wall to which it was attached, because the wall was not of sufficient strength to support the burden.

(February 26, 1890.)

A PPEAL by defendants from a judgment of the Superior Court for the County of San Joaquin in favor of plaintiff, and from an order denying a motion for a new trial, in an action to recover damages for personal injuries alleged to have been caused by a nuisance maintained by defendant. *Affirmed.*

The case sufficiently appears in the opinion.

Messrs. W. L. Dudley and W. M. Gibson for appellants.

Messrs. J. C. Campbell and James H. Budd for respondent.

Sharpstein, J., delivered the opinion of the court:

This action is brought to recover damages caused by the falling of an awning and a portion of a brick wall upon the plaintiff while passing along upon a sidewalk under said awning. Defendants were the owners and lessors of the building to which said awning was attached. The case was tried by a jury, which rendered a verdict in favor of the plaintiff for \$5,000. Defendants moved for a new trial on several grounds, one of them being "insufficiency of the evidence to justify the verdict." The motion for a new trial was overruled, and **7 L. R. A.**

from the order overruling it and the judgment this appeal is taken. There was sufficient evidence to justify a finding that the wall to which the awning was attached was not of sufficient strength to support that burden, although it did support it several months. But the evidence is abundantly sufficient to justify a finding that it was carelessness to hang such an awning to a wall in the condition that this wall is proven to have been. And somebody was guilty of carelessness in placing it there. The building, or some part of it, was occupied by tenants of appellants, and it was doubtless at the instance of those tenants that the awning was put up, and it was put up by contractors employed by said tenants. But appellants not only knew of and consented to the erection of the awning, but contributed the lumber for its construction; the tenants providing the iron used in the construction of it, and paying the contractors for the work on it.

In *Kalis v. Shattuck*, 69 Cal. 503, this court said: "It is well settled that a landlord is not liable for such consequences, unless (1) the nuisance occasioning the injury existed at the time the premises were demised; or (2) the structure was in such a condition that it would be likely to become a nuisance in the ordinary and reasonable use of the same for the purpose for which it was constructed and let, and the landlord failed to repair it (*Jessen v. Sweigert*, 66 Cal. 182; *Rector v. Buckhart*, 3 Hill, 193; *Mullen v. St. John*, 57 N. Y. 567; *Hussey v. Ryan* (Md.) 2 Atl. Rep. 729; Wood, Nuis. §§ 295, 676; Wood, Land and Ten. 918); or (3) the landlord authorized or permitted the act which caused it to become a nuisance occasioning the injury."

In this case appellants not only authorized or permitted the act which caused the nuisance occasioning the injury, but contributed to it by furnishing material to be used in creating it. Under the rule above stated, appellants are certainly liable for the consequences of an act

to which they contributed. We perceive no merit in any of the exceptions taken to the rulings of the court during the trial. The damages awarded the plaintiff are not, in our opinion, excessive, and the instruction of the

court upon the subject of damages was not erroneous.

Judgment and order affirmed.

We concur: Thornton, J., McFarland, J.

MICHIGAN SUPREME COURT.

John HARRISON

v.

DETROIT, LANSING & NORTHERN
R. CO., *Appt.*

(....Mich.....)

1. An engineer and fireman of a locomotive are fellow servants of a section hand.
2. Whether the proximate cause of an injury to an employé loading poles on a car was the failure of the engineer or fireman of an engine which struck the car, to ring the bell, or the negligence of the assistant road-master in ordering him to continue the work while the engine was backing down, telling him there was plenty of time, and throwing him off his guard, leading him to believe that the road-master would take care that the engine did not strike the car, is an important question in determining the liability of the employer, and if properly presented must be submitted to the jury.
3. A command to continue work, given by one standing in the master's place, will not justify a railroad employé engaged in loading a car in doing so, without attempting to save himself from danger when he sees that the near approach of an engine, of which his superior is ignorant, has rendered such continuance perilous.
4. An employé is not a fellow servant but a superior or agent, for whose acts the master is held liable, so far as he is charged with an act which the law imposes upon the master the duty to perform.
5. An assistant road-master, having general charge of a portion of a railroad, with control of all the section-gangs along that line, is not a fellow servant with a section hand so as to prevent recovery by the latter for an injury caused by the negligence of the former in ordering him to continue work while an engine is approaching, thus throwing him off his guard, and then failing to take care to prevent injury by the approach of the engine.

(February 20, 1891.)

Error to the Circuit Court for Kent County to review a judgment in favor of plaintiff in an action to recover damages for personal injuries alleged to have resulted from the negligence of defendant's servant. *Affirmed.* The facts are fully stated in the opinion.

Meers. C. B. Lothrop and Smith & Stevens for defendant, appellant.

NOTE.—Proximate and remote cause of injury. See notes to Louisville, A. N. & C. R. Co. v. Lucas (Ind.) 5 L. R. A. 194; Erickson v. St. Paul & D. R. Co. (Minn.) 5 L. R. A. 735.

Fellow servants, who are. See Murray v. St. Louis Cable & W. R. Co. (Mo.) 5 L. R. A. 735, and cases referred to in note.

7 L. R. A.

Meers. Isaac M. Turner and Birney Hoyt, with Mr. John A. Fairfield, for plaintiff, appellee.

Long, J., delivered the opinion of the court:

This action is brought to recover for personal injuries sustained by the plaintiff through the claimed negligence of the servants of the defendant. On the trial the plaintiff had verdict and judgment for \$9,000. The plaintiff had been in the employ of the defendant Company for about eight years, though for some portion of that time he had been laid off, by direction of those in charge of the works of the Company. During that time, his employment had been confined to the work as a section foreman and hand under a section boss. At the time of the injuries complained of one George Light was the defendant's assistant road-master of the western division, having charge of its tracks from Stanton to Big Rapids, and from Howard City to Saginaw,—a line of about 150 miles of defendant's road, Mr. Doyle being the general road-master. On the morning of November 11, 1887, Light, having been ordered by Doyle, the general road master, to go to Cedar Lake, east of Edmore, to move some telegraph poles, ordered two section foremen,—Cushion, to whose gang plaintiff belonged, and Horton,—to take their gangs there for that purpose. Light went with them from Edmore on a hand car, and assumed charge and direction of the work. The poles were partially loaded on a flat car standing on a side track, and in loading were piled much higher on the side of the car furthest from the pile of poles than on the other, the car being blocked up to prevent its tipping. A freight train came along on the main track from towards Edmore going eastward, when Light ordered the engine of this train to be detached for the purpose of moving the car upon which the poles were being placed to another part of the yard. The engine, on being detached, proceeded eastward beyond the switch; and, the switch being then turned, it was then backed in upon the switch towards the car upon which the plaintiff was at work,—plaintiff, with two other men, being on the east end of the car, with his back towards the approaching engine, and standing on the poles about five feet above the deck of the car. Plaintiff claims that the engine was then about sixty feet from him, when he desisted from his work, and turned his head around, looked towards the approaching engine, and said to Light, who plaintiff claims was standing near the main track, and about ten feet east of the car on which plaintiff was at work, "George, this here car will about do. She is about level,"—and at the same time plaintiff grabbed hold of the poles to protect himself if the engine came back to the car, when Light replied:

"Roll another pole over. What the hell are you looking at? You have lots of time. Roll them over! Roll them over!" While plaintiff and his witnesses place Light at this time some eight or ten feet east of the car, some other evidence puts him near the middle of it. When this order was given by Light, plaintiff resumed his work; and he testifies that he went to work because Light told him to,—that Light was the boss of the gang that day. Plaintiff says that when he turned around to see, and saw the engine coming, he thought she was coming to make the switch to move the cars, and then he grabbed hold; but when Light told him to go to work, he did the same as the rest, went to work to roll more poles over to level the car up, and did not think they were going to let the engine come back on the car until they got through. On being asked if he relied upon what Light said in that respect, he stated: "I had to do as he told me, or maybe I would get the red ticket. I thought he would not let the engine come back while we were at work on it."

While the plaintiff was so at work the engine was backed down against the car. Plaintiff was thrown off, and seriously, and, as it is claimed, permanently, injured, and in a condition which wholly prevents him from doing any kind of labor. It is claimed that Light took no steps to warn the plaintiff of the approach of the engine, or to prevent the engine from striking the car. Plaintiff also claims that the bell was not rung, and the jury so found; that he was listening for the bell, and, had he heard it, would have taken it as a signal of danger, and protected himself. Mr. Light admits ordering the engineer to take the car upon which plaintiff and the others were at work, and move it to another part of the yard, but denies that he gave the plaintiff the order claimed; that he merely directed the men to level the poles on the car, but gave no other order until after the accident; that he stood with his back partly to the east, and at right angles to the east switch; that he saw the engine pass over the switch to the east and stop, and did not see it again until it struck the car. The defendant also contended that the bell was being rung while the engine was backing down.

At the close of the testimony, counsel for defendant requested the court to instruct the jury: "(1) If you find that the injury to the plaintiff was caused by the negligence of Mr. Light, the assistant road-master, the plaintiff cannot recover, for the reason that the two were fellow servants, and the master is not liable for an injury to one caused by the negligence of another." "(3) If you find that the plaintiff was ordered by Mr. Light to continue work while the engine was approaching the flat car upon which the plaintiff was at work, but at the same time the bell upon the engine was ringing and the engine was backing up, then the plaintiff was guilty of contributory negligence in failing to heed the warning of the bell; and your verdict must be for the defendant. (4) If you find that such order was given by Mr. Light, but that afterwards the bell upon the engine was rung as a warning of the approach of the engine to the flat car, then the plaintiff was guilty of contributory negligence, and cannot recover in this action.

7 L. R. A.

(5) If you find from the evidence that Mr. Light gave the order to the plaintiff to continue work, as the engine was backing up, but that the fact of its near approach was not known to Mr. Light when he gave the order, and was known to the plaintiff, then the plaintiff was guilty of contributory negligence in failing to notify Mr. Light of its approach, and to secure himself; and your verdict must be for the defendant. (6) If you find that Light gave the order as claimed by plaintiff, but that at the time of giving it the danger from the engine was not imminent, then the giving of the order was not the proximate cause of the injury, but the proximate cause was his failure subsequently to warn the plaintiff; and for such neglect the defendant is not liable, and the plaintiff cannot recover. (7) If it was apparent to plaintiff, when he looked around to the engine, that the danger of the engine running into the flat car was then impending and imminent, then the plaintiff was guilty of negligence in obeying Light's order, and cannot recover. (8) The evidence shows that if the bell had been ringing as the engine backed down, the plaintiff would have been warned, and would not have been injured; and I charge you that the omission to ring the bell was the proximate cause of the injury, and the plaintiff cannot recover. (9) Under all the evidence in the case, the defendant is not liable for the injury to the plaintiff; and your verdict must be, no cause of action."

The court refused to give these instructions, but instructed the jury that the negligence of Mr. Light would be the negligence of the Company, and for which a recovery might be had. Defendant's counsel submitted five special questions for a finding of the jury thereon, as follows: "(1) If the bell had been rung as the engine backed down on the car, would such ringing have given warning to the plaintiff of the approach of the engine? (2) Was the bell upon the engine ringing when the engine was backing up on the side track to the car on which the plaintiff was at work? (3) Would the accident have happened if the bell on the engine had been ringing as the engine backed up against the flat car? (4) Was the accident caused by the failure of the plaintiff to heed the warning of the bell-ringing? (5) At the time when the plaintiff turned and saw the engine coming and tried to make himself safe, as he testifies, was the danger imminent?" The court submitted the second, fourth and fifth of these questions to the jury and refused the others. To the second, the jury answered, "No;" to the fourth, they said it was disposed of by their answer to the second; and to the fifth, answered "No."

The principal questions argued here are grouped by counsel for defendant under the four following heads: "(1) If Light's negligence was the cause of the injury, was Light, in doing this work, the fellow servant of plaintiff? (2) If he was not, then was his negligence the proximate cause of the accident? Or was such proximate cause the neglect of the engineer or fireman to ring the engine bell? (3) Whether appellant was entitled to have the two special questions one and three submitted. (4) Was the special verdict inconsistent with the general verdict?"

No exceptions were taken to the admission or exclusion of evidence during the trial of the cause, and no complaint is made of the charge as given. The principal contention is that the plaintiff and Light were fellow servants, and therefore the defendant Company could not be held liable for the negligence of Light, even if, through his negligence, the plaintiff received his injuries. It is too well settled in this State to need the citation of authorities that the master is not liable for injuries personally suffered by his servant through the negligence of a fellow servant, acting as such while engaged in the common employment, unless the master is chargeable with negligence in the selection of the servant in fault, or in retaining him after notice of his incompetency. It is not contended in the present case that Mr. Light was incompetent for the position held by him as assistant road-master, but the claim of recovery is based upon the ground that he was not a fellow servant of plaintiff. Neither is there any serious contention that the work being performed by the plaintiff was in itself dangerous. The rule, therefore, that the master is bound to provide a safe place in which to work, or suitable tools and materials to work with, has no application to this case. The fact that the plaintiff was ordered by Light to load the poles upon the car, and to go upon the car to level them, and his having done so in obedience to the order, was not putting him in a place of danger by the assistant road-master. The injuries which he received did not grow out of the work he was ordered to do, either from the work being dangerous in character, or the place in which he was working, dangerous. Neither was he injured by reason of any defect in machinery, tool or other appliance he was called upon to use.

There are many cases in this State holding that, when a superior servant orders one under him to perform work differing from that for which he is employed, the superior is guilty of an abuse of authority, and the master held liable. But in the present case the work being done was in the ordinary line of the duty of the section gang. Their ordinary duty is to keep the road-bed in repair, but they are often called upon to load ties, poles and other materials upon the flat cars, and to unload cars; and they must be held to assume the risk incident to such employment.

The injury resulted either from the negligence of Light in ordering the plaintiff to continue the work while the engine was backing down upon the car, and telling him there was plenty of time, thus throwing him off his guard, and leading him to believe that Light would take care that the engine did not strike the car, or it resulted from the negligence of the engineer or fireman in not ringing the bell, which, if it had been rung, might have given the plaintiff warning of the approach of the engine, so that he could have steadied himself as it struck the car, and thus saved himself from being thrown off, or it was the result of plaintiff's own carelessness. If the injury grew out of the negligence of the engineer or fireman in not ringing the bell, if that was the immediate and proximate cause of the injury, the plaintiff would have no right of recovery, as the law is well settled in this State that the engineer and

fireman, under such circumstances, are the fellow servants of the plaintiff. It therefore became a material fact in the case, for the determination of the jury, whether the failure of the engineer or fireman to ring the bell was the proximate cause of the injury; and the court was in error in not permitting the jury to pass upon the special questions 1 and 3 presented. The jury found that "the bell was not ringing when the engine was backing up on the side track to the car on which the plaintiff was at work." The plaintiff testified that, if he had heard the bell ringing, he would have looked around, and prepared himself for the shock. The answer to these special questions, "If the bell had been rung as the engine backed down on the car, would such ringing have given warning to the plaintiff of the approach of the engine?" and "Would the accident have happened if the bell had been ringing as the engine backed against the flat car?"—might have shown that the jury found the injury was caused by the negligence of the engineer or fireman, and that the proximate cause of the injury was their negligence. Counsel for the plaintiff contended that these did not submit questions of fact, but possible contingencies, if certain facts which did not exist had existed, and were therefore not proper questions for submission to the jury. They were something beyond mere possibilities, under the testimony of the plaintiff himself. He was a railroad man,—had been engaged in that service for a series of years; and he knew, as he testifies, that the ringing of a bell on an engine is evidence that the engine is about to move or is moving; and even people who are not versed in the rules of railroad companies generally understand this fact. Therefore, according to this testimony, if the bell had been ringing he would have prepared himself for the shock; and the jury might have found, if the question had been submitted to them, that the accident would not have happened if the bell had been rung. This finding would, in effect, have been that the accident happened through the negligence of the engineer or fireman, and not through the fault of Light; for, even if Light gave the order to plaintiff to continue his work, and by such order indicated that the engine would be kept from backing down, yet, if plaintiff knew or believed, notwithstanding Light's assurances, that the engine was actually coming, and would strike the car, and place him in peril, very naturally he would have tried to save himself.

There is no evidence that Light had control of the engine, or that the engineer was not in full and complete charge of her. Evidently, the station agent, at the request of Light, gave the order to the engineer to uncouple from his train, and have the flat car upon which the plaintiff was working moved forward to the other pile of poles. When the engine had backed down to the switch, the forward brakeman of the freight train opened the switch, and then ran back to the car to make the coupling, at the same time giving the engineer the signals to back down. This evidence shows that Light had nothing to do with making the coupling or giving the signals. While he stood near there, and, as plaintiff testifies, between the engine and flat car, near the track, there is no evidence in the case that he had, or attempted

to exercise, any control over the engineer in the manner of backing the engine down, or made any signals to stop or start. It was therefore an important element in the case, for the jury to determine under all the circumstances, and especially under the testimony of the plaintiff himself, whether the failure to ring the bell, if it was not rung, was the proximate cause of the injury; and the court should have submitted the special questions.

The court was also in error in refusing to give the defendant's fifth and seventh requests to charge. If, as stated in the fifth request, Light did give the order to the plaintiff as he claims, but at that time Light did not know of the near approach of the engine, and the plaintiff did know of its approach, and failed to notify Light, or to save himself, he was guilty of contributory negligence. Plaintiff would have no right to claim that, though he saw the engine approaching, and knew that he would be put in peril when it backed against the car, yet he said nothing to Light, and made no effort to secure himself from the fall. If such facts existed, the plaintiff must have apprehended a danger which was not apparent to Light. The evidence is somewhat conflicting as to whether the engine came to a stop after it approached or crossed over the switch, but Light testifies that he saw and heard nothing of its approach; that his back was turned partly towards the engine, and he was giving his attention to the men loading the poles. Plaintiff would have no right to recover damages for the negligence of Light, if he was aware of a danger which Light did not apprehend, and, being aware of it, did not seek to save himself from injury; and the fact that Light ordered him to go on with the work would not justify him to do so, in the face of danger which was apparent to him. This was covered by the seventh request, which should have been given.

The other requests, as framed and presented to the court, were properly refused. The first request to charge presents the most important question in the case. It assumes that Light is a fellow servant of the plaintiff, and therefore no recovery could be had, even if his negligence was the proximate cause of the injury. Under the circumstances of this case, was he a fellow servant, or a representative of the defendant Company, standing in the position of a superior servant or agent, for whose negligence defendant Company is to be held liable? If Light, in this position as a superior servant, represented the defendant Company, and the plaintiff, relying upon the statement of Light that he had lots of time, went to work again under the belief that Light would not let the engine back against the car until the poles had been leveled off, and Light knew that the engine was backing up, or was in a position where he would have known it if he had exercised ordinary care, and he gave the plaintiff no warning of its approach, and plaintiff did not know of its approach, the negligence of Light in permitting the engine to back up, and failure to give such warning, would be the negligence of the defendant Company, for which the plaintiff would be entitled to recover, if this, and not the engineer's or fireman's negligence in failing to ring the bell, was the proximate cause of the injury. Under such circumstances, the

servant's dependent and inferior position is to be taken into consideration; and, if the peculiar risk commanded by the master is not obvious, the servant has the right to assume that he is not being put in peril, and is not bound to investigate into the risk before obeying his orders. He is not called upon to set up his own judgment against his superiors; and he may rely upon their advice, and still more upon their orders, notwithstanding many misgivings of his own. And it is a general rule that if the master directs the servant to do some act which is even dangerous, but which could be made safe by special care upon the part of the master, the servant has the right to assume that such special care will be taken; and, failing to exercise such care, the master is held liable. The jury found that at the time when plaintiff turned and saw the engine coming, and tried to make himself safe, as he testifies, the danger was not imminent; and, from the issues submitted to them under the charge of the court, they also found that Light not only told the plaintiff there was lots of time, but that he negligently permitted the engine to be backed against the car.

The management of the affairs of a railroad company is vested in its board of directors, and such powers as Doyle or Light possessed and exercised were such only as were delegated by the directors under the rules of the Company. So far as the corporate directors are concerned, no question can be made that for all purposes they represent the corporation, and their acts as a board are the acts of the principal; but, in the management of its affairs, certain powers are and must be delegated to agents or servants who are clothed with certain discretionary powers. If the master places the entire charge of his business, or a distinct branch of it, wholly in the hands of an agent, exercising no discretion and no oversight, the neglect of the agent of the ordinary care in the exercise of the business of the master thus entrusted to him is a breach of duty for which the master is held liable.

Just what relation this superior servant bears to other servants it is often difficult to determine in a given case. The solution of the question must depend largely upon the power delegated to the superior servant, the exercise of such power and his command and authority over those acting under him. The reciprocal rights and duties of such servants, and the liability of the master, are nowhere defined, except by adjudicated decisions of the courts; and in some of the States the duty and liability of the master is pushed much further than in others by these adjudications.

In this State, in 1861, in the case of *Michigan Cent. R. Co. v. Leahy*, 10 Mich. 199, the general doctrine was laid down that the master is not liable to a servant for the neglect of his fellow servant in doing or omitting to do their portion of the common work. This rule has been followed and approved in numerous cases, which have been so often cited that a repetition is unnecessary. The rule grew out of the English doctrine laid down in *Priestley v. Fowler*, 3 Mees. & W. 1, in 1837, and which has since been adhered to in England.

The Massachusetts court, in *Faircliff v. Boston & W. R. Corp.*, 4 Met. 49 (decided in 1842),

adopted the rule of the English courts. Other States followed this rule, until it has become the general doctrine in all the American States. The reason of this rule as held by the Massachusetts court in the early case above cited, is that, "where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrong-doer."

The rule thus adopted did not, however, relieve the master from a duty and obligation to his servants, whether the master be a natural person or a corporation, to furnish safe machinery or other apparatus, and to observe all the care which the exigencies of the situation reasonably required, as well as to employ competent servants. It is the duty of the master, also, to make such regulations or provisions for the safety of employes as will afford them reasonable protection against the dangers incident to the performance of their respective duties. This duty extends to the selection of competent persons, to whom the master may delegate his authority, to take charge of and control the business in which the servants are employed. There is no diversity of opinion upon these propositions. The difficulties arise when courts are called upon to determine who are and who are not fellow servants in given cases, and this difficulty is made apparent when we note the hundreds of cases which in the last few years have found their way to the courts of last resort in the different States of the Union. The courts are not in harmony upon this question.

In Massachusetts it is said that this rule "is not confined to the case of two servants working in company, or having opportunity to control or influence the conduct of each other, but extends to every case in which the two, deriving their authority and their compensation from the same source, are engaged in the same business, though in different departments of duty; and it makes no difference that the servant whose negligence causes the injury is a sub-manager or foreman of higher grade or greater authority than the plaintiff." *Holden v. Fitchburg R. Co.* 129 Mass. 268; 7 Am. & Eng. Cyclop. Law, 885.

This rule is substantially followed in Maine, though it is said that an exception to the rule exists if the master has delegated to the foreman or superintendent the care and management of the entire business, or a distinct department of it, the situation being such that the superior servant is charged with the perform-

ance of duties towards the inferior servant which the law imposes upon the master.

The rule is ably discussed by *Chief Justice* Church in *Fluke v. Boston & A. R. Co.*, 53 N. Y. 549, where he says: "The true rule, I apprehend, is to hold the corporation liable for negligence or want of proper care in respect to such acts and duties as it is required to perform and discharge as master or principal, without regard to the rank or title of the agent intrusted with their performance. As to such acts, the agent occupies the place of the corporation, and the latter should be deemed present, and consequently liable for the manner in which they are performed."

If an agent whose duty it is to employ servants or provide materials for the company acts negligently in that capacity, his fault is that of the company, because it occurred in the performance of the principal's duty, although only an agent himself.

In *Malone v. Hathaway*, 64 N. Y. 5, *Mr. Justice* Allen makes the distinction between natural and artificial persons, and lays down the rule that it is only where the master withdraws from the management of the business, intrusting it to a middleman or superior servant, or where, as in the case of a corporation, the business is of such a nature that the general management and control thereof is necessarily committed to agents, that the master can be held liable to a subordinate for the negligent acts of one thus placed in his stead. Under this rule, a foreman who had no delegation of power or control, but who was merely charged with special duties, was held to be a fellow servant. 7 Am. & Eng. Cyclop. Law, 884.

Mr. Wharton, in his work on Negligence (§ 229), says this doctrine is in harmony with the American cases.

As before stated, it is difficult to lay down any general rule which shall determine all cases. In some of the States, it is undoubtedly true that the master is held to a much stricter accountability and responsibility for the acts and omissions of those who are classed by some of the other courts as fellow servants; and the tendency of modern adjudications is more and more to relax the rule that those who are engaged in the same common enterprise or business are fellow servants, especially if it can be pointed out that the one in fault occupies some higher grade or more power than the party injured. Especially is this the case where parties are servants of corporations. If parties are fellow servants while engaged in the business of a natural person, the same rule and reasoning, under like circumstances, ought to place them in the same category while engaged in the business of a corporation; and if one is the agent or superior servant while engaged in the business of a corporation, and through whose negligent conduct another engaged in the same common enterprise is injured, and for whose injuries the corporation is held liable, then, under like circumstances, if it was the business of a natural person, the master should be so held. Some general rules may, however, be laid down which in many instances may serve as a guide in the determination of the question. It is not to be determined solely from the grade or rank

of the offending or injured servant, but it is to be determined by the character of the act being performed by the offending servant. If it is an act that the law imposes the duty upon the part of the master to perform, then the offending employé is not a fellow servant, but a superior or agent, for whose acts the master is held liable. Again, if the master has delegated to a servant or employé the care and management of the entire business, or a distinct department of it, the situation being such that the superior servant is charged with the performance of duties towards the inferior servant which the law imposes upon the master, then such superior servant stands in the place of the master, and the rule of *respondet superior* applies. Whether or not the servant has power to employ and discharge other servants is also important in determining whether or not he is deemed to be a superior servant, for whose acts the master is held liable. *Chapman v. Erie R. Co.* 55 N. Y. 579; *Kansas Pac. R. Co. v. Salmon*, 11 Kan. 83.

When the offending servant, having general power and authority to employ and discharge servants, and having authority to direct and control the injured servant, orders him to do an act not within the scope of the injured servant's employment, whereby he is exposed to danger not contemplated in his contract of service, and he is injured in so doing; or where the master has charged a servant or employé with the sole duty of providing proper materials and appliances for carrying on the work in which he is personally engaged, and a servant is injured by his neglect so to do, the master is held liable to the injured servant while acting under the orders of the superior servant. *Gilmore v. Northern Pac. R. Co.* 18 Fed. Rep. 896.

These rules are in line with the remarks of *Mr. Justice Cooley* in *Quincy Mining Co. v. Kitts*, 42 Mich. 39, though the learned justice, in finally deciding the case, held that Wagner did not stand, in respect to the company, in such position. It was, however, remarked by him that, when a servant demands from his master compensation for an injury received in his service, it is necessary that he trace some distinct fault to the master himself. The mere fact of such injury is no evidence of such fault; neither is the mere fact that it resulted from the carelessness of some other person in the same employment. The servant assumes all the usual risks of his employment, and among these is the risk that fellow servants will sometimes be careless, and that injuries will result. All that can be required of the master in that regard is that his servants shall be prudently chosen, and that they shall not be retained in his service after unfitness or negligence shall be discovered, and has been communicated to him. This duty of due care in the employment and retention of competent servants is one the master cannot relieve himself of by any delegation; and, if it becomes necessary to intrust its performance to a general manager, foreman or superintendent, such officer, whatever he may be called, must stand in the place of his principal, and the latter must assume the risk of his negligence. The same is true of the general supervision of his business. If there is negligence in this, 7 L. R. A.

the master is responsible for it, whether the supervision be by the master in person, or by some manager, superintendent or foreman to whom he delegates it. In other words, while the servant assumes the risk of the negligence of fellow servants, he does not assume the risk of negligence in the master himself, or in anyone to whom the master may see fit to intrust his superintending authority. In support of this doctrine the following cases are cited: *Albro v. Agawam Canal Co.* 6 Cush. 75; *McAndrews v. Burns*, 89 N. J. L. 117; *Malone v. Hathaway*, 64 N. Y. 9; *Hard v. Vermont & O. R. Co.* 82 Vt. 478.

In *Ryan v. Bagaley*, 50 Mich. 179, it appeared that the defendant resided at Pittsburgh, and was proprietor of the Palmer Iron Mines. Decedent, while working as a laborer in the mine, was killed. The defense was that the casualty was owing to the negligence of Whitesides, who was a fellow servant. It appeared that Kirkpatrick was the agent of defendant first in station. He knew nothing of the business, and appointed Whitesides as mining captain, and with whom the defendant, on his visits to the mine, consulted. Upon the question whether Whitesides was the fellow servant of the deceased, the circuit judge charged the jury: "Now, what was the position of Captain Whitesides? He was a mining captain. I think it appears from the testimony that he had the entire charge and control of the under ground work, and all the work generally of the mine, and that he employed and discharged men. Now, I charge you that Captain Whitesides, if he had this power delegated to him—to manage and control the mine—negligence on his part would be the negligence of the owners or managers of the mine." This court, in considering that part of the charge, says: "Under this charge, and in view of all the facts, it was settled by the jury that Whitesides' position and power were as indicated by the judge. We are consequently to consider that he was intrusted with the management of the mine, without direction or interference. He was not, in any true sense, a mere foreman or department leader or sub-chief, in a given sphere of the mining operations. His agency covered the entire mine, and his capacity and discretion dominated. The defendant and his agent, Kirkpatrick, equally regarded him, and looked to him, as the one person to contrive and execute; and they were guided by his intelligence, not he by theirs. In respect to legal accountability, his negligence was the negligence of the defendant. The case is within the principle stated and recognized in *Quincy Mining Co. v. Kitts*, 42 Mich. 34."

Many cases have been presented to this court involving the questions as to who were and who were not fellow servants, but in no instance has the question been presented under circumstances exactly like the present case; so that we must determine it upon its own peculiar facts, being guided by the rules here laid down. Applying, therefore, the foregoing rules, so far as the same can be made applicable to this case, is Light to be treated as a superior servant, for whose negligence, if any is shown, the defendant company can be held liable? He had general charge of the entire

length of about 150 miles of defendant's road, and had under his control all the section gangs along that line; and there is nothing in the record showing that Doyle, the general road-master, in any way interfered with him in the manner in which the work of that division was being conducted. He in fact controlled that entire division absolutely, so far as employing and discharging the men was concerned. The order came from Doyle to remove these poles, because they were to be taken to another division or branch of the same road. Doyle was not present at the time of the injury, and the fair inference is that whatever power Doyle would have had, if present, Light had like power, and represented the defendant company as fully as Doyle would have done. He did no manual labor himself, but had the full oversight, care and management of it. It is apparent that the business of the railroad could not be carried forward without this division of labor and responsibility. It was necessary that these heads of departments and divisions should be made, and power delegated to each head. Under such circumstances, and well-settled rules of law, it must be held that Light represented the Company; and for his negligence, while in the line of the duties so assigned and delegated to him, the Company must be held responsible. It is evident that the plaintiff and the other section hands there looked upon Light as the responsible head, from whom they received their orders, and whom they were bound to obey, or else they would receive their "red tickets," or discharges from their employment. Any other rule than this would enable the master to escape all liability, by parceling out his work to different heads of departments or divisions, and retiring from any management or control of it; and the more he abandoned it to others—the more he neglected it—the less would he be liable.

When the master appoints a middleman with such powers as were delegated to Light in this case, or where the business is of such a nature that it is necessarily committed to agents, with full power to employ and discharge those acting under them, and full and absolute control of the work, the principal is liable. The master is in a position to select such middlemen and agents with care, and in regard to their fitness for the place, and is responsible for their negligence. *Laning v. New York Cent. R. Co.* 49 N. Y. 521; *Malone v. Hathaway*, 64 N. Y. 9.

For the errors pointed out, the judgment below must be set aside, with costs, and a new trial granted.

The other Justices concurred.

H. C. FISHER

v.

Charles E. NORTHRUP, Appt.

(....Mich.....)

1. A motion in justice's court to dismiss

NOTE.—Pleading; initial letters of name.

Courts cannot take judicial notice that a well-known railroad company is popularly known by the initial letters of the words constituting its full name; for example, that "C. B. & Q. R. R. Co." means the Chicago, Burlington & Quincy Railroad Company. *Accola v. Chicago, B. & Q. R. Co.* 70 Iowa, 185.

the writ because plaintiff's full Christian name does not appear is equivalent to a plea in abatement and must be granted, where the person appearing for plaintiff says that he cannot amend because he does not know the full name, and does not ask time to ascertain it.

2. A suit cannot be carried on by the initials merely of the Christian or first name of the plaintiff, although the one commencing the action does not know the correct name.

(January 24, 1890.)

ERROR to the Circuit Court for Wexford County to review a judgment reversing a judgment of a justice of the peace dismissing a replevin suit because plaintiff's full Christian name did not appear in the proceedings. *Reversed.*

The case sufficiently appears in the opinion.

Mr. I. C. Wheeler, for defendant, appellant:

There is no provision for commencing or maintaining a suit where the name of the plaintiff is unknown, except in partnership cases, where, if the names of all of the several parties are unknown, suit may be commenced in the partnership name.

How. Stat. § 6872.

The name of the plaintiff should be given in full, both the Christian and the surname.

Tiffany, Justice's Guide, pp. 25, 26; *Franklin v. Talmadge*, 5 Johns. 84; *Roosevelt v. Gardiner*, 2 Cow. 463; *Milk v. Christie*, 1 Hill, 102.

Messrs. Pratt & Davis, for plaintiff, appellee:

The affidavit having been made and the writ issued in the name of H. C. Fisher, the presumption would be that that was his true name, until the question was raised, and the proof established the contrary by plea and abatement stating the true name.

Cowen, 1002; Tiffany, Justice's Guide, 4th ed. 29; *Watson v. Watson*, 47 Mich. 427; 1 Greene, Pr. p. 206; *Fewlass v. Abbott*, 28 Mich. 270.

If there was a mistake in the plaintiff's name, it was the duty of the justice to permit an amendment in harmony with the facts.

How. Ann. Stat. §§ 6817, 7631; Tiffany, Justice's Guide, pp. 28, 29, 161; *Baldwin v. Talbot*, 43 Mich. 12; *Phelps v. Town*, 14 Mich. 381; *Van Sickle v. Kellogg*, 19 Mich. 49; *Webber v. Bolte*, 51 Mich. 113.

Morse, J., delivered the opinion of the court:

One Eli H. Salisbury made affidavit in behalf of plaintiff, and procured the issue of a writ of replevin against the defendant. The requisite bond was also filed. On the return day of the writ, Salisbury appeared for plaintiff. The defendant answered in person, and moved to dismiss the writ, because plaintiff's full Christian name did not appear in affidavit, writ or declaration. The justice returns that he asked Mr. Salisbury if he could amend, and insert full Christian name of H. C. Fisher, and Mr. Salisbury replied that he could not, as he did not know the full Christian name of said

Fisher. Thereupon, the plaintiff being unable to amend, the justice dismissed the case, and rendered a judgment of nonsuit against the plaintiff, together with \$3.25 costs of suit. Salisbury, in the name of H. C. Fisher, sued out a writ of certiorari to the Circuit Court of Wexford County, where, on hearing, the judgment of the justice was reversed. The case comes here on writ of error from the circuit.

It is contended, in support of the judgment of the circuit, that any mistake in the name of the plaintiff must be taken advantage of in a plea of abatement. Pleading in justice's court is not required to be technical. The effect of defendant's motion was the same as a plea in abatement. The plea was also admitted when Salisbury, who appeared for plaintiff, said that he could not amend, because he did not know plaintiff's full name. This was equivalent to saying that H. C. Fisher was not the true or full name of plaintiff. The justice was then warranted in dismissing the case, as Salisbury did not ask for time to ascertain plaintiff's name, who it appears lived in Chicago, Ill.

It is a usual supposition that one commencing an action will know the correct name of the plaintiff, but if he does not he cannot for that reason proceed with his suit by a wrong name, or carry it on by the initials of the Christian or first name.

The case of *Fewlass v. Abbott*, 28 Mich. 270, is not in point. There the plaintiff commenced suit in the name of O. B. Abbott upon a prom-

issory note made by Fewlass payable to O. B. Abbott or bearer. Objection was taken by defendant before the justice that the plaintiff was not properly named in the process, which was overruled, and judgment rendered for plaintiff. Defendant removed the cause to the circuit by certiorari, where the judgment was affirmed. When it came to this court on error, it was held that it would not be presumed, for the purpose of invalidating the judgment and in the absence of any showing on the subject, that the plaintiff had any other name than the one used.

In the case at bar it was substantially admitted in justice's court that plaintiff had sued by the initials of his Christian name, and his bond executed on the issue of the writ of certiorari shows his true name to be Hart C. Fisher. A person sued has a right to know who is making claim against him. If the plaintiff plants the action himself, there is no hardship in requiring him to plead his proper name in full. If the suit is commenced by an agent, who is not acquainted at the time with the full Christian name of his principal, it is certainly his duty to ascertain and plead the same before or at the time issue is joined, and there is no good reason why he should not do it. I think the judgment of the justice was correct, and should be affirmed, with costs of this court and the circuit against the plaintiff.

The judgment of the Circuit Court is reversed.
The other Justices concurred.

NEW JERSEY COURT OF ERRORS AND APPEALS.

John F. BETZ, *Respt.*,

v.

Henry VERNER, Impleaded, etc., *Appt.*

(.....N. J. Eq.)

***1. A mortgagor in possession removed a building** to another lot of land, to make room for a part of a larger building and improvements, and sold the lot, and building affixed to it, to a bona fide purchaser. *Held*, on bill for foreclosure of the mortgage, that the building could not be returned to the mortgaged land, and the remedy of the mortgagee was at law, for the removal of the building.

***2. A mortgagee will have the security of his lien protected by injunction.**

(February 20, 1890.)

*Head notes by SCUDDER, J.

A PPEAL by defendant, Verner, from a decree of the Chancery Court in favor of plaintiff in a suit to foreclose a mortgage and to compel a return to the mortgaged premises of a building which had been removed therefrom. *Reversed.*

Statement by SCUDDER, J.:

The bill of complaint sets forth that the appellee, John F. Betz, held a mortgage on a lot of land in the City of Camden, given by August Muench, one of the defendants, to secure a bond conditioned for the payment of \$1,500, with interest, dated October 10, 1885, duly recorded October 17, 1885, and that there were other subsequent incumbrances; that when the mortgage was executed and delivered to him the premises consisted of a two-story frame dwelling-house, and the lot of land therein described,

NOTE.—Mortgage; rights of mortgagor.

The mortgagor has a right to lease, sell and, in every respect, deal with the mortgaged premises as owner so long as he is permitted to remain in possession, and so long as it is understood and held that every person taking under him takes subject to all the rights of the mortgagee, unimpaired and unaffected. *Teal v. Walker*, 111 U. S. 242 (28 L. ed. 418); *American Bridge Co. v. Heidelberg*, 94 U. S. 796 (24 L. ed. 144); *Clark v. Curtis*, 1 Gratt. 239; *Hunter v. Hays*, 7 Biss. 462; *Souter v. La Crosse R. Co.* *Woolw.* 80, 85; *Foster v. Rhodes*, 10 Nat. Bankr. Rep. 523.

The removal of fixtures takes them out of the lien. See notes to *Cook v. Cooper* (Or.) 7 L. R. A. 279.

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Mortgagor in possession.

Possession by the mortgagor or his grantees will not be adverse so long as payments of principal or interest are made, or the relation of mortgagor and mortgagee is recognized by both parties. *Lewis v. Schwenn*, 6 West. Rep. 855, 93 Mo. 26; *Bartlett v. Sanborn*, 3 New Eng. Rep. 168, 64 N. H. 70.

A mortgagor in possession, as against everybody but the mortgagee, and against him for all purposes except the security of the mortgage debt, is seized of the fee in the land. *Donation Trustees v. Streeter*, 2 New Eng. Rep. 862, 64 N. H. 108.

He is as absolute an owner of the property as if the mortgage had no existence. *Howe v. Wadsworth*, 59 N. H. 397; *Northy v. Northy*, 45 N. H. 141; *Bryant v. Morrison*, 44 N. H. 288; *Worster v. Great*

whereon the house was erected; that in February, 1887, without his knowledge or consent, Muench removed the dwelling-house to another lot, about forty feet northward; that at the time of removal this other lot belonged to E. A. Armstrong, trustee for an association, who by deed dated July 29, 1887, conveyed the land to Muench, and Muench and wife, by deed dated August 8, 1887, conveyed to Henry Verner. He further claims that the removal of the house, the purchase and sale of the property, were fraudulent; that the security of his mortgage is thereby diminished; that it is still subject to the lien of his mortgage, and should be returned to the land described therein; that Muench has erected partly on the mortgaged lot of land a two-story frame building, used as a dancing hall and bowling alley, twenty-four feet in width and fifty-eight feet in length, and the part thereof erected on the mortgaged premises is four feet in width and fifty-eight feet in depth; that other persons claim building liens on the building, and the lot whereon it stands; and the title to the land on which the building is erected, adjoining the mortgaged land, is now in other parties. He also sets forth that the lot of land, without the building, is worth about \$250, and inadequate to secure and raise the amount of his mortgage; and that Muench is insolvent. He therefore prays a foreclosure and sale of the mortgaged premises, that Muench and Verner may be decreed to return the frame dwelling-house to and upon the lot of land described in this mortgage, and that they may be restrained from conveying or creating any lien on the same. The defendant Verner denies all fraud; claims to be a bona fide purchaser for full value, and without notice of complainant's mortgage, or of the removal of the dwelling house from the mortgaged premises. Upon the proofs taken, a decree was made that, unless Verner pay the complainant's debt and costs within twenty days, a receiver be appointed to take charge of the dwelling-house, and move it back to the lot whence it was removed, and that the mortgaged premises be sold to satisfy the debt secured by the mortgage, with other incumbrances, and costs. The defendant Verner appeals from this decree.

Mr. John W. Wartman for appellant.

Mr. William S. Casselman, for respondent:

A purchaser who has obtained a legal title as a mere security for, or payment of, a pre-

existing debt, without parting with anything of value, is not entitled to the character of a bona fide purchaser for value.

Mingus v. Condit, 28 N. J. Eq. 313; *De Witt v. Van Sickle*, 29 N. J. Eq. 209; *Basset v. Noworthy*, 2 Lead. Cas. in Eq. 82.

Not being a bona fide purchaser for value, he must take the property subject to the equities of respondent, which, being prior, take precedence.

Wheeler v. Kirtland, 24 N. J. Eq. 552; *Kerr, Fraud and Mistake*, 322; *Basset v. Noworthy*, 2 Lead. Cas. in Eq. 45.

A mortgagor will not be permitted to commit waste upon the mortgaged premises to the extent of rendering them an insufficient security for the mortgage debt.

Coggill v. Millburn Land Co. 25 N. J. Eq. 87.

Equity will redress the injury of past waste in favor of a mortgagee where he has no legal remedy. He may follow and take the part severed from the realty wherever he can find it.

Jones, Mortg. 453; *Hoskin v. Woodward*, 45 Pa. 42; *High, Inj.* § 481.

Equity will complete the remedy by a return thereof to the realty.

Jones, Mortg. 453.

Scudder, J., delivered the opinion of the court:

The exact form in which this decree is made for the removal of the house back to the mortgaged premises from which it was taken is, so far as my examination of the authorities has gone, without precedent; but this may be not objectionable, if, in administering equitable relief, it be found necessary to apply a remedy which is unusual. The design of the bill is to restore to the mortgagee his security, which he alleges has been taken from him by the severance of the dwelling-house from the land covered by his mortgage, and its annexation to land owned by another. The defense is that the house was removed on another lot, to make room for a larger building which was to be extended over on the lot of land from the adjoining premises; that the defendants acted in good faith; that the complainant had notice, and, if he did not consent, did not object; that a full money consideration was paid, without any actual notice of the lien of the mortgage on the land from which the building was removed, and that the defendant Verner, who appeals, is a bona fide purchaser of the building. The facts are not as fully proved as they might have been, and are thus likely to mislead the court.

Falls Co. 41 N. H. 16; *Blake v. Williams*, 36 N. H. 40; *Ladd v. Wiggin*, 35 N. H. 421; *Johnson v. Brown*, 31 N. H. 405.

As against the mortgagee he is the absolute owner for all purposes except the security of the mortgage debt. *Morrison v. Manchester*, 58 N. H. 500; *Smith v. Moore*, 11 N. H. 55; *Glass v. Ellison*, 9 N. H. 60.

Protection of mortgagees.

The court will see to it that the rights of the parties are secured and protected, and will give direction to the proceedings accordingly. *Van Doren v. Dickerson*, 33 N. J. Eq. 302; *Lansing v. Golet*, 9 Cow. 361; *Ellis v. Craig*, 7 Johns. Ch. 7; *Lyman v. Sala*, 2 Johns. Ch. 487; *Campbell v. Maccomb*, 4 Johns. Ch. 584; *American L. & F. Ins. & T. Co. v. Eyerson*, 6 N. J. Eq. 9.

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A mortgagee will have the security of his lien protected by injunction. *Emmons v. Hinderer*, 24 N. J. Eq. 99; *Brady v. Waldron*, 2 Johns. Ch. 148; *Pasco v. Gamble*, 15 Fla. 568.

A mortgagee may sue for damages for permanent injury impairing his security, as for flowage from a reservoir maintained by a municipality; and settlement in good faith by arbitration is binding on the mortgagor. *James v. Worcester*, 2 New Eng. Rep. 354, 41 Mass. 331.

A purchaser of land subject to a mortgage, who removes a building therefrom to other lands belonging to him, thereby rendering the security inadequate, is guilty of waste, and is liable, in case of deficiency, for the value of the building so removed. *Edler v. Hasche*, 87 Wis. 653. See note to *Cook v. Cooper* (Or.) 7 L. R. A. 273.

We do not find in the evidence proof of the knowledge of the defendant Verner of the transfer of the building from one lot of land to the other, by which he may be charged with constructive notice of the lien of the mortgage, nor actual notice of a fraud that was intended, which appears to have been satisfactory to the court below. It appears that Verner lived in Philadelphia up to February 15th, when he moved to Camden, and opened a grocery store about two squares from Muench's place of business, and after that time went there frequently. He kept bar for him from May to August. Muench testifies that the house was removed about the 8d or 4th of February, and thinks they started in January. This was before Verner came to Camden. Verner says he did not know that the house had been moved from another lot until after he had bought it. This evidence, if believed, shows that he neither saw nor knew that the house was moved from the mortgaged premises, and there was not a fraudulent knowledge or collusion in the purchase. Without proof of such collusion, the testimony of two witnesses that Muench told them "he removed the dwelling-house so that, if the sheriff come on him, he would have a house anyhow," is not competent to show that Verner had knowledge of a fraudulent purpose, and participated in it. If said, it was spoken between other parties in his absence. *Faulkner v. Whitaker*, 15 N. J. L. 438.

The payment of the consideration by Verner to Muench is testified to by them, and by Muench's wife, who says she saw money paid, without knowing the amount. The purchase price, they say, was \$1,300, paid in different sums, at several times,—\$400 on February 15th, \$300 July 30th, \$500 on August 1st, and \$100 in wages due Verner. The first money was brought from Philadelphia, obtained by selling out a grocery store there, and cash on hand. The second and third payments were, as Verner says, borrowed from his brother. The first sum was \$400, loaned to assist Muench in building. Afterwards, he says, when he asked for it, he was told that he (Muench) had no money, and he offered to sell the house and lot. He did not want it, but, with the advice and help of his brother, he bought it to save losing the money he had loaned. Although this money was all paid before August 8d, when the deed was dated, it was not a pre-existing debt, without parting with anything of value at the time of conveyance, depriving the defendant Verner of the character of a bona fide purchaser for value, as was argued by counsel; but all, excepting the first two items, were parts of a present consideration, appropriated, when made, to its payment, and sufficient to constitute the defendant Verner a bona fide purchaser in equity. *Mingus v. Condit*, 23 N. J. Eq. 813; *De Witt v. Van Sickle*, 29 N. J. Eq. 209; *Basset v. Nonworthy*, 2 Lead. Cas. in Eq. 82.

The small profit derived from the grocery store conducted by his wife while he attended bar for Muench, and before that time; the fact that Muench collected rent of the tenant, after the alleged sale, as Verner's agent; and the failure to produce the brother who was said to have loaned the money to complete the pur-

chase,—cast suspicion on the consideration; but as the proof now stands, with the positive evidence of three witnesses to sustain it, and nothing more than these circumstances to overcome it, we do not feel warranted in saying that this payment was not made. Muench swears positively that he received these sums of money, and applied them to making the improvements for the summer garden.

Assuming that the appellant, Verner, bought the house, and paid for it a valuable consideration, without knowledge of its removal, as appears by the direct proof, and that Muench sold it, as he testifies, to raise money to pay for the hall building, and the improvements he was making, the important question is presented whether the complainant is in a position to obtain the relief he asks here for the injury he has sustained. Can a court of equity return to the wasted property the building that has been wrongfully removed, and sold to a bona fide purchaser, after being affixed to other land not included in the mortgage?

The subject of legal and equitable relief, where such removals are made, is considered by Mr. Jones in his book on Mortgages (§§ 143, 144, 453, 684), with abstracts from cases and numerous citations in the notes. It is a question on which the authorities are divided, and depends for its solution on the effect given to a mortgage of lands. It seems that where the mortgage is regarded as a conveyance of the legal title to the property, giving the mortgagee the right of possession, his legal ownership, and actual or constructive possession, give him the right to follow and recover the property severed. The principle applied is that property severed from the realty, so as to become a chattel, belongs to the legal owner of the land; but where the mortgage is regarded merely as a lien for security, and the mortgagor has the right of possession until ejectment or foreclosure, there the mortgagee has merely the right to restrain the removal of the property by injunction, to protect his lien, or, after the removal, only a right to recover damages for the wrongful diminution of his security.

The case of *Hamlin v. Parsons*, 12 Minn. 108 (Gil. 59), comes nearer to the conclusion reached by the decree in this case than any other to which my attention has been called. There the mortgagor moved a dwelling on an adjoining lot belonging to his wife, without the knowledge of the mortgagee, but with the knowledge of the wife; and it was held that the lien on the dwelling-house remained, and the mortgagee might sell the lot of land covered by the mortgage, and afterwards the house, to satisfy his mortgage.

But in *Harris v. Bannon*, 78 Ky. 568, where a petition was filed in equity to subject to the lien created by the mortgage a number of cottage buildings which had been removed to other land, and affixed, it was held that when the buildings were severed from the mortgaged premises, and had become part of another freehold, the lien upon them was gone.

In *Peires v. Goddard*, 22 Pick. 559, the materials of a dwelling-house or mortgaged land were used in the construction of a house upon another lot of land. It was said the right of property vested in the grantee of that land, and the mortgagee could not maintain trover

against the purchaser, either for the new house, or the old materials used in its construction.

In *Cooper v. Davis*, 15 Conn. 556, millstones were severed from the mill, and sold by the mortgagor. It was held that the title passed to the purchaser, and there was no power to seize them after they had been severed and carried away.

In *Buckout v. Swift*, 27 Cal. 433, where a house subject to a mortgage was floated off by a flood into the street, and was bought while in that position, it was said that the severance affected the right of lien; that a building on land was subject to the lien of the mortgage whether there at the time of the mortgage or built there afterwards, but, when severed, the lien was lost. If the contrary were the law, everything affixed to mortgaged lands might, when severed and sold to a bona fide purchaser, be followed and reclaimed. *Clark v. Reyburn*, 1 Kan. 281; *Kimball v. Darling*, 32 Wis. 684; *Van Pelt v. McGraw*, 4 N. Y. 110; *Gardner v. Hearst*, 3 Denio, 232; *Lane v. Hitchcock*, 14 Johns. 213; *Hutchins v. King*, 68 U. S. 1 Wall. 53 [17 L. ed. 544]; *Gore v. Jenness*, 19 Me. 53; *Gooding v. Shea*, 103 Mass. 860; *Byron v. Chapin*, 113 Mass. 308; *Wilson v. Malby*, 59 N. Y. 126, and many other cases,—might be cited as illustrating the differences of opinion, and the principles applied, in determining the rights of parties when fixtures are severed and sold from mortgaged lands.

A distinction is made in *Hoskin v. Woodward*, 45 Pa. 42, where it is said that a mortgagor may sell, in the usual way, lumber, fire-wood, coal, ore or grain growing on the land, until the mortgagee stops him by ejectment or estoppel; for these things are usually intended for consumption and sale, and the sale of them is the usual way of raising the money to pay the mortgage. But in the case of a factory or other building it is from the use of it as it is, and not by its consumption or its sale by piecemeal, that all its profits are to be derived.

It is manifest that this cannot be reconciled with cases cited above, as furnishing a rule applicable to all fixtures, but that any general rule must be based on the right of property. If the mortgagee have the legal ownership and right of possession, he may follow things severed and removed from the mortgaged lands without his consent wherever he can find them. If he holds title under the mortgage only as security for his lien, then the remedies appointed for preserving the security, and compensating for any loss sustained by its diminution, are such only as the mortgagee may use. The theory in the latter case is that, as to innocent third parties, the mortgagor is the owner of the property, and may sever and sell until restrained by injunction, or ejected by entry, or barred by foreclosure. In any view taken of the respective rights of mortgagor and mortgagee, the latter may have the security of his lien protected by injunction. *Brady v. Waldron*, 2 Johns. Ch. 148; *Emmons v. Hinderer*, 24 N. J. Eq. 89.

In our State the title of the mortgagee to lands under his mortgage has been defined by this court in *Shields v. Lozeau*, 34 N. J. L. 496–508, where it is said that the mortgage is regarded, not as a common-law conveyance on

condition, but as a security for debt, the legal estate being considered as subsisting only for that purpose. This is elsewhere called the equitable and the American doctrine, by which the mortgagor has a right to lease, sell and in every respect deal with the mortgaged premises as owner so long as he is permitted to remain in possession, and so long as it is understood and held that any person taking under him takes subject to all the rights of the mortgagee. 4 Kent, Com. 157.

There is no difficulty in applying this rule while fixtures remain attached to the realty; and so long as the mortgagor continues in possession, or when the property severed passes into the possession of a person in collusion with him to defeat the lien and security of the mortgagee, whether upon or off the mortgaged premises, it would seem that the rights of the mortgagee would be unaffected. But when the property is severed, and sold to an innocent purchaser, the lien in equity is gone, and the remedy of the mortgagee is an action at law against the mortgagor, and those who act with him, to impair or defeat the security of the mortgage.

The case of *Kircher v. Schalk*, 39 N. J. L. 385, holds that a mortgagee of real estate, whose debt is due, but who has not entered into possession, cannot maintain replevin for a steam-engine affixed to the realty subject to the mortgage, which the mortgagor or his assigns had severed from the realty, and removed from the premises, because the mortgagee cannot, with propriety, insist upon being legally entitled to a remedy, the enforcement of which pertains to the general legal ownership of the land.

But in *Jackson v. Turrell*, 39 N. J. L. 329, it was decided that a mortgagee may maintain an action on the case against the mortgagor or his assigns for an injury to the security resulting from the removal of fixtures, or other waste, by the defendant. Notice, without fraud, was said to be sufficient to charge the purchaser with liability. It is not necessary in this case to determine whether a court of law will enforce this remedy against a bona fide purchaser without actual notice, or the exact form of remedy that may be then used; but in a court of equity the right of such purchaser is equal to the equity of a mortgagee who has not such title to the article severed that he can maintain an action for the recovery, *in specie*, of the fixtures removed. It is a maxim that where there is equal equity the law must prevail. It is upon this account that a court of equity constantly refuses to interfere, either for relief or discovery, against a bona fide purchaser of the legal estate for a valuable consideration, without notice of the adverse title, if he chooses to avail himself of the defense at the proper time, and in the proper mode. 1 Story, Eq. Jur. § 64c.

The conclusion given in 2 Pom. Eq. Jur. § 743, on this matter is that, wherever one or the other of the parties has a legal estate over which a court of law can exercise jurisdiction, then, in an equity suit between them, as a general rule the defense of a bona fide purchaser for valuable consideration will avail as against the plaintiff, whether he has a legal or an equitable estate. In either case the court of equity

simply withholds its hand, and remits the party to a court of law. In the review of cases which appear to conflict with the conclusion in this case, cited from the English courts, it must be borne in mind that there the mortgagee has the legal title to the mortgaged land, and the right of possession.

Having found that the appellant, Verner, is a bona fide purchaser of the building in controversy affixed to his land, according to the

weight of the evidence as presented, the decree will be reversed, and modified so that the land described in the mortgage, with the building and improvements thereon, as they exist at the time of filing the bill, shall be sold to satisfy the mortgage; and, as to the injury sustained by the removal of the building formerly on the land, the mortgagor will be remitted to his remedy at law.

Decree reversed unanimously.

PENNSYLVANIA SUPREME COURT.

COMMONWEALTH of Pennsylvania, *ex rel.*
ATTORNEY-GENERAL, *Plff. in Err.*,
v.

NEW YORK, LAKE ERIE & WESTERN
R. CO. *et al.*

(.....Pa.....)

1. A corporation violating the Organic Law forfeits its franchise, but does not thereby become subject to the escheat or confiscation of its property.
2. A foreign corporation owning all the stock of a domestic corporation, where the statutes allow its stock to be held by other corporations, does not thereby "acquire or hold" the real estate of the domestic corporation so as to violate the Act of April 23, 1855, against acquiring or holding real estate "directly in the corporate name, or by or through any trustee or other device whatsoever unless specially authorized" under penalty of escheat.
3. The penalty of escheat is removed as to land in the possession of owners having the right to hold the same, although the Act imposing it is not repealed in terms, when before any inquisition is taken the land has been conveyed to such owners, and a statute has declared that the land should be held by them "indefeasibly as to any right of escheat" in the Commonwealth.

(*Storrett and Clark, JJ., dissent.*)

(March 3, 1890.)

ERROR to the Court of Common Pleas for Elk County to review a judgment in favor of defendants in a proceeding in the nature of *quo warranto* to escheat to the Commonwealth certain lands in Elk County. *Affirmed.*

The New York, Lake Erie & Western Railroad Company is a corporation of the State of New York doing the business of a common carrier in Pennsylvania.

The information set out that during the years 1873 and 1874 that corporation acquired certain lands for mining purposes and took the title in the name of trustees. That it acquired, without authority, all the capital stock of the Northwestern Mining & Exchange Company, a domestic corporation. That the Erie Company procured the transfer of the title to said lands by the trustees to the Mining Company for its benefit. That subsequently the title became vested in the New York, Lake Erie & Western Coal & Railroad Company, a domestic corporation, the capital stock of which was held by the Erie Company and the Mining Company. That the Erie Company procured the capital stock of the other two corporations for the purpose of enabling it to hold lands in this State which it could not otherwise lawfully hold, and that such holding of the lands by it was a violation and evasion of the laws of Pennsylvania, and prayed that such lands might be escheated to the Commonwealth.

It appeared at the trial that the shares of stock of the Company holding title to the lands were distributed as follows: of the whole number of 5,000 shares 4,194 shares stood in the name of the Northwestern Mining & Exchange Company, 800 in the name of trustees of the Erie Company and the remainder in the names of persons who were directors of the Coal & Railroad Company, and who were also officers of the Erie Company, and who were alleged to hold the stock merely for the purpose of qualifying them to hold the offices of directors of the Company.

Further facts appear in the opinion.
Messrs. William S. Kirkpatrick, Atty-Gen., John F. Sanderson, Dep. Atty-Gen., and Silas W. Pettit, John R. Read, George A. Jenks and William P. Jenks, for plaintiff in error:

A corporation cannot become a stockholder in another corporation unless by power specifically granted by its charter or necessarily implied in it, especially if it be for the purpose of controlling or affecting the management of the other corporation, and *a fortiori*, if for the purpose of thereby engaging in a business other than and additional to that for which it is incorporated.

Green's Brice, Ultra Vires, 91, note b; Ernest v. Nicholls, 6 H. L. Cas. 401; Sumner v. Marcy, 3 Woodb. & M. 105; Mechanics & W. M. Mut. Sav. Bank & Bldg. Assn. v. Meriden Agency Co. 24 Conn. 159; Central R. Co. v. Collins, 40 Ga. 582; Hazlehurst v. Savannah, G. & N. A. R. Co. 48 Ga. 18; Salomons v. Laing, 14 Jur. 279; Franklin Bank v. Commercial Bank, 36 Ohio St. 354.

If the title was defeasible when taken by the trustees for the Erie Company, it has remained so ever since, and no subsequent conveyances of the title—more especially merely colorable transfers, as were those in this case—will validate it, or bar the right of the Commonwealth to escheat the land.

Leazure v. Hillegas, 7 Serg. & R. 313; Goundie v. Northampton Water Co. 7 Pa. 233; Rubeck v. Gardner, 7 Watts, 455.

A Legislature cannot ratify or confirm that which at the time of such attempted ratification or confirmation it could not originally authorize.

Sykes v. Columbus, 55 Miss. 187; *Grenada Co. v. Brogden*, 112 U. S. 261 (28 L. ed. 704); *Katsenberger v. Aberdeen*, 121 U. S. 172 (30 L. ed. 911).

Although corporations of one State may by comity enter and do business within the borders of another State, yet the license to do so is purely gratuitous, and depends solely upon the permission expressly or impliedly granted by such other State; and wherever a State sufficiently indicates that it refuses or withdraws such permission, the right wholly ceases, "without reference to the injustice, the prejudice or the wrong that is alleged to exist" in such refusal or withdrawal.

Doyle v. Continental Ins. Co. 94 U. S. 585 (24 L. ed. 148); *Bank of Augusta v. Earl*, 88 U. S. 13 Pet. 592 (10 L. ed. 298); *Lafayette Ins. Co. v. French*, 59 U. S. 18 How. 404 (15 L. ed. 451); *Paul v. Virginia*, 75 U. S. 8 Wall. 168 (19 L. ed. 857); *Ducat v. Chicago*, 77 U. S. 10 Wall. 410 (19 L. ed. 972); *Green's Brice, Ultra Vires*, p. 4, note a; *Com. v. Gloucester Ferry Co.* 98 Pa. 105; *Runyan v. Coster*, 39 U. S. 14 Pet. 122 (10 L. ed. 382).

The rights and powers of the New York, Lake Erie & Western Railroad Company, organized in April, 1887, do not in any way relate back to the rights and powers of the Erie Railway Company, as they existed prior to the adoption of the Constitution of 1874.

Memphis & L. R. R. Co. v. Berry, 112 U. S. 609 (28 L. ed. 937); *St. Louis, I. M. & S. R. Co. v. Berry*, 113 U. S. 465 (28 L. ed. 1055); *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 176 (29 L. ed. 121); *Dow v. Beidelman*, 49 Ark. 325; *Dow v. Beidelman*, 125 U. S. 680 (31 L. ed. 841).

Such open and flagrant violation of the fundamental law of the State cannot be excused, or its consequences evaded, by the transparent device of using the name and stock of the Northwestern Mining & Exchange Company, or that of the New York, Lake Erie & Western Coal & Railroad Company.

A thing which is within the intention of the makers of the Statute is as much within the Statute as if it were within the letter; and such construction ought to be put upon it as does not suffer it to be eluded.

Bacon, Abr. Statute, 1, §§ 5-10; *Heydon's Case*, 3 Coke, 7; *Magdalen College Case*, 11 Coke, 78; *People v. Utica Ins. Co.* 15 Johns. 381; *Com. v. Clark*, 7 Watts & S. 127; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 2 (6 L. ed. 24); *Manley v. State*, 7 Md. 135; *Leonard v. Com.* 112 Pa. 607; *Chester Co. v. Brower*, 117 Pa. 647.

For many purposes, and when necessary to attain the justice of the case, courts will always consider the interest of the shareholder as an interest in the property of the corporation.

Seaman v. Enterprise F. & M. Ins. Co. 21 Fed. Rep. 778; *Warren v. Davenport Ins. Co.* 31 Iowa, 464; *Com. v. Standard Oil Co.* 101 Pa. 119; *Coleman v. San Rafael Turnp. Road Co.* 49 Cal. 517.

If such holding is prohibited by the Constitution, the lands are escheatable in this proceeding.

Com. v. New York, L. E. & W. R. Co. 114 Pa. 340. See *Atty-Gen. v. Great Northern R. Co.* 6 Jur. N. S. 1006.

7 L. R. A.

Messrs. John G. Hall and George W. Biddle for defendants in error.

Paxson, C. J., delivered the opinion of the court:

This was an information in the nature of a *quo warranto* filed by the Attorney-General, the object of which was to escheat to the Commonwealth certain lands in Elk County, alleged to be held by or for the defendant Railroad Company. The facts as disclosed by the evidence and admitted by the parties, do not differ essentially from those in *Com. v. New York, L. E. & W. R. Co.*, reported in 114 Pa. 340. This is really a branch of the same proceeding, but for lands lying in a different county. The present case has been twice argued—a re-argument having been ordered of our own motion—and has received careful consideration. This was due to the gravity of the questions involved and the amount in controversy.

It was alleged in the first place by the Commonwealth that the Railroad Company had violated section 5 of article 17 of the Constitution of this State. The said section is as follows:

"No incorporated company doing the business of a common carrier shall directly or indirectly prosecute or engage in mining or manufacturing articles for transportation over its works; nor shall such company directly or indirectly engage in any other business than that of common carriers, or hold or acquire lands, freehold or leasehold, directly or indirectly, except such as may be necessary for carrying on its business; but any mining or manufacturing company may carry the products of its mines and manufactories on its railroad or canal not exceeding fifty miles in length."

It will be noticed that this clause in the Constitution affixes no penalty for its violation. It is conceded that for a violation of the Organic Law, a Pennsylvania corporation or a foreign corporation having or exercising corporate franchises within this Commonwealth would forfeit such franchises. This, however, would not involve an escheat or confiscation of its property.

For present purposes we must regard this constitutional provision as out of the case. The question here is whether the real estate in controversy is liable to escheat. This is not a proceeding to forfeit the Company's franchises but to escheat its lands. It must rest, if it can be sustained at all, upon the Act of April 26, 1855 (Pub. Laws, 329), the fifth section of which provides that "no corporation shall hereafter acquire or hold any real estate within this Commonwealth, directly in the corporate name, or by or through any trustee, or other device whatsoever, unless specially authorized to hold such property by the laws of this Commonwealth."

This is the prohibition of the Act. The penalty for its violation is contained in section 9. It is as follows:

"That all property hereafter acquired and held by persons, corporations or associations forbidden by this Act, and all such hereafter acquired and held beyond the limit prescribed as aforesaid by this Act, shall escheat to this Commonwealth, and upon the same being adjudged to have escheated under proceedings in

court by *quo warranto* in all respects as is provided by law in the case of the usurpation of any corporate franchises, the same shall be taken in possession and disposed of," etc.

It was not alleged that the defendant Railroad Company held the title to any of the lands in controversy either in its corporate name, or by or through a trustee. The contention of the Commonwealth was that the title thereto was held by the Northwestern Mining & Exchange Company, defendant; that all of the stock of said last-named Company was held by the said Railroad Company, and that the placing of the title in the former Company was a mere "device" to enable the Railroad Company to hold lands indirectly which it was forbidden by the Act of 1855 to hold directly, or by or through a trustee. Whether it was such "device" was the question we directed to be submitted to the jury, when the other branch of the case was here, reported in 114 Pa. 340.

It is not denied that the Northwestern Mining & Exchange Company is a Pennsylvania corporation, and authorized by its charter to hold these or similar lands, and to carry on the business of mining, milling, smelting and refining gold, silver, copper, iron, lead and other ores, coal and other minerals. Nor was it denied that under the Act of April 15, 1869 (Pub. Laws, 32), the New York, Lake Erie & Western Railroad Company had the right to purchase and hold all or any portion of the stock of the Northwestern Mining & Exchange Company. The said Act expressly declares: "It shall and may be lawful for railroad and canal companies to aid corporations authorized by law to develop the coal, iron, lumber or other material interests of this Commonwealth by the purchase of their capital stock or bonds or either of them, or by the guaranty of or agreement to purchase the principal or interest, or either, of such bonds."

The object of this legislation is obvious. It was to authorize railroad and canal companies to employ their capital and credit to aid in the development of the mineral resources of the Commonwealth. Such development, as everyone knows, is in many instances beyond the reach of individual enterprise. It was easy enough to form corporations with all the requisite powers for this purpose. It was a very different thing to find capitalists to take their stocks or bonds. Hence it was that the Legislature gave to railroad and canal companies the power to purchase both stocks and bonds of such companies. Nor was any limitation placed upon this power. They might buy a portion or all of the stock. It probably never occurred to the legislative mind that while the purchase of a portion of the stock of a mining company would be aiding such corporation to develop the mineral resources of the State, the purchase of a majority of the whole of the stock of such company might be held to be a "device" to evade the Act of 1855. However that may be, the Act of 1869 was evidently intended to legalize, and perhaps encourage, railroad and canal companies to invest in this species of mining companies. It involved, necessarily, the control of such companies by the corporations making such investments to the extent of the stock held by them. A majority of the stock controls the corporation; T. R. A.

the corporation controls the land held by it. In this sense, and to this extent, the Act of 1869 enabled railroad companies to control real estate, the title to which they were forbidden to hold directly or indirectly by the Act of 1855. It must not be forgotten, however, that controlling real estate, by means of the ownership of a majority of the stock of such corporation is a very different matter from holding the title to such real estate. The one is legalized by the Act of 1869; the other is forbidden by the Act of 1855.

It appears by the evidence that the Railroad Company purchased the charter of the Mining Company and retained all of the stock thereof, except the number of shares requisite to qualify the directors. It is admitted that the whole interest in the stock of the Mining Company was owned and controlled by the Railroad Company. It was contended that this was not aiding the Mining Company, but was a mere scheme or "device" to hold lands in violation of law. This was the view taken of it by our brother Sterrett in the former opinion of this court, and in that case it was directed that the question whether it was a "device" to evade the Act of 1855 should be submitted to a jury. That case was not heard before a full bench; those who heard it were not unanimous; it involved a question of grave importance, and a majority of those who heard the argument were in favor of taking the verdict of a jury upon the facts.

As the question is now presented here, and as it was presented below, there are no disputed facts. It is conceded that at the time these proceedings were commenced the title to the lands was in the Northwestern Mining & Exchange Company; that the said Company was expressly authorized by law to hold them; that the stock of said last-named corporation is held or controlled by the Railroad Company, which Company is in terms authorized by the Act of 1869 to hold it; that the stock so held is personal property, and that the Railroad Company does not hold the title to said real estate, or to any portion of it, either in its own name, or by or through a trustee. With the facts upon the record undisputed, we cannot evade the responsibility of this case by throwing it upon a jury. With the facts admitted, it is the duty of this court to pass upon their legal effect, and the verdict of a jury could not aid us. Moreover, if we submit this question to a jury, we would have no rule whatever. Different juries in different counties might find conflicting verdicts, in which case we would have the strange result that in one county the transaction would be held to be legal, while in an adjoining county it would be held to be illegal. We were informed upon the argument, and have no doubt of its truth, that a vast amount of real estate in this Commonwealth is held by corporations similar to the Northwestern Mining & Exchange Company, and chartered by the State for the purpose, *inter alia*, of holding the title to such property; that the stock of said companies is largely held by railroad corporations, in pursuance of the Act of 1869, and that the said real estate is in whole or in part controlled by the latter class of corporations by means of their stock. If in all such cases the question of whether the holding of

such stock is a "device" on the part of the railroad companies to evade the Act of 1855 must be submitted to a jury, the consequences might be very serious and destructive of vested rights. To say the least, it would introduce an element of uncertainty into the titles to a large amount of property which it would be difficult for a purchaser to protect himself against. The possibility of such results admonishes us to move with caution, and to hesitate ere we finally adopt a principle which may lead to such confusion.

If there is anything that is clear in this case it is that the defendant Railroad Company has no title, legal or equitable, to this land. Its whole title thereto, in fee simple, passed by the conveyance to the Northwestern Mining & Exchange Company. Attention is again called to the Act of 1855, and at the risk of being prolix I repeat it: "No corporation shall hereafter acquire and hold real estate within this Commonwealth directly in the corporate name, or by or through any trustee or other device whatsoever, unless specially authorized to hold such property by the laws of this Commonwealth."

It will be observed that the prohibition of the Act is of a threefold character, viz.: (a) holding real estate in its corporate name; (b) by means of a trustee; and (c) by any device whatever. It must be conceded, indeed it is not denied, that there is no violation of the first two prohibitions. It is equally clear to my mind there is no violation of the third, for the reason that the Railroad Company has, as before stated, no title to the real estate of any kind. If it has no title how can it hold title by a "device?" The only answer that has or can be made to this is that the Company controls said real estate. If we concede this proposition, where in the Act of 1855 is there to be found a prohibition of a railroad company controlling the use of real estate? The Act strikes only at the holding of the title, and as it is a highly penal statute, penal to the extent of practically confiscating all real estate held in violation thereof, we are not at liberty to extend it beyond its terms. The Legislature may have had good reasons to prohibit railroad companies from holding the title to large bodies of mining lands. They may not have had the same reasons to move them to prohibit all control over them. At any rate they have not done so, which is sufficient for our purpose.

As before observed, this is a question of escheat. It must be manifest that before there can be an escheat of these lands under the Act of 1855, it must appear that the defendant Railroad Company holds the title thereto in its corporate name, or by or through a trustee, or by some device, by means of which said Company not only controls the lands but enjoys the beneficial ownership thereof. In other words it must have either the legal or the equitable title or it has no title whatever. If it has no title there can be no escheat of the lands as real estate. The third section of the Act of 1855, which does not appear to have been heretofore called to our attention, provides that "the shares held by shareholders in all incorporated land and building associations, and mining and manufacturing companies, shall be taken to be personal property, confer-

ring a right to receive dividends of the profits and proceeds of the real estate held by such companies, but not to create any title in the shareholders in or to such real estate, which shall be subject only to the liens of, and be fully conveyed by the corporation holding the title and owning the same."

This section of the Act of 1855 is a distinct declaration by the law-making power that shares of stock held in a mining company are personal property, and create or give no title to the holder of such shares in or to any of the real estate held by such company. How, then, is it possible to escheat it as real estate belonging to or held for the company owning the shares? The law having fixed its character I do not see how the parties can change it even by a "device."

The Act of April 8, 1881 (Pub. Laws, 9), enacts that "where any conveyances of real estate in this Commonwealth have been made by any alien, or any foreign corporation or corporations of another or of this State, to any citizen of the United States, or to any corporation chartered under the laws of this Commonwealth, and authorized to hold real estate, before any inquisition shall have been taken against the real estate so held to escheat the same, such citizen or corporation grantee as aforesaid shall hold and may convey such title and estate indefeasibly as to any right of escheat in this Commonwealth, by reason of such real estate having been held by an alien, or a corporation not authorized to hold the same by the laws of this Commonwealth."

While I do not consider this Act important in the determination of this case, as the contention of the Commonwealth cannot be sustained for the reasons already given, it is proper to say that it appears to condone the alleged offense so far as the Legislature may lawfully do so. It removes the penalty of escheat imposed by the Act of 1855. It may be said, however, that it is controlled by section 10 of article 17 of the Constitution, which declares: "No railroad, canal or other transportation company, in existence at the time of the adoption of this article, shall have the benefit of any future legislation by general or special laws, except on condition of complete acceptance of all the provisions of this article." In the absence of any evidence that the defendant Company had accepted the provisions of the above article, it is urged that it cannot claim the benefit of the Act referred to.

It is doubtless true that before a railroad company can enjoy the benefit of new legislation, enlarging its powers or increasing its facilities, it must formally accept all of the provisions of the 17th article of the Constitution relating to railroads and canals. This question, however, is not raised. The Act of 1881 is in the way of the Commonwealth. No one doubts that the Act of 1855, imposing the penalty of escheat, could at any time have been repealed by the Legislature. The repeal of the Act would have been an answer to this proceeding. The Commonwealth would have nothing to rest it upon. The Act of 1881 does not in terms repeal the Act of 1855, but it removes the penalty. This information was not filed until several years after the passage of the Act of 1881. Nor had any inquisition been taken

against the real estate in controversy until after it had been conveyed to the Northwestern Mining & Exchange Company. The case comes, therefore, precisely within the terms of the Act of 1881, and were we in doubt as to our former position, we might well affirm the judgment upon this ground alone.

We have considered this case solely upon the power of the Commonwealth to escheat the lands. No question is raised under the constitutional provision referred to, and none is decided.

Judgment affirmed.

Sterrett and Clark, JJ., dissent.

OREGON SUPREME COURT.

William M. KILLINGSWORTH, *Appt.*,

v.

PORTLAND TRUST CO., of Oregon, *Respt.*

(....Or.....)

"When a corporation is made the agent of another to sell and convey real property, it acts through the same instrumentalities as when acting for itself, and the relations between it and its instrumentalities are as one legal entity or artificial person in the performance of its engagements, and involve no delegation of powers. *Held*, therefore, that a corporation has capacity to execute a deed as attorney in fact for another.

(January 13, 1890.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Multnomah County in favor of defendant in an action to recover damages for breach of a contract for the sale of certain real estate. *Affirmed.*

The case sufficiently appears in the opinion.

Messrs. Sears & Beach, for appellant:

A corporation in this State is inherently incapable to execute a deed as attorney in fact for the following reasons:

First. It cannot execute or acknowledge a deed except through agents.

Story, Ag. § 116; Morawetz, Priv. Corp. § 357; *Georgetown College v. Browne*, 84 Md. 450; *Re Thompson's Estate*, 83 Barb. 834.

Second. An agent appointed by power of attorney to sell and convey land cannot delegate his or its power at all, unless a power of substitution is given.

Story, Ag. §§ 13, 14.

Third. Where the right of substitution is given it would have to be exercised by executing and acknowledging the substituting instrument with the same formalities as those under which the original power is executed.

Stinchcomb v. Marsh, 15 Gratt. 202.

Mr. George H. Williams, with *Messrs. Woodward & Woodward*, for respondent:

Corporations on full compliance with the statutes respecting their organization become legal entities, with power to do and to act, and to the extent of the powers conferred by the charter of such corporation can perform all acts which a natural person might do to accomplish the same end.

Barry v. Merchants Exch. Co. 1 Sandf. Ch. 239.

By the laws of the State of Oregon a corporation may engage in any lawful enterprise, business, pursuit or occupation.

Hill, Amd. Laws of Oregon, § 3217, p. 1424.

If the articles define clearly what acts the

corporation may do, there goes with it the implied power to use the necessary and usual means to effect that purpose.

Bridgeport v. Housatonic R. Co. 15 Conn. 475.

A corporation has power to pledge.

Leo v. Union Pac. R. Co. 17 Fed. Rep. 273.

To take and hold property in trust.

Vidal v. Girard, 43 U. S. 2 How. 187 (11 L. ed. 230).

To make a lease.

Ardeco Oil Co. v. North Am. Oil Co. 66 Pa. 375.

To make an assignment for the benefit of creditors.

White Water Valley Canal Co. v. Vallette, 63 U. S. 21 How. 414 (16 L. ed. 154); *Gottfried v. Miller*, 104 U. S. 521 (26 L. ed. 851).

To give guaranty.

Green Bay & M. R. Co. v. Union Steamboat Co. 107 U. S. 101 (27 L. ed. 414).

It may borrow money, make notes, draw and accept drafts.

Memphis & L. R. R. Co. v. Dow, 120 U. S. 287 (30 L. ed. 595).

It may make deeds, mortgages and leases.

Musser v. Johnson, 42 Mo. 74.

It may form a partnership with individuals or other corporations.

1 Lindley, Partn. 165.

Lord, J., delivered the opinion of the court:

This is an action to recover damages for failure of the defendant to execute and deliver to the plaintiff a conveyance of certain premises pursuant to an agreement to that effect. The defendant denies this, and alleges, as the attorney in fact of one Deborah H. Ingersoll, in compliance with said agreement, that it did execute and tender to the plaintiff a conveyance of said premises, etc., and now brings it into court, and deposits it for the plaintiff, and that plaintiff refuses to accept the same. To this the plaintiff demurred on the ground that the same does not state facts sufficient to constitute a cause of defense to the cause of action alleged.

The point raised by the demurrer is, Can the defendant, a corporation, execute a deed of conveyance of real property as the attorney in fact of another? In this State the right to become incorporated is secured by a general law, and any persons may avail themselves of it by complying with its provisions. Corporations which owe their existence to the common law must be governed by it in the mode of their organization, in the manner of exercising their powers, and in the use of the capacities conferred. But the Legislature may authorize the creation of corporations for many purposes not contemplated by the common law, and endue them with powers and capacities to be exer-

*Head note by LORD, J.

7 L. R. A.

cised in disregard of its rules, or which may greatly extend, modify or limit their common-law powers and privileges. The measure of the legislative power in this regard is limited only by circumstantial provisions. Ordinarily, in the creation of corporations, the common-law incidents and powers are implied, unless otherwise provided or restrained by the law of its corporate existence. But, in determining the nature and extent of the powers and capacities conferred on a corporation, and the mode of their exercise, the law of its creation, whether a charter or a statute, must be consulted; for it has no power, except as thus given, either expressly or as incidental to the exercise of the powers granted. It is provided by our Statute that a corporation may engage in any lawful enterprise, business pursuit or occupation (Code, § 3217); so that, unless corporations are affected with some disability, when the articles of incorporation are sufficient for the purpose, there is no lawful occupation or business in which it may not engage in this State exactly as individuals.

By its articles of incorporation, the defendant corporation is expressly authorized and empowered "to act as the general or special agent, or attorney in fact, for any public or private corporation or person in the management and control of real estate or other property, its purchase, sale or conveyance," etc. No question is made but what the defendant, by its articles of incorporation, has conferred upon it the power to do the act as to which there is claimed to be an alleged failure; but the contention is that a corporation, from the nature of the organization, as an artificial body, necessitated to act through agents, is incapable of executing a deed as an attorney in fact. This argument is based on the assumption that there are some things, from the inherent nature of the case, that a corporation is incapable of doing, and seeks its illustrations in the common law, as that a corporation cannot be an administrator or executor because its duties are of a personal nature, and cannot be delegated; or cannot take an oath, when so required by law, before proceeding to execute some duty or trust. But this argument overlooks the fact that a corporation may be empowered to do by statute what it was incapable of doing under its common-law powers; and, when thus created, its powers, capacities and modes of exercising them depend upon the Statute. Nor is the disability, in such cases, of a character which cannot be obviated by statute; for, as Mr. Morawetz says, "there are numerous instances in which corporations have been expressly empowered by statutes to administer estates." 1 Morawetz, Priv. Corp. § 357.

The reason why a corporation was unable to perform the office of executor or administrator, as stated by Blackstone, was that it could not take an oath for the due execution of the office, 1 Bl. Com. 477.

But, to enable a corporation to act as executor or administrator, the Statute may dispense with the oath, or provide that some one of its officers may take it, or the law of the State may not require any oath for the due execution of the office; and in such case, where no other impediment intervenes, a corporation may act as administrator when the law of the

State does not require the administrator to take an oath. It was so held in *Deringer v. Deringer*, 5 Houst. 416. So, too, in *Lincoln Sav. Bank v. Ewing*, 12 Lea, 602, where it was urged that a corporation was incapable of taking to itself a mortgage or trust conveyance, it was held that a corporation may take and hold as a trustee or mortgagee, and execute a trust in which it has an interest, within the scope of its business; and a failure or inability to comply with the provisions of the Code by taking the required oath would not affect the validity of the deed, or the title vested.

As it is not questioned that the business in which the defendant is engaged is a lawful occupation, and that the articles of incorporation are sufficient to confer the power on the defendant to act as an attorney in fact in furtherance of its legitimate objects, there is nothing to prevent it from doing the acts essential to carry on its business, and comply with the terms of its agreement, unless it is incapable of performing such acts from some cause inherent in itself.

A corporation, like a natural person, has a right to conduct its legitimate business by all the means necessary to effect such object. Within its prescribed range, it can do whatever a natural person *mutatis mutandis* could do. Wharton, Ag. § 57.

In *Barry v. Merchants Exch. Co.* 1 Sandf. Ch. 280, it is said: "Every corporation, as such, has the capacity to take and grant property, and to contract obligations, in the same manner as an individual. . . . And every such corporation has power to make all contracts which are necessary and usual in the course of the business it transacts, as means to enable it to effect such object, unless expressly prohibited by law." Having the power conferred upon it to act as an attorney in fact, is it not endowed with all the faculties or capacities essential to execute it, and carry out the business projects of its creation? Why may not a corporation act as an agent for an individual or another corporation? As the owner of real property, it can by its authorized agents execute a conveyance, or it may authorize another, by power of attorney in writing, to convey such property for it; why, then, may it not act as the agent or attorney in fact of another for a like purpose, when it is so authorized, and to thus act is one of the chief powers conferred to effect the object of its creation, and to carry on the business in which it is engaged?" "Within the scope of its corporate powers," says Mr. Mechem, "unless there are express provisions in its charter or constituting instruments to the contrary, a corporation may act as agent, either for an individual, a partnership or other corporation. Many of the great corporations of the country are organized for this express purpose, under statutes or charters conferring and defining their powers, and the methods of executing them; but even in other cases, authority so to act might be implied as auxiliary to their main purpose." Mechem, Ag. § 64.

It is clear, then, that a corporation may act as the agent of another; and, if so, it must be endowed with the faculties or instrumentalities to perform the office it is authorized to undertake, and carry out the purposes of its creation.

When a corporation engages in a legitimate business, and is authorized by its incorporation to do the things necessary to carry on such business, it is an express grant of power to enable it to effect that object. If it is to be excluded from doing such things because, from the nature of its organization, it cannot act personally, but only through agents, there would be little left in the domain of business it could do. As was said by the court in *Hopkins v. Gallatin Turnp. Co.*, 4 Humph. 412: "The common-law rule with regard to natural persons, that an agent, to bind his principal by deed, must be empowered by deed himself, cannot, in the nature of things, be applied to corporations aggregate. These beings, of mere legal existence, and their board, as such, are, literally speaking, incapable of a personal act. They direct or assent by vote; but their most immediate mode of action must be by agents." Being a creation of the law,—an artificial person,—it can only act by agents, who are its limbs, or instrumentalities to effect the purpose for which it was organized, and to act for it, their act being the act of the corporation, exactly as the act of an individual is his act. As such, upon the principle of the objection raised, it could not make an acknowledgment in person, but it may by its officers; and in such cases its officer affixing the seal is the party executing the deed, within the meaning of the Statute requiring deeds to be acknowledged by the grantor. *Kelly v. Cathoun*, 95 U. S. 711 [24 L. ed. 544]; *Frostburg Mut. Bldg. Asso. v.*

Brace, 51 Md. 508; Am. & Eng. Cyclop. Law, *Acknowledgment, Corporations*.

In fact, within the same principle of reasoning, it may be said that a corporation cannot make a deed of its own property; but we know it can, and that the act of its officers in so doing is the act of the corporation.

When a corporation is made the agent of another to sell and convey property, it acts through the same instrumentalities as when acting for itself; and the relation between it and its instrumentalities are as one being or artificial person in the performance of its engagement, and involves no delegation of powers. So that, when a corporation is invested with a power of attorney to sell and convey real property, the person conferring the power knows that the corporation cannot act personally in the matter, but that in performing the engagement it will act through its agents, who for that purpose are its faculties, and whose acts in the discharge of that duty are the acts of the corporation, and as such must be considered to be included in the artificial person, as instrumentalities authorized by him to do the act conferred upon it by his power of attorney. In this view, the argument that the corporation cannot do such act, under the power of attorney, without a delegation of authority to its agents, and that the grantor of the power has given no such power of substitution, cannot be sustained.

There was no error, and the judgment must be affirmed.

FLORIDA SUPREME COURT.

Annie M. PRENTISS *et al.*, *Appts.*,
v.

Hugh S. PAISLEY *et al.*

(...Fla....)

*1. A bill of review, for error of law apparent upon the record, will lie, although the decree

*Head notes by RANNEY, Ch. J.

sought to be reviewed is a final decree, consequent upon a decree *pro confesso*, for failure of the defendant to plead.

2. Where the bill does not justify the final decree following the decree *pro confesso*, a bill of review for error apparent upon the record is a proper remedy for relief in the court rendering such decree, and an appeal the remedy through the appellate court.

NOTE.—*Wife's capacity to contract.*

As to the wife's disability to contract, see notes to *Speler v. Opfer* (Mich.) 2 L. R. A. 345; *Roop v. Real Estate Invest. Co.* (Pa.) 7 L. R. A. 211; *Cook v. Walling* (Ind.) 2 L. R. A. 769.

The existence of the wife is merged in that of the husband, and a contract binding herself personally, or subjecting her to a judgment *in personam*, is void. *Spencer v. Parsons*, 11 Ky. L. Rep. 769.

A married woman cannot be sued at law in an action *ex contractu*, except where such suit is authorized by express legislative enactment. *Davis v. Carroll* (Md.) 18 Atl. Rep. 965.

A contract which could not have been enforced against a married woman if living cannot be enforced against her estate. *Ibid.*

Where coverture is pleaded to a contract it is proper, in the reply, to show that the contract is one a married woman has power to make. *Arnold v. Engleman*, 1 West. Rep. 483, 108 Ind. 512.

Late decisions from various state courts: California.

A married woman, in California, is incapable of contracting a personal obligation except in cases provided by statute. *Norton v. Meader*, 4 Sawy. 604, 7 L. R. A.

Under the Civil Code

Under Civ. Code, a married woman may enter into any agreement or transaction respecting her property which she might if unmarried. She may mortgage or convey it by deed of trust to secure the debts of her husband, and, having done so, his creditors may enforce their claims against it in the same manner and to the same extent that they could if it were his property, and not hers. *Burkile v. Levy*, 70 Cal. 250.

District of Columbia.

The common-law disability has not been removed in the District of Columbia (*Bitch v. Hyatt*, 3 Mac-Arth. 586); but a married woman may contract to repair her house, or to put it into rentable condition. *Harmon v. Garland*, 1 Mackey, 1.

Florida.

Though the wife may conduct a mercantile business in Florida, and the husband may act as agent for her in that business, yet she cannot make a contract herself or by him as agent on which she will be personally liable. *McQuaid v. Fontane*, 24 Fla. 509.

To determine whether the credit was given to

- 3. A married woman is by the common law incapable of making a contract** that will bind her personally, either in law or equity; and for this reason there cannot, in the absence of legislation changing the common law, be a judgment or decree against her personally for the recovery of money, as distinguished from a decree charging her separate equitable estate, or other property, with the payment of money. No exception to this rule is created by the existence of a marriage contract between husband and wife giving her the right to control and manage her separate estate and property the same as if she had remained unmarried.
- 4. A married woman is personally liable** for her civil torts, including such frauds as do not grow out of, or are not directly connected with, or a part of, a contract which she has undertaken to make.
- 5. Wherever coverture avoids a contract** which a wife has attempted to make, it likewise bars a personal recovery against the wife on the ground of the fraud connected therewith; and the bar cannot be overcome by suing her in an action *ex delicto*.
- 6. It is error to decree a recovery of money** of or against a married woman personally, in a suit in equity instituted to set aside a contract for the sale of land on the ground of fraud, and to recover the amount of a cash payment made thereon by the complainant.

7. The marital relation does not of itself disqualify a husband from acting as the agent of his wife with reference to her separate estate.

8. The person in whom the legal title to property is vested in trust for a married woman is a necessary party to a bill seeking to charge the property with the payment of money paid to her.

(January 13, 1890.)

A PPEAL by plaintiffs from an order of the Circuit Court for Marion County dismissing a bill for review of proceedings in which a personal decree was entered against a married woman, and refusing to enjoin the sale of her separate property for the enforcement of such decree. *Reversed*.

Hugh S. Paisley filed a bill against T. D. C. Prentiss and Annie M. Prentiss his wife, alleging misrepresentation and fraud on the part of defendants in selling to plaintiff certain land alleged to contain orange trees, but which in fact had no such trees on it and was of very little value. He prayed a rescission of the contract of sale, a cancellation of the bond for title, a delivery up of the notes given for the purchase money and a judgment against defendants for the amount of the purchase money already paid.

him or to her, it should be shown that the fact was known to the vendor, or that between him and the husband there was a clear and distinct understanding that the credit was given to her; else the husband will be liable. *Ibid*.

Georgia.

A married woman is not liable on her note given for money borrowed to pay the premium due by the husband upon a policy of insurance on his life, where it is not shown that the policy was for her benefit alone. Jones v. Bradwell (Ga.) 10 S. E. Rep. 745.

Illinois.

As to the power of the wife, under the Enabling Laws of Illinois, to engage in trade, etc., see *Re Kinkhead*, 3 Biss. 405; *Farwell v. Kinkhead*, 1 Am. L. Rec. 323.

Indiana.

A married woman may execute a promissory note for property purchased by her. Lane v. Schlemmer, 12 West. Rep. 924, 114 Ind. 296.

Kentucky.

A note given by a married woman, not for necessities for herself or family, and for which credit was not given her, is void. Stevens v. Deering (Ky.) 9 S. W. Rep. 232.

Maryland.

A bond executed by a *feme covert* alone, without the joinder of her husband, is void, and no action can be maintained upon it, either during coverture or afterwards. Harris v. Dodge (Md.) 19 Atl. Rep. 597.

Massachusetts.

A married woman who indorses blank promissory notes, at her husband's request, for him to fill up and use, which afterwards and in her absence he fills up and negotiates for value at a bank, is liable to the bank as indorser, under the Massachusetts statutes, which give her the unrestricted right to contract except with her husband. Binney v. Globe Nat. Bank (Mass.) 6 L. R. A. 373.

Michigan.

A married woman cannot make an executory contract that is not directly connected with her estate. Howe v. North, 12 West. Rep. 919, 69 Mich. 272. 7 L. R. A.

But she may render herself liable for things bought by her for family use. *Ibid*.

Yet she is not liable upon a contract for the board of herself and husband. *Ibid*.

She cannot make a valid contract for the erection of a building upon the joint property of herself and husband, but can contract only with reference to her sole or separate property. Curtis v. Crowe (Mich.) 41 N. W. Rep. 876.

A contract in writing to bind her must have been made on behalf of her sole property. Mutual Ben. L. Ins. Co. v. Wayne Co. Sav. Bank, 12 West. Rep. 535, 68 Mich. 116.

The statutes do not authorize a wife to become personally liable on an executory promise except concerning her separate estate. Kenton Ins. Co. v. McClellan, 43 Mich. 554; Reed v. Buys, 44 Mich. 80; Edwards v. McEnhill, 51 Mich. 160; Harvey v. Galloway, 48 Mich. 532; Richards v. Proper, 44 Mich. 93; Wilson v. Coolidge, 42 Mich. 112; Gantz v. Toles, 40 Mich. 725.

Minnesota.

The capacity of married women to be bound and estopped by their conduct is incident to their enlarged power to deal with others, under Minnesota statutes. Dobbin v. Cordiner (Minn.) 4 L. R. A. 333.

Mississippi.

The statutes in Mississippi in relation to married women have not relieved a wife from common-law disabilities to make contracts. Canal Bank v. Partee, 99 U. S. 325 (25 L. ed. 390).

With certain exceptions a married woman cannot bind herself by any covenant, nor can she be bound by the covenants of her trustee in a deed of separation; nor can she, in consideration of such separation, convey or release to her husband her claims on his estate. Stephenson v. Osborne, 41 Miss. 125.

In Mississippi, unless a married woman has a separate estate, she is subject, as to her contracts, to the disability of coverture. Canal Bank v. Partee, *supra*.

A personal judgment against a married woman, in an action against her on her promissory note, is a nullity under the laws of Mississippi. *Ibid*.

A decree *pro confesso* was rendered against defendants granting the relief prayed for and directing execution to issue for the collection of the money judgment, which decree was afterwards enrolled.

Subsequently defendants filed a bill of review against Paisley and the sheriff to set aside so much of the judgment as bound Mrs. Prentiss and to enjoy the sale of her separate estate which had been levied on to satisfy the judgment.

The bill was dismissed, the injunction refused and defendants appealed.

Further facts appear in the opinion.

Messrs. Miller & Spencer, for appellants:

A creditor suing a married woman must, in his bill in equity or declaration at law, aver that she is a married woman, that she has a separate estate and that the debt is a charge on it or ought to be paid out of it.

Choppin v. Harmon, 46 Miss. 307; *Canal Bank v. Partee*, 99 U. S. 384 (25 L. ed. 894).

There can be no personal judgment against her at law, and no personal decree in chancery; it must be one which reaches her property only.

Reeves, Baron and Feme, 171; *Bank of Louisiana v. Williams*, 46 Miss. 629; *Cary v.*

Dixon, 51 Miss. 598; *Wallace v. Rippon*, 2 Bay, 112; *Francis v. Wigzell*, 1 Madd. 263.

Her property is not liable on a general engagement, except where a case is made out for a court of equity to charge her separate estate, as for improvements on the same.

Spearman v. Ward, 6 Cent. Rep. 147, 114 Pa. 634.

The only relief given in equity on a married woman's contract to convey is to enforce a refunding of the purchase money where she has received it.

Goss v. Furman, 21 Fla. 411.

The judgment against her is not a personal one purely, but one to be satisfied out of her separate estate; and the record should show this, otherwise the judgment is void, and may be so treated wherever it is met.

Offutt v. Dangler, 5 Cent. Rep. 430, 5 Mackey, 818; *Canal Bank v. Partee*, 99 U. S. 325 (25 L. ed. 890); *Rodemeyer v. Rodman*, 5 Iowa, 427; *Lewis v. Perkins*, 86 N. J. L. 183; *McLaughlin v. O'Rourke*, 12 Iowa, 461; *Cary v. Dixon*, 51 Miss. 598; *Mallett v. Parham*, 52 Miss. 921.

When a bill seeks to affect the separate property of the wife through her personally, it should be dismissed; her trustees must be made parties.

Missouri.

Under the Revised Statutes of Missouri a married woman may act as *feme sole* as to her separate property, and may make contracts for purchase of personal property with her separate means. *Dailey v. Singer Mfg. Co.* 4 West. Rep. 563, 88 Mo. 301; *Roenheim v. Hartsack*, 7 West. Rep. 114, 90 Mo. 357; *Miller v. Brown*, 47 Mo. 504.

The restriction by Mo. Rev. Stat., § 668, on the power of a married woman to covenant in a joint deed with her husband of her statutory estate, does not apply to her covenants in a conveyance of her separate estate in equity. *Barlow v. Delaney*, 40 Fed. Rep. 97.

New Jersey.

Under the New Jersey Revision, a wife may contract to sell her real estate; and specific performance thereof will be decreed after her husband's death, against one purchasing with knowledge thereof. *Union Brick & Tile Mfg. Co. v. Lorillard*, 12 Cent. Rep. 32, 44 N. J. Eq. 1.

New York.

In New York, a married woman may carry on business and may make contracts in the prosecution of such business. *United States v. Garlinghouse*, 11 Int. Rev. Rec. 11. See *Voorhees v. Bonesteel*, 63 U. S. 16 Wall. 16 (21 L. ed. 268).

In the course of her separate business she can make negotiable paper, which will be governed by the law-merchant. *Noel v. Kinney*, 8 Cent. Rep. 60, 106 N. Y. 74.

Her contracts may be either express or implied, and may be made either personally or by agent, and when within the statute they will charge her separate estate. *Dickerson v. Rogers*, 114 N. Y. 406.

As to all contracts relating to her separate estate, a married woman stands at law, under the Married Woman's Acts, on the same footing as if unmarried. *Noel v. Kinney*, *supra*; *Overseers of Poor of Parker City v. Overseers of Poor of Du Bois Borough* (Pa.) 8 Cent. Rep. 207; *Frecking v. Rohland*, 58 N. Y. 422; *Bodine v. Killeen*, 58 N. Y. 93.

North Carolina.

As to the power of a wife, in North Carolina, to make contracts which will charge her separate estate, see *Matthews v. Murchison*, 17 Fed. Rep. 760, 7 L. R. A.

Ohio.

The *jus disponendi* which attaches in Ohio to the estate of a married woman is largely regulated by statute. *Levi v. Earl*, 30 Ohio St. 147.

The ground upon which a court of equity charges her separate estate for her general engagements is not because her contracts have any validity but because the circumstances are such that equity decrees it to be just that they should be paid out of her estate. *Ibid*.

Her separate property is not liable for her general engagements in the absence of a contract valid in law to bind the same. *Rice v. Columbus, T. & T. R. Co.* 32 Ohio St. 380.

Except so far as capacity has been given to her by statute to bind herself by her contracts, they are void. *Payne v. Thompson*, 3 West. Rep. 153, 44 Ohio St. 122.

She may charge her separate estate at least to the extent that such liability may be incurred for its benefit. *Phillips v. Graves*, 20 Ohio St. 371; *Patrick v. Littell*, 36 Ohio St. 72.

Pennsylvania.

The wife has only such power over her personal property as is conferred by statute. *Hinkle v. Landis* (Pa.) 26 W. N. C. 218.

All contracts made by the wife concerning her separate estate, other than for labor and materials for improving the same, are subject to her disabilities as a *feme covert*, except where a case is made out for the court to charge her separate estate. *Spearman v. Ward*, 6 Cent. Rep. 147, 114 Pa. 634.

Under Pa. Act of Feb. 29, 1872, a married woman can make a valid judgment note for a sewing-machine purchased for her own use. *Baker v. Singer Mfg. Co.* 13 Cent. Rep. 477, 122 Pa. 363.

Under the Pennsylvania Act of June 8, 1887 (Pub. Laws, 332) known as the Married Person's Property Act, a married woman may confess judgment, or bind herself or her estate by contract, for three purposes, viz.: where she engages in trade or business; in the management of her separate estate; and for necessities; but she cannot bind her estate generally as a *feme sole*. *Real Estate Invest. Co. v. Roop* (Pa.) 7 L. R. A. 211.

A married woman cannot enter into a valid agreement with a third person, without the consent of

Lewis v. Yale, 4 Fla. 418; 1 Daniell, Ch. Pr. 186.
Mr. S. D. McConnell, for appellees:

Equity will charge the separate property of the wife with the repayment of money advanced to her at her instance and for her benefit or on account of her estate.

Pentz v. Simonson, 13 N. J. Eq. 232; *Norton v. Tursoil*, 2 P. Wms. 144; *Greatley v. Noble*, 3 Madd. 79; *Stuart v. Kirkwall*, 3 Madd. 387.

The marital relation does not disqualify the husband from becoming the agent of his wife.

Tresch v. Wirtz, 84 N. J. Eq. 124.

Equity will charge the separate estate of a married woman with the value of property delivered to her as a consideration of a contract for the sale of her separate property and for money expended by vendee by reason of contract of sale.

Pierson v. Lum, 25 N. J. Eq. 890.

The estate of a married woman is chargeable with its augmentation by another through her procurement or knowledge and consent.

Thrasher v. Doig, 18 Fla. 809; *Staley v. Hamilton*, 19 Fla. 275.

Raney, Ch. J., delivered the opinion of the court:

This is an appeal from an order denying an injunction and dismissing a bill of review.

her husband, transferring to such third person a sum of money in consideration of his obligating himself to pay her an annuity out of such sum during her natural life; and if she does so it will be presumed that such third person knew that she was acting *ultra vires*. *Hinkle v. Landis* (Pa.) 25 W. N. C. 218.

South Carolina.

Under the South Carolina law, a married woman cannot execute a valid contract of suretyship. *Harris v. McCastan* (S. C.) 10 S. E. Rep. 104.

A note given by a married woman for money borrowed for her own use is valid, under S. C. Gen. Stat., § 2037. *Howard v. Kitchens* (S. C.) 10 S. E. Rep. 224.

And a note given by her for money expended on account of her child at her request is invalid. *Ibid*.

Wisconsin.

In Wisconsin, married women have not been vested by statute with general power to bind themselves or their separate estates, by the ordinary contract of indorsement of a note. *Avery v. Doane*, 1 Biss. 64.

Husband as agent of wife.

The mere relation of husband and wife creates no agency in the husband to bind her by his representations or to create an estoppel against her. *Henry v. Sneed* (Mo.) 12 S. W. Rep. 663; *Wilcox v. Todd*, 64 Mo. 383; *Hall v. Callahan*, 66 Mo. 316.

A married woman may manage her separate estate either in person or by an agent, and can constitute her husband her agent for that purpose, whose acts in purchasing articles for the use of her separate estate are binding upon her. *Brown v. Thomson* (S. C.) 10 S. E. Rep. 96.

The husband may be the agent of the wife, though the agency must be clearly established. *Mead v. Spalding*, 12 West. Rep. 408, 94 Mo. 43; *Eystra v. Capelle*, 61 Mo. 580; *Rodgers v. Pike Co. Bank*, 69 Mo. 532; *Morrison v. Thistle*, 67 Mo. 596; *Baum v. Mullen*, 47 N. Y. 577; *Treman v. Allen*, 15 Hun, 4; *Abbey v. Deyo*, 44 N. Y. 343; *Paine v. Farr*, 118 Mass. 77; *Ross v. Baldwin*, 65 Miss. 370.
 7 L. R. A.

The bill of review, considered as one for error of law apparent upon the face of the record, is maintainable. The term "record," as used in connection with such bills, means the pleadings and decree in the cause as to which the complaint is made. *Whiting v. Bank of U. S.* 38 U. S. 13 Pet. 6 [10 L. ed. 83]; *Shelton v. Van Kleeck*, 106 U. S. 532 [27 L. ed. 269].

Looking at the Paisley decree, complained of, we perceive one of its features to be a personal recovery against Mrs. Prentiss, and the pleading or bill shows the claim to be for a money demand growing out of a contract, the sum recovered being the amount of a cash payment alleged to have been made on a contract for the sale of land, in which the complainant charges he has been defrauded.

A married woman is by the common law incapable of making a contract that will bind her personally, either in law or equity; and for this reason there can be no personal judgment or decree of recovery against her. *Goss v. Furman*, 21 Fla. 406; *Randall v. Bourguardez*, 23 Fla. 264; *Dollner v. Snow*, 16 Fla. 86; 1 Bishop, Married Women, § 601; *Pileher v. Smith*, 2 Head, 208; *McQuaid v. Fontane*, 24 Fla. 509; *Choppin v. Harmon*, 46 Miss. 304; *Bank of Louisiana v. Williams*, Id. 618; *Cary v. Dixon*, 51 Miss. 593; *Mallett v. Parham*, 52 Miss. 921;

So the improvement of land, or the management of personal property, may be conducted through the agency of her husband. *Noel v. Kinney*, 8 Cent. Rep. 58, 106 N. Y. 74; *Rowe v. Smith*, 45 N. Y. 230.

Where a husband, under a power of attorney from his wife to convey her real estate, conveyed the real estate to a third party, who reconveyed to the husband on the same day, and he conveyed to the defendant, the transaction is void, being in fact a conveyance to himself by an agent authorized to sell land. A subsequent grantee of the wife may maintain ejectment against the husband's grantee. *McKay v. Williams*, 12 West. Rep. 38, 67 Mich. 547.

Where a husband, both before and after marriage, was the agent for his wife, and collected the interest on a note sued on, for four years before the defendant acquired it by an assignment from him, a previous note having thus been negotiated with the defendant with the wife's knowledge; and the proceeds of the note were used in paying family expenses,—a finding against the wife, as to the husband's agency, will not be disturbed. *Mead v. Spalding*, *supra*.

In an action to recover for labor done and materials furnished on a wife's house, where it appeared she was aware of the work at the time it was being done, the agency was sufficiently made out to support a verdict for the plaintiff. *Kelly v. Kearns*, 10 Cent. Rep. 244, 107 N. Y. 633.

But the knowledge, consent and approval of a wife, that improvements should be made to a house owned by the wife, does not of itself constitute the husband, under whose direction it was done, her agent in fact. *Ziegler v. Galvin*, 45 Hun, 44.

That the wife resided on premises with her husband subsequently to their being hired by him is no evidence of her husband's authority to hire as her agent. *Sandford v. Pollock*, 7 Cent. Rep. 821, 106 N. Y. 450.

Where a husband by an agreement with his wife, not recorded and not known to a creditor, carries on business for himself upon his wife's plantation, she is responsible, as an undisclosed principal, for those items of account only which were all for the use and benefit of the business transacted with her

Canal Bank v. Partee, 99 U. S. 325 [25 L. ed. 890]; *Wallace v. Rippon*, 2 Bay, 112; *Rodemeyer v. Rodman*, 5 Iowa, 426; *Levis v. Perkins*, 36 N. J. L. 133; *Pentz v. Simonson*, 13 N. J. Eq. 232; *Pierson v. Lum*, 25 N. J. Eq. 390.

Several of the above authorities are to the effect that where she has been given authority by statute to make personal contracts the proceedings must show the existence of the special circumstances as to or under which the power has been conferred or may be exercised; and others of them adjudicate that, when it is sought to charge her property with liability, the bill, or other proper pleading, must show the character of her estate in the property sought to be charged, in order that the court may know that it is chargeable. The decree assailed does not adjudicate a charge upon any particular estate or property of Mrs. Prentiss, but the feature of it in question is a personal recovery.

If it be that a personal judgment or decree may be rendered against a married woman licensed as a free trader under our Statute of March 11, 1879 (McClell. Dig. 756, 757), it is sufficient on this point to say that Mrs. Prentiss is not sued as such.

A married woman is personally liable for her wrongful civil acts or actual torts, including frauds not growing out of, or founded

upon, or directly connected with, or a part of, or the means of effecting, a contract which she has undertaken to make; and she may be sued jointly with her husband in respect to such acts, or separately if she survives him. His liability for her torts is a result of the mere fact that by the common-law rules a suit cannot be maintained against the wife alone during coverture. If, before or pending the action, she dies, the right of action against him falls. Whenever her coverture avoids the contract, it is likewise a bar to a personal recovery for the fraud; and this cannot be overcome by suing *ex delicto*. 2 Bishop, Married Women, §§ 254-256, 261, 268; 1 Bishop, Married Women, §§ 842, 905 908; *Owens v. Snodgrass*, 6 Dana, 229; *Smith v. Taylor*, 11 Ga. 20; *Kovins v. Manly*, 49 N. Y. 192; *Liverpool Adelphi Loan Assn. v. Fairhurst*, 9 Exch. 422; *Wright v. Leonard*, 11 C. B. N. S. 258; *Capel v. Powell*, 17 C. B. N. S. 743.

As to when a tort will be deemed the wife's, and when the husband's, *vide* 1 Bishop, Married Women, § 905, and 2 Bishop, Married Women, §§ 257-260.

The fraud in the case before us, in so far as it is imputable to the wife, is not one sounding in tort, but is a part of, and directly connected with, the contract for the sale of the land, and hence not one as to which there is a personal

property; and the burden of proof is upon the creditor to show what items fall within that class. *Porter v. Staten*, 64 Miss. 421.

A husband undertaking to be bound for the commissions of a broker for effecting the sale of real estate of his wife is personally bound, whether he disclosed his agency for his wife or not. *Jarvis v. Schaefer*, 7 Cent. Rep. 675, 106 N. Y. 239.

Where the husband simply acted as agent for the wife, and did not profess to bind himself, then the note and check were not in any sense the joint instruments of the husband and wife; and unless it is proved that they were executed by them jointly, action cannot be sustained against the wife. *Wilderman v. Rogers*, 66 Md. 127, 5 Cent. Rep. 574; *Lowenkamp v. Koehling*, 64 Md. 95.

Where a wife executed a deed absolute on its face, but in reality an equitable mortgage, to enable the grantee named therein to raise money to pay off a liability of the husband, the grantee was bound to ascertain the conditions upon which it had been executed and intrusted to the husband for delivery, the husband not being the general agent of the wife. *Gilbert v. Deahon*, 9 Cent. Rep. 648, 107 N. Y. 324.

Liability of wife for her torts; common-law rule.

The common-law rule making a husband liable for torts of his wife not having been abrogated by the New York Code of Civil Procedure, he is liable for damages sustained by another person in consequence of forgeries committed by her. *Mangum v. Peck*, 111 N. Y. 401.

At common law when a tort is committed by a married woman, she is personally liable jointly with her husband, unless her husband is both present and directs the doing of it at the time, in which case he is alone liable. *Franklin's App.* 4 Cent. Rep. 322, 115 Pa. 534.

His presence furnishes evidence and raises presumption of direction, but is not conclusive. *Cassin v. Delany*, 38 N. Y. 178.

They are jointly liable in an action for damages for the tort; but the death of the wife terminates the liability of the husband. *Franklin's App.* supra 7 L. R. A.

pra; *Southworth v. Kimball*, 1 New Eng. Rep. 350, 58 Vt. 337.

If the husband dies she may be sued alone, as if she had been *feme sole* when the tort was committed. *Franklin's App.* *supra*.

While the presence of the husband furnishes evidence and raises the presumption of his direction of a tort committed by his wife, it may be rebutted by competent evidence; and in the absence of evidence that he was present, there is no presumption. *Ibid*.

If a wife makes unlawful sales of intoxicating liquors in the absence of her husband, there is no presumption that she acts under his coercion; but if the husband is near enough to influence the wife, although not in the same room, he is not absent. *Com. v. Flaherty*, 1 New Eng. Rep. 530, 140 Mass. 454.

Where a married woman wrongfully converts, in the absence of her husband, property intrusted to her as bailee, she is, at common law, personally liable for her tort, jointly with her husband. *Wheeler & W. Mfg. Co. v. Heil*, 7 Cent. Rep. 179, 115 Pa. 487.

Exemplary damages are recoverable against husband and wife in an action against them for a malicious assault committed by the wife, though the husband is without blame, and endeavored to prevent his wife from injuring the plaintiff. *Lombard v. Batchelder*, 2 New Eng. Rep. 738, 88 Vt. 558.

The husband alone is liable for the wrongful detention of property by his wife, which was delivered *in specie* to her in his presence, with his approval, and detained for their use. *Doherty v. Madgett*, 1 New Eng. Rep. 344, 58 Vt. 323; *Southworth v. Kimball*, *supra*.

Connecticut.

A *quid tam* action, under Conn. Gen. Stat., p. 253, § 1, for placing obstruction in a highway, is maintainable against a wife without joinder of her husband, provided the tort was committed by her without actual coercion by him. *Blakeslee v. Tyler*, 5 New Eng. Rep. 598, 55 Conn. 397.

Where bars obstructing a highway inclosed the lands of the wife, and after they had been taken

money liability, or can be such a personal decree or judgment, as to her.

The bond for title executed by Prentiss and wife not being a basis for the money recovery against Mrs. Prentiss personally (*Norton v. Turvill*, 2 P. Wms. 144; *Dollner v. Snow*, *supra*; 1 Bishop, Married Women, § 842), the order of the chancellor was erroneous. Still it is proper, in view of possible future proceedings, to notice another feature of the proceedings before remanding the cause. The Paisley bill states, in effect, that the land involved in this controversy was included in a deed of trust made by Dr. Butte, the former husband of Mrs. Prentiss, to Mrs. Simmons, and providing that the land could not be conveyed by Mrs. Butte, but could be conveyed by the trustee upon the written request of Mrs. Prentiss. The bill of review represents that on July 11, 1885, prior to the marriage between Mrs. Butte and Prentiss, they entered into a marriage contract, whereby the latter agreed to relinquish and surrender to the former his right to control and manage her separate estate and property described in the above deed of trust, which is dated August 28, 1883, and any other separate property then owned, or that she might thereafter own, and that he would suffer and permit, and it authorizes her, without let, hindrance, molestation or interference on his part, to hold, occupy, "exert" and enjoy the absolute, unqualified control and management

of all such property owned or to be owned by her, with all the rents, issues and profits, and all the receipts and income therefrom by sale, mortgage, lease or otherwise, as fully and absolute, and as free from his debts, as if she remained single and unmarried; he surrendering and relinquishing all his marital rights, and also the management and control of her property as her husband, under the laws of this State, and it being stipulated that she does not part with the right to dispose of the interest surrendered to her by Prentiss.

These allegations would not have the effect to create any exception to the doctrine announced above as to the money decree, and the only further observation necessary to be made as to them now is: If it be that a cash payment was made to Mrs. Prentiss, or to her husband for her, with her consent or as her authorized agent, which relation he could sustain to her (*Tresch v. Wirtz*, 34 N. J. Eq. 124; *Baum v. Mullen*, 47 N. Y. 577; *Pentz v. Simonson*, *supra*), and under the circumstances of the case, as they may be shown to exist, the land involved, or her other property, if she have any, can be charged with such payment, the trustee is, as suggested by counsel for appellants, a necessary party to any proceeding seeking to charge any property included in that trust. *Lewis v. Yale*, 4 Fla. 418; *Dollner v. Snow*, *supra*.

Whether or not her property is so charge-

down she and her husband started together to put them up, and he said to her, as she was running ahead of him, "Put them up,"—it is not actual coercion by him. *Ibid*.

Indiana.

By Statute (Rev. Stat. 1881, § 5120), married women are made liable to action for damages for their torts. *Mayhew v. Burns*, 1 West. Rep. 577, 108 Ind. 328.

They take right to their separate estates with all its incidents, and must use their property with due regard to the rights of others. *Ibid*.

The statute which provides that a married woman is jointly liable with her husband for torts relates to mere personal torts of the wife, and not to trespasses on real estate resulting in injury to others. *Ibid*.

Michigan.

In an action of trespass for forcible dispossession of one claiming as tenant, it was held that personal assaults made by defendant's wife in his presence were admissible, while those made while he was not present should have been excluded. *Baumier v. Antiau*, 8 West. Rep. 115, 65 Mich. 31.

The wife is not chargeable with the fraudulent intent of her husband, notwithstanding he may have been her agent in the management of her property and the conduct of her business. *Plinsky v. Germania F. & M. Ins. Co.* 32 Fed. Rep. 47.

New Jersey.

Since the enactment of the statutes empowering married women to transact business independently of their husbands, they will be held more amenable to the same rules as other persons in reference to what may amount to fraud. *Troxall v. Silverthorne* (N. J.) 10 Cent. Rep. 189.

New York.

Under the statutes of New York, the husband must be joined as defendant in an action for the tort of the wife (having no relation to her separate property), and is liable for recovery had therein. 7 L. R. A.

Fitzgerald v. Quann, 12 Cent. Rep. 745, 109 N. Y. 441.

A wife who received property through the fraudulent acts of her husband acting as her agent is liable for the consequences of such acts to the persons injured. *Rush v. Dilks*, 43 Hun, 232.

A married woman may have such community of interest with her husband in relation to real estate as will render her liable for his frauds relating to it; and when he, professing to act as her agent, makes false representations, although without her knowledge, and she receives the proceeds, she cannot retain the fruits of his fraud. *Noel v. Kinney*, 8 Cent. Rep. 58, 105 N. Y. 74.

Pennsylvania.

Since the passage of the Pennsylvania "Married Persons' Property Act," of June 3, 1887 (Pub. Laws, 333), a husband is no longer liable for torts committed by his wife alone. *Kukience v. Vocht* (Pa.) 11 Cent. Rep. 855.

That Act does not deprive a married woman of her common-law exemption from arrest on *capias ad respondendum* or *capias ad satisfaciendum* in a civil action for a tort committed by her. *Vocht v. Kukience*, 11 Cent. Rep. 787, 119 Pa. 986; *Kukience v. Vocht*, *supra*; *Whalen v. Gabell*, 12 Cent. Rep. 508, 120 Pa. 234.

A married woman is personally liable for a tort committed by her, unless her husband was both personally present and directed the doing of it at the time. If directed by him, he alone is liable. *Franklin's App.* 4 Cent. Rep. 324, 115 Pa. 534.

Where the evidence shows a wrongful conversion of trust funds by a married woman, her estate is liable in damages although the trust funds be not identified as a part of her estate. There was no evidence of coercion by the husband. *Ibid*.

Virginia.

Where a wife is sued as a sole trader, under the Virginia Married Woman's Act of April 4, 1877, in an action of unlawful detainer, the consent or non-concurrence of her husband can have no effect whatever. *Farley v. Tillar*, 81 Va. 278.

able is a question we do not feel called upon to discuss, in the absence of both proper pleadings and necessary parties.

Though the decree assailed is one absolute upon a decree *pro confesso*, we think a bill of review for error apparent is a proper remedy. *Stribling v. Hart*, 20 Fla. 235; *Maynard v. Percault*, 30 Mich. 160.

The purpose of a bill of review for error apparent is to have the court rendering the decree give the same relief that the appellate court might under the same circumstances. *Evans v. Clement*, 14 Ill. 206.

Where the bill does not justify the final decree which has been taken upon a decree *pro confesso*, relief may be had from the appellate

court on an appeal (*Hart v. Stribling*, 21 Fla. 186), and the same may be secured through a bill of review from the court rendering the decree.

The decree appealed from should be set aside. If Paisley shall desire to amend his bill, he should be permitted to do so, and, as a consequence, his decrees should be vacated, and his cause proceed on the bill as it may be amended; but should he elect rather to stand upon his decree, modified to the extent of the personal money recovery against Mrs. Prentiss, his decree should be modified merely as to such relief against her.

The cause will be remanded for proceedings not inconsistent with this opinion.

IDAHO SUPREME COURT.

TERRITORY OF IDAHO, *Recept.*,

v.

Henry EVANS, *Appt.*

(.....Idaho.....)

*1. **A juror must have all the qualifications** now prescribed for an elector, and a member of the so-called "Mormon Church" cannot be a juror.

2. **No exception is by statute allowed** to an order overruling a challenge to a juror for general cause; hence such order is not error.

3. **Depositions** taken in the presence of the accused may be used on trial, when, on account of death or other good cause, the presence of the witness cannot be had. Our Statutes do not forbid such use, nor is it in violation of the Sixth Amendment to the Constitution of the United States.

(February 24, 1890.)

APPEAL by defendant from a judgment of the District Court for Bear Lake County convicting him of the offense of resisting an officer. *Affirmed.*

The case fully appears in the opinion.

Mcers. Smith & Smith, for appellant:

Under § 3942, Rev. Stat. Idaho, a person who is not an elector cannot serve at all as a juror.

Sampson v. Schaffer, 3 Cal. 107; *People v. Chin Mook Sow*, 51 Cal. 599; *State v. Salge*, 1 Nev. 455; *Thompson & M. Juries*, p. 24, § 26; *Thompson, Trials*, §§ 52, 53; *Reich v. State*, 53 Ga. 73, 21 Am. Rep. 266; *State v. Jackson*, 27 Kan. 581.

The memorandum or deposition taken before an examining magistrate is not competent evidence against the defendant upon trial.

Amend. to Federal Const. art. 6; *State v. Thomas*, 64 N. C. 74; *Jackson v. Com.* 19 Gratt. 656; *People v. Lambert*, 5 Mich. 349; *People v. Chung Ah Chue*, 57 Cal. 567.

Mcers. Richard Z. Johnson, Atty. Gen., and Hawley & Reeves, for respondent:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury.

United States, Const. Amend. art. 6.

It is incompetent for the Legislature to disqualify the great body of the community and

*Head notes by BEATTY, Ch. J.

7 L. R. A.

restrict the number eligible to jury duty to such a small class as to substantially impair or in effect preclude this right.

Thompson & M. Juries, § 24.

The decision upon the challenge for actual bias is not the subject of exception or review on appeal.

People v. Taing, 53 Cal. 602, 608; *People v. Riley*, 65 Cal. 107, 108; *People v. Cotta*, 49 Cal. 169.

The decision of the trial court upon any general cause of challenge is not subject to exception or review upon appeal.

People v. Kong Ah Sing, 70 Cal. 8, 11; *People v. Ward*, 77 Cal. 118.

Where a witness failed to appear at the trial of the cause, but had previously, either on a former trial or at the preliminary examination of the accused, given evidence in the cause and the defendant had had an opportunity to cross-examine him, his deposition, or proof of the testimony given by him, can be admitted as evidence. To receive such evidence does not conflict with the provisions of article 6 of the Constitution of the United States or the Constitutions of the several States giving the accused the right to be confronted with the witnesses against him, or to meet them face to face.

1 Chitty, Cr. L. 585, 586; 1 Archb. Pr. and Pl. 478-480, authorities cited; Starkie, Ev. 409, 410, 414, 417; *State v. McO'Brien*, 24 Mo. 402. See article in 11 Crim. Law Mag. 771-773; *Summons v. State*, 5 Ohio St. 325; *Sneed v. State*, 47 Ark. 180; *People v. Riley*, 75 Cal. 98; *Brown v. Com.* 73 Pa. 321; *Barnett v. People*, 64 Ill. 325; *Greenwood v. State*, 35 Tex. 587; *Weeks, Depositions*, § 565; *Hair v. State*, 16 Neb. 601, 4 Am. Cr. Rep. 180; *Gilbreath v. State*, 36 Tex. App. 815; *Dunlap v. State*, 9 Tex. App. 179, 35 Am. Rep. 786; *Simms v. State*, 10 Tex. App. 181; *Black v. State*, 1 Tex. App. 368; Wharton, Cr. Ev. § 230; *People v. Gannon*, 61 Cal. 476; *People v. Devine*, 46 Cal. 46; 1 Greenl. Ev. § 163 and note 1; *Hurley v. State*, 29 Ark. 17; *Shackelford v. State*, 33 Ark. 559; *Sullivan v. State*, 6 Tex. App. 819, 32 Am. Rep. 580; *State v. Fitzgerald*, 63 Iowa, 268; *Kean v. Com.* 10 Bush, 190, 1 Am. Cr. Rep. note 204, 205; 3 Field, Lawyers' Briefs, §§ 353, 356; *Conner v. State*, 23 Tex. App. 878.

Beatty, Ch. J., delivered the opinion of the court:

The appellant was charged with the offense of resisting an officer. From the judgment rendered upon his conviction thereof he has appealed to this court, and now contends that the trial court erred (1) in admitting as a trial juror a person "who was a member of an organization that taught . . . its adherents . . . to commit the crime of bigamy or polygamy;" and (2) in admitting as evidence before the trial jury the depositions of witnesses taken before the committing magistrate.

Must the juror have all the qualifications of an elector? Whether a juror must have the same qualifications now required of an elector is the question involved in the first assignment of error. Sections 8941, 8942, Rev. Stat., together provide that jurors must be citizens of the United States, and electors of the county. Sections 500, 501, require that electors, besides having certain qualifications, must not be members of any "organization which teaches its adherents to commit the crime of bigamy or polygamy." While these Statutes seem clearly to exclude as jurors all persons who belong to such "organization," it is contended such a construction will do violence to the legislative will and intention, for which the reasons following are assigned: (1) that when the law first provided a juror should be an elector (Laws 8th Sess. p. 704) the only qualifications of an elector were citizenship and residence, and, in changing the qualifications of electors (13 Sess. p. 106) by requiring they must not belong to said organization, it was not designed to apply this restriction to jurors also; (2) that, if jurors must have all the qualifications of electors, they must also be registered, which, under the operation of the Registration Law, would often result in the temporary exclusion of good citizens as jurors, who are otherwise qualified electors; and (3) that in some counties in this Territory so many of the people are members of such organization that the courts would thus practically be without jurors.

1. The authorities holding that statutes will not be repealed by implication are not applicable to general laws which are in conflict with, and repugnant to, each other. When a general law is in apparent conflict with some prior private or special Act, passed for the benefit of some particular interest or municipality, the presumption is indulged that it was not designed by the general to repeal the special law; but no such presumption is entertained in the case of conflicting General Statutes. They cannot stand together. There can be no question that the two Statutes prescribe different qualifications for electors, and the older must yield to the later. It may be added that the Act of the 13th Session was an Election Law, and by its last section it not only expressly repealed the former law on the same subject, but also "all Acts or parts of Acts in conflict with this Act," which must be held to exclude any presumption that the Legislature did not intend the repeal of all conflicting statutes. However, the fact that on the 11th day of January, 1887, the Legislature by one Act swept out of existence all former legislation and laws of Idaho, and enacted a complete revision thereof, now embodied in our Revised Statutes,

7 L. R. A.

including sections 8941, 8942, as they now are, is sufficient answer to all suggestions that the Legislature did not intend the Statutes as they now read. One of the prime objects of a revision is the elimination of doubt. What is included therein must be construed together as the law, and all that formerly existed, and is not included, is clearly repealed. § 19, Rev. Stat.

2. It is not conceded an elector must be registered to act as a juror. Section 500 says he must be registered to vote. It does not follow that, if he has all the qualifications of an elector, he must be registered to sit in the jury box. Registration does not go to his qualification, but is only a precaution to prevent fraud in the election. But, even if the law should be construed that a juror must be registered, it would generally result in only a few being temporarily debarred the privilege of jurors.

3. It is, unfortunately, true that in some counties such a large proportion of the people belong to said "organization" that juries cannot be selected from the mass of the people, and courts may at times find it even inconvenient to procure them. So, also, communities might be found where the (5) qualification of citizenship, or any other general qualification, might result in the same inconvenience. On the contrary, we think the Legislature meant to exclude from jury service those belonging to the so-called "Mormon Church." By section 501 they are distinctly enjoined from "holding any position or office of honor, trust or profit." Laws are construed in the light of the facts and circumstances under which enacted. We are justified in supposing the law-maker took notice of the generally admitted fact that the members of that church are more obedient to its teachings, which are antagonistic to the laws of the land, than to the latter. View this question in any light, we are forced to the conclusion that under our laws a juror must have all the qualifications now required of an elector, and that the court should have excluded the juror objected to by appellant. That this conclusion will lead to inconvenience in some localities may be true, but we cannot change what seems to be a positive and clear statute. If there is any need of a change, we respectfully refer it to the legislative department.

Exception to Order Overruling Challenge for General Cause.

Respondent insists, however, that, even if the juror was not qualified, the Statute does not allow appellant an exception to the order of the court overruling his challenge to such juror. Inconsistent as it may appear, it seems such is the Statute. Section 7381 divides causes of challenge to jurors into (1) general, including "a want of any of the qualifications prescribed by law to render a person a competent juror" (7832), and (2) particular, which includes implied and actual bias (7833).

The cause of challenge in this case was a general cause; and the Statute in no place provides for or allows an exception to an order overruling such a cause of challenge. Our section 7940 (Penal Code Cal. § 1170) allows exceptions only in matters of challenge based on implied or actual bias. Here, then, we have a statute which declares a juror disquali-

fied, but provides no remedy to the aggrieved party when the court admits him. On the principle that there is a remedy for all wrongs, we would be inclined to hold that such action of the court is reviewable. But our Statute on this subject is an exact copy of that of California, and in adopting their laws we adopt also their construction of them. Partially in point is the case of *People v. Riley*, 65 Cal. 107, and cases cited, which hold that a defendant is not allowed an exception to the ruling of the court disallowing a "challenge for actual or implied bias," because the Statute makes no provision for such exception, but only allows it to the decision of the court "in admitting or rejecting testimony, or in charging the triers in the trial of a challenge to a juror for actual bias." Rev. Stat. § 7940 (Penal Code Cal. § 1170).

The direct question is decided in *People v. Fong Ah Sing*, 70 Cal. 8-11, being a cause in which defendant was found guilty of murder. A juror who was not a resident of the county, as required by law, was admitted against defendant's challenge. On appeal it was held this was a general cause of challenge, to rulings in which no exception is allowed. The case seems approved in *People v. Ward*, 77 Cal. 118. We therefore hold the appellant's exception to the order of the court overruling his challenge to the juror is not well taken.

Depositions may be Used on the Trial.

Was it error to admit in evidence the depositions referred to in the cause? Appellant claims it was, because not permitted by the Statute, and contrary to the Constitution of the United States. Under the common law, the depositions of witnesses, taken in the presence of the defendant, could be used at the trial of the cause in case of the death or absence of the witness, but it seems they could not be used before the grand jury. Does our Statute abrogate the common-law rule, or prohibit the use of depositions? Sections 7576 and 7634 provide for the taking of the depositions, and their use before the grand jury. It seems probable these provisions were designed to procure the testimony of witnesses while it is fresh in their minds, and also in the interest of economy and convenience. The question of testimony before the trial jury was not under consideration. The two questions are not sufficiently relevant that the consideration of one necessarily involves the other. It is evident this legislation referred only to the use of such evidence before the grand jury; for it provides for its use even when the presence of the witness can be procured, which is never permitted in the use of such testimony before the trial jury. The subjects not being relevant, failure to provide for its use before the trial jury does not operate to exclude it. Our Statutes expressly establish and recognize the principle of the use of depositions on the trial in certain cases of the absence or death of the witness. §§ 7588, 8161.

Then why not in all cases, if not expressly forbidden?

Section 8161 provides expressly for the taking of depositions of defendant's witnesses for use on the trial, and the fact that no provision is made therein for taking the deposition of the people's witnesses strongly suggests that

it was designed they should not be used. But it does not appear we have abolished the common-law rule on this subject, nor have we directly enjoined the use of such testimony; and it does appear that all the depositions above referred to are taken in the same way, in the presence of the accused, thus justifying the presumption of a like use of all so taken; and section 7864 provides that "the rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this Code." There is no doubt this is a question relating to "the rules of evidence," nor is there that depositions may be used in civil actions. We think our Statute permits their use before the trial jury when duly taken in the defendant's presence, and the witnesses cannot, for good cause, be brought before the court.

The Use of Depositions not Forbidden by United States Constitution.

It remains to consider whether article 6 of the Amendments to the Constitution of the United States, providing that the accused must be "confronted with the witnesses against him," absolutely requires the presence of the witnesses at the trial. This question has been discussed time after time in the courts of the States having the same or similar constitutional provisions; and, while the decisions have not been uniform in their conclusions, the weight of authority is that depositions taken in the presence of the defendant, with the right of cross-examination, is being "confronted by the witnesses," and meets the demands of the Constitution. Such depositions have been admitted when it appeared the witness was dead. If constitutional in such case, the same justification can be urged for their use in case of absence of the witness. Of the many authorities sustaining this view are *State v. McO'Brien*, 24 Mo. 412, a murder case, in which depositions were allowed notwithstanding a constitutional provision that "in all criminal prosecutions the accused has the right to meet the witnesses against him face to face."

Summons v. State, 5 Ohio St. 340, was a murder case. The constitutional provision was: "In any trial, in any court, the party accused shall be allowed . . . to meet the witnesses face to face." The testimony of a witness given in a former trial was permitted to be testified to by those who heard it, the witness having in the mean time died. To same effect are *Gilbreath v. State*, 26 Tex. App. 818; *Sneed v. State*, 47 Ark. 180, and numerous authorities.

Had the depositions been improperly admitted, the appellant has failed to furnish the court with such a record as will authorize it to correct the error. Section 8286 is: "Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right."

The appellant has entirely failed to show us he was prejudiced in the least by the alleged error of permitting the use of the depositions. That the court may judge whether they were detrimental to appellant, he should have brought them here, which he has failed to do.

It is not enough for appellant to show error. He must, under our Statute, show damaging error. Under the plain provision last noted, we do not need the guide of other courts to lead us to this conclusion; but in harmony with

it are *People v. Brotherton*, 47 Cal. 338; *People v. Leong Sing*, 77 Cal. 117, and cases cited, and *People v. Olsen*, 80 Cal. 123.

The judgment in this cause should be and is affirmed.

DISTRICT OF COLUMBIA SUPREME COURT

Samuel FOWLER

v.

Andrew SAKS *et al.*, Appts.

(....Mackey....)

1. A building regulation for the District of Columbia established under Act of Congress, which authorizes a party or division wall to be made good, repaired or taken down by one of the land owners if deemed necessary by the inspector of buildings, may properly require such owner to make good all damage to the adjoining owner.
2. One who has taken the benefit of a building regulation cannot repudiate the conditions on which it is given.
3. A party under an antecedent obligation to do a thing, or to do it in a particular way, cannot get rid of his responsibility by deputing it to somebody else.
4. The obligation to make good all damages to an adjoining owner by interference with a party-wall, whether it arises under building regulations or the common law, cannot be escaped by employing a contractor to do the work; and the fact that the damages were due to the negligence or unskillfulness of the contractor is no defense.

NOTE.—Party-wall defined.

A party-wall is a substitute for a separate wall to each adjoining owner, and neither owner may impair its value as to the other owner. See note to *Everett v. Edward* (Mass.) 5 L. R. A. 110. See, as to definition of a party-wall, note to *Nalle v. Paggi* (Tex.) 1 L. R. A. 33.

A party-wall is joint property from the time it is built; but the builder has a right to the whole as security of the debt due by one party for half the cost. *Gibson v. Holden*, 1 West. Rep. 677, 115 Ill. 120.

All that the builder can convey, under the agreement of the other party to pay half the cost, is the title to his lot and the easement of the half of the wall resting on the adjoining lot, the title to the other lot being in the other owner. *Ibid.*

The claim for reimbursement for half the cost of the wall is personal, and does not run with the land. *Ibid.*; *Huling v. Chester*, 2 West. Rep. 175, 19 Mo. App. 607.

The right to payment of one half the expense of building a party-wall is personal, and goes to the personal representative of deceased. *Ibid.* See note to *Nalle v. Paggi*, *supra*.

Its use.

Either party may make any use of it which he may require, either by deepening the foundations or increasing the height, so far as it can be done without injury to the other. *Field v. Leiter*, 6 West. Rep. 54, 117 Ill. 341. See notes to *Matthews v. Dixey* (Mass.) 5 L. R. A. 102; *Everett v. Edwards* (Mass.) 5 L. R. A. 110.

There is no division of the ownership of a party-wall, but the whole belongs jointly to the neighbor-
7 L. R. A.

(March 24, 1890.)

APPEAL by defendants from an order of the Special Term of the Supreme Court overruling their motion for a new trial on exceptions taken during the trial of an action to recover damages for injuries alleged to have resulted from the taking down of a party-wall, in which a verdict had been returned in plaintiff's favor. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Sidney T. Thomas and Enoch Totten, for appellants:

If a nuisance necessarily occurs in the ordinary mode of doing the work let to an independent contractor, the occupant or owner is liable; but if it is from the negligence of the contractor or his servants, he alone should be responsible.

Scammon v. Chicago, 25 Ill. 424; *Hilliard v. Richardson*, 8 Gray, 349; *Chicago v. Robbins*, 67 U. S. 2 Black, 428 (17 L. ed. 304); *Robbins v. Chicago*, 71 U. S. 4 Wall. 677 (18 L. ed. 432); *St. Paul Water Co. v. Ware*, 83 U. S. 16 Wall. 586 (21 L. ed. 485); *New Orleans, M. & O. R. Co. v. Hanning*, 83 U. S. 15 Wall. 649 (21 L. ed. 220); *Painler v. Pittsburgh*, 46 Pa. 218; *Erie v. Caulkins*, 85 Pa. 247; *Vanderpool*

ing proprietors, independently of the dividing line between the lots. *Weill v. Baker*, 39 La. Ann. 1102.

In the absence of evidence to the contrary, the whole of a party-wall, with its flues and appurtenances, as originally constructed, is presumed to have been so constructed by common consent, at the common expense, and for the common benefit of the proprietors. *Ibid.*

That a flue is constructed in the lower stories of a party-wall, in that half of it which is on the side of one property, does not establish exclusive ownership in the flue or destroy the presumption that it was intended for the common use and benefit of the parties. *Ibid.*

The incidental lateral support which may be given by a party-wall to a perfectly independent wall which only touches it at different and distinct places, and where the independent wall is sufficient in and of itself to stand all the demands which may be made upon it for years to come, is not within the terms of a contract for the use of a party-wall for a stipulated consideration. *Kingsland v. Tucker*, 115 N. Y. 574.

It is not necessary, to constitute a "use," within the meaning of that term as used in an agreement to pay for such use, that the wall of the new building should be tied or anchored to the party-wall, and be lined up to it at all points; but a lateral support received from the party-wall at various points, and placed where the two structures could come in contact, contributing to the strength, stability and safety of the new wall, will constitute such use. *Kingsland v. Tucker*, 44 Hun. 91.

Where, on the line of adjoining lots owned by the same party, there is erected a party-wall, a conveyance of one of the lots, unless there are express

v. Husson, 28 Barb. 196; *McGuire v. Grant*, 25 N. J. L. 856; *Boswell v. Laird*, 8 Cal. 469; *Kellogg v. Payne*, 21 Iowa, 575; *McCaffrey v. Spuyten Duyvil & P. M. R. Co.* 61 N. Y. 178; *Clark v. Fry*, 8 Ohio St. 358; *Cuff v. Newark & N. Y. R. Co.* 35 N. J. L. 17, 10 Am. Rep. 205; *Eaton v. European & N. R. Co.* 59 Me. 520, 8 Am. Rep. 430.

One who contracts to do a specific piece of work, furnishing his own assistants and executing the work either entirely in accordance with his own ideas, or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect of the details of the work, is clearly a contractor and not a servant.

Shearm. & Redf. Neg. § 77; *Allen v. Hayward*, 7 Ad. & El. N. S. 961; *Peachey v. Rowland*, 16 Eng. L. & Eq. 442; *Knight v. Fox*, 5 Exch. 721; *Overton v. Freeman*, 11 C. B. 867; *Steel v. South Eastern R. Co.* 16 C. B. 550.

For an injury to buildings the party making excavation on the adjoining land can only be held liable where there is a want of due care.

Partridge v. Scott, 3 Mees. & W. 220; *Walters v. Pfril*, Moody & Malk. 362; *Thurston v. Hancock*, 12 Mass. 220; *Clark v. Foot*, 8 Johns. 421; *Panton v. Holland*, 17 Johns. 100; *La Sala v. Holbrook*, 4 Paige, 169; *Richart v. Scott*, 7 Watts, 460, 32 Am. Dec. 780; 8 Kent, Com. pp. 530, 532; Washb. Easem. 425.

If the building regulation declared the defendants indebted to the plaintiff in such amount as the jury might find was necessary

to repair his premises, then it is void; it is legislation, and Congress had no power to delegate to the executive authority of this district legislative functions.

Cooley, Const. Lim. 5th ed. p. 139; *Murray v. Hoboken Land & Imp. Co.* 59 U. S. 18 How. 273 (15 L. ed. 372); *State v. Noyes*, 30 N. H. 293; *Hammond v. Haines*, 25 Md. 541; *Thorne v. Cramer*, 15 Barb. 112; *People v. Stout*, 23 Barb. 349; *Santo v. State*, 2 Iowa, 165; *Parker v. Com.* 6 Pa. 507; *Ex parte Wall*, 48 Cal. 299; *State v. Wilcox*, 45 Mo. 458; *Dillon*, Mun. Corp. §§ 44, 153; *Roach v. Van Renswick*, MacArth. & M. 171; *Bates v. District of Columbia*, 1 MacArth. 433; *District of Columbia v. Washington Gas Light Co.* (D. C.) 3 Mackey, 343; *Ohio & M. R. Co. v. Lackey*, 78 Ill. 55.

Messrs. Calderon Carlisle and William G. Johnson, for appellee:

The building regulation is but a statement of the common law.

Eno v. Del Vecchio, 6 Duer, 17.

A person cannot escape liability by letting work out like this to a contractor, and shift responsibility on him if an accident occurs.

Chicago v. Robbins, 67 U. S. 2 Black, 426 (17 L. ed. 308).

An exception to the rule that the contractor and not the owner is responsible is "where the work or erection is itself a nuisance, or where the injury was a necessary result of the contract."

Vanderpool v. Husson, 28 Barb. 198; *Cooley*, Torts, pp. 873, 547; *Eno v. Del Vecchio*, 6 Duer, 28.

words of reservation, conveys the right to use the party-wall. *Goldschmid v. Starring* (D. C.) 8 Cent. Rep. 716, 5 Mackey, 582.

Where a party-wall is built equally upon the lots of adjoining owners by one of them, and is afterwards used for a building erected by the other, who does not pay to the owner one half the value thereof, as required by Iowa Code, § 2020, but conveys the lot to one having full notice of the facts, the purchaser is liable to the grantee of the person who built the wall, in an action to recover half the cost thereof. *Pew v. Buchanan*, 72 Iowa, 637.

Easement and servitude created by agreement.

An agreement made between adjoining owners, in relation to a party-wall erected on the division line of their lots, is binding on the parties, and creates an equitable charge, easement and servitude upon the lots built upon. *Keating v. Korfhage*, 4 West. Rep. 509, 88 Mo. 544; *Gibson v. Holden*, 1 West. Rep. 677, 115 Ill. 190; *Hulling v. Chester*, 2 West. Rep. 175, 19 Mo. App. 607.

The effect of such an agreement is to create cross-easements as to each other, which bind all persons succeeding to the estates to which the easements are appurtenant. *Sharp v. Cheatham*, 6 West. Rep. 373, 88 Mo. 498.

The doctrine of contribution is founded, not on contract, but on the principle that equality of burden as to a common right is equity. *Ibid.*

An agreement between adjoining owners, for the erection of a party-wall, made a covenant running with the land, is a breach of subsequent conveyance by one of the owners with covenant against incumbrances; and the measure of damages is the depreciation in value of the land, considering that the agreement created mutual easements or servitudes. *Mackey v. Harmon*, 34 Minn. 168.

A court of equity will enforce an agreement in regard to a party-wall, as well against the pur-

chaser with notice as against the original party. *Sharp v. Cheatham*, *supra*.

An agreement by an adjoining owner to pay for a share of a party-wall when he should have occasion to use it does not run with the land, and does not bind a purchaser, even if he has notice of it. See note to *Nalle v. Faggi* (Tex.) 1 L. R. A. 33.

Where an adjoining owner acquiesces in the construction of a party-wall, such acquiescence estops him and those claiming under him from afterwards objecting to the method or materials whereby and wherewith such wall was constructed. *Keating v. Korfhage*, *supra*.

Law relating to party-walls.

The law relating to party-walls is no invasion of the absolute right of property; it prescribes simply a rule for the convenient, economical and safe enjoyment of property by the owner. Authorities cited in *Barns v. Wilson*, 8 Cent. Rep. 456, 118 Pa. 303.

One of two adjoining owners of land in a city, who erects a wall over the property line, under ordinances respecting party-walls, cannot claim the benefit of such wall as a party-wall, unless it be built of the width prescribed by the ordinance, and also be solid and free from any opening. *Traute v. White* (N. J.) 19 Atl. Rep. 183.

A party-wall, under building regulations which allow its construction by one party without the consent of the other, cannot be constructed, against his will, with windows or openings which overlook the servient tenement. *Corcoran v. Nallor* (D. C.) 6 Mackey, 580.

When one proprietor exercises the right as to a party-wall granted by La. Civ. Code, art. 683, his neighbor is bound to bear, without indemnity, the inconvenience and injury consequent thereon, so far as they are inseparable from the exercise of the right. *Heine v. Merrick* (La.) 5 So. Rep. 700.

The party making the addition to a party-wall does it at his peril, and if injury result he is liable for all damages. He must insure the safety of the operation.

Brooks v. Curtis, 50 N. Y. 644. See also *Clark v. Fry*, 8 Ohio St. 359.

Defendants were under a positive duty to make good to plaintiff any damages occasioned by their work, and they cannot shift their obligations to a contractor.

Baltimore v. O'Donnell, 53 Md. 117; *Cooley*, Torts, pp. 373, 547; *Bower v. Peate*, L. R. 1 Q. B. Div. 321; *Tarry v. Ashton*, Id. 814; *Dalton v. Angus*, L. R. 6 App. Cas. 740; *Hughes v. Percival*, L. R. 8 App. Cas. 443.

Cox, J., delivered the opinion of the court:

This is an action brought to recover damages for injuries alleged to have been done, by the defendants, to a building belonging to the plaintiff, immediately north of and adjoining the new store erected by Saks & Company on the corner of Pennsylvania Avenue and Seventh Street.

It is known that the lot was occupied formerly by another building some five stories in height, well known in judicial history as having been erected by Miss Dermott, which passed afterwards into the ownership of Mr. Jesse Wilson. Mr. Fowler bought his lot in 1850, adjoining this building, and made use of the north wall of it as a party-wall, resting his rafters in that wall. In 1884, the defendants, Saks & Company, entered into possession under an agreement with Mr. Wilson for a twenty-year lease, which agreement was performed on Mr. Wilson's part by the execution of such a lease on the 16th of October, the same year. As soon as they entered into possession, they entered into a contract with Kenderdine and Paret to pull down the existing building and erect a new one, which is the present structure. In the course of that work it became necessary to remove the north wall which had been used as a party-wall. In doing so, the contractors did undertake to shore up and protect the building of Mr. Fowler, the plaintiff, but, as he alleges, did it very imperfectly, and the consequence was that his building was weakened, cracked and settled, and was permanently injured.

At the trial of the case, only one instruction was given by the court at the instance of the plaintiff. That related merely to the measure of damages. There were thirteen instructions asked by the defendants. The trial resulted in a verdict for the plaintiff for \$2,784; there was a motion for a new trial before the trial justice, on exceptions, which was overruled, and an appeal was taken to this court.

One of the complaints in the argument, as to rulings of the court, may be resolved into three propositions:

First. That the declaration in this case relies entirely upon the alleged neglect of the defendants in failing to properly protect the building of the plaintiff in the course of their operation of building; and

Second. That the court allowed the plaintiff to spring upon the defendants, in the trial, one of the building regulations of the District, which was not made the foundation of the

claim in the declaration at all. It reads as follows:

"The inspector of buildings shall, upon the application of any building owner or his authorized agent, examine any or all existing party or division wall; if deemed by said inspector to be defective, out of repair or otherwise unfit for the purpose of new buildings about to be erected, such party or division wall shall be made good, repaired or taken down by the building owner, as the decision may be, the cost and expense of which repair or removal, together with the expense of the new wall or walls to be erected in lieu thereof, shall be borne and paid exclusively by him; and he shall also make good all damage occasioned thereby to the adjoining owner or his premises."

And it is further claimed that the trial judge rested his rulings upon that building regulation, whereas, it is said, that was not the foundation of the claim in the declaration.

And the third proposition is, that so much of this regulation as imposes upon the building owner the duty of making good all damage caused by taking down a party-wall is not strictly a building regulation but is entirely *ultra vires* and void.

On examining the declaration, we find that it is not confined to the allegation of negligence on the part of the defendants as to the manner in which they prosecuted their work, but it alleges that "it was the duty of the said defendants to use such care, skill and workmanship in the destruction of said building on said lot . . . as to protect the plaintiff from all loss or injury to his said premises by reason of the destruction of said building and party-wall by said defendants." "And further, that it was the duty of said defendants to care for plaintiff's said building during the time occupied in the prosecution of said work, and to properly and skillfully rebuild and shore said party-wall, and to make good all injuries occasioned to plaintiff's said building and to repair all damage occasioned to plaintiff's said building by the said works of defendants or by the failure of defendants to do all acts necessary by them to be done. Yet," and here is the breach alleged, "the said defendants, by their said agents and servants, so negligently, unskillfully, wrongfully and improperly tore down said building and said party-wall so adjoining and forming part of plaintiff's said building as aforesaid without properly shoring up, propping up or duly securing plaintiff's said building from damage by reason of their tearing down and destroying the said building and party-wall as aforesaid, so that for want of such proper shoring up, propping up or duly securing thereof the said house of the plaintiff became and was by and through the tearing down and destroying of the said building and party-wall adjoining the plaintiff's said premises, greatly weakened, damaged and injured, and as a consequence thereof, in part fell down, by reason of which negligent, unskillful, improper and wrongful tearing down of said building and party-wall, and of the defendants' failure properly and skillfully to guard and protect the plaintiff's said building, and by reason of said defendants'

failure to care for plaintiff's said building during the time occupied in the prosecution of said work by said defendants, and of their failure to make good all injuries occasioned to said building and to repair all damages occasioned to said building by the said works of said defendants, and to properly and skillfully rebuild and restore said party-wall; and by reason of the failure of defendants to do all acts necessary by them to be done the plaintiff was and is greatly damaged," etc.

So that we think the declaration is not founded upon merely alleged neglect of the defendants, but upon their duty to make good all damages occasioned by the prosecution of their operations in the particulars mentioned.

When we come to see the instructions of the court, we find that, at the instance of the plaintiff, only one instruction was given, which is as follows:

"If the jury shall find for the plaintiff, the measure of damages is such amount as the jury may find from the evidence was expended by plaintiff for the necessary preservation of his premises during the work of taking down and putting up the party-wall, together with such sum as the jury may find would be necessary to restore the plaintiff's premises to the same condition they were in before the taking down of said party-wall, and in addition thereto such amount as the plaintiff would necessarily lose in rent during said restoration, if they shall find that plaintiff would be subjected to such loss of rent."

The court refused the 18th instruction asked by the defendants but granted it with a modification. That instruction was:

"If the jury shall be satisfied from the evidence that the old wall between the plaintiff's building and the premises occupied by the defendants was skillfully and carefully taken down, and that the new party-wall was constructed with reasonable care and skill, and that the property of the plaintiff was reasonably cared for and protected during the building thereof and then restored with reasonable care and skill and with proper material, the defendants are entitled to your verdict. The defendants possessed the lawful right to take down the old building and to build a new one in its place, provided such work was done with reasonable care and skill and with proper material."

The court refused to grant that except with the qualification: "Provided that the building of the plaintiff, so far as affected by the taking down and erection of said party-wall, was restored to the like good condition in which it was at the time of taking down said party-wall."

The court gave no instruction as to what hypothetical state of facts would justify a verdict for the plaintiff, but it may be inferred from these two instructions, that is, the instruction as to the measure of damages and the qualification I have just mentioned, that the court did deem it the duty of the defendants to make good the damages occasioned by the destruction of that party-wall. The court does not in terms derive this duty either from the building regulation or from the common law, but if the duty is prescribed by either,—validly prescribed by

the building regulation or one that is enjoined by the common law,—that would be sufficient to vindicate the rulings of the court. That brings us to the subject of party-walls in general, and the rights and obligations connected with them.

What we understand now by a party-wall had no existence at common law, except by convention between coterminous proprietors. A man had no right to enter upon and occupy a part of his neighbor's land for his own convenience or for any purpose whatever without his consent. The privilege or easement, as we call it, giving to a builder the right of erecting a division-wall between himself and his neighbor, partly upon his neighbor's land, is therefore purely the creature of legislation.

Under authority of the deeds executed by the original proprietors of land within the District to the trustees Beall and Gantt, which are very well known in this District, and of the Act of Maryland of 1791, making the cession of the District to the United States, General Washington promulgated certain building regulations. One of these is in the following terms:

"October 17, 1791.

"That the person or persons appointed by commissioners to superintend the buildings may enter on the land of any person to set out the foundation and regulate the walls to be built between party and party as to the breadth and thickness thereof, which foundation shall be laid equally upon the lands of the persons between whom such party-walls are to be built, and shall be of the breadth and thickness determined by such person proper; and the first builder shall be reimbursed one moiety of the charge of such party-wall or so much thereof as the next builder shall have occasion to make use of, before such next builder shall any use or break into the wall,—the charge or value thereof to be set by the person or persons so appointed by the commissioners."

This building regulation, so authorized, is the foundation and the only source of the right claimed by anyone here to locate his party-wall one half on his neighbor's land. If the regulation stopped there, and we conceive a case in which the party-wall is thus established, the question would naturally arise, Has either party a right afterwards to disturb that party-wall, pull it down, built up a larger one or make an addition to the existing wall, underpin it or raise it higher for his own purposes? On general principles, it would seem not, for the simple reason that each party then has a vested right in that wall, whether you call them tenants in common or tenants in severalty as to the parts occupying their respective lots of ground. If tenants in common, each has the right to have his interest in common undisturbed; if they are tenants in severalty each has the right to one half of the wall in severalty, and to the support of the other half. On general principles, it would seem neither one has the right to disturb the wall. This seems to be the current of the authorities, with this simple qualification, that if the wall becomes dilapidated, so that it actually needs to be reconstructed, then either party may, for his own protection, remove the wall; but with that exception, the rule, I think, seems to be, that at common law, independently of any legislation, neither party

would have a right to pull down the wall once established. The cases on this subject will be found collated in 2 Washburn on Easements, pages 604 to 621.

There are cases, however, which hold that either party may underpin a wall or raise it higher for his own purposes, as long as he can do it without prejudice to the adjoining building. The cases on that subject will be found referred to in Cooley on Torts, on pages 878 and 874, and also collated in the case of *Brooks v. Curtis*, in 50 N. Y. 689.

But in those cases it does not become a mere question of care or diligence. There is an absolute duty imposed upon the proprietor who makes an alteration in the wall for the purposes mentioned, to see that his neighbor's property is not injured, and whether he exercises care and skill or not, he is absolutely responsible for any injury that results from the change.

We may assume, then, that, in the absence of legislative sanction, one of two conterminous owners has no right to pull down a party-wall; if he does so, he commits a trespass and he is liable in damages, and the natural measure of damages would be what it would cost to restore the property of his neighbor to the condition in which it was before he entered upon that undertaking. That is his common-law liability, and, we may say, his duty.

In that condition of the law, a new building regulation is enacted. By Act of Congress of June 14, 1878, the commissioners were authorized to establish such new building regulations as they may deem proper. Thereupon a new building regulation was added to the existing ones in the following terms, which has been already read but I will read it again.

"The inspector of buildings shall, upon the application of any building owner or his authorized agent, examine any or all existing party or division-wall, and if deemed by said inspector to be defective, out of repair or otherwise unfit for the purpose of new buildings about to be erected such party or division-wall shall be made good"—that is the important part in the present case—"repaired, or taken down by the building owner, as the decision may be, the cost and expense of which repair or removal, together with the expense of the new wall or walls to be erected in lieu thereof"—that is, whether defective, out of repair or otherwise unfit for the purpose of erecting a new building thereon—"shall be borne and paid exclusively by him, and he shall also make good all damage occasioned thereby to the adjoining owner or his premises."

Now, it is said that this latter part is not a building regulation, but is an ordinance by these commissioners that the building owner should make good all damages occasioned by his act. If there had been a pre-existing right to take down the wall and then the commissioners had afterwards attempted to establish an independent regulation to the effect that the party exercising that right should have to pay damages for it, perhaps it might be contended with at least plausibility, if not success, that such a regulation would not strictly be a building regulation, but would belong to the legislative authority; but, in the present form I think the building regulation must be read as prescribing the condition upon which this priv-

ilege or easement of taking down and reconstructing a party-wall is conferred. It should be remembered that there is no right at all to remove a party-wall, except such as is derived from this building regulation. Now, it does seem that the commissioners, in ordaining (if I may use that expression) such a building regulation, giving that privilege which is an unusual one—a departure from the common law—had a right to prescribe such conditions as were just and reasonable. We cannot doubt that this would be a just and reasonable condition. It is to be read, therefore, as giving the right to take down and remove and reconstruct this party-wall on the condition that the expense of it shall be paid exclusively by the building owner, and that "he shall also make good all damage occasioned thereby to the adjoining owner or his premises."

The defendants invoke that regulation as a warrant for their proceeding. They cannot take the benefit of that building regulation and repudiate the conditions on which it is given. The Supreme Court in a recent case just decided, *Keller v. Ashford*, 133 U. S. 610 [33 L. ed. 667], used language appropriate to that question. That case, it will be remembered, was one in which one Thompson conveyed certain real estate to Dr. Ashford, subject to certain incumbrances which the grantee assumed. After the property was sold, falling short of realizing the amount of the incumbrances, a bill was filed to compel him to pay the balance. The court said he could not take the benefit of the deeds to him without also assuming the burdens.

So, anyone who invokes the authority of this building regulation to justify him entering his neighbor's premises and pulling down his wall, must take it subject to the condition annexed to that permission, which, in itself, is a perfectly reasonable condition. As a matter of fact, also, the defendants in this case did accept the privilege with the condition, and did assume the duty which the building regulation purports to impose upon them. It appears from the testimony of Mr. Entwistle that when he gave the permit to pull down the north wall it was given with the notice that they would be required to make good all damages occasioned thereby to the adjoining owner. And thereupon the defendants, in making their contract with Kenderdine and Paret, put in this provision:

"As the walls of the present building are to be taken down, the contractor is to shore up all joists, etc., in the adjoining buildings, board up and make weather tight the several stories of the buildings and space under roofs, and as soon as practicable after the new walls are up, plaster and restore all the work injured by taking down the walls and put it in as good condition as it was before the walls were removed."

To save themselves harmless, they make the contractor enter into that engagement; and the contractor did enter upon the lot of the plaintiff and undertake to shore up his building and restore it to its former condition, but the complaint is that he did not shore it up sufficiently and, in consequence, it got out of plumb and was generally injured. So that the reasonable condition prescribed by this building regulation was recognized, assumed and accepted by the

defendants themselves when they undertook to tear down the wall and when they made this contract with Kenderdine and Paret. It is not for them to say now that the condition was void when it is annexed to a privilege which they undertook to exercise.

The building regulation may reasonably receive still another reading. At common law, a party had no right to enter upon and take down this wall, and if he did so, he was liable to make good the damage. If this regulation had said nothing about damages, the question might have been made whether it intended to confer the privilege of taking down the wall without regard to the consequences to the neighbor; but, as it is expressed, it simply gives a privilege which did not exist at common law, but reserves the common-law liability for the consequences. We are satisfied, therefore, that upon all the grounds—both on the ground that this building regulation prescribed a reasonable condition, and also because the building regulation may be entirely ignored and the defendants would still be under an obligation to make good the damages occasioned by this entry upon their neighbor's land, whether the justice at the trial based his opinion upon the common-law duty or the duty prescribed by the building regulation—he was right.

The next important question in the case is that relating to the subject of independent contractors. It is claimed that this work was not done by the defendants, Saks & Company, but done by Kenderdine and Paret, who were not their agents in the matter, but independent contractors. The distinction is very well understood between an agent and an independent contractor. I employ a man to do work for me—to build my house, for example,—under my express directions as to all the details. He becomes my agent and I become responsible for all injuries resulting to other people from his neglect; but if I am compelled to have work done which requires technical skill, and employ a man versed in that species of work, and trust the matter entirely to him, and contract with him simply for the result, and have no control whatever over the means and details of producing it, that man becomes an independent contractor, and I am not, as a general rule, responsible for injuries to other people through his negligence. That would be illustrated in this case by supposing somebody passing along the street where this building was in course of construction to be injured by falling bricks or timber through the negligence of the contractor. The owners of the building would not have been responsible in that case. There is no doubt at all that this was a case of independent contractor. These defendants had no skill in building. They never undertook to exercise any, but trusted it entirely to their contractors, Kenderdine and Paret.

But the rule itself has certain very proper and reasonable exceptions. These are expressed, perhaps, as well as anywhere else, in Cooley on Torts, pages 547 and 548.

"In general," it is said, "it is entirely competent for one having any particular work to be performed to enter into agreement with an independent contractor to take charge of and do the whole work, employing his own assistants and being responsible only for the completion

of the work as agreed. The exceptions to this statement are the following: He must not contract for that the necessary or probable effect of which would be to injure others, and he cannot, by any contract, relieve himself of duties resting upon him as owner of real estate not to do or suffer to be done upon it that which will constitute a nuisance, and therefore an invasion of the rights of others. Observing these rules, he may make contracts, under which the contractor, for the time being, becomes an independent principal, whose servants are exclusively his, and not those of the employer he contracts with; and the contractor is in no such sense the servant of his employer as to give to others rights against the employer growing out of the contractor's negligence. In one case the following rules have been laid down: "1. If a contractor faithfully performs his contract, and a third person is injured by the contractor in the course of its due performance or by its result, the employer is liable, for he causes the precise act to be done which occasions the injury, but for the negligence of the contractor not done under the contract, but in violation of it, the employer is in general not liable. 2. If I employ a contractor to do a job of work for me which, in the progress of its execution, obviously exposes others to unusual perils, I ought, I think, to be responsible on the same principle as in the last case, for I cause acts to be done which naturally expose others to injury."

This question generally arises where a man is doing or causing work to be done on his own premises, but the present is a case where he has actually entered upon the premises of another man. It is hardly necessary to say that that kind of work is, necessarily and *per se*, a nuisance. In the first place, it causes inevitable temporary disarrangement and inconvenience; it imperils the safety of the adjoining building and very often results, as in the present case, in its permanent injury; and in a case of that kind it would seem to be extremely unjust that the building owner should get rid of his responsibility by contracting with somebody else to prosecute this work, especially as his contractor, although a reputable and skillful builder, may be peculiarly irresponsible.

Then, another exception to the rule would be where a party is under an antecedent obligation to do a thing, or to do a thing in a particular way. In that case he cannot get rid of his responsibility by deputing it to somebody else. That principle is illustrated in the case of *Baltimore v. O'Donnell*, 53 Md. 110. There a contractor had been employed to do certain work on one of the public streets. An excavation had been made but it was imperfectly protected and a person fell into it and was injured. The court of appeals says:

"The appellant contends that inasmuch as the work was being done by an independent contractor pursuing an employment wholly independent of the city, who was free to exercise his own judgment as to the mode of conducting the work and the assistants he was to employ, the rule of *respondent superior* does not apply, and that the contractor alone is responsible, if anyone is. In reply, the appellee admits that, ordinarily, as a condition precedent to holding a superior amenable, the relation of master and

servant must be shown to exist, and that in the case of a contractor employing others to do the work these sub-employés cannot be strictly regarded as servants of the city; but he insists that another rule applies which fixes the responsibility of the city in this case. That rule he insists is this: That where the person for whom the work to be done is under a pre-existing obligation to have the work done in a particular way or to have certain precautions against accident observed, he cannot be discharged by creating the relation between himself and another of employer and contractor. The learned judge who decided the case below regarded the appellant as under such pre-existing obligation, and so instructed the jury, and it is that ruling we are asked to review;" and the court affirmed the ruling.

It seems to me that case lays down a very clear principle. In this case it was the duty of the defendants, either under the building regulations or the common law, to make good all damages occasioned by this building operation, and they could not get rid of that duty by employing a contractor to do the work.

This kind of case is distinguishable from those in which a man occasions an injury to a neighbor by work on his own premises, as by excavation. It seems to be pretty well settled that a man has a right to support his own land by the adjoining land, and if his neighbor digs down his land so as to deprive him of that support so that his land caves in, he has a right of action, although his neighbor may exercise all the care and skill he can. He is absolutely bound to make good the damages. But a man, unless in certain instances, as where he has a clear right by prescription or otherwise, has no right to the support for buildings that he loads his land with in that way. The law then requires that a man who excavates his own land at the risk of his neighbor's buildings must exercise proper care and skill; but on the other hand the authorities also hold that even in that case this duty of exercising care and skill cannot be deputed to a contractor so as to relieve the owner of responsibility.

Certain cases were cited in the argument to this effect, as the case of *Bover v. Peate*, L. R. 1 Q. B. Div. 321, where it was held that where one ordered work even on his own premises which would naturally threaten injurious consequences to his neighbor, that is, pulling down a house and the excavation of land, he was bound to see to the doing of all that was necessary to prevent it and could not relieve himself from that responsibility by employing a contractor.

In *Tarry v. Ashton*, L. R. 1 Q. B. Div. 314, it was held that one keeping a lamp suspended in front of his house on a public highway was bound to keep it in a safe condition, and was not protected from the consequences of neglect by employing an independent contractor to attend to it.

In *Hughes v. Percival*, L. R. 8 App. Cas. 443, where the defendant took down his own house, in doing which his contractor cut into the party-wall between him and his neighbor—not even attempting to remove the party-wall,—and thereby caused the builder's house to fall

and drag down the plaintiff's house, it was held that the law cast the duty on the defendant to see that skill and care were exercised in the operation, and he could not avoid the consequences by delegating the performance to a third person. If that rule operates where a man is building on his own land, with how much more force ought it to obtain where he is actually invading his neighbor's land and temporarily destroying part of his property?

We therefore are satisfied that the general rule exonerating a party who employs an independent contractor has no application at all to this case.

On looking at the instructions asked on the part of the defendants, it will be found that all of them, except the general instruction prayed for at the close of the evidence, "that the plaintiff is not entitled to recover," presented this same question in different forms. I will read a single one of the instructions to show the character of all. The third instruction:

"If the jury find from the evidence that the construction of the building mentioned in the declaration was done under the contract and specifications annexed thereto, given in evidence, and that the defendants neither furnished any of the material, machinery and labor employed in doing the work, nor exercised any control over it, either as to the mode or manner of doing it, and that the damage complained of was the result of negligence on the part of the contractors, Kenderline and Paret, and their employés, between whom and the defendants the court instructs the jury, the relation of master and servant did not exist, then the plaintiff is not entitled to recover in this action, and your verdict should be for the defendants."

That is a sample of the instructions. They are all simply variations of that one form. There are one or two minor questions presented by instructions which were not pressed at the argument and which do not seem to call for any remark. On the whole, we think *the ruling of the court at the Trial Term ought to be affirmed.*

James, J., said:

While concurring entirely in the conclusion reached, I prefer to base the liability of the defendants distinctly upon the ground of the common law. I do not think I am ready to say that the makers of the building regulations can add to or vary the liability the party incurs at common law in doing an act. I think, also, that the defendants' liability may be based upon the ground that they assumed the liability by contract, for when they were informed of the terms of the building regulations, they substantially said, "Very well, we accept them, and will remove these walls on those terms, and will make good the damages, if there are any." I think the conclusion of the court may be rested on either of these two grounds, but am not prepared to say that in making a building regulation the commissioners can impose *in invitum* the liability a man incurs, and say what he shall pay for injuring the property of another. It is only for the purpose of avoiding any contribution to that idea that I have said this much.

ILLINOIS SUPREME COURT.

George B. JOHNSON, *Appt.*,

v.

Henry W. LEMAN *et al.*

(.....III.....)

1. A trust estate is not chargeable with the compensation of a broker for securing a loan for the benefit of the trust under a contract of employment by the trustee, who agreed that payment for the service should be made from the trust fund, if he did not make it a specific lien thereon, or stipulate that he should not be personally liable, and the trustee or his estate is solvent.
2. The death of a trustee who has employed a broker to perform services for the trust estate, and the consummation of the contract of his successor, will not render the estate liable if it was not liable when the contract was made.

(January 21, 1890.)

A PPEAL by plaintiff from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County dismissing the bill in a suit to obtain from a trust estate compensation for services rendered in procuring a loan for its benefit. *Affirmed.*

The case sufficiently appears in the opinion.

Messrs. Tenney, Bashford & Tenney, with *Messrs. Peckham & Brown*, for appellant:

Even were the trustee alive, and trustee of the estate, and were he pecuniarily responsible, yet this court would compel him, should he refuse without such compulsion to do so, to pay from the funds of the estate, if he had them in his hands, this claim which Mr. Johnson is now suing.

Frazier v. Brownlow, 3 Ired. Eq. 237; *Noyes v. Blakeman*, 6 N. Y. 567; *New v. Nicoll*, 73 N. Y. 127; *North American Coal Co. v. Dyett*, 7 Paige, 8; *Greene v. Grimshaw*, 11 Ill. 889.

As this is a matter appertaining to a trust, and as it appears that there is a fund connected with that trust justly due to the appellant, and no legal remedy whatever by which he can secure it, a court of equity should put out its hands and take possession of that fund for the benefit of the person to whom it is due.

1 Pom. Eq. Jur. § 180; *Kirkpatrick v. McDonald*, 11 Pa. 387.

The appellant is entitled to the intervention of a court of equity in his behalf, because he is seeking only that the court, in a case where

he has no other remedy, shall instruct and control a trustee in the discharge of the duties which, under the supervision of a court of equity, he has to perform.

Bispham, Eq. pt. 1, chap. 6, p. 181.

Messrs. William C. Wilson and David L. Zook, for appellees:

No one can bring a trust fund into chancery, who has no interest in or lien on the trust fund. A mere agent of the trustee has no interest in nor lien on such fund and cannot bring such action.

Worrall v. Harford, 8 Ves. Jr. 4; *Jones v. Dawson*, 19 Ala. 672. See also *Lawless v. Shaw*, Lloyd & G. 154, 10 Eng. Ch. Rep. 454; *Bozon v. Bollard*, 4 Myl. & C. 854; *Hall v. Laver*, 1 Hare, 578; *Hill, Trustees*, 567; *Sanford v. Howard*, 29 Ala. 684; *Peters v. Heydenfeldt*, 8 Ala. 205; *Simms v. Norris*, 5 Ala. 42; *Johnson v. Gaines*, 8 Ala. 791; 2 Perry, Tr. 8907; *Barker v. Kunkel*, 10 Ill. App. 407; *Fearn v. Mayers*, 53 Miss. 458.

The death of the principal revokes the agent's authority.

Davis v. Windsor Sav. Bank, 46 Vt. 728; *Hunt v. Rousmanier*, 21 U. S. 8 Wheat. 174 (5 L. ed. 589), 1 Am. Lead. Cas. 700; *Saltmarsh v. Smith*, 82 Ala. 407; *Galt v. Galway*, 29 U. S. 4 Pet. 393 (7 L. ed. 876); *Gale v. Tappan*, 12 N. H. 146; *Coney v. Sanders*, 28 Ga. 511; *Houghtaling v. Marvin*, 7 Barb. 412; *Lewis v. Kerr*, 17 Iowa, 78; *Primm v. Stewart*, 7 Tex. 178.

For work and labor performed under an express contract, a suit to recover the same must be between the parties to the contract.

Compton v. Payne, 69 Ill. 854.

A third person, though benefited by services, cannot be sued on an implied assumpsit.

Ibid.; *Morrison v. Jones*, 6 Ill. App. 94.

Mr. W. T. Burgess, for appellee Hugh A. White, trustee:

An employé of the trustee cannot proceed against the corpus of the estate by bill claiming a lien.

Hall v. Laver, 1 Hare, 571; *Heriot's Hospital v. Ross*, 12 Clark & F. 507.

Scholfield, J., delivered the opinion of the court:

Appellant's case, stated briefly, and in the most favorable view for him warranted by the record, is this: He was employed as a broker, by the trustee of the Sherman House property, in Chicago, to obtain a loan for the benefit of that trust. The best interests of the trust re-

NOTE.—*Trustee cannot create a lien on trust estate.* A trustee cannot create a lien in favor of a creditor without express authority given by the trust deed. *Steele v. Steele*, 64 Ala. 438. See generally *Starr v. Moulton*, 97 Ill. 525; *Bradbury v. Birchmore*, 117 Mass. 509; *Ferry v. Laible*, 27 N. J. Eq. 148; *Kearney v. Kearney*, 17 N. J. Eq. 59; *Ryder v. Sisson*, 7 R. I. 341; *Williams v. Smith*, 10 R. I. 280; *Benselaer & S. R. Co. v. Miller*, 47 Vt. 146.

The general rule is, that a trustee cannot charge the trust estate by his executory contracts unless so authorized by the terms of the instrument creating the trust. *New v. Nicoll*, 73 N. Y. 127; *Durch v. Breckenridge*, 16 B. Mon. 438; *Meyer v. Cole*, 12 7 L. R. A.

Johns, 349; *Demott v. Field*, 7 Cow. 53; *Ferrin v. Myrick*, 41 N. Y. 315; *Austin v. Munro*, 47 N. Y. 361; *Tenney v. Evans*, 14 N. H. 351; *Pearl v. McDowell*, 3 J. J. Marsh. 658.

The exception to this rule is where he is authorized to make the expenditure and he has no trust funds on hand, and the expenditure is necessary. In such case he may himself advance the money, and would have a lien upon the trust estate, and could by express contract transfer his lien to another, who, upon the faith of the estate, may make the expenditure. *New v. Nicoll*, 73 N. Y. 127; *Hendall v. Dusenbury*, 7 Jones & S. 174, 66 N. Y. 645; *Stanton v. King*, 8 Hun. 4.

quired that the loan should be obtained, and the trustee promised him that he should be paid for obtaining the loan a stipulated commission from the trust fund. He did all the work necessary to obtain the loan; but, before the party from whom the loan was to be obtained signified its formal acceptance of the terms proposed by him, the trustee by whom he was employed died. A subsequent trustee obtained the loan on substantially the same terms as those for which he had negotiated, and thus the trust had the fruits of his labor. It is not alleged that the agreement between the trustee and the appellant was that the trustee should not be personally liable to appellant upon their contract, or that the compensation for obtaining the loan should be a specific lien on the trust fund, or that the same was thereby assigned by the trustee to the appellant; nor is it alleged that the trustee was, or that his estate is now, insolvent. The question is, Does the claim of appellant for compensation for his services in obtaining the loan constitute a charge against the trust estate which a court of equity will decree payment of out of that estate (the funds being ample) on bill filed by appellant? The general rule is that the expenses of properly administering a trust are a lien on behalf of the trustee on the estate in his hands; and he will not be compelled to part with his control of that estate until such expenses are paid. But this, unless it may be in exceptional cases, does not extend to persons employed by the trustee. In general, their only remedy for compensation is personal against the trustee employing them. *Hill, Trustees*, 4th Am. ed. 879 [567]; *Lewin, Tr.* 7th ed. 549; *Perry, Tr.* § 907; *Tiff. & B. Tr.* 583; *Worrell v. Hartford*, 8 Ves. Jr. 7, 8; *Heriot's Hospital v. Ross*, 12 Clark & F. 507; *Hall v. Laver*, 1 Hare, 571; *Francis v. Francis*, 5 De G. M. & G. 108; *Re Sadd*, 34 Beav. 650; *Jones v. Dawson*, 19 Ala. 673; *Fearn v. Mayers*, 53 Miss. 458.

It is manifestly irrelevant to notice cases where, the beneficiary of a fund in the hands of a trustee becoming indebted, it has been held the creditor may have satisfaction from the fund, as in *Fraser v. Brownlow*, 3 Ired. Eq. 237, cited by counsel for the appellant, since this is not the contract of the beneficiary of the fund, but of the trustee; nor cases that might be cited where it has been held that solicitors, etc., had a lien upon the amount realized to the estate in the case in which they had been employed for their costs, because appellant is not a solicitor or attorney seeking the recovery of taxable costs, nor is he seeking the enforcement of a lien upon a specific fund brought to the estate through his endeavors. The borrowed money was paid out in satisfaction of previous loans, and appellant seeks recourse against any unappropriated trust funds of the estate.

Counsel for appellant cite and rely upon *Noyes v. Blakeman*, 6 N. Y. 567, and *New v. Nicoll*, 78 N. Y. 127, as laying down a rule by which his claim may be sustained. Those cases certainly go in the direction of his contention much further than any other cases of which we have knowledge, but, if we were to concede that they are the law here, it is impossible that he could recover.

In *Noyes v. Blakeman*, the recovery was only sustained by a divided court, and there upon the ground that the agreement was that the trustee

was not to incur any personal liability, and that the claim was to be paid out of the income of the trust estate.

In *New v. Nichol*, it is conceded in the opinion (page 180) that "the general rule undoubtedly is that a trustee cannot charge the trust estate by his executory contracts, unless authorized to do so by the terms of the instrument creating the trust. Upon such contracts he is personally liable, and the remedy is against him personally." The court, however, adds: "But there are exceptions to this general rule. When a trustee is authorized to make an expenditure, and he has no trust funds, and the expenditure is necessary for the protection, reparation or safety of the trust estate, and he is not willing to make himself personally liable, he may, by express agreement, make the expenditure a charge upon the trust estate. In such a case he could himself advance the money to make the expenditure, and he would have a lien upon the trust estate; and he can by express contract transfer this lien to any other party who may, upon the faith of the trust estate, make the expenditure." And the court further adds: "It was not sufficient for him to show that he did the work upon the faith or credit of the trust estate. He could get a lien or charge upon the trust estate only by virtue of some agreement to that effect."

It has been seen, there was here no agreement releasing the trustee from liability, and assigning his lien to appellant, or otherwise creating a lien in behalf of appellant upon the trust estate. We express no opinion whether, if the facts presented to us the precise case before the New York court, we should follow their ruling. It is sufficient that no such case now demands the expression of our opinion.

Counsel for appellant have also cited in support of their contention our decision in *Greene v. Grimshaw*, 11 Ill. 889. The question there originated in the probate court, and was whether a claim presented by attorneys at-law against an estate for professional services in an action at law, whereby assets of the estate were collected, should be allowed as a charge against the estate, and it was held that it should. The Statute then in force provided that expenses of the settlement of the estate should be allowed against the estate in the second class. See section 115, chap. 109, Rev. Stat. 1845.

It is true that the Statute was not cited in the opinion, but the only controversy was whether the judgment in the recovery of which the attorney's services were rendered was for the executrix personally, or for the estate, the controversy assuming that, if for the latter, the estate was liable, and so there was no necessity for referring to the Statute. The decision therefore has no bearing upon the question involved here.

It is earnestly insisted by counsel for appellant that the death of the trustee before the consummation of the negotiations to borrow money, the subsequent transfer of the trust property to another person acting as trustee, and the subsequent decision of the courts that the person with whom appellant contracted and the person to whom the trust property was subsequently transferred were not lawfully appointed trustees, are exceptional reasons to take the present case from without the operation

of the general rule, as stated *supra*. But it is manifest that that rule cannot logically be affected by these circumstances. If the trustee was liable individually, no rule of law is better settled than that his death did not terminate it, nor could any possible reason exist why, if the estate was not liable when the contract was made, it should become liable by the fact of the subsequent death of the trustee. If the trust property was liable when the contract was made, it would be equally liable when transferred to a subsequent trustee. If it was not then liable, it is not possible to reasonably conceive of its being made liable by the mere act of subsequent transfer. If the validity of the appointment of the trustees cannot be inquired into in this case, then, beyond all question, it is immaterial how the courts have decided, or, indeed, whether they have decided at all, upon that question. If the validity of the appointment of the trustees can be inquired into in this case, it is not to be conceived that appellant's position can be strengthened thereby, since, if the act of a trustee would not, under the circumstances, have rendered the estate liable, much less could the act of a mere intermeddler, having no authority of law, have done so.

It is argued by counsel that the rule, however well adapted to the conditions of things in the days of *Lord Eldon*, is not adapted to the conditions of things to-day. It may be that trust estates are more numerous, and the property values affected thereby are much greater, now than then, but we do not perceive that these affect the reason of the rule.

Lord Eldon said in *Worrall v. Harford*, *supra*, that it would be quite mischievous to allow every person with whom the trustees may contract to have an account of the whole administration of the estate; and without such an account such claimant could in no case have a decree against the trust funds. It would seem obvious that the greater the estate the more mischievous this would be. The rule can work no great hardships. If a trustee shall be unable to procure the services of the necessary agent upon his own responsibility, let him apply to the chancellor for permission to charge the estate specially for that purpose. In our opinion, the ends of justice will be best subserved by adhering to the rule.

The decree is affirmed.

PENNSYLVANIA SUPREME COURT.

Mary A. WINTERS

v.

Jeremiah DeTURK, *Appt.*

(.....Pa.....)

1. The Statute of Limitations cannot run against any person until his or her right has accrued.

2. There is no adverse holding by the grantee of land during the life of the grantor against the dower right of the grantor's wife who did not join in the conveyance; but it is otherwise in the case of a disfeisor who has acquired title by adverse possession as against the husband during his lifetime.

(March 17, 1890.)

NOTE.—*Statute of Limitations does not begin to run until right of action accrues.*

Wright v. Tichenor, 2 West. Rep. 208, 104 Ind. 185; *Ewell v. Chicago & N. W. R. Co.* 29 Fed. Rep. 57; *Sims v. Gay*, 6 West. Rep. 559, 109 Ind. 501.

It is of the essence of the Statute of Limitations not to run against a party until a right of action has accrued to such party. *Dyer v. Wittler*, 4 West. Rep. 377, 80 Mo. 81.

It begins to run at the date suit may be commenced, and, once begun, it is not stayed by the death of the party in whose favor the right of action accrued. *Kulp's App.* 6 Cent. Rep. 886, 115 Pa. 356.

It runs immediately upon accrual of a cause of action, unless the party at the time is under some disability named in the Statute. *Wright v. Kleyla*, 3 West. Rep. 217, 104 Ind. 223.

It runs against all persons, whether under disabilities or not, unless they are excepted from its operation. *Ibid.*

The only effect of disability as to minors is to give them, if the full limitation has run during minority, two years thereafter within which to sue. *Walker v. Hill*, 9 West. Rep. 683, 111 Ind. 223; *Sims v. Gay*, 6 West. Rep. 559, 109 Ill. 501.

When two or more disabilities co-exist, or when one disability shall supervene an existing one, the period prescribed within which an action may be brought shall not begin to run until the expiration of the latest disability. *Campbell v. Grater*, 95 N. C. 156.

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The Statute of Limitations begins to run when the right of action accrues; and unless otherwise provided for in the Statute, the right of action is not deemed to have accrued until there is a person authorized to prosecute the same. *Ewell v. Chicago & N. W. R. Co.* 29 Fed. Rep. 57; *Glass v. Williams*, 16 Lea, 697.

Under a state Statute of Limitations the time of the limitation commences when the cause of action is first subjected to the operation of the Statute, unless the Legislature has otherwise provided; and as to causes of action existing at the passage of the Act, the time will begin to run from the date when the Act takes effect. *Sohn v. Waterson*, 84 U. S. 17 Wall. 596 (21 L. ed. 787).

In case of real estate the right does not accrue until there is a right of entry. *Wright v. Tichenor*, 104 Ind. 185, 2 West. Rep. 208.

The Statute of Limitations begins to run from the time a tenant in common denies the right of his co-tenant. *Almy v. Daniels*, 4 New Eng. Rep. 915, 15 R. I. 818.

Until the death of the life tenant it does not run against the heirs. *Orthwein v. Thomas*, 11 West. Rep. 399, 127 Ill. 554.

It does not begin to run against the remainderman until determination of the prior estate. *Fleming v. Burnham*, 100 N. Y. 1, 1 Cent. Rep. 287.

The Pennsylvania Statute begins to run against a person having an estate tail, and also against the remaindermen, from the date of a conveyance by him. *Bassett v. Hawk*, 10 Cent. Rep. 788, 118 Pa. 94.

APPREAL by defendant from a judgment of the Court of Common Pleas for Berks County in favor of plaintiff in an action by a widow for dower out of property of which her husband had been seised but which he had aliened during the marriage by a deed in which she did not join. *Affirmed.*

At the trial in the court below defendant requested the court to charge, *inter alia*, as follows:

1. The Statute of Limitations of 1785 applies to this action of dower, *unde nihil habet*, by the widow for property of which her husband had been seised, but which he had aliened before his death.

Answer. "As a principle of law, the Statute begins to run from the death of the husband; and if this point is intended to apply to this case, that is, so as to debar the plaintiff of her right to recover, it is answered in the negative."

2. More than twenty-one years have elapsed, while the property was held adversely to the husband, before suit was brought; and hence the widow cannot recover in this action.

"This is answered in the negative."

The jury returned a verdict for plaintiff, and defendant took this appeal assigning as error, among other things, the answers to above points.

The facts sufficiently appear in the opinion.

Messrs. I. C. Becker and A. S. Sassaman, for appellant:

An action for dower is a real action.

Jones v. Patterson, 12 Pa. 149.

This action is within the operation of the Statute of Limitations.

Act March 26, 1785, § 2.

Culler v. Motzer, 13 Serg. & R. 356; *Rankin v. Tenbrook*, 6 Watts, 388; *Trickett*, Limitations in Pa. § 118.

The Statute does not run until dower has been assigned. *Johns v. Fenton*, 4 West. Rep. 64, 38 Mo. 64; *Holmes v. Kring*, 12 West. Rep. 384, 38 Mo. 452.

The Statute does not begin to run until the action has accrued, and to put it in operation the possession must be adverse. *Robinson v. Ware*, 14 West. Rep. 360, 94 Mo. 678; *Beard v. Hale*, 14 West. Rep. 341, 95 Mo. 16.

Where the widow whose dower had never been assigned conveys the land by warranty deed, the Statute begins to run against the heir before the widow's death. *Smith v. Shaw* (Mass.) 22 N. E. Rep. 324.

Where a father conveyed his life interest as tenant by the curtesy in the interest of his wife, the sole heir of the wife became vested of her estate, but the right of action did not accrue till the father's death. *Smith v. Patterson*, 14 West. Rep. 757, 95 Mo. 525.

Under Cal. Code Civ. Proc., the Statute does not commence to run against devisees and legatees, in favor of heirs and distributees, until final distribution. *Re Grider's Estate*, 81 Cal. 571.

The special Statute of Limitations concerning claims against decedents' estates begins to run from the time that the substantial right of recovery accrues. *Garesche v. Lewis*, 11 West. Rep. 307, 93 Mo. 197.

On sale of real property.

It begins to run against an oral contract by a purchaser to pay a mortgage, from the time the debt is due and payable. *Patterson v. Colmer* (Pa.) 5 Cent. Rep. 235.

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The Statute of Limitations is a complete bar to an action of dower *unde nihil habet*.

Care v. Keller, 77 Pa. 437-493.

Messrs. John H. Rothermel and A. H. Rothermel for appellee.

Paxson, Ch. J., delivered the opinion of the court:

At common law a wife was entitled to dower out of any lands of which her husband was seised at any time during coverture. Under our law the wife may convey her right to dower by joining with her husband in the deed. But if the husband conveys his land without his wife so joining, and executing the deed as prescribed by the Act of Assembly, her dower rights do not pass, and she can claim them after the death of her husband. In this case the husband conveyed the real estate in controversy in 1847. His wife did not join in said conveyance, nor did she in any manner release her dower rights. The title to the property finally became vested in Jeremiah De Turk, the appellant and defendant below. Isaac Winters, the husband and grantor, died in 1886, and shortly thereafter this claim for dower was made by his widow out of the land in the possession of the appellant. It was resisted on the ground that it was barred by the Statute of Limitations. The learned judge below thought otherwise, and there being no facts in dispute, directed a verdict in favor of plaintiff.

It is difficult to see how the Statute can run against any person until his or her right has accrued. No right accrued to the widow in this case until the death of her husband, and it would seem to follow logically that the Statute could not commence to run until then. It was so held in *Culler v. Motzer*, 13 Serg. & R. 356, where it was said by *Justice*

Upon covenants of warranty against incumbrances, it does not run until covenantees has made payment to protect his interests. *Priest v. Deaver*, 4 West. Rep. 303, 21 Mo. App. 209; *Taylor v. Priest*, 4 West. Rep. 329, 21 Mo. App. 635.

It does not begin to run against a grantee whose unrecorded deed was lost, until the subsequent purchaser takes possession. *Mason v. Black*, 3 West. Rep. 203, 37 Mo. 329.

Nor against a purchaser at execution sale before he becomes entitled to a deed; and whether then or when the deed is actually delivered, is not decided. *Barrollhet v. Anspacher*, 68 Cal. 116.

In an action to recover realty sold at a void sale, it begins to run from the time purchaser took possession, not from confirmation of the sale. *L'Hommiedieu v. Cincinnati, W. & M. R. Co.* 120 Ind. 435.

Sale of personal property.

It commences to run at the time of the sale, by one in possession, but without right to sell. *Merrill v. Bullard*, 4 New Eng. Rep. 111, 59 Vt. 389.

In a contract to account annually for sales of patented articles, the Statute begins to run from the time for accounting, and not from the time of sales made. *Adams' App.* 5 Cent. Rep. 135, 113 Pa. 449.

By principal against agent.

An action by a principal to recover money negligently invested by his agent accrues from the time he had knowledge of the facts upon which a right to make demand depended. *King v. MacKellar*, 11 Cent. Rep. 898, 109 N. Y. 215.

Duncan: "I cannot assent to the doctrine of the court of common pleas, that where the husband conveys without the wife's joining, the Statute of Limitations runs during the coverture. If the entry and possession had been adverse to the husband's right, and his right of entry had been barred by the Statute of Limitations, the widow's dower would have been barred. Our Act of Limitations comprehends as well all possessory actions; but here the entry was not adverse to the right of the husband. All was a continuation of the same inheritance, and therefore the Statute would

not begin to run until the death of the husband.

In *Hall v. Vandegrift*, 8 Binn. 874, the principle is laid down that "it is the spirit of the Act of Limitations to allow twenty-one years from the time that a person might make an entry and support an action, the Statute not stopping after it has begun to run, in consequence of infancy, coverture or any other disability. But if a party has not a right of entry, but only a possibility which may give a right of entry at a future day, the Statute does not run against him until that right accrues.

Commercial paper.

It begins to run upon a demand note in favor of the maker, at its date. *Shutts v. Fingar*, 100 N. Y. 530, 1 Cent. Rep. 731.

It runs from the date of actual delivery, and not from the date it bears. *Collins v. Driscoll*, 69 Cal. 550.

In a suit on a certificate of deposit it does not begin to run until demand for its payment. *Smiley v. Fry*, 1 Cent. Rep. 510, 100 N. Y. 823.

In contracts.

On an agreement with an attorney, prescription for the fee agreed upon begins from the collection of the claim. *Shepherd v. Dickson*, 38 La. Ann. 741.

On agreement between debtor, creditor and a third person for delivery of property of the debtor for sale, the Statute does not begin to run in favor of the creditor until a reasonable time for making the sale. *Smith v. Waynesburg Exchange Bank*, 1 Cent. Rep. 591, 110 Pa. 508.

In an action for breach of covenant in not executing bonds for deferred payments, it begins from the date of the breach. *Davis v. McMullen*, 13 Va. L. J. 713.

It begins to run against sureties from payment of the judgment obtained against them, not from its rendition. *Glass v. Williams*, 16 Lea, 697.

It will not begin to run against one who pays at the request of another until he has been compelled to pay his assumed obligation. *Wheeler v. Young*, 3 New Eng. Rep. 316, 143 Mass. 143.

A debt from a town, where a bounty is awarded for enlisting, is not due until demand. *Smith v. Franklin*, 61 Vt. 886.

On contract to account.

In cases of mutual and open current accounts, the cause of action accrues at the time of the true date of the last item. *Abbey v. Hill*, 64 Miss. 340.

Limitation does not run as between partners until settlement of the accounts and agreement as to a balance (*Hendy v. March*, 75 Cal. 586), or until the partnership has ceased to exist. *Horne v. Ingraham*, 14 West. Rep. 567, 125 Ill. 198.

On subscription to corporate stock.

A claim against stockholders on their personal liability does not accrue, in Alabama, until the dissolution of the corporation. *McDonell v. Alabama Gold L. Ins. Co.* 85 Ala. 401.

In the absence of a contract to make subscriptions payable at a future time, they become due and payable at once. *William v. Meyer*, 41 Hun, 545.

If payment is to be made upon call, and no call is made, the obligation is continuing, and the Statute must be set in motion by some adverse action. *Thompson v. Reno Sav. Bank*, 19 Nev. 171.

The Statute does not run until a call has been made, although the corporation has become insolvent, or until a decree of court calling for such subscriptions. *Vanderwerken v. Glenn (Va.)* 13 Va. L. J. 91; *Glenn v. Foote*, 36 Fed. Rep. 824.

If the corporation will not make the call, a court of chancery will make it. *Glenn v. Howard*, 51 Ga. 383.

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Time does not begin to run against the right of the owner of bank stock to the dividends thereon until a demand of such dividends. *Louisville Bank v. Gray*, 84 Ky. 565.

In actions for torts.

The Statute of Limitations begins to run against a cause of action founded on a tort when the wrongful act causing damage is done, although the damages may not all have been sustained at the time. *Raynor v. Mintzer*, 72 Cal. 585.

So, in cases of trespass, from the time of the trespass. *Valley R. Co. v. Franz*, 3 West. Rep. 361, 43 Ohio St. 623.

So for mesne profits, which accrue when the trespass is committed. *Herreshoff v. Tripp*, 1 New Eng. Rep. 44, 15 R. I. 98.

But for a continuing trespass, action may be brought at any time until the trespasser has acquired a presumptive estate. *Valley R. Co. v. Franz*, *supra*.

The Statute runs on a cause of action for wrongful action from the time of the wrong. *McCuaker v. Walker*, 77 Cal. 203.

And, in conspiracy, from the time of the last overt act. *Ochs v. People*, 14 West. Rep. 679, 124 Ill. 809.

For injuries resulting from a defective bridge, from the date of the injury. *Wabash Co. v. Pearson*, 120 Ind. 436.

For maliciously burning a building, from the time of the injury. *Gale v. McDaniel*, 72 Cal. 334.

In a case of conversion and wrongful sale of property, from the date of the sale. *Moses v. Taylor (D. C.)* 11 Cent. Rep. 724.

But where conversion is shown by proof of demand and refusal, then from date of demand. *Ibid.*

The Statute begins to run against a claim against the State for damages from the operation of canals, on its withdrawal from the board of appraisers; and subsequent ineffectual proceedings therein do not revive it or suspend the running of the Statute. *McDougall v. State*, 11 Cent. Rep. 917, 109 N. Y. 73.

It commences to run against an action for depreciation in value of property by the construction and operation of a railroad in an adjoining street, from the time the tracks are laid (*Lyles v. Texas & N. O. R. Co.* 73 Tex. 95), or at the time of the occupation of the street, and is barred in the prescribed number of years from that time. *Franklin v. Jackson*, 30 Fed. Rep. 368.

In regard to its right of entry upon land, the Statute runs after condemnation for a right of way. *Walsh v. Chicago, B. & K. C. R. Co.* 1 West. Rep. 393, 19 Mo. App. 127.

In criminal cases.

In criminal cases the Statute begins to run from the commission or consummation of the crime. *United States v. Owen*, 32 Fed. Rep. 534.

In an instantaneous crime, as arson or homicide, it begins to run with the consummation; in a continuous crime, as carrying weapons, it begins to run with the commission of the act. *Id.*

Hence, notwithstanding the next heir in tail releases to the tenant in tail in possession, the Statute does not run against the releasor until the death of the tenant in tail without issue."

The principle indicated in these cases could be fortified, were it necessary, by copious citations, not only from the text-books, but from the decisions both in this country and in England; but I apprehend the law is too well settled to require it.

Care v. Keller, 77 Pa. 487, was cited with much confidence in support of the opposite view; but a careful examination of it shows that it is not authority for the principle contended for by the defendant. It is true the broad principle is there asserted "that the Statute of Limitations of 1785 applies to an action of dower, *unde nihil habet*, brought by a widow for property of which her husband had been seised, but which he had alienated before his death." This principle is not denied, and, had the plaintiff delayed her action for twenty-one years after her husband's death, I concede her right of action would have been barred by the Statute.

This was precisely the case in *Care v. Keller*. There the plaintiff claimed as the widow of John Keller. Her husband sold the real estate by articles of agreement to George Keller. This contract was afterwards enforced specifically by a decree of the orphans' court. John Keller, the vendor, died in March, 1846, George Keller, his vendee, moved on the premises the following April, and remained in possession as owner until 1848, when the administrator for John made him a deed for the property in pursuance of the decree of the orphans' court for specific performance. The widow brought her suit for dower within twenty-one years from the date of the deed, but more than twenty-one years from the time when George Keller took possession of the land under his contract, and the court held that her right of action accrued "when the vendee, by some unmistakable act or declaration, after the death of the vendor, asserted his right under the contract, and claimed the ownership of the land," and that the estate was equitably converted by the contract, and specific performance under the decree related back to the contract of sale in giving effect to the rights acquired under it. That the question we are now discussing was not raised or considered in that case is clear, from the foregoing review of it. The widow's right accrued, and was lost by her failure to prosecute it within twenty-one years.

It requires but a cursory examination of the Act of 1785 to see that it applies only to cases where a right of entry or a right of action has accrued, and that the Statute commences to run only from that time. This has been expressly decided. *Hall v. Vandegrift*, *supra*; *Shepley v. Lytle*, 6 Watts, 500; *Poe v. Foster*, 4 Watts & S. 355; *Marpie v. Myers*, 12 Pa. 125.

It was not error, therefore, for the learned judge below to refuse the defendant's first point as applicable to this case. He correctly said in answering it that the Statute began to run from the death of plaintiff's husband, and for this reason the point did not apply to the facts of the case. Nor was there error in refusing defendant's second point. It assumed a fact not in the case, *viz.*, that the property

had been held adversely to the husband for more than twenty-one years before suit brought. There was no such adverse holding. On the contrary, the defendant held under the title of the husband, and not adversely to it. There is no analogy between such case and that of a disseisor who has turned husband and wife out of possession, and holds adversely to them for twenty-one years. In such case the title and seisin of the husband is destroyed, and with the destruction of the husband's title the right of the wife to dower falls with it. So, if the premises are sold by a judicial sale for the husband's debt. In such case the purchaser takes and holds adversely to his title. But, where a husband makes a voluntary conveyance of his title to a purchaser without his wife joining therein, her rights do not pass by such conveyance; her right of action does not accrue until her husband's death, and the Statute does not run against her until then.

Judgment affirmed.

J. Lewis CREW *et al.*, *Plffs. in Err.*,

v.

THE BRADSTREET COMPANY.

(....Pa....)

A commercial agency is not exempted from liability for gross negligence in erroneously giving the financial standing of a person in consequence of a typographical error, by a provision in its contract with subscribers that the company shall not be liable for any loss or injury caused by the neglect or other act of any officer or agent of the company in procuring, collecting and communicating said information, and that such company does not guarantee the correctness of said information.

(April 7, 1890.)

ERROR to the Court of Common Pleas. No. 8, for Philadelphia County to review a judgment in favor of defendant in an action brought to recover damages for losses alleged to have resulted to plaintiffs in consequence of their acting upon certain information furnished them by defendant. *Reversed.*

Defendant is an incorporated commercial agency. As such it entered into a contract with plaintiffs by which it agreed to procure for plaintiffs, to the best of its ability, information concerning the responsibility and character of mercantile persons inquired for. In consideration of the compensation which plaintiffs were to give to defendant they were entitled to the loan of certain books which were published by defendant and which purported to contain the financial standing of persons and corporations engaged in business.

Under the contract plaintiffs received from defendant a book which was published in July, 1884.

NOTE.—*Mercantile agency.*

In the conduct and management of its business a mercantile agency must be subjected to the ordinary rules of law, and its proprietors and managers held to the liability which the law attaches to the acts of others. *King v. Patterson*, 8 Cent. Rep. 397, 40 N. J. L. 417.

Subsequently plaintiffs had an opportunity to sell goods to a corporation called the Union Refining & Manufacturing Company on a thirty days' acceptance.

They consulted defendant's book and found that it stated that that company had \$800,000 capital paid in, and upon the faith of this statement they accepted the offer and shipped the goods.

When the draft became due it was not paid and the Union Refining Company was then insolvent, and it appeared that the company, although having an authorized capital of \$600,000, had only \$20,000 of capital paid in and an indebtedness at the time the report was made of \$5,000.

The court below entered a nonsuit which the court in banc refused to take off and plaintiffs thereupon took this writ.

Mr. Theodore F. Jenkins, for plaintiffs in error:

The contract provides for the negligence of "any officer or agent of the Company," but not for the negligence of the Company. There is a very broad distinction between the act of a corporation and the act of an agent or officer of a corporation.

Culver v. Reno Real Estate Co. 91 Pa. 367; *Allegheny County Workhouse v. Moore*, 95 Pa. 40; *Wright's App.* 99 Pa. 425; *American Steamship Co. v. Landreth*, 103 Pa. 181; *Duncan v. Dun*, 7 W. N. C. 246.

The special report and the answer to the plaintiff's request for an explanation of the discrepancy between the special report and the book, show that the agent of the defendant had obtained and communicated correctly the information as to the paid-in capital of the Refining Company, and that the defendant negligently did not publish in the book the information communicated to it by its agent.

It is against public policy to allow any person, natural or artificial, to contract against liability for negligence.

Camden & A. R. Co. v. Baldauf, 16 Pa. 67-77; *American Exp. Co. v. Sands*, 55 Pa. 140; *Grogan v. Adams Exp. Co.* 5 Cent. Rep. 298, 114 Pa. 523.

Where one man engages with another to supply him with a particular thing, to be applied to a certain use, in consideration of a pecuniary payment, he enters into an implied contract that the thing shall be reasonably fit for the purpose for which it is to be used, and shall not contain any defect unfitting it for such purpose, which might have been discovered by the exercise of reasonable skill and diligence, or by ordinary inquiry and examination.

8 Addison, Cont. 497, § 401.

Ordinary negligence is the absence of such care as was reasonably required under the circumstances of the particular case, and is a question for the jury.

Pennycuik & R. Co. v. Peters, 8 Cent. Rep. 405, 116 Pa. 206.

Messrs. Sharp & Alleman, for defendant in error:

A mercantile agency is not liable for a loss to a subscriber acting upon information collected by its agents and communicated by them to him under his written contract with the agency, wherein it is expressly agreed that the information to be given subscribers is mainly

obtained and communicated by servants, clerks, attorneys and employes appointed as the sub-agents of the subscriber, and expressly providing that the mercantile agency shall not be responsible for any loss caused by the neglect of any of the servants, attorneys, clerks and employes.

Duncan v. Dun, 7 W. N. C. 246; *Bradstreet v. Emerson*, 72 Pa. 124; *Bullitt v. Baird*, 27 Leg. Int. 171.

One may contract for indemnity against the negligence of his servants or agents or even his own negligence.

Wood, Ins. 2d ed. pp. 274-286; *Cumberland Valley Mut. Protection Co. v. Douglas*, 58 Pa. 419; *Phenix F. Ins. Co. v. Cochran*, 51 Pa. 143; *Citizens Ins. Co. v. Marsh*, 41 Pa. 387; *Hart v. Pennsylvania R. Co.* 112 U. S. 831 (28 L. ed. 717); *Karow v. Continental Ins. Co.* 57 Wis. 56.

The suit at bar was prematurely brought. The most that could be fairly claimed of us would be that we guaranteed the subscriber against loss which is the result of our negligence. Pursuit to insolvency, or proof that this would be useless, is essential to recovery against the Company.

See *Brown v. Brooks*, 25 Pa. 210; also *Isett v. Hoge*, 2 Watts, 128; *Reigart v. White*, 52 Pa. 438; *Kramph v. Hatz*, 52 Pa. 525; *Rudy v. Wolf*, 16 Serg. & R. 79; *Gilbert v. Henck*, 30 Pa. 205; *Kirkpatrick v. White*, 29 Pa. 176.

Paxson, Ch. J., delivered the opinion of the court:

It is not denied that the book furnished the plaintiffs by the Bradstreet Company contained a serious error. The Union Refining & Manufacturing Company, of Jersey City, was therein rated as having \$800,000 capital actually paid in, whereas, in fact, that was the amount of its authorized capital, while only \$20,000 had been paid in. This was explained by the Bradstreet Company as a typographical error. The plaintiffs allege that, on the faith of the statement contained in the book, they sold the Union Refining & Manufacturing Company a bill of merchandise amounting to \$1,457.47, which has been wholly lost by reason of the insolvency of said company.

The defendant contends that it is protected by the following provision of its contract with the plaintiffs: "That the said Company shall not be liable for any loss or injury caused by the neglect or other act of any officer or agent of the Company in procuring, collecting and communicating said information; that the said Company does not guarantee the correctness of said information," etc.

Contracts against liability for negligence are not favored by the law. In some instances, such as common carriers, they are prohibited as against public policy. In all cases such contracts should be construed strictly, with every intendment against the party seeking its protection. This contract provides for exemption from the negligence of the officers and agents of the Company, but not from its own. We think the fair and reasonable construction of it is that the Company should not be liable for the mistakes of those who collect and impart the information. Thus, if the Company had been informed by the person

who gave them the report as to the Union Refining & Manufacturing Company, that it had \$600,000 of paid-up capital, and this statement had been furnished as received, we think the defendants would not have been responsible. Information as to the financial standing of individuals, firms and corporations is sometimes difficult to procure, and cannot, in all instances, be entirely accurate. It is a delicate inquiry always, and involves the employment of a large number of agents scattered over a wide extent of country. In some instances the information furnished may not only be erroneous, but willfully false to gratify the private malice of the informant against the subject of the inquiry.

The contract referred to was evidently intended to protect the Company from the consequence of errors from whatever cause in the collection and transmission of such information by its agents. Hence, if the Company communicates such information as it has received, it may well claim protection under the contract, even though such information should subsequently appear to have been erroneous. Its duty is to give the information which it receives in good faith to its customers, or to those who apply for it. In this case, however, the contention is that the report made to the Company by its agent was correct, and that the mistake was the blunder of the Company in having it erroneously printed in its July book. This book was certainly issued by the Company; it cannot be said to be the act of any particular officer or agent, as would be the sending of information as to the standing of a particular individual, or the transmission of such information by a clerk, in the course of his routine duties, to a subscriber or customer. The contract was against the negligence of particular officers or agents, not against the negligence of the Company as such. It was certainly negligence on the part of the Company to issue a book containing such a gross error; not the error of the agent who furnished the information, for he furnished it truly, but of the Company in sending it out falsely.

It was urged, however, that the Bradstreet Company, if liable at all, was only so as guarantor, and that as the plaintiffs had commenced no suit against the refining company, they are not entitled to recover against the defendant in this action. We need not discuss this proposition, in view of the evidence that the refining company is insolvent.

The judgment is reversed, and a venire facias de novo awarded.

Absent, Sterrett and Williams, JJ.

George REHFUSS *et al.*, Appts.,

v.

Edward B. MOORE *et al.*, Trading as the Automatic Overseaming Buttonhole Machine Co., Limited.

(...Pa....)

1. A patent right is property within the meaning of the Act of May 1, 1876, which permits the contribution of property to the capital of a limited copartnership.

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2. A description of letters-patent in the schedule required by the Act of May 1, 1876, to be made of property contributed to a limited partnership concern, by giving its respective numbers in the United States Patent Office, together with the name of the inventor and the date and title of the patent, is sufficient.

3. Different letters-patent, which are useful only as they unite in forming a single device, may all be considered and valued together in adjusting the valuation thereof which is to be placed in a limited partnership schedule.

4. The fact that the valuation placed on property contributed to a limited partnership concern and inserted in the schedule is grossly excessive will not remove the limitation upon the partner's liability if it was made honestly and in good faith and through a mistaken idea of the true value of the property.

(May 5, 1890.)

APPEAL by plaintiffs from a judgment of the Court of Common Pleas, No. 3, for Philadelphia County in favor of defendants in an action to collect the debt of a dissolved partnership from defendants as general partners thereof. *Affirmed.*

The case fully appears in the opinion.

Mr. Joseph M. Pile, for appellants:

The Act of 1876 requires subscriptions to be certified according to the fact.

Maloney v. Bruce, 94 Pa. 249.

The mingling of these patents, and putting one gross sum on all, is a lumping surmise. It is not sufficient to insert lumping valuation in the articles.

Vanhorn v. Corcoran, 4 L. R. A. 386, 127 Pa. 255.

It will not do to say that the value was fixed in good faith, or that creditors had notice. It is not a question of good faith or of notice to creditors. It is no defense that creditors had actual notice.

Shibley v. Strong, 128 Pa. 315.

If the defendants failed to comply with the requisites of the Act they became general partners and were liable as such.

Andrews v. Schott, 10 Pa. 47.

Messrs. William A. Manderson and John G. Johnson for appellees.

Clark, J., delivered the opinion of the court:

The Act of June 2, 1874, Pub. Laws, 371, requires persons desiring to form a limited partnership or association to file with the recorder of deeds a statement in writing, duly signed and acknowledged, in which shall be set forth the full names of the persons associated, with the amount of capital subscribed by each; the total amount of the capital, and when and how to be paid; the character of the business and the location of the same; the name of the association, with the word "Limited" added thereto; the contemplated duration of the association, not exceeding twenty years, and the names of the officers selected in conformity with the provisions of the Act. This Act contemplated that the subscriptions to the capital should be payable in cash (*Maloney v. Bruce*, 94 Pa. 249); but by the supplemental Act of May 1, 1876, Pub. Laws, 69, it was provided that it should be lawful "to make contributions to the capital thereof, in real or personal estate, mines or

other property, at a valuation to be approved by all the members subscribing to the capital of such association;" provided, that in the statement, "subscriptions to the capital, whether in cash or in property, shall be certified in this respect according to the fact; and when property has been contributed as part of the capital, a schedule containing the names of the parties so contributing, with a description and valuation of the property so contributed, shall be inserted."

The Automatic Overseaming Buttonhole Machine Company, Limited, was organized under the Act of 1874 and its supplements; the statement filed is in due form and sets forth in detail the various matters required. The capital is fixed at \$500,000, of which \$496,970 is contributed by Charles R. Deacon, "in property at a valuation approved by all the members of the association subscribing to the capital thereof; a schedule containing the name of the party contributing said property, with a description and valuation of the property so contributed," being inserted as follows:

"Property contributed by Charles R. Deacon, as follows:

"Letters-Patent of the United States, No. 286,989, for Improvements in Buttonhole Attachments for Sewing Machines, dated October 23, 1888, granted to the 'Banks Buttonhole Machine Company, Limited,' Assignee of Charles M. Banks.

"Letters-Patent of the United States, No. 287,218, for Improvements in Buttonhole Sewing Machines, dated October 23, 1888, granted to the 'Banks Buttonhole Machine Company, Limited,' Assignee of Charles M. Banks.

"Letters-Patent of the United States, No. 305,657, for Improvements in Buttonhole Sewing Machines, dated September 23, 1884, granted to Charles M. Banks, and assigned to the 'Banks Buttonhole Machine Company, Limited,' October 12, 188—.

"Right, title and interest in three certain letters-patent of the Dominion of Canada, for the same inventions patented in the United States by letters-patent No. 286,989, dated October 23, 1888, No. 287,218, dated October 23, 1888, and No. 305,657, dated September 23, 1884, said Canadian letters-patent having been granted but not delivered owing to models not having been supplied.

"And which letters-patent, rights and interests are valued at the sum of four hundred and ninety-six thousand six hundred and seventy dollars (\$496,670), by all the members of the association subscribing to the capital stock thereof. The balance of said capital, to wit, three thousand and thirty dollars (\$3,030), has been paid in cash by the members contributing the same."

It will be observed that these letters-patent are scheduled and described by giving their respective numbers in the Patent Office of the United States, the name of the inventor, the date of the patent and its title. The Canadian letters-patent "for the same inventions," not yet issued, were described for identification by their numbers in the United States Patent Office, and as the right was not yet absolute, the schedule covered the right, title and interest of the member contributing the same. No more complete, accurate and definite de-

scription could have been made, as a reference to the several numbers in the Patent Office would disclose every particular respecting the nature of the patents and validity of the same. These inventions, moreover, were considered valuable only in combination; one of them, as we understand, covered the foundation principle of the invention, and the others were in aid of its practical operation. The patents, although distinct, were considered useful only as they united in the completion and operation of a single device embodying the principle of all three combined. In adjusting the valuation of these patents, therefore, they were properly considered and valued together. The contributor of these patents seems to have acted in trust for himself and others, but no question is raised as to that. But it is objected, first, that patent rights are not "personal estate" or "property" within the meaning of the Act of 1876, and second, if they are, there was no proper valuation of these patents inserted in the schedule.

Property is corporeal or incorporeal; one may be said, with equal propriety, to have property in a farm or a horse, or in an easement, a franchise or in letters-patent. A patent right is the subject of assignment, sale and inheritance. It may not, perhaps, be liable to a sale on a common-law execution, as it has no visible and tangible existence, and is a species of property which is incapable of manual seizure; but the highest courts in New York and California have affirmed the power upon a creditor's bill to order the assignment and sale of a patent right for the payment of the patentee's judgment debts (see *Gillett v. Bate*, 86 N. Y. 87; *Pacific Bank v. Robinson*, 57 Cal. 520), and the same power was sustained in *Ager v. Murray*, 105 U. S. 126 (26 L. ed. 942), 21 Am. L. Reg. N. S. 409, in the Supreme Court of the United States, where Mr. Justice Gray, in delivering the opinion of the court, said: "A patent or a copyright, which vests the sole and exclusive right of making, using and vending the invention, or of publishing and selling the book, in the person to whom it has been granted by the government, as against all persons not deriving title through him, is property, capable of being assigned by him at his pleasure, although his assignment, unless recorded in the proper office, is void against subsequent purchasers or mortgagees for a valuable consideration," without notice.

In England it has long been held that a patent right would pass by assignment in bankruptcy even without expressed words to that effect in the Bankrupt Act. *Hesse v. Steenson*, 8 Bos. & P. 565. See also *Curtiss, Patents*, § 174, and *Ager v. Murray*, *supra*, and cases there cited.

We think there can be no question that a patent right is such property as may be contributed to the capital of a limited partnership association, within the meaning of the Act of 1876. All property thus contributed is to go into the capital "at a valuation to be approved by all the members subscribing to the capital," and the valuation so made is to be inserted in the statement.

In *Maloney v. Bruce*, 94 Pa. 249, it was held that if parties seek to have all the advantages of a partnership, and yet limit their liability to creditors, they must comply strictly with

the Act of June 2, 1874. The object of the Act of May 1, 1876, requiring a schedule of the property contributed, it was said, was to enable creditors to ascertain precisely of what the property consists, and to judge of its value, and that where property has not been scheduled and valued there is no payment of the capital. In that case, the property contributed was, "A contract with the Pennsylvania Globe Gas Light Company, at the valuation of \$3,500; merchandise, consisting of iron, steel, tin and copper wire, gas pipes, etc., all the goods, tools and chattels now on the premises, 209 Lackawanna Avenue, Scranton City," etc. "This," says the court, in that case, "is not the kind of schedule contemplated by the Act of 1876. The description is too general to enable anyone to form a correct estimate of the extent of the property, and the lumping valuation renders it equally difficult to judge of the values. The property contributed was intended as the equivalent of the cash capital, and the plain object of the provision in the Act of 1876, requiring a schedule, was to enable creditors to ascertain precisely of what the property consisted and to judge of its value."

In *Vanhorn v. Corcoran*, 127 Pa. 255, 4 L. R. A. 886, we held that where property is contributed, it must be property valuable for the business of the company and for the payment of its creditors, and the certificate must set forth in its statement such a description of the property contributed as will enable creditors to ascertain precisely of what the property consists, and to judge of its value.

In that case, the statement showed a subscription of property "paid in merchandise, lumber, book accounts and bills receivable transferred to the association, \$21,609.18, and in cash, \$3,890.82, making a total subscription of \$25,000." It appeared that the \$21,609.18 represented the difference between the estimated assets and liabilities of the firm subscribing to the capital of the association, and if the statement had certified, in this respect, correctly "according to the fact," the organization would have been defective; and the certificate was held to be insufficient.

In *Sheble v. Strong*, 128 Pa. 815, the subscription was of "machinery to be valued and accepted," but there was no schedule, and it was held that the recorded statement must show a schedule with a detailed description and valuation of the machinery as required by the Act of 1876, otherwise the members will be held as general partners. "The question," says our brother Sterrett, in delivering the opinion of the court, "is not one of good faith on the part of the defendants, or of notice to the creditors, but whether, in their attempt to form a limited partnership, they conformed to the law; if they did not, their attempt was abortive, and it is no difference that creditors had actual knowledge of the facts required to be set out in the required statement."

But where, as here, the statement is in due form and contains all the essential requirements of the Statute, but the valuation is alleged to be unconscionable, and inserted in the statement without any proper consideration of the inherent or intrinsic worth of the property contributed, the question is one of good faith. All property contributed, under the Act of

1876, is to go into the capital "at the valuation to be approved by all the members subscribing to the capital," and the subscribers would not be justified, perhaps, in fixing a grossly fictitious and fraudulent valuation to mislead and defraud creditors. But if their estimate is made honestly and in good faith, it must be accepted, although mistaken, and even grossly excessive. Their motives must be considered as of the time when the valuation was made; it will not do to condemn their estimate of the property because it afterwards proved worthless, and the enterprise resulted in a disastrous failure. In this case there is no evidence of fraud. The members of the association seem to have believed these patents to have been of extremely great value. One fifth interest in the original invention cost \$10,000; the remaining four fifths were held by Mintzer and Banks, and the entire patent was thus contributed to the association.

The design of the association was to manufacture extensively a device attachable to the ordinary sewing machine, for working buttonholes, which, it was believed, would come into universal use, not only for factory, but for family uses. Banks' invention worked the buttonhole, but did not cut the cloth; a cutler attachment was afterwards perfected and turned into the Association, and then the device not only cut the cloth, but worked the buttonholes in a very perfect manner. When this device was attached to the sewing-machine, however, the needle had to be lengthened, and the operation of the machine was impaired somewhat from the vibration of the needle.

Major Moore was asked: "What were those patents worth at that time, independent of your patent and your improvements?"

A. That is a very indefinite question; no man can tell the value of a patent until it is tried. Mr. Banks' patent involved what I regarded as of very great value—a slide that moves straight forward, stops, a disc turns and moves that again in the same direction—a thing that had never been done before, and for which he holds the button patent. That I regarded as very valuable.

Q. Did you ever have an idea yourself that those patents were worth any such sum of money?

A. Yes, sir, I did. If you want to know the reason, I will tell you.

Q. I would like to have it.

A. A patent, as I said, is worth just what it will be able to earn. That patent, which was the ground-floor patent, contemplated in its construction of going into every household in this country, if it could have been made to do it; and I believed at the time it could have been done; and when you contemplate what a country this is, and other countries beside, if we could produce a machine of that kind, by which a woman could change that by removing four screws, make her buttonholes, then change it back into a plain sewing-machine, we thought that would be a very valuable patent. Mr. Rehfuß tried it years before. It was the making of the American Sewing-Machine Company, and we believed it was valuable. Otherwise we would not have stepped up and put down our money.

Q. The reason why you believed those patents were worth that enormous sum of money was because you expected in the future to perfect that improvement and to put, as you say, the machine in every house in the country?

A. We did.

Q. It was the expectation of being able to do that, that made the patents, in your mind, valuable?

A. Yes, sir. It is the earning capacity of that machine that made it valuable. I have never sold a share of stock in that company, from the time it was organized under Banks up to the present time; and I think I have \$20,000 in it. That shows what my faith has been in it. I never offered a share of stock for sale. No man ever bought a share of stock from me, and I am still spending money on it.

Q. You are the proprietor of the patents now?

A. Yes, sir; and I have still the same faith I had before. I want to say further, with reference to these patents, what my experience has been. The earning capacity of a patent, if you can get it right, is very great. The first buttonhole machine that I was in was not a success, although a contract was made with the Singer Company to put it on all their machines. That company transferred the principle it had in that buttonhole machine into a company. The device on it does not cost \$10, and yet it has been earning the interest of a million dollars. We went out of that company and organized another company, for which we paid \$2,000, three of us, and four of us went into it and organized a company on the basis of \$50,000. I have taken out of that in the last four years about \$12,000. It is not what you think a thing is worth, to look at it; it is what you think it will earn. You would not give me a five-cent piece for that to look at it. That cost ten dollars to put on a sewing machine; yet, I tell you, that under the control of two companies, a combination was formed to put that on a sewing machine, and yet it has earned the interest of a million dollars. I do not know whether it has not paid more than that—two million dollars; because, on one side, I cannot tell how much they get. The other side has paid 10 per cent on \$800,000. That patent did not cost \$10 to make.

Q. Then you got together with those other gentlemen, Mr. Long, Mr. Gray, Mr. Shipley, Mr. Deacon and Mr. Williamson, and signed an agreement agreeing that that patent was worth \$496,970.

A. We did.

Q. How did you get just that amount of money? How did you fix that?

A. I do not know how it was done. The original value was fixed by Dr. Mintzer and Banks, and we accepted the situation as they made it.

This testimony illustrates the great degree of confidence which the members of the association had in the success of their enterprise, and in the value of these patents. It appears that the same patents had previously been put into what was known as the Banks Buttonhole Machine Company at the valuation of \$500,000. This valuation was made by Dr. Mintzer and Charles M. Banks, the owners of the patents. That company, whilst endeavoring to perfect the

action of this device, had some differences arise between its members, and went into liquidation, and the re-organization was effected under the name of the Automatic Overseaming Buttonhole Company, Limited, the patents being put in at the same price, less the amount of cash contributed.

Dr. Mintzer testified that when Banks sold his patents, the device worked quite satisfactorily. He says: "We most clearly defined satisfactorily a principle, but oftentimes it wants close adjustment before it will do practical work. Such was the position when Mr. Banks sold his patents."

He says, further, that he regarded the Banks patents as involving an exceedingly valuable principle, out of which he expected a very large sum of money would be realized; that their counsel was Mr. Connolly, a patent lawyer of very large experience, and, in fixing the valuation he deferred to the opinion of his counsel, but he joined in the certificate believing that it was all right and proper. Mr. Deacon testifies that the members of the association agreed to accept the valuation that had been placed upon the patents in the old company; that the capital was \$500,000, and they decided to deduct the cash contributed, and the balance was agreed upon as the value of the patents. He says: "I believe the patents to be very valuable. I had considerable experience in the sewing-machine business, and I thought it was the best buttonhole I had seen, and on the strength of it I invested the money in the old company."

Charles B. Lee says he thought the patents were worth the amount of their valuation, or he would not have signed the papers or paid his money.

The case depends upon this testimony; there is practically nothing to support a charge of fraud. The testimony clearly shows that this enterprise was undertaken in good faith, and that the members had the utmost confidence in its final success. They paid in the cash capital and contributed as much more in aid of the enterprise. The whole trouble was, that, although the invention was valuable in mechanical conception and was a pioneer invention in its line, yet others, who were active in the same direction, relieved its imperfections and reaped the reward. The plaintiffs were not deceived. They knew the nature and character of the several contributions made to the association, for these contributions were certified upon the record according to the fact, and they had besides, actual, personal and intimate knowledge of the resources of the company. We are of opinion that this was a good-faith transaction, and the judgment should be affirmed.

Judgment affirmed.

Paxson, Ch. J., and Williams, J., absent.

COMMONWEALTH OF PENNSYLVANIA

William GARDNER et al., Appts.

(...Pa....)

1. A person selling goods from door to

NOTE.—Property rights; constitutional guaranty. The right to acquire, hold and enjoy property is guaranteed by the fundamental law of government

door as an agent of the manufacturers at a salary, with no personal interest in the goods or their proceeds, is a peddler within the meaning of the Act of April 17, 1846, prohibiting peddling in Schuylkill County.

2. The right of "acquiring, possessing and protecting property," given by the Constitution, does not include the right to sell goods as a peddler, when that is prohibited by statute.

3. A state statute prohibiting the sale of goods by hawkers or peddlers is not void as a regulation of commerce, where there is no discrimination against nonresidents, or goods from out of the State.

(March 17, 1890.)

A PPEAL by defendants from a judgment of the Court of Quarter Sessions for Schuylkill County convicting them of hawking and peddling contrary to the Statute and sentencing them to pay a fine therefor. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. John B. Hinkson and Cyrus G. Derr, for appellants:

Under the Constitution of this Commonwealth the acquisition, possession and protection of property, and, as necessarily incidental thereto, the sale or exchange of it, are inherent and indefeasible rights which even the Legislature cannot invade; and an Act of Assembly which makes the owner of chattels, who desires to dispose of them, and with that view seeks a purchaser from house to house, guilty of a penal offense, is an invasion of those rights, and therefore void.

State Const. art. 1, § 1; *Sharpless v. Philadelphia*, 21 Pa. 166; *Baltimore v. Radecke*, 49 Md. 217; *Fick v. Hopkins*, 118 U. S. 356 (30 L. ed. 220); *People v. Marx*, 99 N. Y. 977, 52 Am. Rep. 84; *Bertholf v. O'Reilly*, 74 N. Y. 515; *Re Jacobs*, 98 N. Y. 98; *Re Peddler's License*, 22 W. N. C. 35; *Fromberg's Petition*, 4 Pa. Co. Ct. Rep. 354; *Sharon Borough v. Golden*, Id. 357.

An Act of Assembly which prohibits the sale by the owner or his agent, in any part of this

Commonwealth, of goods manufactured and owned by citizens of another State, is an interference with the exclusive right of Congress, under the Federal Constitution, to regulate interstate commerce, and is therefore void.

U. S. Const. cl. 4, § 8, art. 1; *Mobile Co. v. Kimball*, 102 U. S. 691 (24 L. ed. 238); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 (29 L. ed. 158); *Santa Clara Co. v. Southern Pac. R. Co.* 115 U. S. 894 (30 L. ed. 118); *Stockton v. Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 411, 32 Fed. Rep. 9; *Welton v. Missouri*, 91 U. S. 280 (23 L. ed. 849); *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1 (6 L. ed. 23); *U. S. v. Lees*, 46 Phila. Leg. Int. 38; *Moran v. New Orleans*, 112 U. S. 69 (28 L. ed. 653); *Walling v. Michigan*, 116 U. S. 446 (29 L. ed. 691); *Leloup v. Mobile*, 127 U. S. 640 (32 L. ed. 311); *Fargo v. Michigan*, 121 U. S. 230 (30 L. ed. 888); *Robbins v. Shelby Co. Tazewell Dist.* 120 U. S. 489 (30 L. ed. 694); *Philadelphia & S. Steamship Co. v. Pennsylvania*, 123 U. S. 326 (30 L. ed. 1200); *Asher v. Texas*, 128 U. S. 129 (32 L. ed. 868); *Simmons Hardware Co. v. McGuire*, 39 La. Ann. 848; *Ex parte Rosenblatt*, 19 Nev. 439; *Almy v. California*, 65 U. S. 24 How. 169 (16 L. ed. 644); *Stoutenburgh v. Hennick*, 129 U. S. 141 (32 L. ed. 637); *People v. Gillson*, 12 Cent. Rep. 616, 109 N. Y. 889.

The sale by a manufacturer of his own goods only is not hawking and peddling.

Chester v. Larkin, 4 Week. Rep. 21, *Jacelyn v. Parson*, L. R. 7 Exch. 129.

Messrs. George J. Wadlinger, John W. Ryan and R. H. Koch, Dist. Atty., for appellee:

If the Act of April 17, 1846, is a legitimate exercise of the police power of the State for the prevention of fraud and the preservation of the public morals, it is not inconsistent with the Constitution of the Commonwealth.

Powell v. Pennsylvania, 127 U. S. 678 (32 L. ed. 253); *Mugler v. Kansas*, 123 U. S. 623, 663 (31 L. ed. 205, 211); *Butchers Union S. H. & L. Co. v. Crescent City L. & S. H. Co.* 111 U. S. 751 (28 L. ed. 587); *Barbier v. Connolly*, 113 U.

Com. v. Bacon, 13 Bush, 214, whether real or personal. *Ervine's App.* 16 Pa. 256.

The right to life includes the right to exercise the faculties and follow any lawful avocation. *Bertholf v. O'Reilly*, 74 N. Y. 509, 18 Am. L. Reg. N. S. 111.

The sanctity of private property, under whatever guise it is attempted to be assailed by legislation, is effectively protected by the guaranty of the Constitution. *Wynehamer v. People*, 13 N. Y. 378.

Hawkers and peddlers subject to state license.

Hawkers and peddlers are itinerant or traveling traders, who carry goods about for sale. *Merriam v. Langdon*, 10 Conn. 460; *Alcott v. State*, 3 Blackf. 6; *Colson v. State*, 7 Blackf. 590; *Spencer v. Whiting*, 68 Iowa, 673; *Keller v. State*, 11 Md. 525; *Com. v. Farnum*, 114 Mass. 287; *Com. v. Ober*, 12 Cush. 463; *Page v. State*, 6 Mo. 205; *Whitfield v. Loggess*, 6 Ired. L. 268; *Plymouth v. Pettjohn*, 4 Dev. L. 561; *Cincinnati v. Bryson*, 15 Ohio, 626; *Mays v. Cincinnati*, 1 Ohio St. 268; *Com. v. Willis*, 14 Serg. & R. 308; *Fisher v. Patterson*, 13 Pa. 388; *State v. Charleston*, 10 Rich. L. 240; *State v. Pinckney*, 10 Rich. L. 474; *State v. Belcher*, 1 McMull. L. 40; *Charleston v. Ahrens*, 4 Stroob. L. 241; *Davenport v. Rice*, 75 Iowa, 74.

A peddler is one who travels about on foot or in a

vehicle from town to town or from house to house carrying his goods, wares and merchandise for sale. *Woolman v. State*, 2 Swan, 353; *Higgins v. Rinker*, 47 Tex. 402; *Cook v. Pennsylvania*, 97 U. S. 566 (24 L. ed. 1015); *Henderson v. New York*, 92 U. S. 268 (23 L. ed. 548); *Andrews v. White*, 32 Me. 389; *Huntington v. Cheesbro*, 67 Ind. 74.

A statute imposing a penalty or forfeiture for peddling without a license does not apply to goods forwarded from without the State upon orders procured by an agent of the seller. *Burbank v. McDuffee*, 65 Me. 135; *Morrill v. State*, 38 Wis. 428; *Wrought Iron Range Co. v. Johnson* (Ga.) post. p. —.

The Constitution authorizes the General Assembly to tax peddlers, and does not prevent the Legislature from authorizing municipal corporations to tax for such purpose. *Wiggins v. Chicago*, 69 Ill. 372.

The usual method is to tax them a specific sum per year. *Wynne v. Wright*, 1 Dev. & B. L. 19; *Cowles v. Britain*, 2 Hawks, 204; *Wilmington v. Roby*, 3 Ired. L. 250.

The license issued is a personal privilege. *Temple v. Sumner*, 51 Miss. 13. See note to *State v. Richards* (W. Va.) 3 L. R. A. 705; *Com. v. Smith*, 6 Bush, 303; *Mork v. Com.* 6 Bush, 397; *Gibson v. Knuffield*, 68 Pa. 168.

7 L. R. A.

S. 27 (28 L. ed. 923); *Yick Wo v. Hopkins*, 118 U. S. 356 (30 L. ed. 220); *Kidd v. Pearson*, 128 U. S. 1 (32 L. ed. 346).

The appellants are hawkers and peddlers within the meaning of our Act.

Com. v. Edison, 2 Pa. Co. Ct. Rep. 877; *Gibson v. Kauffeld*, 63 Pa. 168; *Weiss v. Kell*, 2 Pa. Co. Ct. Rep. 286; *Fisher v. Patterson*, 13 Pa. 836; *Com. v. Cotton*, 1 Chester Co. Rep. 77; *Com. v. Willis*, 14 Serg. & R. 398.

Williams, J., delivered the opinion of the court:

The defendants were employed at a salary by a manufacturing company in Rhode Island, to sell an article of merchandise called "Soapine." They came into the County of Schuylkill in the regular course of their employment, and as they say in the history of the case in their paper-book "were in the county temporarily for the purpose of selling this article as the agents of the manufacturers." When they had completed their canvass of the County of Schuylkill, they would, if continuing in the employment of the manufacturers, move on to another county, and subject its citizens to the same system of house-to-house visitation and personal solicitation.

By the Act of April 17, 1846, § 1, the sale of foreign or domestic goods, wares and merchandise in the County of Schuylkill by any person or persons as a hawker or peddler is forbidden. The defendants were arrested under this Act while engaged in selling soapine from house to house in Mahanoy City, and indicted. On the trial the jury rendered a special verdict, finding the defendants guilty of selling soapine from door to door, as the agents of the manufacturers, at a salary, with no personal interest in the goods or their proceeds, and submitted these facts to the judgment of the court. The theory of the defendants appears to have been that the manner in which their sales were made was of no consequence, if they did not own the articles sold, but acted as the agents of the owners. But it is the manner of sale that makes a peddler.

Webster defines a peddler as "one that carries about small commodities on his back, or in a cart or wagon, and sells them." In the *Law Dictionary* of Rapalje and Lawrence the word is defined thus: "Peddler, a person who carries goods from place to place for sale."

Whether the goods are the property of him by whom they are carried and offered for sale or of another who employs the seller, is of no possible consequence. The business of the itinerant vendor is the same in either case, and so is the inconvenience and annoyance he inflicts on others. The merchant or storekeeper is a resident, has a fixed place of business where his goods are shown to those who come in search of what they need, where he can be reached by process and compelled to make good his guaranty of the quality of his wares. The peddler is a transient with no fixed place of business, who seeks customers by invading their homes and makes sales by persuading people to buy what they do not need, and who by the time he is wanted to answer for his representations and engagements is out of sight and out of reach of process. It is this matter of tracking a laboring man or woman into the home

and laying siege to him or her by an unscrupulous and self-possessed stranger, who is after money and has no delicate scruples about the manner in which he gets it, that has made the peddler a dread in the country and in the villages and has led the law-makers in this and other States to put the business under strict regulations when it is not wholly forbidden.

In this case the jury found that the defendants were doing that which exactly fills the definition of peddling, that is, carrying about from house to house small packages of goods and offering them for sale. It only remained for the court to pronounce upon the legal effect of the facts found and enter the appropriate judgment against the defendants as peddlers.

The next point taken by the defendants is that under the Constitution of the State an owner of goods has an indefeasible right to carry them when and where he pleases, in search of buyers. This conclusion seems to be drawn from a paragraph in the Declaration of Rights which asserts that all men have certain inherent and inalienable rights, among which is that of "acquiring, possessing and protecting property." But a distinction must be taken between the right and the manner of acquisition. The highwayman engages in his business with a view to acquire property, but the trouble is that his methods of acquisition are open to objection. The same is true of the gambler and the lottery dealer. Some business men have been known, in their zeal to acquire property, to use false weights and measures, but the law lays its hand on the methods they employ. It does not agree that the end justifies the means, and for that reason it punishes the highwayman, the gambler, the lottery dealer and the cheat, while it recognizes their constitutional right to "acquire, possess and protect property." Our laws relating to peddling are directed, not against the right of acquisition, but the manner in which some people exercise that right; not to the right of an owner to sell his goods, but to the manner in which he may sell them. Our Peddling Laws are therefore not in violation of the constitutional rights of the owners of goods, but are a wise exercise of the police power over the manner in which goods, wares and merchandise shall be sold. I do not regard the sale of the natural products of the soil by the farmer or gardener by whom they are raised as affected by the laws relating to peddlers. Farmers are not within the mischief which these laws were intended to remedy, except as they are the victims of that mischief. They are not traders or travelers in any legal sense. The carriage of the surplus products of the farm or garden to a market town, or from house to house, is not peddling, but it is incidental to their business as farmers. Peddlers are forbidden to sell "goods, wares and merchandise." These words were never intended to include farm products in the hands of the farmer; nor is the transportation of such products to a market for sale, or to regular customers who are supplied by the grower, the sort of business at which the laws relating to peddling are directed. The business they were intended to reach is very plainly indicated in section 1 of the Act of 1784, which declares: "Whereas, many idle and vagrant persons may

come into this State, and under pretense of being hawkers and peddlers may greatly impose upon many persons," etc. The Act then provides for protecting the public from such fraudulent practices upon them by forbidding any person to engage in the business of peddling without a license. It is very clear that this prohibition was not directed against the farmer and his truck wagon, but against the itinerant vendor who carries his goods on his back, or in a cart or wagon, in search of customers. It was directed against him for the protection of the public against the impositions practiced by the class of dealers to which he belongs, in regard both to "the quality and price of goods" carried by them, and against the commission "of felonies and misdemeanors," by the vagrant persons who traveled the country "under pretense of being hawkers and peddlers." But while we are of opinion that farmers and gardeners are not within the letter or the spirit of our laws relating to peddling, this can in no way serve the defendants, for they are not farmers, and "soapine" is not a natural product of the soil. The special verdict assures us that it is a manufactured article, produced by the Kendall Manufacturing Company, all of whose stockholders are nonresidents of Pennsylvania, and whose factory is located in the State of Rhode Island.

On these facts, so found, the third and last question presented in this case is raised, viz., Is not the sale of soapine from door to door in Mahanoy City interstate commerce? This is broadly asserted, and the position is taken that our laws on the subject of peddling are an invasion of the exclusive right of Congress under the Federal Constitution to regulate interstate commerce, and therefore void. We have understood interstate commerce to refer to the free interchange of commodities between citizens of the different States without regard to state lines. If we are right about this, then the laws relating to peddling do not interfere with such interchange and cannot be an invasion of the authority of the United States. They erect no barrier at the state line, provide for no inspection or stoppage, and levy no tax on the introduction into, or transportation through, the

State of any sort of property whatever. The citizen of another State may come into Pennsylvania when he will, and where he will, stay as long as he chooses, open as many places for the sale of his goods as he may see fit, and enjoy the same measure of freedom in regard to the conduct of his business as a native citizen. But when he comes within the State, permanently or temporarily, he is under the protection of its laws, and the correlative duty of obedience rests on him. His rights are equal to but not above those of the citizen. He has no more right to sell intoxicating drinks without a license than a citizen; no better right to sell cigarettes to children, or oleomargarine to customers in violation of law, than a citizen. He has no better right to take a pack on his back, or a horse and cart, and engage in the business of peddling than a citizen. To hold the contrary would be subversive of law and order, and would render the possession of the police power useless to the State. If it is true, as is now asserted, that the itinerant stranger who treads the country roads and haunts the mining towns, carrying a pack or box filled with sham jewelry and worthless watches, to sell to those who are credulous enough to believe his representations, for many times their real value; and who as soon as he has "gone through" a neighborhood moves quickly out of reach—if it is true that such a person is the ward of the Federal Constitution, engaged in interstate commerce, with the power of the government of the United States interposed between him and the police power of the State, it must be admitted that we have stumbled on a startling and unlooked-for result of the investment of the general government with the power to regulate commerce. Fortunately the federal courts do not so hold. They distinctly recognize the police power of the States and their right to forbid altogether the sale of such articles as are injurious. *Powell v. Pennsylvania*, 127 U. S. 678 [32 L. ed. 253].

The same doctrine was held in the *Kansas* cases arising under the prohibitory feature of the Constitution of that State. We think the questions in this case were rightly decided in the court below, and the *judgment is affirmed*.

INDIANA SUPREME COURT.

CITIZENS LOAN, FUND & SAVINGS ASSOCIATION of Bloomington, *Appt.*,

v.

Harmon H. FRIEDLEY *et al.*

(....Ind....)

1. A lawyer cannot be held liable for a mistake in reference to a matter in which members of the profession possessed of reasonable skill and knowledge may differ as to the law, until it has been settled in the courts, nor if he is mistaken in a point of law on which reasonable doubt may be entertained by well informed lawyers.
 2. A lawyer upon whose advice a mortgage was taken in 1883, executed by a husband and wife upon lands held by them as tenants by entireties, to secure the husband's debt,
- 7 L. R. A.

cannot be made liable for the loss occasioned by the death of the husband and the defeat by the wife of a foreclosure suit upon the ground that she signed as surety for her husband, although it was well settled when the mortgage was executed that the wife's signature was void, since it was not decided until 1884 that such a mortgage was void as to both husband and wife.

(April 5, 1890.)

APPEAL by plaintiff from a judgment of the Circuit Court for Lawrence County in favor of defendants in an action upon the bond of an attorney-at law to recover losses alleged to have resulted from his want of skill in his profession. *Affirmed*.

The facts fully appear in the opinion.

Messrs. London & Rogers for appellant.
Messrs. Buskirk & Duncan for appellees

Mitchell, Ch. J., delivered the opinion of the court:

This suit was instituted by the Citizens Loan, Fund & Savings Association, against Harmon H. Friedley, and the sureties on his bond, to recover money alleged to have been lost to the Loan Association on account of the negligence and want of skill of the defendant Friedley, while acting as the attorney of the Association.

It is averred that the Association made a loan of \$400 to one of its shareholders in August, 1883, upon the faith of advice given by the appellee, its attorney, who certified to its officers, in writing, that the title to certain real estate upon which the applicant for the loan proposed to execute a mortgage as security therefor, was perfect and available to secure the loan applied for.

It appears that the real estate was owned by the applicant and his wife as tenants by the entireties; that the loan was made in reliance upon the advice of the attorney; that the borrower subsequently died, his estate being insolvent, and that his widow successfully resisted a suit for the foreclosure of the mortgage subsequently brought by the Association, her defense having been predicated upon the ground that she signed the note and mortgage merely as the surety for her husband.

It is insisted that the complaint shows that the Association sustained loss in consequence of the ignorance, carelessness or unskillfulness of its attorney, and that the latter, with his sureties, must therefore respond to it in damages for the amount lost. No neglect or want of skill appear, except that the attorney was mistaken as to the law applicable to the state of the title of the borrower, and its availability as a security for the loan. Attorneys are very properly held to the same rule of liability for want of professional skill and diligence in practice, and for erroneous or negligent advice to those who employ them, as are physicians and surgeons, and other persons who hold themselves out to the world as possessing skill and qualification in their respective trades or professions. *Waugh v. Shunk*, 20 Pa. 130.

The practice of law is not merely an art; it is a science which demands from all who engage in it, without detriment to the public, special qualifications, which can only be attained by careful preliminary study and training, and by constant and unremitting investigation and research. But as the law is not an exact science, there is no attainable degree of skill or excellence, at which all differences of opinion or doubts in respect to questions of law are removed from the minds of lawyers and judges. Absolute certainty is not always possible. "That part of the profession," said Lord Mansfield, in *Pitt v. Yalden*, 4 Burr. 2060, "which is carried on by attorneys, is liberal and reputable, as well as useful to the public, when they conduct themselves with honor and integrity, and they ought to be protected where they act to the best of their knowledge and skill. But every man is liable to error, and I should be very sorry that it should be taken for granted that an attorney is answerable for every error or mistake, and to be punished for it by being charged with the debt which he was employed to recover for his client." *Wat-*

son v. Muirhead, 57 Pa. 161; *U. S. Mortgage Co. v. Henderson*, 111 Ind. 24, 34.

An attorney who undertakes the management of business committed to his charge thereby impliedly represents that he possesses the skill, and that he will exhibit the diligence ordinarily possessed and employed by well-informed members of his profession, in the conduct of business such as he has undertaken. He will be liable if his client's interests suffer on account of his failure to understand and apply those rules and principles of law that are well established and clearly defined in the elementary books, or which have been declared in adjudged cases, that have been duly reported and published a sufficient length of time to have become known to those who exercise reasonable diligence in keeping pace with the literature of the profession. *Hillegas v. Bender*, 78 Ind. 225, and cases cited; *Pennington v. Yell*, 11 Ark. 212, 52 Am. Dec. 262; *Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 184; *Weeks, Attorneys*, §§ 284-289; *Fenaille v. Coudert*, 44 N. J. L. 234; *Gambert v. Hart*, 44 Cal. 543.

Thus it has been said: "An attorney is liable for the consequences of his ignorance or non-observance of the rules of practice of the court he practices in, for the want of care in the preparation of a cause for trial; while, on the other hand, he is not answerable for an error in judgment upon points of new occurrence, or of nice or doubtful construction." *Chitty*, Cont. 482; *Godefroy v. Dalton*, 6 Bing. 460; *Dearborn v. Dearborn*, 15 Mass. 816.

It is his own fault, however, if he undertakes, without knowing what he needs only to use diligence to find out, or applies less than the occasion requires.

A lawyer is without excuse who is ignorant of the ordinary settled rules of pleading and practice, and of the statutes and published decisions in his own State; but he is not to be charged with negligence when he accepts as a correct exposition of the law a decision of the supreme court of his own State, nor can he be held liable for a mistake in reference to a matter in which members of the profession, possessed of reasonable skill and knowledge, may differ as to the law until it has been settled in the courts, nor if he is mistaken in a point of law on which reasonable doubt may be entertained by well informed lawyers. *Marsh v. Whitmore*, 88 U. S. 21 Wall. 173 [23 L. ed. 482]; *Kemp v. Burt*, 1 Nev. & Man. 262.

Now, while it is quite true that § 5119, Rev. Stat. 1881, which took effect September 19, 1881, prohibited a married woman from entering into any contract of suretyship, and declared all such contracts void as to her, and while it had been thoroughly settled that a married woman who had joined in a mortgage of her separate property to secure the debt of her husband was to be regarded as his surety (*Leary v. Schaffer*, 79 Ind. 567), it had never been held prior to the 23d day of January, 1884, when the judgment in *Dodge v. Kinney*, 101 Ind. 102, was pronounced, that a mortgage executed by a husband and wife, on lands held by them as tenants by entireties, was void as to both of them. It cannot fairly be said, therefore, that before the decision in *Dodge v. Kinney*,

supra, was made and promulgated, so as to have become known by those reasonably diligent in the profession, it was such a mistake to advise that a husband and wife might secure a debt of the former on his estate in lands held by himself and wife as tenants by the entireties, as could only have resulted from the want of

ordinary knowledge and skill, or from the failure to exercise reasonable care and caution. The error must be regarded as one into which any reasonably careful and prudent lawyer might have fallen, and therefore one for which the attorney was not liable.

The judgment is affirmed, with costs.

MINNESOTA SUPREME COURT.

James I. JELLETT, *Resp't.*,

W. A. RHODE, *Appt.*

(.....Minn.....)

*A parol lease of real estate for the term of one year, to commence *in futuro*, is invalid, being an agreement which by its terms is not to be performed within one year from the making thereof.

(April 17, 1890.)

APPEAL by defendant from a judgment of the Municipal Court for the City of St. Paul in favor of plaintiff in an action to recover rent alleged to be due under a parol lease. *Reversed.*

The case sufficiently appears in the opinion.

Messrs. Thompson & Taylor, for appellant;

In Minnesota, no decision ever has been made directly upon the point, but it is well settled, upon statutes corresponding to that of Minnesota, that no action will lie upon an oral lease for the full term of one year to begin *in futuro*.

Olt v. Lohnas, 19 Ill. 576; *Comstock v. Ward*, 22 Ill. 248; *Wheeler v. Frankenthal*, 78 Ill. 124; *Briar v. Robertson*, 1 West. Rep. 456, 19 Mo. App. 66; *Parker v. Hollis*, 60 Ala. 411; *Wolf v. Dozer*, 22 Kan. 436; *White v. Holland*, 17 Or. 8; *Atwood v. Norton*, 81 Ga. 507; *Roberts v. Tennell*, 3 T. B. Mon. 247; *Morehead v. Watkins*, 5 B. Mon. 229; *Crommelin v. Thiess*, 81 Ala. 412; *Delano v. Montague*, 4 Cush. 42; *Hawley v. Moody*, 24 Vt. 608; *Rawlins v. Turner*, 1 Ld. Raym. 786; *Ryley v. Hicks*, 1 Strange, 651.

The States which have held that an oral lease for one year to begin *in futuro* was valid and binding may be divided into two classes, dependent upon differences existing in their respective statutes.

In the first class are Indiana, Maryland and New Jersey, in which States, by an express provision of their Statute of Frauds, oral leases for a period not exceeding three years are valid; and so accounting for such holding.

See *Huffman v. Starks*, 81 Ind. 474; *Union Bkg. Co. v. Gittings*, 45 Md. 181; *Birckhead v. Cummins*, 83 N. J. L. 44.

*Head note by DICKINSON, J.

NOTE.—*Lease; Statute of Frauds.*

An oral lease for a longer period than that allowed by the Statute of Frauds has been held void only for the excess. Other authorities hold that it creates a tenancy from year to year (*Rosenblat v. Perkins* (Or.) 6 L. R. A. 267), and others a tenancy at will. *Wolke v. Fleming*, 108 Ind. 106, 1 West. Rep. 169.

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In the second class are New York, Michigan and Wisconsin, where, by Statute, the provision, "No action shall be maintained . . . upon any agreement, not in writing, etc., which is not to be performed within one year from the making thereof," is made to apply only to "goods, chattels and things in action," thus accounting for all the decisions rendered in these States.

See *Becar v. Flues*, 64 N. Y. 518; *Whiting v. Ohlert*, 52 Mich. 462; *Young v. Dake*, 5 N. Y. 464, 468; *Taggard v. Roosevelt*, 2 E. D. Smith, 100.

Mr. S. C. Olmstead, for respondent.

That the *infra annum* clause of the Statute does not apply to agreements relating to land is held in the following cases among many others:

Lord Bolton v. Tomlin, 5 Ad. & El. 354; *Grant v. Ramery*, 7 Ohio St. 167; *Sears v. Smith*, 8 Colo. 290; *Sobey v. Brisbee*, 20 Iowa, 105; *Jones v. Marcy*, 49 Iowa, 188; *Nash v. Berkmeir*, 83 Ind. 586; *Eaton v. Whitaker*, 18 Conn. 231; *Purple v. Rickert*, 8 Cow. 226; *Clarke v. Serricks*, 2 Up. Can. Q. B. 585; *Young v. Dake*, 5 N. Y. 464; *Becar v. Flues*, 64 N. Y. 518; *Taggard v. Roosevelt*, 2 E. D. Smith, 100; *Whiting v. Ohlert*, 52 Mich. 462; *Steininger v. Williams*, 68 Ga. 475; *Brown v. Kayser*, 60 Wis. 1. See 1 Sugd. Vend. chap. 4, § 1, note.

The Statute of this State is precisely the same as the Statutes of the States of New York, Michigan, Wisconsin and Colorado, and substantially the same as the Statutes of Georgia and Iowa; in all of these States the same question has arisen as the one involved in the case at bar, and in all those States it has been expressly held that oral leases for a term of one year, to commence in future, are valid.

Young v. Dake, 5 N. Y. 464; *Becar v. Flues*, 64 N. Y. 518; *Whiting v. Ohlert*, 52 Mich. 462; *Brown v. Kayser*, 60 Wis. 1; *Sears v. Smith*, 8 Colo. 288; *Sobey v. Brisbee*, 20 Iowa, 105; *Jones v. Marcy*, 49 Iowa, 188; *Steininger v. Williams*, 68 Ga. 475.

Dickinson, J., delivered the opinion of the court:

July 10, 1889, these parties entered into an oral agreement, the plaintiff leasing to the defendant certain real property for the term of one year from the 1st day of August at a year-

A lease for more than a year, void under How. Stat., § 6173, because signed by a person other than the owner, not thereunto authorized by the owner in writing, is not aided by the fact that a duplicate lease retained by the owner was signed by him, but never delivered to the lessee or known of by him. *Chesebrough v. Pingree* (Mich.) 1 L. R. A. 529.

ly rental of \$780, payable in monthly installments, in advance. The defendant entered into the occupancy of the premises on the first day of August, and remained in possession until the 28th of September, when he went out. This action is for the recovery of the stipulated monthly rental for the month of October, payable according to the terms of the agreement, on the 1st of that month.

By the terms of our Statute of Frauds (title 2, chap. 41, Gen. Stat. 1878) no action is maintainable upon a mere parol agreement that by its terms is not to be performed within one year from the making thereof (§ 6); no estate or interest in lands, other than leases for a term not exceeding one year, nor any trust, etc., shall be created, unless by act or operation of law, or by deed or conveyance in writing, etc. (§ 10); and every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party by whom the lease or sale is to be made, or by his authorized agent. § 12.

The agreement upon which this action is prosecuted is clearly within the language of section 6. By its terms the agreement was not to be performed within one year from its making. There is no reason why that section should not be deemed applicable to such a case as this, unless it is to be considered that the exception in section 10, and the implied exception in section 12, of leases "for a term not exceeding one year," or for a period not longer than one year, are effectual to exclude from the operation of section 6 leases for a term of one year, to commence *in futuro*. The reasons which led to the enactment of that part of section 6, above referred to, are as applicable to parol agreements leasing land not to be performed within one year, as in respect to any other kind of a contract. The evil result likely to follow from allowing such a contract, the performance of which is to be long postponed, to rest in parol, without any written evidence showing the terms of the agreement, are of the same nature, and just as likely to occur, as in the case of any other contract.

If a merely oral lease may be effectually made for a year to commence *in futuro*, it matters not how long the commencement of the term may be postponed. If such a case is not within the provision of section 6, then a lease may be thus made for a term to commence many years subsequent to the agreement. Such a case is so clearly within the plain, explicit language of section 6, and would so obviously involve the very evils to avoid which has been the well-understood purpose of this clause of the Statute of Frauds, that it should be construed as applicable, unless the other sections of the law very clearly manifest the intention to withdraw or exclude such cases from its operation. Such an intention is not manifest. Full effect may be given to the excepted cases in section 10, and to cases within the implied exception in section 12, consistently with the applicability of section 6 to parol

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leases for a term not to be completed within one year. "Leases for a term not exceeding one year," or for a period not longer than one year, may be made, if the term is to commence at once, and such a contract would not come under the terms of the Statute as to agreements not to be performed within one year. We see no sufficient reason, either from the terms or arrangement of the Statute, for excluding such cases as that before us from the operation of section 6. In this conclusion we are supported by the following authorities: *Olt v. Lohnas*, 19 Ill. 576; *Wheeler v. Frankenthal*, 78 Ill. 124; *Wolf v. Dozer*, 23 Kan. 486; *Briar v. Robertson*, 19 Mo. App. 66, 1 West. Rep. 456; *Parker v. Hollis*, 50 Ala. 411; *Atwood v. Norton*, 81 Ga. 507; *White v. Holland*, 17 Or. 3. See also *Roberts v. Tennell*, 8 T. B. Mon. 247.

The decisions upon the English Statute of Frauds (29 Car. II. chap. 3) have but little bearing upon the construction of our Statute, for the reason that by that Statute parol leases for a term not exceeding three years from the making thereof were authorized, and of course the provision in section 4 as to agreements not to be performed within one year could not be applicable to such cases. The same is true as to the Statute of Indiana, in which State parol leases like that under consideration are held valid.

In *Young v. Dake*, 5 N. Y. 468, it was held, overruling *Oronell v. Crane*, 7 Barb. 191 that such a lease was valid. The decision, however, was placed upon considerations which cannot be regarded under our Statute. One of these considerations was the fact that in the revision of the Statute the Legislature eliminated from the clause of the Statute of Frauds, excepting leases for a term not exceeding one year, the qualifying words, "from the making thereof," which was regarded as disclosing an intention to allow such a term to commence *in futuro*.

Again, it was considered that the statutory provision as to contracts which by their terms were not to be performed within one year was not applicable to contracts relating to leases of or interest in real estate, for the reason that the former provision was embraced in title 2 of the Statute, entitled "Of Fraudulent Conveyances and Contracts, Relative to Goods, Chattels and Things in Action," while the provisions in which parol leases of real estate were authorized are found in title 1, relating to "Fraudulent Conveyances and Contracts Relative to Lands."

This reason for the decision in *Young v. Dake* is not available under our Statute since the Revision of 1866, in which all of the provisions under consideration are embraced in one title denominated "Statute of Frauds."

In Michigan and Wisconsin the Statutes in this particular have been arranged and entitled as in New York, and in those States *Young v. Dake* has been followed, or cited with approval. It has also been followed in some other States, where the reasons upon which that decision was made were wholly inapplicable.

Judgment reversed.

C. J. SWANSON *et al.*, *Appts.*,
v.

MISSISSIPPI & RUM RIVER BOOM CO.,
Repts.

(....Minn....)

- *1. The right to use a navigable river is a public, and not a private, right, and the owner of land on the stream cannot maintain an action for an illegal obstruction of navigation which prevents his use of this public right.
2. To entitle him to maintain a private action, the obstruction must constitute an invasion or violation of some private right, as distinguished from the public right which he has of navigating the river in common with the rest of the public.
3. Held, that certain of the causes of action were properly dismissed, because they did not state facts constituting special damage for which a private action would lie; and that the others were also properly dismissed, because the evidence did not tend to connect the injuries complained of with any illegal or negligent act of the defendant, or to show that they were the proximate result of any such act.

(February 14, 1890.)

A PPEAL by plaintiffs from an order of the District Court for Hennepin County overruling a motion for new trial in an action to recover damages for the alleged unlawful obstruction of a navigable river, in which the several causes of complaint had been dismissed upon defendant's motion. *Affirmed.*

*Head notes by MITCHELL, J.

NOTE.—Navigable rivers, what are.

The common-law rule, making the ebb and the flow of the tide the test of navigability, is not now applicable to the United States. *Wiese v. Smith*, 3 Or. 445; *Hodges v. Williams*, 95 N. C. 331. Compare *Felger v. Robinson*, 3 Or. 456; *The Daniel Ball*, 77 U. S. 10 Wall. 557 (19 L. ed. 909); *The Montello*, 78 U. S. 11 Wall. 411 (20 L. ed. 191); *Chicago v. McGinn*, 51 Ill. 272; *McManus v. Carmichael*, 8 Iowa, 1; *Bucki v. Cone* (Fla.) 6 So. Rep. 160.

Tidal waters and rivers above tidewaters, which are in fact navigable the entire year, without reference to the manner or degree in which they are affected by the seasons, are presumptively public and navigable. *Sullivan v. Spotswood*, 32 Ala. 163.

The following have been judicially pronounced navigable rivers: the Androscoggin (*Thompson v. Androscoggin Co.* 54 N. H. 545; *Gerrish v. Brown*, 51 Me. 256); the Allegheny (*Dairymple v. Mead*, 1 Grant, Cas. 197); the Delaware and the Lehigh (*McKeen v. Delaware Div. Canal Co.* 49 Pa. 424); the Falla (*Ingram v. St. Tammany Police Jury*, 20 La. Ann. 226; *Hog Bayou* (*Sullivan v. Spotswood*, 32 Ala. 163); the Mohawk (*People v. Canal Appraisers*, 33 N. Y. 461; *Crill v. Rome*, 47 How. Pr. 866); the Monongahela (*Monongahela Bridge Co. v. Kirk*, 46 Pa. 112); the Ohio (*Porter v. Allen*, 3 Ind. 1; *Baker v. Lewis*, 38 Pa. 301); the Passaic (*Newark Aqueduct Board v. Passaic*, 45 N. J. Eq. 393); the Pond Branch (*Witt v. Jefeost*, 10 Rich. L. (S. C.) 389); the Savannah (*Lawton v. Comer* (Ga.) 7 L. R. A. 55, and *note*); the St. Joseph (*St. Joseph Co. v. Pidger*, 5 Ind. 13; *Williams v. Beardsley*, 2 Ind. 591); the Suwanee (*Bucki v. Cone* (Fla.) 6 So. Rep. 160); the Tualitin and the St. Mary (*Wiese v. Smith*, 3 Or. 445); the Wallamet. *Wallamet Iron Bridge Co. v. Hatch*, 19 Fed. Rep. 347.

In this country, as a general thing, all waters are deemed navigable which are really so, and especially L. R. A.

The sixth cause of action sought to recover damages for plaintiffs' being compelled to take wood, which they were floating down the river for use upon their premises, out of the river before it reached said premises, by reason of obstructions placed by defendant in the river, and convey the same to its place of destination over land.

The other causes of action are sufficiently set out in the opinion.

Messrs. Davis & Farnam, for appellants: The unlawful obstruction of a navigable stream is a common nuisance, subject to abatement in equity, and, where special injury has been sustained by a private citizen thereby, may be abated in equity or compensated for at law in damages at the instance of the citizen's private suit.

Schurmeier v. St. Paul & P. R. Co. 10 Minn. 82; *Dawson v. St. Paul F. & M. Ins. Co.* 15 Minn. 186; *Wilder v. De Cou*, 26 Minn. 11; *Rochette v. Chicago, M. & St. P. R. Co.* 83 Minn. 201; *Barnum v. Minnesota Transfer R. Co.* 83 Minn. 365; *Shero v. Carey*, 35 Minn. 423; *Adams v. Chicago, B. & N. R. Co.* 39 Minn. 286; *Carroll v. Wisconsin Cent. R. Co.* 40 Minn. 168; *Brayton v. Fall River*, 113 Mass. 229; *Stetson v. Faxon*, 19 Pick. 147.

If the injuries sustained by the plaintiffs are special, and the damages arising therefrom consequential, not necessarily direct, from the unlawful complained-of acts of the defendant in obstructing the navigable channel of the river, then the order of the trial court should be reversed.

Baxter v. Winoski Turnp. Co. 22 Vt. 114;

ly is it true with regard to the Mississippi and its principal branches. *McManus v. Carmichael*, 8 Iowa, 1; *Haight v. Keokuk*, 4 Iowa, 199; *Tomlin v. Dubuque, B. & M. R. Co.* 23 Iowa, 106; *Barney v. Keokuk*, 94 U. S. 836 (24 L. ed. 237); *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678 (27 L. ed. 442); *People v. St. Louis*, 10 Ill. 351; *Castner v. The Dr. Franklin*, 1 Minn. 73.

Those rivers must be regarded as public navigable rivers, in law, which are navigable in fact. *The Montello*, 87 U. S. 20 Wall. 430 (22 L. ed. 391).

A stream below tide water, running into the Savannah River, one hundred feet wide and fourteen feet deep, is a navigable stream the obstruction of which is a nuisance. *Charleston & S. R. Co. v. Johnson*, 73 Ga. 303.

Navigable rivers in Wisconsin are such as are navigable in fact, though not affected by the ebb and flow of the tide. *Diedrich v. Northwestern Union R. Co.* 42 Wis. 248; *Olson v. Merrill*, 42 Wis. 203.

Test of navigability of rivers.

Capability of use by the public for purposes of transportation and commerce affords the true criterion of navigability of a river. *The Montello*, 87 U. S. 20 Wall. 430 (22 L. ed. 391); *Treat v. Lord*, 43 Me. 552; *Moore v. Sanborne*, 3 Mich. 519; *Spring v. Russell*, 7 Me. 273; *Browne v. Scofield*, 3 Barb. 239; *Tyler v. People*, 3 Mich. 320; *Wilson v. Forbes*, 2 Dev. L. 30; *Ingram v. Threadgill*, 3 Dev. L. 56; *Stuart v. Clark*, 2 Swan, 2.

Every stream which in its natural state can be used for the purposes of commerce is a public navigable river. *Walker v. Allen*, 72 Ala. 456; *Little Rock, M. R. & T. R. Co. v. Brooks*, 39 Ark. 403.

So a river made useful for commerce by improvements is a navigable river. *Ibid.*

To make a stream navigable, there must be some

Allison v. Chandler, 11 Mich. 542; *Hughes v. Heiser*, 1 Binn. 468.

So long as the plaintiffs were aware that the obstructions in the stream were such that they could not pass them, they were not bound to commit their property to the water and have it destroyed before recovery would lie; nor if they knew of them were they bound to refrain from attempting to navigate.

Martin v. Bliss, 5 Blackf. 85.

Rafts of the plaintiffs were, without any negligence upon the part of the plaintiffs' servants, destroyed through obstructions placed in the channel of the river, or, at least, created by logs over which the defendant exercised control and the care of which was exclusively its charge, and plaintiffs were entitled to recover the damages thereby resulting.

Bacon v. Arthur, 4 Watts, 487.

One who is forced by an obstruction to carry his cargo overland in order to reach a particular point, or to abandon his voyage, suffers peculiar damage, distinguishable from that inflicted upon the general public and entitling him to recover the additional expenses to which he is unlawfully subjected.

Gould, *Waters*, § 230; *Iveson v. Moore*, 1 Ld. Raym. 486; *Chichester v. Lathbridge*, Willes, 71; *Rose v. Miles*, 4 Maule & S. 101; *Hart v. Basset*, Sir T. Jones, 156; *Greasley v. Codling*, 2 Bing. 268; *Blagrace v. Bristol Waterworks Co.* 1 Hurlst. & N. 369; *Brown v. Watson*, 47 Me. 161; *Dudley v. Kennedy*, 68 Me. 465; *Stetson v. Faxon*, 19 Pick. 147; *Hughes v. Heiser*, 1 Binn. 468; *Philadelphia v. Collins*, 68 Pa. 106; *Philadelphia v. Gilmartin*, 71 Pa. 141; *Milarkey v.*

Foster, 6 Or. 378; *Memphis & O. R. Co. v. Hicks*, 5 Sneed, 427; *Shero v. Carey*, 35 Minn. 428; *Pierce v. Dari*, 7 Cow. 608.

So long as damages are natural, even though not the necessary consequence of the wrongful acts, they are special in their character, and if specially averred, the complaint is sufficient, and, if proof be admitted and the fact established, will warrant a recovery at the hands of the jury.

Vandersice v. Newton, 4 N. Y. 180; *Griggs v. Fleckenstein*, 14 Minn. 92; *Enos v. Hamilton*, 27 Wis. 256.

Messrs. Jackson, Atwater & Hill, for respondent:

The deterioration of appellants' property by reason of being prevented from using a certain public highway does not constitute special damage.

Shaubert v. St. Paul & S. C. R. Co. 21 Minn. 502; *Rochette v. Chicago, M. & St. P. R. Co.* 32 Minn. 201; *Barnum v. Minnesota Transfer R. Co.* 38 Minn. 365; *Shero v. Carey*, 35 Minn. 428; *Houck v. Wachter*, 34 Md. 265; *Winterbottom v. Lord Derby*, L. R. 2 Exch. 316; *Powell v. Bunker*, 91 Ind. 69; *Thelan v. Farmer*, 36 Minn. 225; *Lansing v. Smith*, 3 Cow. 153.

All the injuries complained of are the direct and necessary result of the obstruction of the public right of navigation, but do not result from the invasion of any private right of the individual, and therefore there is no special damage.

Hickok v. Hine, 23 Ohio St. 523; *Barnes v. Racine*, 4 Wis. 454; *Jarvis v. Santa Clara*

commerce and navigation upon it which is essentially valuable. *Woodman v. Pitman*, 4 New Eng. Rep. 702, 79 Me. 454.

A fresh-water stream, above tide water, is navigable and a public highway only when it is susceptible of being used, in ordinary condition, for a highway of commerce. *Morrison v. Coleman*, 5 L. R. A. 384, 87 Ala. 656.

To be navigable, it must, for a season or considerable part of the year, contain a sufficient depth of water to fit it for transportation. *Ibid.*

A fresh-water stream having the requisite volume of water only occasionally as the result of freshets, and for brief periods, is unnavigable and private property. *Ibid.*

Navigability does not cease at a point where navigation is interrupted by falls. *Spooner v. McConnell*, 1 McLean, 337.

Navigable rivers are public highways.

A stream which in its natural condition is capable of being used for purposes of navigation is a public highway. *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308.

The Statute admitting California provides that all navigable rivers within it shall be common highways to the use of its inhabitants and to the citizens of the United States. *Cardwell v. American River Bridge Co.* 19 Fed. Rep. 562.

Under the Constitution of Colorado, title to the unappropriated waters of the State is vested in the public, with a perpetual right to their use in the people. *Wheeler v. Northern Colo. Irrigation Co.* 10 Colo. 553.

The public in West Virginia have a right to use as a highway not only tidal rivers, in which the tide ebbs and flows, and fresh-water rivers capable of being profitably used to carry on commerce in 7 L. R. A.

their natural state without artificial improvements but also floable streams,—that is, such streams as are capable of being profitably used by the public in their natural state to float logs or timber or the products of mines or tillage to markets or mills. *Gaston v. Mace* (W. Va.) 5 L. R. A. 382, and note.

The public easement on a watercourse naturally navigable depends not so much upon actual user as upon capability or for advantageous use as a highway. *Healy v. Joliet & C. R. Co.* 2 Ill. App. 436.

The right of navigation in all navigable waters is the paramount public right of every citizen. *Flanagan v. Philadelphia*, 43 Pa. 219.

The right to store or boom logs on river banks and in natural harbors follows as a corollary to the right of the public to the free use of streams. *Cannfield v. The City of Erie*, 1 Brown, N. P. (Mich.) 106.

Power of States over navigable rivers.

The power of States over navigable rivers exclusively within their borders has never been surrendered to the general government. *Chicago v. McGinn*, 51 Ill. 266.

The provision in the Ordinance of 1787, that certain rivers "shall be common highways and forever free," does not prevent their improvement by the States. *Palmer v. Cuyahoga Co.* 3 McLean, 228.

If Congress has not legislated on the subject, a State may authorize the erection of a dam across the river. *Pound v. Turuk*, 95 U. S. 459 (24 L. ed. 526); *Delaware & H. Canal Co. v. Lawrence*, 3 Hun, 163.

A State may prohibit the floating of loose logs, in order to make navigation safe and prevent its being monopolized by the few. *Craig v. Kline*, 65 Pa. 399.

But no State can place any obstruction in or upon any navigable waters, against the will of Congress, and Congress may summarily remove

Valley R. Co. 52 Cal. 488; *Miller v. New York City*, 109 U. S. 385 (27 L. ed. 971); *Pittsburgh & L. E. R. Co. v. Jones*, 1 Cent. Rep. 884, 111 Pa. 204; *Blackwell v. Old Colony R. Co.* 122 Mass. 1; *Severy v. Central Pac. R. Co.* 51 Cal. 195; *Bigley v. Numan*, 53 Cal. 408; *Crook v. Pitcher*, 61 Md. 515; *Houck v. Wachter*, 84 Md. 272; *State v. Barton*, 36 Minn. 145; *Billard v. Erhart*, 35 Kan. 611; *Shaubut v. St. Paul & S. O. R. Co.* 21 Minn. 502; *State v. Holman*, 40 Minn. 369; *Rude v. St. Louis*, 12 West. Rep. 288, 98 Mo. 406; *Ricket v. Metropolitan R. Co.* L. R. 2 H. L. 175.

The distinction between damages which are special and those which are common to the public lies in the determination of the question whether the right, by the invasion of which the damages are caused, is a public right or a private right.

Frits v. Hobson, L. R. 14 Ch. Div. 542; *Brayton v. Fall River*, 118 Mass. 218; *Garites v. Baltimore*, 53 Md. 422; *Blackwell v. Old Colony R. Co.* 122 Mass. 1; *Thayer v. New Bedford R. Co.* 125 Mass. 256; *Miller v. New York City*, 109 U. S. 385 (27 L. ed. 971).

Up to the present time this court has sustained no action, unless there appeared either that the only access to plaintiffs' premises was obstructed by the nuisance (*Brakken v. Minneapolis & St. L. R. Co.* 29 Minn. 41), or that there was a direct physical invasion of plaintiffs' property.

Wilder v. De Cou, 26 Minn. 10; *Wilkin v. St. Paul*, 33 Minn. 181.

In all the other cases, although the plaintiffs suffered inconvenience and pecuniary loss un-

der various forms from the obstruction to the public way, yet the court held these injuries the same in kind, though not in degree, with those suffered by the public.

Carroll v. Wisconsin Cent. R. Co. 49 Minn. 168; *State v. Barton*, 36 Minn. 145; *Thelan v. Farmer*, 86 Minn. 225; *Shero v. Carey*, 35 Minn. 423; *Ofstie v. Kelly*, 83 Minn. 440; *Barnum v. Minnesota Transfer R. Co.* 33 Minn. 865; *Rochette v. Chicago, M. & St. P. R. Co.* 83 Minn. 201; *Schuster v. Lemond*, 27 Minn. 253; *Shaubut v. St. Paul & S. O. R. Co.* 21 Minn. 502; *Dawson v. St. Paul F. & M. Ins. Co.* 15 Minn. 188.

Mitchell, J., delivered the opinion of the court:

The plaintiffs allege that they were riparian owners of two tracts of land on the Mississippi River,—one in Anoka County, which they used as a yard for the manufacture of brick, and another in Wright County, thirty-five miles above, which they used for the purpose of piling wood, to be conveyed by river down to their brickyard; that the defendant, a corporation created by the laws of this State (Sp. Laws 1867, chap. 184), had wrongfully and unlawfully interfered with and obstructed the channel of the river by driving piles therein, fastening booms, and detaining large quantities of logs therein, thereby absolutely preventing the navigation of the river between plaintiffs' two tracts of land. Predicated upon this alleged illegal obstruction of the navigation of the river, plaintiffs set up eleven causes of action for damages. The first, second, third,

such obstruction at its pleasure. *Stockton v. Baltimore & N. Y. R. Co.* 32 Fed. Rep. 9.

Police juries have no power to obstruct navigable watercourses by bridges without draws. *Goodwill v. Police Jury*, 38 La. Ann. 722; *Willamett Iron Bridge Co. v. Hatch*, 19 Fed. Rep. 347.

Unlawful obstructions a common nuisance.

Any obstruction which interferes with commerce between the States is unlawful. *Silliman v. Troy & W. T. Bridge Co.* 11 Blatchf. 274.

Any obstruction, whether by wharves, piers, bridges or other constructions, is a common or public nuisance. *State v. Parrott*, 71 N. C. 311; *Re Water Comrs.* 3 Edw. Ch. 220, 6 N. Y. Ch. L. ed. 660; *Newark Pl. Road & Ferry Co. v. Elmer*, 9 N. J. Eq. 754; *South Carolina R. Co. v. Moore*, 28 Ga. 308; *State v. Freeport*, 43 Me. 198; *State v. Dibble*, 4 Jones, L. 107; *Gold v. Carter*, 9 Humph. 369; *Selman v. Wolfe*, 37 Tex. 68; *Barnes v. Racine*, 4 Wis. 454; *Georgetown v. Alexandria Canal Co.* 37 U. S. 12 Fed. 91 (9 L. ed. 1012).

So a boom erected in such waters is an unlawful obstruction. *Atlee v. Northwestern Union Packet Co.* 38 U. S. 21 Wall. 389 (22 L. ed. 619).

An obstruction of a river for six weeks during the season for navigation must be presumed to have been unreasonable. *Enos v. Hamilton*, 37 Wis. 256.

A pier erected without license or authority is an unlawful obstruction and subjects the owner to liability for damages caused by it. *Atlee v. Northwestern Union Packet Co.* *supra*.

The obstruction to floatage of logs by a dam is unlawful. *Volk v. Eldred*, 23 Wis. 410.

A rope stretched across the principal channel of a navigable river is an unlawful obstruction of navigation. *The Swan*, 19 Fed. Rep. 455.

But a temporary use of such a line in handling

vessels is not necessarily unlawful (*The Echo*, 19 Fed. Rep. 458), as the temporary interruptions to navigation are not illegal. *People v. Horton*, 64 N. Y. 610.

Any obstruction incident to commerce is not unlawful. *Cummins v. Spruance*, 4 Harr. (Del.) 315.

A well-defined watercourse of running water, although dry at certain seasons, is within the doctrine against obstructions. *Schnelitz v. Bailey*, 11 Cent. Rep. 737, 45 N. J. Eq. 179.

Liability for wrongful obstruction.

If a person wrongfully obstructs a navigable stream, he is liable for the consequences. *Philadelphia, W. & B. R. Co. v. Philadelphia & H. De G. Steam Tow Boat Co.* 64 U. S. 23 How. 209 (16 L. ed. 438).

Obstructions in navigable streams within States are indictable as offenses against their laws, but not as against United States laws which do not exist. *Willamette Iron Bridge Co. v. Hatch*, 126 U. S. 1 (31 L. ed. 629).

An unlawful obstruction to navigation is remediable by indictment or by abatement, or equity may take jurisdiction upon information filed by the attorney-general. *Woodman v. Pitman*, 4 New Eng. Rep. 702, 79 Me. 456.

Action of damages, when.

A public nuisance may also be a private nuisance; but before a person can sue he must have sustained special damage distinct from what he suffers in common with the public. *Yolo Co. v. Sacramento*, 36 Cal. 193; *Crommelin v. Cox*, 30 Ala. 318; *Burrows v. Pixley*, 1 Root, 362; *Gates v. Blincoe*, 2 Dana, 158; *Seeley v. Bishop*, 19 Conn. 128; *Cole v. Sprowl*, 35 Me. 161; *Stetson v. Faxon*, 19 Pick. 147; *Barden v. Crooker*, 10 Pick. 388; *Runyon v. Bordine*, 14 N. J. L. 472; *Dougherty v. Bunting*, 1

fourth, ninth and tenth are all alike, viz., that at the several dates named the plaintiffs had wood piled on their upper tract which they contemplated transporting by river to their brickyard below, but were prevented from doing so by these obstructions to navigation, and were compelled to leave it on the upper tract for over a year, whereby it became injured and depreciated in value. The eighth cause of action is not in principle different from these. It is that by these obstructions the plaintiffs were prevented from transporting a lot of wood by river from the upper to the lower tract, and were compelled to take it out of the river at a point where they were not owners of the shore, and were compelled to pay the riparian owner the sum of \$50 for the privilege of doing so.

It is not alleged that the plaintiffs had started to transport the wood down the river not knowing of or anticipating the existence and effect of these obstructions before they embarked upon the use of the river. Hence it does not fall within the category of those cases where a person who has actually started to travel a highway or embarked on the navigation of a river is unexpectedly stopped by an obstruction, and is compelled to turn back, or is put to expense in removing the obstruction, which some authorities hold constitutes special damage for which a private action will lie, distinguishing it from a case where a person merely had the use of the highway in contemplation. *Ross v. Miles*, 4 Maule & S. 101. But see *Winterbottom v. Lord Derby*, L. R. 2 Exch. 816; *Houck v. Wachter*, 84 Md. 265; *Blackwell v. Old Colony R. Co.* 122 Mass. 1.

The eleventh cause of action is that plaintiffs, by reason of being thus prevented from transporting this wood by river to their brickyard, were compelled to buy at great expense other and inferior fuel for use in their business of brick making, and that by reason of the use of such inferior fuel a large quantity of brick were spoiled.

When the case was called for trial, the court, on defendant's motion, dismissed the case as to each of these several causes of action. The ground upon which the motion was made and granted is not stated, but it doubtless was that none of them stated facts constituting a cause of action. In this the trial court was clearly right. The wrong alleged is the obstruction of the navigation of the river, which is a public nuisance. The right of plaintiffs to navigate

the river is not a private, but a public, right which they are entitled to only in common with the whole public; and the facts alleged only show that the present consequential damages to them from being prevented from navigating the stream may be greater in degree, but not different in kind, from those suffered by other riparian owners or the rest of the public who may desire to use this highway. It is not alleged that these obstructions resulted in any trespass upon or actual invasion of the private property of the plaintiffs, or that they cut off all access to it, but, taking the allegations of the complaint at their full value, they simply show that defendant has committed a public nuisance by obstructing a public highway which deprives the plaintiffs of the cheapest and most convenient route by which to convey their wood from their wood lot to their brickyard. The case, therefore, clearly comes within the familiar rule that an individual cannot maintain a private action for a public nuisance by reason of an injury which he suffers in common with the public; that it is only when he sustains special injury differing in kind, and not merely in degree or extent, from that sustained by the general public, that an individual may recover damages in a private suit. We think the case is fully covered by the following, among other, decisions of this court: *Shaubert v. St. Paul & S. C. R. Co.* 21 Minn. 502; *Rochette v. Chicago, M. & St. P. R. Co.* 33 Minn. 201; *Barnum v. Minnesota Transfer R. Co.* 33 Minn. 365; *Shero v. Carey*, 35 Minn. 423.

The principle and its reason are thus stated by Lord Coke: "For if the way be a common way, if any man be disturbed to go that way, or if a ditch be made overthwart the way so as he cannot go, yet shall he not have an action upon his case; and this the law provided for avoiding of multiplicity of suits; for if any one man might have an action, all men might have the like." 1 Co. Inst. 56a.

While universally recognizing this principle, the courts have not always been clear or consistent in its application, sometimes seeming to confound for special damage some special circumstances in the situation of the individual by reason of which he has suffered from the obstruction of the highway damages greater in extent, but the same in kind, as those sustained by the general public. We think the correct rule to be that to constitute special damage there must be an invasion or violation

Sandf. 1; *Gold v. Philadelphia*, 115 Pa. 184, 6 Cent. Rep. 567; *Mechling v. Kittaning Bridge Co.* 1 Grant, Cas. (Pa.) 416; *Abbott v. Mills*, 8 Vt. 529; *Baxter v. Winooski Turnp. Co.* 22 Vt. 114; *Hatch v. Vermont Cent. R. Co.* 28 Vt. 142; *United States v. New Bedford Bridge Co.* 1 Wood. & M. 431; *Talbot v. King*, 22 W. Va. 6.

Case by a private individual for a public nuisance does not lie where plaintiff has suffered no particular direct damage or pecuniary actual loss. *McLauchlin v. Charlotte & S. C. R. Co.* 5 Rich. L. 583; *Carey v. Brooks*, 1 Hill, L. (S. C.) 365.

No individual can maintain an action for damages for a public nuisance, unless he has sustained an injury which is special in its character, or which is not common to others affected by the nuisance. *Dougherty v. Bunting*, 1 Sandf. 1; *Butler v. Kent*, 19 Johns. 223; *Mills v. Hall*, 9 Wend. 315; *Davis v. New York*, 14 N. Y. 500; *Carhart v. Auburn Gas* 7 L. R. A

Light Co. 22 Barb. 297; *Osborne v. Brooklyn City R. Co.* 5 Blatchf. 306; *Currier v. West Side E. P. R. Co.* 6 Blatchf. 437; *Seeley v. Bishop*, 19 Conn. 123.

Yet if anyone sustains a special injury by an act which is unlawful on the ground of public injury, he may maintain an action for his own special injury. *Myers v. Malcolm*, 6 Hill, 292; *Henly v. Lyme*, 5 Bing. 91; *Lyme Regis v. Henley*, 3 Barn. & Ad. 77, 1 Bing. N. C. 222; *Pieroe v. Dart*, 7 Cow. 609; *Lansing v. Smith*, 8 Cow. 144, 4 Wend. 25; *Mills v. Hall* and *Carhart v. Auburn Gas Light Co.* *supra*; *Burrows v. Pixley*, 1 Root, 362.

Any—the least—injury to an individual, by a public nuisance, e. g., an expense of time or money or labor, etc., entitles him to an action. *Pieroe v. Dart*, 7 Cow. 609; *Hughes v. Heiser*, 1 Binn. 463; *Ross v. Miles*, 4 Maule & S. 101; *Lansing v. Smith*, *supra*.

of using a public highway in common with the rest of the public. What we apprehend *Lord Coke* means by the reason assigned for the rule is that a mere public right to the use of a highway which an individual has only as a member of the public, and in common with them, must be asserted and maintained by the public as such, instead of permitting each individual to maintain a private action to abate the public nuisance, or for damages for an invasion of a mere public right; and such a rule, we think, is sustained by considerations both of principle and public policy. Our conclusion is that the court was right in dismissing the case as to these causes of action. The eleventh might clearly have been dismissed, upon the ground that the damages were remote, and not proximate.

2. Upon the fifth, sixth and seventh causes of action, the plaintiffs submitted their evidence, and when they rested the court dismissed them also on the ground that plaintiffs had failed to make out a cause of action, which ruling is assigned as error.

It is unnecessary to consider the questions discussed by counsel as to the extent and nature of the powers of the defendant under its charter, for we have been unable to discover anything in the evidence introduced or offered which, under the narrowest possible view of these charter powers, tends to connect the injuries complained of with any illegal or negligent act of defendant, or to show that they were the result (proximate at least) of any such act. Take, for example, the fifth cause of action; as to one matter all that the evidence offered would tend to prove is that there was a jam of logs against the piers of Anoka bridge, and that, in passing through, plaintiffs' woodraft struck a "sweeper" that projected from the jam, and was broken up. But the defendant did not build and maintain the bridge piers, and, assuming the logs belonged to defendant (which was not proven), it does not appear what caused the jam. There is not a particle of evidence that it was caused by any negligence of the defendant, or that it was derelict in its duty in efforts to break it. Without any reference to the defendant's charter, the courts will take judicial notice that floating logs is a legitimate use of this public stream, if exercised in a proper manner, and that for obstructions resulting from such use by unavoidable accident, the log owner would no more be liable than the owner of a steamboat which might accidentally sink while lawfully navigating the river. Take, again, the seventh cause of action, which was for damages caused by logs and debris cast against or upon plaintiffs' shore. There was not a particle of evidence offered that defendant's booms or piers caused this, or that it was caused by any negligence or fault of defendant in driving or handling its logs.

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pened. It was perhaps intended to bring this cause of action within the doctrine of *Weater v. Mississippi & R. R. Boom Co.*, 28 Minn. 534, and *McKenzie v. Mississippi & R. R. Boom Co.*, 29 Minn. 298; but an examination of those cases will show how far short of them, on the facts, this case falls.

In another instance, a raft was caught between the shore and some logs set loose by the Otsego ferryman,—an act for which defendant was in no way responsible, unless, forsooth, it had no right to use the river at all for floating logs. In another case a raft of sheer booms of the defendant came down the river, and destroyed a raft of wood, but no offer was made to prove how this occurred, or that it was caused by any negligence or misconduct of the defendant. For anything that appears, it might have been an unavoidable accident, or one of the perils of navigation.

The same general criticism will apply to the evidence offered to support the sixth cause of action, which we think might also have been dismissed on the complaint, as not stating a case of special damage for which a private action would lie. In fact plaintiffs throughout the case seem to have proceeded on the theory that they had a right to the navigation of the river, absolutely free and clear of all logs. But such a conception of their rights was fundamentally erroneous. Floating logs is as legitimate a use of the stream as floating wood rafts or running steamboats; and as two bodies cannot occupy the same space at the same time, the use of the river for one purpose is necessarily, in a certain sense, an obstruction to its use for another purpose, and each person must, in his use of it, submit to such inconveniences as necessarily or naturally result from the proper exercise of the same right by others. The only instance we can find where there was an attempt to connect, even indirectly, plaintiffs' loss with what might have been an unlawful act of defendant, was where, what plaintiffs call the regular channel of the river being obstructed, they ran their wood raft down another course and struck a sandbar. In view of what occurred on the trial in connection with the offer of this evidence, we must assume the fact to be that plaintiffs, with previous knowledge that this channel was wholly obstructed, started out with their raft to run it down another way, and there met with this accident. On this state of facts there was no natural or proximate connection between the injury and the act of defendant in obstructing the channel. It would be analogous to a case where a man, knowing that one road was obstructed, started out on his journey by another, and perhaps poorer, road, and there met with an accident.

Order affirmed.

INDIANA SUPREME COURT.

Jonathan EVANS, *Appt.*,

v.

ADAMS EXPRESS CO.

(....Ind.....)

1. To stand in the carriage-way of a public street at night, engaged in conversation, heedless of horses and vehicles that are passing, is such negligence as will prevent recovery for injuries resulting from being thrown down by a wagon the driver of which did not see the person injured, although the driver, also, was negligent.
2. Where the united and contemporaneous negligence of two persons causes a collision between them in a public street, neither can recover from the other for a resulting injury.

(February 27, 1890.)

APPEAL by plaintiff from a judgment of the Circuit Court for Gibson County in favor of defendant in an action to recover damages for personal injuries resulting from a collision between plaintiff and a vehicle in charge of defendant's servant and alleged to have been caused by such servant's negligence. *Affirmed.*

The facts sufficiently appear in the opinion.

NOTE.—Contributory negligence defeats recovery of damages for personal injuries.

A person cannot recover for injuries caused by the negligence of others to which his own negligence has contributed. *Allen v. Maine Cent. R. Co. (Me.) 19 Atl. Rep. 105.*

Any negligence of the plaintiff, however slight, that contributed to the injury, precludes his recovery. *Schoenfeld v. Milwaukee City R. Co. 74 Wis. 438; Moore v. Central R. Co. 24 N. J. L. 268; Bunyon v. Central R. Co. 26 N. J. L. 556; Drake v. Mount, 38 N. J. L. 441; Pennsylvania R. Co. v. Matthews, 38 N. J. L. 531; Delaware, L. & W. R. Co. v. Toffey, 38 N. J. L. 525; East Tennessee, V. & G. R. Co. v. Hull (Tenn.) 12 S. W. Rep. 419.*

One unnecessarily standing in a place known by him to be dangerous is guilty of such contributory negligence as will prevent a recovery. *Schoenfeld v. Milwaukee City R. Co. supra.*

Where a traveler on a highway voluntarily, and not of necessity, attempts to cross over a skid placed across the sidewalk in front of a store for the purpose of unloading a wagon, there being room to pass around it, and is injured, he is negligent. *Jochem v. Robinson, 72 Wis. 192.*

Contributory negligence as a defense.

Contributory negligence which will defeat a recovery consists in such acts or omissions on the part of the plaintiff, amounting to a want of ordinary care, as, concurring or co-operating with the negligent acts of the defendant, are a proximate cause or occasion of the injury. *Richmond & D. R. Co. v. Picklesimer, 13 Va. L. J. 646.*

It is a good defense to an action for damages for a personal injury; and it is immaterial to what extent it is proven, provided it contributed to the injury. *Kyne v. Wilmington & N. R. Co. (Del.) 13 Cent. Rep. 391; Gerity v. Haley, 29 W. Va. 98.*

Freedom from negligence is not one of the essentials of the defense of contributory negligence. *7 L. R. A.*

Mr. Lucius C. Embree, for appellant:
Negligence on the part of the plaintiff, which does not contribute proximately to the injury, will not bar his action if the negligence of the defendant was the proximate cause of the injury.

Indianapolis, P. & O. R. Co. v. Pitzer, 4 West. Rep. 250, and 7 West. Rep. 896, 109 Ind. 179; Nave v. Flack, 90 Ind. 205.

By "proximate cause" is intended an act which directly produced or concurred directly in producing the injury. By "remote cause" is intended that which may have happened, and yet no injury have occurred, notwithstanding that no injury could have occurred if it had not happened.

Baltimore & O. R. Co. v. State, 38 Md. 542; Northern Cent. R. Co. v. State, 29 Md. 421. See Adams v. Wiggins Ferry Co. 27 Mo. 95, 73 Am. Dec. 247; Butterfield v. Forrester, 11 East, 60; Davies v. Mann, 10 Mees. & W. 546; Keruhacker v. Cleveland, C. & O. R. Co. 8 Ohio St. 172, 62 Am. Dec. 246; Trow v. Vermont Cent. R. Co. 24 Vt. 487, 58 Am. Dec. 191; New Haven Steamboat Co. v. Vanderbilt, 16 Conn. 428; Sedgwick, Damages, 470; Angell, Carriers, 532; Redfield, Railways; Brownell v. Flagler, 5 Hill, 283; Inman v. Funk, 7 B. Mon. 588; Radley v. London & N. W. R. Co. L. R. 1 App. Cas. 754.

The party who last has a clear opportunity

There must be negligence in the defendant before plaintiff can contribute to its injurious results. *Louisville & N. R. Co. v. Hall, 57 Ala. 708.*

The fact that the defendant was also guilty of negligence, and was performing acts which it had no right to perform, will not render the latter liable. *Trousdale v. Pacific Coast Steamship Co. 80 Cal. 521.*

Where the negligence of plaintiff contributed to his injury, caused by a defect in highways, there can be no recovery, unless the defendant, if aware of the plaintiff's danger, and having the opportunity to avert it, fails to use ordinary caution to do so. *Phillips v. Ritchie Co. Ct. 31 W. Va. 477.*

One who has by his own negligence contributed to an injury, cannot recover, though the negligence of the other party was gross. *Atkyn v. Wabash R. Co. 41 Fed. Rep. 193.*

But it has been held that although plaintiff may be guilty of some negligence, yet, where negligence of defendant is gross, plaintiff may recover for injuries sustained by him. *Chicago & A. R. Co. v. Johnson, 2 West. Rep. 288, 116 Ill. 308.*

So the element of contributory negligence does not enter into a case where on the part of the defendant there was a direct violation of a positive enactment. *Weity v. Indianapolis & V. R. Co. 2 West. Rep. 662, 106 Ind. 55.*

Where the plaintiff could have avoided the consequences of defendant's negligence, he is expressly prohibited from recovering under the Georgia Code. *Smith v. Central R. & Bkg. Co. (Ga.) 10 S. E. Rep. 111.*

But plaintiff may recover, although he contributed to the injury, if he was not in fault in so doing. *South Covington & C. Street R. Co. v. Ware, 84 Ky. 287.*

As to the relative degrees of care and vigilance demanded of footmen and horsemen on a public street, see *Stringer v. Frost, 3 L. R. A. 614, 116 Ind. 477.*

Pollock, Torts, 874 et seq.; *Evansville & O. R. Co. v. Hiatt*, 17 Ind. 102; *Indianapolis & O. R. Co. v. Wright*, 22 Ind. 376; *Dowell v. General Steam Nav. Co.* 5 El. & Bl. 195; *Birge v. Gardiner*, 19 Conn. 507; *St. Louis & S. E. R. Co. v. Mathias*, 50 Ind. 65.

There must be a want of ordinary care contributing to the injury as a proximate cause before contributory negligence can exist.

Am. & Eng. Encyclop. Law, 24, and authorities cited; *Houston & T. O. R. Co. v. Carson*, 46 Tex. 345; *Bergman v. St. Louis, I. M. & S. R. Co.* 4 West. Rep. 594, 88 Mo. 678; *Kelley v. Union R. Co.* 18 Mo. App. 151; *Baltimore & O. R. Co. v. Kean*, 3 Cent. Rep. 716, 65 Md. 394; *Tuff v. Warman*, 5 C. B. N. S. 585; *State v. Manchester & L. R. Co.* 52 N. H. 528; *Jucker v. Chicago & N. W. R. Co.* 52 Wis. 151; *Richmond & D. R. Co. v. Howard*, 79 Ga. 44; *Muehlhausen v. St. Louis R. Co.* 6 West. Rep. 857, 91 Mo. 832; *Baltimore & O. R. Co. v. State*, 38 Md. 366; *Kerwhacker v. Cleveland, C. & C. R. Co.* 3 Ohio St. 172; *Donohue v. St. Louis, I. M. & S. R. Co.* 6 West. Rep. 848, 91 Mo. 357.

Every person upon the driveway of a street owes it as a duty to every other person lawfully in the same situation to use such a degree of care as an ordinary prudent man would be supposed to exercise for the purpose of avoiding injury to those around him.

2 Thomp. Neg. p. 1200, § 46; 2 Shearm. & Redf. Neg. 4th ed. § 654; *Williams v. Crealy*, 112 Mass. 79; *Bigelow v. Reed*, 51 Me. 825.

Messrs. A. P. Twineham and W. D. Robinson, also for appellant:

It is not negligence *per se* for a footman to stop upon the street of a city, even at a place other than on a crossing for footmen.

2 Thomp. Neg. 1200.

Negligence is the want of ordinary care. Ordinary care is that degree of care which a person of ordinary prudence is presumed to use, under the particular circumstances, to avoid injury. It must be in proportion to the danger to be avoided and the fatal consequences involved in its neglect.

Toledo & W. R. Co. v. Goddard, 25 Ind. 197.

Instruction number 18 took the question of the appellant's negligence from the jury and was erroneous.

Pennsylvania Co. v. Hensil, 70 Ind. 575; 2 Thomp. Neg. 1236; Shearm. & Redf. Neg. 4th ed. § 11; *Albion v. Hetrick*, 90 Ind. 547; *Huntington v. Breen*, 77 Ind. 29; *Wilson v. Trafalgar & B. C. Gravel Road Co.* 88 Ind. 326; *Howland v. Union Street R. Co.* 150 Mass. 86; *Chicago & I. R. Co. v. Lans* (Ill.) 23 N. E. Rep. 518; *Ohio & M. R. Co. v. Collarn*, 73 Ind. 261; *Chicago & E. I. R. Co. v. O'Connor*, 6 West. Rep. 778, 119 Ill. 586.

Slight negligence on the part of the plaintiff will not defeat his action for damages because that is the want of extraordinary care, and such care is not required of a person injured by the carelessness of another as a condition precedent to his right to recover damages for an injury sustained.

Griffin v. Willow, 43 Wis. 509; *Oremer v. Portland*, 86 Wis. 92; *Wharton*, Neg. § 324; 7 L. R. A.

use of the street, and they are not bound to keep in motion all the time, but may stop for business or pleasure without being precluded from their right to recover damages inflicted by the negligence of another.

2 Thomp. Neg. 1200; *Britton v. Cumington*, 107 Mass. 847; *Hunt v. Salem*, 121 Mass. 294.

A footman's stopping on the crossing in the street, as plaintiff was, was at most only passive negligence. It could have nothing of contribution to the injury in it. It was simply a condition and not a cause. He must have done more,—committed some overt act, taken some delicate chance or risk.

Bishop, Non-Contract Law, § 458; *O'Brien v. McGlinchy*, 68 Me. 552; *Bigelow*, Torts, 2d ed. 807; *Davies v. Mann*, 10 Mees. & W. 546; *Wright v. Brown*, 4 Ind. 98.

Messrs. Clarence A. Buskirk and John W. Brady for appellee.

Mitchell, Ch. J., delivered the opinion of the court:

Evans sued the Adams Express Company to recover damages for injuries alleged to have resulted to him from being run over in a public street in the City of Princeton by a horse and wagon alleged to have been negligently driven by the agent or employé of the Company. There was a verdict and judgment for the defendant below. There is no controversy as to the facts. The evidence shows that about 7 o'clock on the evening of November 12, 1888, the appellant was standing on a crosswalk in a public street of the City of Princeton conversing with two acquaintances. After being thus engaged for a few moments, they stepped aside from the crosswalk, and continued in the street talking. The appellant stood in the street about eight feet from the curb, near the margin of the traveled track, over which horses and vehicles were accustomed to pass, there being, however, about thirty feet of space in the street, over which a horse and wagon might have been driven without coming in contact with the appellant. It was after night-fall, but it was not so dark but that persons standing or a horse and vehicle approaching on the street could be seen.

The Adams Express Company employed an agent at Princeton, who transacted its business for a stipulated price per month, and furnished his own horse and wagon, and employed a driver at his own expense, to carry express packages and matter to and from the trains. The United States mail was also carried to and from the trains in the same wagon, and when not occupied in carrying express or mail matter, the horse and wagon were employed by the owner, as opportunity offered for hire. On the evening in question the boy having the horse and wagon in charge received a sack of mail at the postoffice, and while on his way with it received at another place a parcel which was to go by express. With the mail-sack and express package in his wagon, the boy was pursuing his way to the depot, another boy occupying the driver's seat with him, the horse being permitted to walk at a moderate pace,

without being guided. When within about twelve feet of the place where the appellant and his friends were standing, the boy observed them; and seeing two of them move out of the way, and being playfully engaged with the other boy, he did not afterwards see the appellant until the wagon wheel struck and threw him to the ground, inflicting painful injuries upon his person. The jury having found, in answer to a special interrogatory, that the appellant was not in the exercise of ordinary care at the time he was injured, it is proper to remark that no question is made on this appeal relating to the liability of the Express Company for the negligence of the driver employed by the owner of the horse and wagon. *Wabash, St. L. & P. R. Co. v. Farver*, 111 Ind. 195, 9 West. Rep. 621.

At the proper time the plaintiff asked the court to give the jury the following, among other instructions: "(12) The fact that at the time of the alleged injury the plaintiff was in the street, and not on the sidewalk or regular crossing for footmen, will not of itself preclude him from recovering, if you find that he was injured, as alleged, by the negligence of the driver of the vehicle in running it against and over him. An individual on the street of a city, whether he be on a sidewalk, a foot-crossing or on a carriage-way of such street, is bound to use only ordinary care to avoid injury, and whether such care has been used depends upon all the facts and circumstances surrounding the event."

This instruction relates to the subject of contributory negligence, and, while we regard it as in some respects defective, we do not deem it necessary to point out wherein it is inaccurate; since, even if it had been entirely correct, it would not have been error to refuse it, because the court had sufficiently expounded the law to the jury covering the subject of contributory negligence. We may remark, however, that it cannot be said, as a matter of law, that standing in the carriage-way of a public street in a city, in the dark, and engaging in conversation, without using sufficient vigilance to discover a slowly approaching horse and vehicle, may not preclude the recovery of damages for injuries resulting from the inattention of the driver. The degree of vigilance must always be in proportion to the danger which is reasonably to be apprehended from the situation in which one voluntarily places himself, and if a footman selects the carriage-way of a public street as a place at which to hold converse with his friends after night-fall, he may know that the situation and occasion are such as to demand more than ordinary vigilance to avoid contact with vehicles in the charge of inattentive drivers, who are not looking out to avoid footmen standing in the way.

The following instruction given by the court is complained of: "(15) Where one knows of danger which threatens injury to himself, or where one voluntarily places himself in a dangerous place, as in a public street where horses and vehicles pass, and he can avoid such danger by reasonable exertion, his negligent failure to do so will prevent his recovery for an injury so incurred."

We are unable to discover any just ground of objection to the above instruction, and the 7 I. R. A.

same may be said of the one which follows, in which the court told the jury that: "(18) To stand in a public street, knowing that it is where wagons and horses are liable to pass, and especially to stand in such a place at night, and to pay no heed to the danger of so standing, and take no care to avoid the danger of such a place, is not exercising reasonable care to protect one's self from the danger of such a place."

It is said that the instruction is erroneous, because it assumes that a public street, where horses and wagons are liable to pass, is a dangerous place. The assumption contained in the instruction is that it is dangerous to stand heedlessly in such a place, especially at night. This is so, according to the common observation and experience of mankind, and we are unable to see how the jury could have been misled by being so instructed.

When the facts assumed present a case in which the standard of duty is fixed and certain, or when the measure of duty as defined by law is the same under all circumstances, to omit the duty is negligence, and may be so declared by the court; or when, upon a given hypothesis, negligence is so clearly defined and palpable as to constitute negligence under all circumstances, it is the duty of the court to declare that, if the facts assumed are found from the evidence, the conclusion of negligence follows as a matter of law. It is for the court to say whether or not, upon a given state of facts, negligence may or can reasonably be inferred. The jurors have to say whether or not the facts assumed have been proven, and whether, when they are submitted to them by the court, negligence ought to be inferred. *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404-421, 11 West. Rep. 877, and cases cited; *Carter v. Carver*, 97 Ind. 497; *Woolery v. Louisville, N. A. & C. R. Co.* 107 Ind. 381, 5 West. Rep. 667; 2 Thomp. Neg. 1236.

For a footman to stand heedlessly at night in the carriage-way, on a public street, where it is known that horses and vehicles are liable to pass momentarily, is so unusual that persons riding or driving along the street might well be thrown off their guard, and for one to do so without taking any precaution to avoid danger from persons riding or driving on the street is negligence. In effect, this is what the court told the jury. It is true that a footman about to cross a street is not held to the degree of diligence that is imposed upon a traveler at the crossing of a street by a railroad track. *Stringer v. Frost*, 116 Ind. 477, 2 L. R. A. 614.

It is, however, the duty of persons crossing or about to cross a public street on foot, to look and take proper precautions so as to avoid collision with approaching horsemen or vehicles. We quite agree that, if the driver of the express wagon saw the appellant standing in the street, it was his duty to turn out, and not drive his wagon upon him; and if the facts presented a case in which it appeared that the driver, after seeing the appellant, had any reasonable ground to apprehend that he was not aware of the approaching wagon, and was unconscious of the danger that was imminent, a recovery would have been justified, notwithstanding the antecedent negligence of the appellant. *Cincinnati, I. St. L. & C. R. Co. v.*

Long, 112 Ind. 166, 11 West. Rep. 822; *Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 179, 4 West. Rep. 250, and 7 West. Rep. 896; *Shearm. & Redf. Neg.* 4th ed. § 61.

One whose negligence has contributed to an accident from which he has sustained an injury will not be debarred the right to recover if the defendant, after having discovered his peril, having also reasonable ground to believe him unconscious of danger, or unable to avoid it, might himself, by the exercise of ordinary diligence, have prevented the mischief which followed. The ground upon which a plaintiff may recover, notwithstanding his own negligence, is that the defendant, after becoming aware of the danger to which the plaintiff was exposed, failed to use a proper degree of care to avoid injuring him. *Zimmerman v. Hannibal & St. J. R. Co.* 71 Mo. 476.

Such a case is not, however, presented by anything contained either in the instructions or the facts which appear in the record.

Where the negligence of two persons is contemporaneous, and the fault of each operates directly to cause the injury, the rule deducible from the authorities is that the plaintiff cannot recover if, by the exercise of ordinary care on his part, he might have avoided the injurious results of the defendant's negligence. *Bigelow*, Torts, 811; *Mayhew v. Burns*, 108 Ind. 328, 1 West. Rep. 577; *Murphy v. Deane*, 101 Mass. 455.

When a collision occurs in a public street by the united and contemporaneous negligence of two persons, neither can recover from the other for a resulting injury.

The facts and instructions bring the case clearly within the rule last above stated. What has already been said disposes of all the questions made, and demonstrates that no error was committed by the court which would justify a reversal of the judgment.

Judgment affirmed, with costs.

Thomas F. QUILL, *Appt.*,
v.

CITY OF INDIANAPOLIS *et al.*

(.....Ind.....)

1. Section 2, Act of March 9, 1889, requiring publication of a notice of the passage of a municipal resolution declaring the necessity for certain improvements, which shall state the time and place where property owners may make objections to the necessity for the construction thereof, does not contemplate the appointment of a committee to hear the objections or the determination of the rights of the objectors, such determination being provided for in another section; hence such notice is not rendered invalid by the facts that objections are required to be filed with the city clerk, and that no committee is appointed to hear them.

2. The validity of the issuance by a municipal corporation of bonds or certificates to raise funds to construct a street improvement, which show on their face the purpose for which they are issued, and that they are payable out of a special fund to be derived from assessments upon the property bordering on the street improved, and for the payment of which out of

the general funds of the corporation no liability exists, is not affected by the constitutional provisions limiting the indebtedness of such corporations.

3. Where by the Act authorizing a municipal corporation to construct street improvements the portion of the expense thereof chargeable to it is to be paid in cash upon the completion of the work, no indebtedness can be said to be incurred therefor, even although during the pendency of the work bonds may be issued to raise funds to prosecute the same.

4. One who has signed an agreement provided for in an Act authorizing street improvements, that in consideration of the right to pay his assessment in installments, he will not question its validity, cannot attack the provision of the Act prohibiting the questioning of the assessment by one in such position.

(February 8, 1890.)

APPEAL by plaintiff from a judgment of the Circuit Court for Marion County in favor of defendants in an action to enjoin the issuance of certain bonds and the enforcement of a certain street assessment against plaintiff's property. *Affirmed.*

Messrs. Denny & Elliott for appellant.

Mr. W. L. Taylor, City Atty., for appellees.

Mitchell, Ch. J., delivered the opinion of the court:

It is shown by the complaint, upon which all the questions in the present case arise, that the plaintiff, Thomas F. Quill, is a resident taxpayer of the City of Indianapolis, and the owner of a certain described lot in one of the additions to the City. It appears that the common council and board of aldermen, in August, 1889, assuming to proceed under the authority of the Act of March 9, 1889, entitled "An Act Concerning Powers and Duties of Cities and Incorporated Towns, . . . Providing the Mode and Manner of Making Street Improvements and Building Sewers . . . and Permitting Cities and Incorporated Towns to Issue Street and Sewer Improvement Bonds," passed an ordinance for the improvement of a certain designated street in the City on which a lot owned by the plaintiff abutted.

The contract for the improvement was duly awarded to Robert Kennington, who completed the work accordingly, after which the city engineer made and reported his final estimate of the total cost of the improvement, and apportioned the amount to the several lots and parcels of land bordering on the street, as required by § 817, Elliott's Supp., being section 6 of the above Act. The report having been presumably adopted, and an assessment made by the proper authorities after due notice, it is averred that the contractor threatened to enforce payment of the amount assessed against the plaintiff's lot, and, being unable to pay, it is alleged that the plaintiff, in order to prevent the sacrifice of his property, executed, under protest, a written agreement in which he stipulated, in effect, that in consideration of having the right to pay the amount assessed against his lot in installments, he would make no objection to the legality or regularity of his assessment, etc.

It is also averred that in making the improvement the City incurred a debt of \$97 for that portion thereof occupied by street and alley crossings, which it is alleged is in violation of the Constitution of the State, and that the corporation is about to issue bonds, as provided in the Act mentioned, to cover the cost of the improvement.

After setting out the amount or value of the taxable property within the City and the present indebtedness, it is averred that the indebtedness already exceeds 2 per centum of the value of all the taxable property.

It is also averred that while the property owners were duly notified, as provided in section 2 of the Act, of the time and place where they might make objection to the necessity of the improvement, that no committee was appointed to hear the objections, which, according to the direction of the common council, were required to be filed with the city clerk. It is contended that the giving of such a notice was not a compliance with the provisions of the Act, because no committee was appointed to hear and determine the validity of the objections. It is also contended that the City has no power to issue the bonds provided for in the Act, because its present indebtedness exceeds the limit fixed by article 18 of the Constitution of the State, and that so far as the Act assumes to authorize the issuing of bonds without regard to the amount of the existing indebtedness it is unconstitutional.

Section 818, Elliott's Supp., requires the common council, whenever it deems it necessary to make any of the improvements authorized by the Act, to declare the necessity therefor by resolution, and also to state the kind, size, location and terminal points thereof. Ten days' notice of the passage of the resolution is required to be given by two weeks' publication in some newspaper of general circulation; and it is also required that the notice thus published shall state the time and place where the property owners along the line of the proposed improvement can make objections to the necessity for the construction thereof. This Statute contemplates the publication of notice for two successive weeks, ten days prior to the day fixed for making objections; that is, the first publication must have been made twenty-four days before the time therein fixed. The Statute does not require or contemplate the appointment of a committee to hear the objections, or that there should be any determination of the rights of the objectors. It simply contemplates that no action shall be taken by the common council, after resolving to make the improvement, until notice is given and an opportunity afforded the property owners to present for the consideration of the council such objections as they may make to the necessity for the construction of the work.

It is designed to prevent the city authorities from entering inconsiderately upon the construction of expensive improvements, without affording the property owners, who are in the end to pay for them, the opportunity to present their objections at the outset, which are intended to be rather as advisory to the common council than otherwise. This purpose could be accomplished as well by requiring objections to be filed with the clerk to be by

him laid before the common council, as in any other way. The right of the property owners to appear before the common council for the purpose of urging the validity of any objections filed with the clerk is in no way abridged or impaired. The right to a hearing is secured to each property owner by another provision of the Act. We discover no valid objection to the notice.

It is conceded that the present bonded indebtedness of the City exceeds the limit fixed by the Constitution, but it is contended that the cost of improving the street and alley crossings payable by the City must and will be paid in cash, and that the bonds authorized by the Act in question are merely improvement bonds, for the payment of which the City is not liable, and that they are hence not an indebtedness of the City within the contemplation of the Constitution.

So much of article 18 of the State Constitution as is germane to the subject under examination declares: "No political or municipal corporation in this State shall ever become indebted, in any manner or for any purpose, to an amount in the aggregate exceeding 2 per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by such corporation shall be void."

It becomes necessary to determine whether bonds or certificates issued in pursuance of the provisions of the Act above mentioned create an indebtedness within the inhibition of section 18. It is essential, therefore, that we consider the Act and ascertain its scope, purpose and effect. An examination of the Statute discloses at once that the entire cost and expense of constructing any work or improvement provided for therein, for the payment of which bonds or certificates may be issued, is to fall primarily and exclusively upon the property benefited, except only for such part of the work as shall be occupied by street and alley crossings, the expense of which the corporation is to pay. Provision is made whereby, during the progress of the work, estimates may be made from time to time of the amount of work done by the contractor, and the amount of the estimates, less a reasonable percentage to secure the completion of the contract, may be paid out of the corporate treasury; but the amount of such estimates is made a lien upon the several parcels of ground upon which they are assessed in favor of the municipality and the owner of the certificates or bonds which may afterwards be issued. Elliott's Supp. § 816.

Of course the money thus advanced by the City does not constitute a debt against the City. It is simply money advanced by the City to be repaid by the property owners.

The Statute provides that when the work is completed a final estimate of the total cost thereof is to be made, and distributed according to a rule prescribed, against each lot or parcel of ground bordering on the street or alley improved. This is to be reported to the common council of the City. Notice to and a hearing by each person feeling himself aggrieved is

provided for, and after the report, with such alterations or amendments as may be made, is adopted, the common council is required to assess against the several lots or parcels of ground the several amounts which should be assessed on account of the improvement. The amounts so assessed become a lien upon the several lots or parcels of ground, and are to be placed on the city tax duplicate and charged against the several lots and become payable in 10 per cent installments to be collected as other taxes are collected, with 6 per cent interest to be collected from the date of the final estimate, payable semi-annually. It is provided that the proceeds arising from the assessments so made, when collected, shall constitute a special fund for the payment of the costs of the improvement, and the bonds and certificates thereafter provided for. Provision is made for the issuance of bonds by the City for the purpose of raising money with which to pay for the improvement, or bonds or certificates may be issued to the contractor in payment for the work; but in either case it is required that the bonds shall bear the name of the street or alley improved or sewer constructed, and that they shall be payable out of the special fund provided for in the Act.

Without summarizing further, it is enough to say the remedy of the holders of the bonds or certificates is confined exclusively to the special fund provided for, and to the collection of assessments by enforcing the lien upon the lots or parcels of ground assessed with the cost of the improvement. The City is in no way liable for the payment of the bonds except out of the special fund to be accumulated from assessments made against the property benefited. According to the scheme promulgated in the Statute, in case the assessments are paid without delinquency, it is impossible for a single bond or certificate to mature in advance of the accumulation of a special fund devoted exclusively to its payment. If the assessments become delinquent, the remedy of the holders of the bonds or certificates is confined to the property. There is no liability against the City. The special fund provided for and the property are the sources from which the holders of the bonds and certificates must receive their pay, the city authorities acting merely as an agency for making and collecting the assessments, and as the custodian of the fund when the assessments are collected. In this they do not act as the agents of the City, but as special agents to accomplish a public end. *Montgomery Co. Comrs. v. Fullen*, 111 Ind. 410, 9 West. Rep. 651.

A fair interpretation of the Statute requires that the character of the bonds and the fact that they are payable out of a special street-improvement fund shall appear upon the face of the paper, thus making it apparent to the world that they are not to be regarded as the obligations of the corporation. While the common council and officers of the City are designated as the instruments to be used in executing the scheme devised, it is apparent all the way through that the entire expense of constructing an improvement for which bonds may be issued is to be borne exclusively by the property benefited.

In *Strick v. Cox*, 111 Ind. 299, 9 West. Rep. 71. R. A.

849, it was held that of county commencing money to free gravel road (ness against the c article 13 of the c ciples which uph our conclusion i *Comrs. v. Hill*, 11

Merely issuing show upon their the course of coi ment, and that th fund to be derive property borderin from creating a d indebtedness cannot legal, equitable o sum of money to relation of a credi moral right to call to pay. *State v. Rep. 845.*

It is not always istence of an indeb an absolute legal ri that sense the Stat ed. *Mayor of Ba*

It is, however, e that an obligation contract, express o holder thereof unc the promisor a sum is under a legal o regard to any futur for street improv ground that the ad the cost of the im hanced in value to assessed against it, received a peculiar do not share in com Ind. 279, 9 West. F 114 Ind. 200, 18 W *Philadelphia*, 65 Pa land, 84 Ohio, 551.

The municipality by the improvement the law in question, obligation to pay. of the City to pay de or condition of the payment is to be m City discharge the c by the Statute, their exhausted. They a create an indebtedne

In *Sackett v. New* ing in reference to the now under considera 'indebtedness' in this agreement of some money where no sui made for the promp tion imposed by the

Within the definiti dantly clear that no result against a city f improvement bonds.

In *Valparaiso v. (* general conclusion thorough and caref case the current resou

for the payment of a debt when it comes into existence, a contract to supply water to a city, under which debts against the city may arise from time to time, covering a period in the future, was not within the inhibition of the Statute. These cases are more than sufficient to vindicate our conclusion that any bonds which can be issued under the law in question are not affected by the constitutional inhibition.

As respects the expense for so much of street and alley improvements as shall be occupied by the street and alley crossings, it is fairly apparent from the whole scope and tenor of the law that the corporation becomes liable to pay that in cash, upon the completion and final estimate of the work, or as estimates therefor may be made from time to time. This being so, no debt results on that account.

It is said, however, that so much of section 819 as provides that "no suit shall lie to restrain or enjoin the collection of such assessments," and that the validity of such assessment shall not be questioned, is unconstitutional because it is an attempt to deprive the land owner of all substantial remedy for the protection of his property, thereby in effect depriving him of his property without due process of law. While we are satisfied that it would be within the power of the Legislature to enact that one who had stood by while an improvement was being made, under color of statutory authority, until the work was substantially completed, and until his property had received the benefit of the money expended, should not thereafter question the validity of the assessment, we are not required to go to that extent in the present case. *Prezinger v. Harness*, 114 Ind. 491, 18 West. Rep. 846; *Ross v. Stackhouse*, *supra*.

It is apparent from the connection in which it occurs that the above provision only applies to those persons who, in consideration of their right to pay their assessments in semi-annual installments, agree in writing, to be filed with the city clerk, that they will not make any objection to the legality or regularity of their respective assessments. Such an agreement is required by section 821, as the condition upon which the property owner may secure the benefit of the installment scheme for which the Act provides. When the work is completed the property owner has his election to refuse to sign the agreement provided for and stand upon his common-law rights in respect to contesting the validity of the assessments made against him, in which case the assessment becomes due whenever made, or he may waive any irregularities and secure the benefit of ten years' time by signing an agreement to that effect. Since, as we have seen, the law makes no provision whereby the bonds go out with any credit from the municipality issuing them, this feature of the law puts the securities or bonds beyond question, by giving them the absolute credit of the property upon which they are made a lien of the same degree as taxes are a lien, and removing all question as to the validity of the assessments.

While, as we have said, we do not doubt the power of the Legislature to incorporate into the Statute the feature complained of, even without the agreement, for it is little else than the affirmation of a common-law principle, there is no 7 L. R. A.

room to question its validity as applied to one who has signed the agreement provided for.

What has been said disposes of all the questions argued or involved in the record, and, as we find no ground for reversing the ruling of the learned court from which the appeal is prosecuted, *the judgment is affirmed, with costs.*

Petition for rehearing overruled June 6, 1890.

Board of Commissioners of KNOX COUNTY, *Appt.*,

William H. JOHNSON.

(....Ind....)

1. The rule that mandamus will lie to compel a board of commissioners to approve the bond of a public officer or show cause for not approving it does not apply where the rejection of the bond operates as a decision against the right of the applicant to hold the office, since such decision is a judicial one from which an appeal will lie.
2. The failure of a school superintendent who has been elected and duly inducted into office to give, within the proper time, the special bond required by the Act of March 2, 1889, will not *per se* forfeit his title to the office.
3. Where an officer is rightfully in office and there is a fair question, as there was under the Act of March 2, 1889, as to whether the time within which he is directed to file a special bond in order to be entitled to continue in office begins to run from the date of his election or upon the happening of a future event, and he files the bond within the time designated after such event happens, a declaration that he has vacated the office, made without a hearing by a board which has no general power to appoint such officers, does not oust him therefrom.
4. One who has been duly elected and inducted into an office, and who institutes proceedings to determine his right to continue therein after an attempt has been made to oust him therefrom for failure to file a special bond, need not prove himself eligible to the office.

(April 25, 1890.)

APPEAL from a judgment of the Circuit Court for Knox County, rendered upon an appeal from a decision of the Board of Commissioners of Knox County refusing to approve a special bond tendered by the County Superintendent of Public Schools, in favor of the appellant directing the approval of the bond. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. W. A. Cullop and C. B. Kessinger, for appellant:

Upon the refusal of the Board to act, appellee's remedy was by mandate to set this subordinate tribunal in motion, commanding it to act in the premises or show cause why.

Condit v. Newton Co. 25 Ind. 422; *Decatur Co. v. State*, 86 Ind. 8; *State v. Knox Co.* 101 Ind. 898; *Boone Co. v. State*, 61 Ind. 379; *State v. Lewis*, 10 Ohio St. 129.

NOTE.—Mandamus, title to office cannot be tried by. See note to *Fleming v. Guthrie* (W. Va.) 3 L. R. A. 53-57.

tion of the bond within thirty days after the governor issued his proclamation protected his title to the office.

As our statement of facts shows, the appellee was elected after the Act of March 2, 1889, went into force, and the question is whether he lost his title to the office by his failure to give the special bond within thirty days after his election. If he did lose his title to the office, then he is in no situation to complain, for if he is not entitled to the office he has no cause of action. The section of the Statute which governs the case reads thus:

"It shall be the duty of the several county school superintendents of this State, within thirty days from the issuing of the proclamation by the governor, as hereinbefore provided for, and of every county school superintendent hereafter elected, before he enters upon the discharge of his official duties, to enter into a special bond, with at least two freehold sureties of such county, payable to the State of Indiana, conditioned that they will faithfully and honestly perform all the duties required of them by this Act, and account for and pay over all moneys that may come into their hands pursuant to the provisions of this Act, in a penal sum which shall be equal in amount to \$100 for every one thousand inhabitants of their respective counties, as shown by the last census immediately preceding the giving of such bond, to be approved by the board of commissioners of their respective counties; and upon the failure of any county school superintendent to give such bond, his office shall become immediately vacant, and the board of commissioners of his county shall immediately appoint such competent and suitable person to fill such vacancy for the unexpired term of his office."

We cannot agree with the appellee's counsel that the Statute does not apply to superintendents elected after the law went into force, but who had given the general bond at the time of their election. We see no reason for attempting to change the words used in the Statute, and they clearly direct that superintendents elected after its passage shall file a special bond within thirty days after their election. It is only those who were elected prior to the time the Statute took effect that are allowed thirty days after the governor issues his proclamation to file a special bond.

But it by no means results from the construction we have given the Statute that the appellee lost his title to the office to which he was elected and to which he had been legally inducted. It is held by our own and other courts that statutes requiring official bonds to be filed within a designated time are directory and not mandatory. Upon this question the authorities are harmonious. *State v. Porter*, 7 Ind. 204; *Smith v. Cronkhite*, 8 Ind. 184; *Indianapolis v. Geisel*, 19 Ind. 844; *Indianapolis v. Wright*, 19 Ind. 846; *Speaks v. United States*, 18 U. S. 9 Cranch, 28 [3 L. ed. 645]; *People v. Holley*, 12 Wend. 481; *State v. Churchill*, 41 Mo. 41; *State v. Texas Co. Ct.* 44 Mo. 280; *Sprout v. Lawrence*, 33 Ala. 674; *State v. Ely*, 43 Ala. 568; *Kearney v. Andrews*, 10 N. J. Eq. 70; *State v. Falconer*, 44 Ala. 696.

This rule is carried very far, for it is held, without substantial diversity of opinion, that

unless the Statute makes the filing of a bond within a limited time a condition precedent to the right to the office, the failure to file it within the time prescribed will not work a forfeiture of the right to the office nor create a vacancy.

In the case of *Chicago v. Gage*, 95 Ill. 593, 85 Am. Rep. 183, the Statute provided that upon failure to file a bond within the time designated, the person chosen shall "be deemed to have refused said office, and the same may be filled by appointment," and it was held not to change the rule.

In *State v. Toomer*, 7 Rich. L. 216, the provision of the Statute was, that upon the failure of the person elected to file a bond within the time limited, "the office shall be deemed absolutely vacant, and shall be filled by election or appointment," and the court adjudged upon full consideration that title to the office was not lost. But we cannot further quote from the adjudged cases, and we cite them without comment. *State v. Colvig*, 15 Or. 57; *State v. Peck*, 30 La. Ann. 290; *State v. Ring*, 29 Minn. 78.

Under the established rule, the mere failure of the appellee to give the additional and special bond required by the Act of 1889 did not, it is clear, forfeit his title to the office, for his case is much stronger than those to which we have referred. That the case of the appellee is an unusually strong one is apparent when it is brought to mind that he was actually and rightfully in office, having duly qualified as the law directs. As he was rightfully in office and had duly qualified, his failure to execute the special bond cannot by any possibility be considered as a failure to perform a condition precedent to his right to the office. The utmost that can be said is that it was his duty, if he desired to continue in office, to file the special bond required by the Act of 1889.

If the appellee had lost title to the office it must be for the reason that before he filed the special bond the Board of Commissioners had declared the office vacant. In order to determine the effect of this declaration it is necessary to consider the facts and give some attention to the provisions of the Act. The proclamation of the governor was not issued until more than thirty days after the election of the appellee, and until the proclamation was issued no duty could be required of the superintendent which made the bond necessary. There is, indeed, reason for the contention of the appellee's counsel that no superintendent, whether elected before or after the passage of the Act, was bound to give the special bond until the governor's proclamation was issued, for, until that was done, there was no necessity for a bond. Section 6 of the Act provides that as soon as the contract for the furnishing of books shall be entered into, the governor shall issue his proclamation announcing such fact to the people of the State. While we feel compelled to yield to the explicit provisions of section 10, and to hold that the direction contained in it applies to all superintendents elected after the passage of the Act, we must also hold that there is a substantial and close question involved, for there is no little reason for holding that until the governor issued his proclamation the school superinten-

a question, too, upon which not only laymen, but lawyers, might, in the utmost good faith, entertain opposite views.

The question comes to this: Can a person rightfully in office be ousted for the failure to give an additional and special bond within the time prescribed, in a case where there is a substantial and close legal question as to when the time begins to run, without a day in court and a hearing?

It is to be remembered that the Board of Commissioners has no power to elect a county superintendent, nor any general power to appoint, so that the question is very different from one arising in a case where the removal is made by the appointing power. The power to oust an officer rightfully in office is essentially a judicial one, except where it is exercised by the appointing power. *State v. Harrison*, 113 Ind. 484, 18 West. Rep. 870; *Page v. Hardin*, 8 B. Mon. 672; *Dullam v. Wilson*, 58 Mich. 392.

If it is judicial, then it seems clear that the officer is entitled to a hearing.

In *Williams v. Bagot*, 8 Barn. & C. 786, Bagley, J., said: "It is contrary to common justice that a party should be concluded unheard."

The question was fully considered in the case of *Reg. v. Archbishop of Canterbury*, 1 El. & El. 545, and it was held that there could not be a removal without a hearing. This decision was made upon a statute providing that a curate whose license was revoked might "appeal to the archbishop of the province, who shall confirm or annul such revocation, as shall seem to him proper." Lord Campbell said: "No doubt the archbishop acted most conscientiously and with a sincere desire to promote the interests of the Church but we all think he has taken an erroneous view of the law. He was bound to hear the appellant and he has not heard him. It is one of the first principles of justice that no man shall be condemned without being heard."

Delivering an opinion in a case involving the right to remove an officer, Chief Justice Marshall said: "It is a principle of natural justice, which courts are never at liberty to dispense with unless under the mandate of positive law, that no person shall be condemned unheard or without an opportunity of being heard." *Meade v. Deputy Marshal of Va. Dist.* 1 Brock. 824.

In the case of *Com. v. Slifer*, 25 Pa. 23, the doctrine was carried very far, perhaps too far, for it was held that although the governor had the power to appoint, still he could not remove an officer without giving him an opportunity to be heard.

In the case of *Biggs v. McBride*, 17 Or. 640, the question arose in a case where the governor, acting under a statute, removed a railroad commissioner who held his office by virtue of a legislative enactment, and the court, in discussing the question whether the power to remove was executive or judicial, said: "But it is believed, under either view, and by whomsoever the removal for cause may be exercised, it must be done upon notice to the delinquent 7 L. R. A.

See also 7 L. R. A. 435.

Many other cases affirm the same general doctrine. *State v. Hawkins*, 44 Ohio St. 98, 3 West. Rep. 125; *People v. New York Fire Comrs.* 72 N. Y. 448; *People v. New York*, 19 Hun, 441; *State v. St. Louis*, 90 Mo. 19, 6 West. Rep. 464; *Willard's App.* 4 R. I. 601; *Field v. Com.* 82 Pa. 482; *Foster v. Kansas*, 112 U. S. 201 [28 L. ed. 629]; *Kennard v. Louisiana*, 92 U. S. 480 [28 L. ed. 478].

In the two cases last cited, the Supreme Court of the United States assumed jurisdiction, without hesitation or question, of cases involving the right to remove state officers and examined the statutes and proceedings so far as to ascertain whether there was due process of law under the Fourteenth Amendment, thus tacitly deciding that without a hearing an officer cannot be removed.

Our conclusion is that where, as here, an officer is rightfully in office, and there is a fair question as to whether the time within which he is directed to file a special bond in order to entitle him to continue in office begins to run from the date of his election or upon the happening of a future event, and he does file a bond within the time designated after such event does happen, a declaration that he has vacated the office, made without a hearing, does not oust him. We are far within the authorities in asserting this conclusion, but the case does not require that a broader or more general one should be asserted.

As the appellee had been duly elected and inducted into office, and as the only question that was presented by his failure to file the additional bond required by the Act of 1889 was as to his right to continue in office, it was not necessary for him to show that he was eligible to the office. There is a radical difference between such a case as this and one wherein the plaintiff asserts a right to be admitted to an office.

Judgment affirmed.

Petition for rehearing denied May 28, 1890.

PENNSYLVANIA CO., *Appt.*,

v.

Nicholas MARIEN.

(.....Ind.....)

1. Railway companies are bound to keep the platforms at their passenger sta-

NOTE.—Common carriers of passengers; obligations and liabilities.

A common carrier may constitute itself such by advertising or general acceptance of employment. *Citizens Street R. Co. v. Twiname*, 10 West. Rep. 824, 111 Ind. 587.

A person transporting passengers for hire upon a railroad operated by him is a common carrier. *Davis v. Button*, 78 Cal. 247.

The obligations and liabilities of a common carrier do not depend upon contract. *Hannibal & St. J. R. Co. v. Swift*, 79 U. S. 12 Wall. 202 (20 L. ed. 423); *Philadelphia & R. R. Co. v. Derby*, 55 U. S. 14 How. 468 (14 L. ed. 502).

Common carriers of passengers are obliged to

tions in a safe condition for persons to enter and leave the cars; and failure to do so will render the company liable to persons injured, without fault on their part, on account of the defect.

3. Whether or not alighting from a moving train constitutes negligence is a question of fact to be determined by the jury, taking into consideration all the circumstances connected therewith.
3. Permitting a witness to answer a question as to what he did on a certain occasion, over an objection that it calls for a conclusion or opinion, is not reversible error where the court subsequently strikes out of the answer all that portion which states a conclusion or opinion.
4. Excluding evidence is not reversible error where the excluded evidence is subsequently admitted.
5. A physician will not be permitted to testify regarding answers to inquiries propounded to an injured person whom he had been called to visit professionally, concerning matters in which he had no interest or concern professionally, or which were made for the purpose of qualifying himself as a witness, at least where they in any way relate to the injury or to the patient's former condition.
6. A witness cannot be impeached by a bill of exceptions containing his testimony taken at a former trial of the same action.
7. A passenger is not bound to abandon the use of a station platform, which is not in good repair, and seek some other way of entering and leaving the cars, if it is still held out by the company as safe, and used by the public.
8. The fact that a person may have seen a station platform out of repair at

one time does not bind him to carry such defect in mind upon all future occasions when approaching or leaving a train at such place.

(March 21, 1890.)

A PPEAL by defendant from a judgment of the Circuit Court for Owen County in favor of plaintiff, in an action to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are fully stated in the opinion.

Mr. Samuel O. Pickens, for appellant:

Generally negligence is a question of mixed law and fact, but where there is no controversy about the facts, what is proper care becomes a question of law for the court. And where all the facts found do not constitute negligence the court will so declare and will not hesitate to set aside a verdict.

2 Thomp. Neg. 1236; Wharton, Neg. § 420; Shearm. & Redf. Neg. (Old ed.) § 11 and notes; Beach, Contrib. Neg. § 162; *Hogan v. Chicago, M. & St. P. R. Co.* 59 Wis. 159, 15 Am. & Eng. R. R. Cas. 489; *Dun v. Seaboard & R. R. Co.* 78 Va. 645, 16 Am. & Eng. R. R. Cas. 363; *Bohan v. Milwaukee, L. S. & W. R. Co.* 61 Wis. 891, 19 Am. & Eng. R. R. Cas. 276.

And so, whether there has been contributory negligence on the part of the plaintiff is generally a question for the jury. But where the facts are undisputed or where but one reasonable inference can be drawn from them the question is one of law for the court.

Indianapolis & V. R. Co. v. McClaren, 63 Ind. 566; *McClaren v. Indianapolis & V. R. Co.* 88 Ind. 819; 2 Thomp. Neg. 1178; Beach,

carry all persons who apply for passage, if the accommodations are sufficient, unless there is a proper excuse for refusal. *Pearson v. Duane*, 71 U. S. 4 Wall. 605 (18 L. ed. 447).

Where carriers undertake to convey persons by the agency of steam, they should be held to the greatest possible care and diligence, whether the consideration for such conveyance be pecuniary or not. *The New World v. King*, 57 U. S. 16 How. 469 (14 L. ed. 1019); *Searles v. Kanawha & O. R. Co.* 32 W. Va. 870.

A carrier of passengers for hire is bound to observe the utmost caution, and is responsible to them for injuries received by them in the course of their transportation by the want of extraordinary vigilance aided by the highest skill. *Pennsylvania Co. v. Roy*, 102 U. S. 451 (26 L. ed. 141); *The New World v. King* and *Searles v. Kanawha & O. R. Co. supra*.

A railroad company is bound to see that the road and all its appurtenances are in perfect order, and free from any defect which the utmost vigilance, aided by the highest degree of knowledge and skill, could discover or prevent. *Palmer v. Delaware & H. Canal Co.* 46 Hun. 490.

Carefulness and fidelity are essential duties of the employment of a common carrier, in respect to his servants as well as himself, which cannot be abdicated. *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 387 (21 L. ed. 627).

A railroad company is responsible for the utmost precaution, care and skill in the construction and operation of cars and engines used in carrying passengers, to render them sufficient and safe, and is bound to use all precaution, as far as human care and foresight will go, for the safety of passengers. *Topeka City R. Co. v. Higga*, 38 Kan. 375; *Palmer v. Delaware & H. Canal Co.* 46 Hun. 490; *Ladd v. Foster*, 31 Fed. Rep. 827.

They are bound for defects in the vehicles furnished by them, which might have been discovered by the most careful examination. *Treadwell v. Whittier*, 5 L. R. A. 498, 80 Cal. 574.

Passengers, who are.

A passenger, in the legal sense, is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier,—such as payment of fare, or that which is accepted as an equivalent therefor. *Bricker v. Caldwell* (Pa.) 25 W. N. C. 204.

One going to the depot of a railroad company to take passage on its trains, although not having yet purchased a ticket, is regarded as a passenger. *Grimes v. Pennsylvania Co.* 36 Fed. Rep. 72.

The duties of a railroad company extend to the case of one who, having an appointment with a passenger, enters the company's premises, intending, in case the appointment be met, to become a passenger himself. *Texas & P. R. Co. v. Best*, 68 Tex. 116. See note to *Dewire v. Boston & M. R. Co.* (Mass.) 2 L. R. A. 166.

Means of approach and departure.

Railroad companies are bound to provide safe and convenient means of approach to and departure from their stations, for passengers. *Wallace v. Wilmington & N. R. Co.* (Del.) 18 Atl. Rep. 818. See note to *Louisville, N. A. & C. R. Co. v. Lucas* (Ind.) 6 L. R. A. 193.

They must keep their platforms connecting with their stations in safe condition. *Ibid.*

Their diligence and care in protecting their passengers in coming to and going from stations, and of the passengers themselves, must be proportioned to the risk incurred by them on account of the number of trains and the like. *Wallace v. Wilmington & N. R. Co. supra*.

They are bound to have their stations sufficiently

Contrib. Neg. § 162; *MacDougall v. Central R. Co.* 63 Cal. 431, 12 Am. & Eng. R. R. Cas. 143; *Reading & C. R. Co. v. Ritchie*, 102 Pa. 425; *Gavett v. Manchester & L. R. Co.* 16 Gray, 501.

A railroad company is not required to exercise the same high degree of care with reference to platforms at a way or flag station where trains do not regularly stop for the reception and discharge of passengers as at regular passenger stations.

Cincinnati, W. & M. R. Co. v. Peters, 80 Ind. 172; *Pennsylvania Co. v. Marion*, 2 West. Rep. 284, 104 Ind. 248.

A carrier of passengers is not a insurer of their safety.

Jeffersonville R. Co. v. Hendricks, 26 Ind. 228; *Stokes v. Sultonstall*, 89 U. S. 13 Pet. 181 (10 L. ed. 115); *Thomp. Carr.* 199.

The high degree of care required of carriers of passengers applies only to those means and measures of safety which the passengers must of necessity trust wholly to the carrier. It does not apply to providing buildings, depots, platforms, etc. As to such appliances, the carrier is only required to exercise reasonable care.

Thomp. Carr. 104, 309; *Welfire v. London & B. R. Co.* L. R. 4 Q. B. 698; *Crafter v. Metropolitan R. Co.* L. R. 1 C. P. 300; *Cornman v. Eastern Counties R. Co.* 4 Hurlst. & N. 781; *Chicago & A. R. Co. v. Wilson*, 63 Ill. 167; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346; *Pennsylvania Co. v. Marion*, 2 West. Rep. 284, 104 Ind. 239.

The rule that the happening of an accident to a passenger raises a presumption of negligence against the carrier does not apply where

the accident occurs on the platform of a station.

Thomp. Carr. 212-214; *East Tennessee, V. & G. R. Co. v. Mitchell*, 11 Heisk. 400.

It is negligence for a passenger to leave a railroad train while in motion unless impelled thereto by impending danger or under invitation or direction of the company or its servants.

Evansville & C. R. Co. v. Duncan, 28 Ind. 441; *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228; *Cincinnati, W. & M. R. Co. v. Peters*, supra; *Pennsylvania R. Co. v. Aspell*, 23 Pa. 147; *Morrison v. Erie R. Co.* 56 N. Y. 802; *Burrows v. Erie R. Co.* 63 N. Y. 556; *Damont v. New Orleans & O. Co.* 9 La. Ann. 441; *Dougherty v. Chicago, B. & Q. R. Co.* 86 Ill. 467; *Gavett v. Manchester & L. R. Co.* 16 Gray, 501; *Lucas v. New Bedford & T. R. Co.* 6 Gray, 64; *Chicago & A. R. Co. v. Randolph*, 53 Ill. 510; *Illinois Cent. R. Co. v. Statton*, 54 Ill. 139; *Ohio & M. R. Co. v. Schiede*, 44 Ill. 480; *Ohio & M. R. Co. v. Stratton*, 78 Ill. 88; *Illinois Cent. R. Co. v. Able*, 59 Ill. 181; *Knight v. Pontchartrain R. Co.* 23 La. Ann. 462; *Jewell v. Chicago, St. P. & M. R. Co.* 54 Wis. 610, 6 Am. & Eng. R. R. Cas. 379; *Wharton, Neg.* § 371; 2 Rorer, Railroads, 1090, 1116; *Richmond & D. R. Co. v. Morris*, 81 Gratt. 200; *Central R. & Bkg. Co. v. Letcher*, 69 Ala. 106; *Southwestern R. Co. v. Singleton*, 66 Ga. 252, 67 Ga. 306; *Lambeth v. North Carolina R. Co.* 66 N. C. 494; *Lake Shore & M. & S. R. Co. v. Bangs*, 47 Mich. 470; *Houston & T. C. R. Co. v. Leslie*, 57 Tex. 83; *Galveston, H. & S. A. R. Co. v. Le Gierse*, 51 Tex. 189; *Nelson v. Atlantic & P. R. Co.* 68 Mo. 593; *Ginnon v. New York & H. R. Co.* 8 Robt. (N. Y.) 25; 2 Redfield,

lighted until all passengers have had a reasonable time to reach a safe public thoroughfare, unless a guide be furnished for that purpose by the companies. *Ibid.*

They must not only keep their platforms in good condition and properly lighted, but they must make them of sufficient width. Where one was struck and injured by a train of cars which extended over a new platform, leaving a space of but two feet upon which to stand, the company was held liable. *Chicago & A. R. Co. v. Wilson*, 63 Ill. 167; *Whittaker's Smith, Neg.* 313. See note to *New York, C. & St. L. R. Co. v. Doane* (Ind.) 1 L. R. A. 157.

Duty of railroad carrier to give opportunity to passenger to alight.

It is the duty of a railroad company to give passengers a reasonable opportunity to leave its trains at stations, and reasonable diligence is required on the part of the passengers in alighting. *McDonald v. Long Island R. Co.* 116 N. Y. 543.

It is the reciprocal duty of a railroad company and a passenger, the former to give reasonable time to leave the train at the place of destination, and the latter to use reasonable diligence and care in getting off. *Pennsylvania R. Co. v. Lyons*, 129 Pa. 113.

A passenger who, in getting off a train at a stopping-place where there was no platform, stepped down, not on the side where passengers usually alight, but on the other side, where there was another track and was injured by a passing train which he could not have failed to see had he used his eyes; and where his only reason for getting down on that side was that it was a more level surface and an easier place to get down,—cannot re-

7 L. R. A.

cover for injuries received. *Morgan v. Camden & A. R. Co.* (Pa.) 23 W. N. C. 139.

A railroad company, whose servants move a train before a passenger thereon who is entitled to leave at the stopping place has had a reasonable time to alight, and while he is in the act of leaving the train, thereby gives him an implied invitation to alight while it is moving; a compliance by him therewith is not *per se* negligence, unless speed or some other circumstance makes it manifestly dangerous. *Louisville & N. R. Co. v. Stacker*, 38 Tenn. 343.

A passenger told by the conductor that he would let him off at a certain station to take a train in the other direction, when hurriedly told by the conductor, "Be quick and get off," without any warning that he is not at the station mentioned, is not guilty of contributory negligence in attempting to reach a moving train only seven or eight feet distant, although it is on a dark night, and he has no light except a dim lantern, and falls into an uncovered waterway between the tracks. *Griffith v. Missouri Pac. R. Co.* 98 Mo. 168.

A passenger who, upon alighting from a train upon a dark night, and when no sufficient light is furnished by the company, commits himself to the guidance of a third person, thereby waives the duty of the company to furnish him with safe means of departure. *Wallace v. Wilmington & N. R. Co.* (Del.) 18 Atl. Rep. 813.

A railroad company owes the same duty, in respect to allowing a reasonable time to leave the train, to one who goes upon it to aid a passenger who is in an enfeebled condition requiring assistance to alight, that it owes to a passenger, although the services were voluntary. *Louisville & N. R. Co. v. Crunk*, 119 Ind. 543.

Railways, 240; *Shearm. & Redf. Neg.* § 520; *Chicago & N. W. R. Co. v. Scates*, 90 Ill. 586; *Secor v. Toledo, P. & W. R. Co.* 10 Fed. Rep. 15; *Solomon v. Manhattan R. Co.* 4 Cent. Rep. 775, 108 N. Y. 487; *Reibel v. Cincinnati, I. St. L. & O. R. Co.* 14 West. Rep. 331, 114 Ind. 476.

Before the statutory exclusion is made applicable to a privileged communication made by a patient to his physician, it must clearly appear that the communication is within both the language and purpose of the statute.

Campau v. North, 39 Mich. 606; *Eddington v. Aetna L. Ins. Co.* 77 N. Y. 564.

Messrs. J. C. Robinson and Inman H. Fowler for appellee.

Olds, J., delivered the opinion of the court:

This is an action brought by the appellee against the appellant, to recover damages sustained by the appellee, alleged to have resulted by reason of the negligence of the appellant.

On the 6th day of December, 1882, the appellee was a passenger in a caboose of one of the appellant's freight trains from Gosport to Mundy's Station. When the train arrived at the latter station, the place of appellee's destination, and while the train was slowing up to make the stop and running at a very slow rate of speed, the appellee stepped off the car on the platform, the train not coming to a stop until after the caboose passed the platform. In stepping on to the platform the appellee fell, with his right arm under the car, and it was so badly crushed by the car wheels passing over it that it had to be amputated.

The appellant is charged with negligence in constructing and maintaining the platform in an unsafe and dangerous condition, wholly unfit and unsafe for use of passengers.

The appellant demurred to the complaint for want of facts, which was overruled and exceptions. Issue was joined by answer in denial, and a trial had resulting in a verdict and judgment in favor of appellee for \$3,000. Appellant filed a motion for new trial, which was overruled and exceptions.

The rulings of the court on the demurrer to the complaint and motion for new trial are assigned as error. There was a former trial of the cause and an appeal to this court and reversal of the judgment. *Pennsylvania Co. v. Marion*, 104 Ind. 289, 2 West. Rep. 284.

It is conceded by counsel for appellant that the complaint is sufficient, and the alleged error in overruling the demurrer to the complaint is waived. The only error relied upon for the reversal of the judgment is the ruling of the court on the motion for new trial. The principal grounds urged against such ruling is that the verdict is not sustained by sufficient evidence. This contention of the appellant is mainly on account of the fact that the evidence shows that the appellee stepped from the train while it was in motion, and this it is contended is negligence *per se*, and therefore it must be declared as a matter of law that the appellee was guilty of contributory negligence, and hence cannot recover.

It is important to consider what obligation rests upon the appellant in regard to the keeping of the platform at the station in repair, and this has been so fully considered in the re-

cent decisions of this court that it is unnecessary to do more than refer to the decisions and quote briefly from them.

In *Louisville, N. A. & O. R. Co. v. Lucas*, 119 Ind. 583, at p. 590, it is said: "The duty of a railway carrier does not end when it provides safe cars, engines and appliances, for its duty extends so far as to require it to provide means for passengers to safely enter its cars at its stations, and that duty also requires the carrier to make it safe for them to leave its cars and stations."

It is further said: "It was the duty of the appellant to keep the platform which it used in conjunction with the Pennsylvania Company in a safe condition. The situation of the platform and the manner of its construction were such as to make it the duty of the appellant to see that it was safe, for it was bound to know that if it became unsafe the lives and limbs of its passengers were put in peril."

In the case of *Lucas v. Pennsylvania Co.*, 120 Ind. 208, the following language from Bishop on Non-Contract Law, § 1086, is quoted and approved: "The depot and connected grounds, visited by coming and going passengers, should be fitted up with a careful regard to their comfort and safety. The approaches, the tracks around the platforms and places for entering and leaving the cars, every spot likely to be visited by passengers seeking the depot, waiting at it for trains or departing, should be made safe and kept so, and at reasonable times should be lighted; and passengers not in fault, injured through a neglect of this duty, may have compensation."

These decisions settle the law in this State in accordance with the holding of other courts, that railway companies are bound to keep the platforms at their passenger stations in a safe condition for persons to enter and leave the cars; and a failure to do so is a neglect of duty which makes the company liable to persons injured without fault on their part on account of such defective platform.

The evidence clearly shows the platform where the appellee stepped from the car to be out of repair, and unfit and unsafe for use by passengers in getting on and off trains; and this is not seriously controverted, except to contend that it might have been worse.

We next consider the question of contributory negligence by the appellee in stepping from the train while in motion. There was evidence from which the jury may have found that at the time the appellee stepped from the train the train was moving at a speed of not over two miles an hour, or at the speed of an ordinary or slow walk of a person, and that it came to a stop about two car-lengths beyond the platform; that it was moving at that slow rate of speed, and was continuing to move past the platform and the appellee came out upon the platform of the car and stepped on to the lower step and from there on to the platform at the station in a careful manner, and as he stepped on to the platform his feet slipped or he stumbled and fell by reason of the condition of the platform; that the platform was uneven, some boards being higher than others, the boards warped and the platform sunken in the center so that it was on a decline from the outer edge next to the track toward the center, and

There was also evidence from which the jury may have properly found that appellee was unacquainted with the condition of the platform, and the appellee was a man in full vigor and strength and the place of alighting was on the platform of a public railway station, used to enter and depart from the cars run on appellant's railroad. Under this state of the evidence the question as to whether or not the appellee was guilty of contributory negligence was a fact to be left to the jury to determine.

The question as to whether or not a person who voluntarily alights from a moving train is guilty of negligence or not was considered in the case of *Louisville & N. R. Co. v. Crunk*, 119 Ind. 542, and in that case it was held that whether alighting from a moving train constitutes negligence or not is a fact to be determined by the jury trying the cause, taking into consideration all the circumstances in connection with the alighting; and this we think well supported by authorities which are considered and cited in that case.

There was evidence to support the verdict.

Some other causes for new trial are stated in the motion, and while they are not waived, as we understand counsel in their brief, they are not confidently relied upon for a reversal. The first in order is, appellee was asked by his counsel the following question: "In stepping off the train what effort, if any, did you make to prevent yourself from falling?" Appellant objected on the ground that the question called upon the witness to give a conclusion or opinion. The objection was overruled and the witness made the following answer: "Well, I don't know. I had a hold with my left hand and I stepped off careful, as careful as I could, and my feet kind of flew from under me and how I did fall, I can't exactly tell you how it did happen."

Appellant then moved to strike out from the evidence the words: "I stepped off careful, as careful as I could," and the court sustained the motion. The question called for the witness to state what he did, and not a conclusion or opinion, and the court struck out all that portion of the answer stating a conclusion or opinion of the witness.

The next error complained of is the sustaining an objection to cross-examining questions propounded by appellant to appellee while a witness, in regard to whether or not he had drunk intoxicating liquor at Gosport. The appellee had not been examined in chief as to what he did or where he was while at Gosport; but there is no available error in this ruling, as afterwards the appellee was called and the appellant's counsel fully cross-examined him upon the same subject, interrogating him as to what he drank at Gosport.

The appellant called one Dr. Schill as a witness. The doctor had assisted in dressing the appellee's injuries, and while engaged in such professional duties he conversed with appellee, and the doctor was interrogated on the subject and it was proposed to prove by him that he asked the appellee how the accident occurred, and appellee should have answered that the Company was not to blame for the accident; that he tried to get off the train before it stopped

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the communication was privileged and made to the doctor while engaged professionally in treating the appellee for the injury. It is contended by appellant that this question was propounded, not to ascertain the nature of the injury, but to learn whether the appellee was to blame for the injury. In this ruling there was no error.

The case of *Heuston v. Simpson*, 115 Ind. 62, 14 West. Rep. 828, and other decisions collected and cited in that opinion are decisive of this question. The physician had no business to interrogate his patient for any purpose or object other than to ascertain the nature and extent of the injury, and to gain such other information as was necessary to enable him to properly treat the injury and accomplish the object for which he was called professionally, and such communications are privileged and he cannot disclose them. If the physician took advantage of the fact of being called professionally, and while there in that capacity made inquiries of the injured party concerning matters in which he had no interest or concern professionally, or for the purpose of qualifying himself as a witness, he cannot be permitted to disclose the information received. The patient puts himself in the hands of his physician; he is not supposed to know what questions it is necessary to answer to put the physician in possession of such information as will enable the physician to properly treat his disease or injury; and it will be conclusively presumed that the physician will only interrogate his patient on such occasion as to such matters and facts as will enable him to properly and intelligently discharge his professional duty, and the patient may answer all questions propounded which in any way relate to the subject or to his former condition, with the assurance that such answers and communications are confidential and cannot be disclosed without his consent.

One Parish was called and testified as a witness for the appellee, and the appellant offered in evidence that portion of the bill of exceptions taken in the former trial of this cause, containing the testimony given by the witness on the former trial for the purpose of contradicting or impeaching the witness, and it was objected to and the court sustained the objection and the appellant contends such ruling was error. This ruling was proper.

It is contended that the court erred in giving and refusing to give certain instructions. One question presented by the exceptions to the instructions relates to the appellee leaving the train while in motion, it being contended by the counsel for appellant that in so doing the appellee was guilty of contributory negligence which barred his right to recover, and the appellant requested an instruction on this theory and the court refused to give it and gave an instruction submitting the question to the jury to determine whether, under all the circumstances, the appellee was guilty of contributory negligence in leaving the train at the time, place and manner he did.

The instructions given by the court are in accordance with the rules as hereinbefore stated in passing upon the sufficiency of the evidence. The instructions given state the law fairly on

the subject, and the court properly refused those requested by the appellant.

It is further contended that the instructions given by the court in relation to the duty of the appellant in keeping its platform in repair, and as to appellee's knowledge of the condition of the platform at the time of the injury, are erroneous, and instructions numbers two and four are particularly complained of in this respect. We do not deem it necessary to set out these instructions, as they must be considered and construed together with all the other instructions in the case relating to the same matter, and when the instructions are considered and construed together they state the law to be that a railroad company, in constructing a platform for the use of passengers in getting on and off trains at a public railway station, intrusts its use to the public, and impliedly represents and gives out to the public that it is reasonably safe and sufficient for such purpose, and it is their duty to make it so as that it may be used safely in approaching and leaving trains, in any way in which passengers might reasonably and with reasonable care be expected to approach and leave trains; and that if the one at Mundy's, where appellee alighted, was not so constructed or was allowed to become and remain out of repair so that it could not be used only by careful attention to its structure, and if inattention as to its actual condition would imperil the safety of passengers, it would be insufficient, and the Railroad Company would be guilty of negligence in knowingly suffering and allowing it to remain in such condition, and that although the appellee may have previously known of its condition he would not be bound to keep such knowledge actually in mind; and if, at the time he stepped from the train upon it he knew of its condition, yet he would not be required to abandon the use of it and seek some other place of approaching and leaving the train, and if he used care proportionate to the known danger, and was injured by reason of such defect, he would not be barred from recovery; and that it was for the jury to determine, from all the facts and circumstances, whether or not the appellee was guilty of negligence in leaving the train at the time, place and manner in which he left it; if he was guilty of negligence in so leaving the train, which contributed to the injury, he could not recover.

We think there was no error in these instructions. Certainly under the authorities we have heretofore cited, the duty of the appellant in regard to the keeping of its platforms in repair is not too strongly stated against the appellant.

Railway companies are common carriers; they owe a duty to the public, and the public has the right to rely upon its performance. The fact that a person may have seen a platform

out of repair at one time does not bind him to carry such defect in mind upon all future occasions, when approaching or leaving a train at such point. The platform is in constant use by the employees of the Company. They are bound to take notice of its condition. The presumption is, not that such defect will be allowed to remain, but that the Company will discharge its duty to the public and repair the defect. If the defect were such as would naturally suggest to one of common understanding that it was dangerous, and place one in peril to pass over it to and from a train, and with such knowledge one voluntarily steps upon it, or, having knowledge of such defect, within such a short space of time previous that the Company could not reasonably be expected to have repaired it, under such circumstances one may be regarded as not having used ordinary care, and having recklessly entered upon it at his own risk; but we have no such case as this under consideration. The Railroad Company stand in the position of saying to the public, "Our platform is safe," and though it is not in such repair as the Company are required to keep it, yet it is in common use by the public, and being so held out by the Company and used by the public, the appellee was not bound to abandon its use and seek some other way of entering and leaving the cars. If in using it as he is invited to do by the Company he exercises proper care proportioned to the apparent condition of the platform in leaving the train, and is injured by reason of the defects, we do not think it can be said that he is guilty of contributory negligence and cannot recover for the injury sustained by reason of the negligence of the Company.

We have a long line of decisions of this court which support our conclusion, which hold that, when there is a defect in a street, a person is not bound to abandon the use of the street; that he may travel upon the street provided that it be not such a defect as renders the street impassable or would suggest to one of common understanding that to attempt to pass it would put one in peril. And if, in the use of the street, he exercises care proportioned to the known danger, he may reasonably expect to shun or avoid the defect; and if in doing so he is injured, he can recover.

These cases are collected and cited in the cases of *Gosport v. Evans*, 112 Ind. 138, 11 West. Rep. 115; *Brannen v. Kokomo, G. & J. Gravel Road Co.* 115 Ind. 115, 14 West. Rep. 887, and *Knightstown v. Musgrove*, 116 Ind. 121.

This disposes of all the questions presented. We think there is no error in the record.
Judgment affirmed, at costs of appellant.

Petition for rehearing overruled June 4, 1890.

(....Conn.....)

A husband has no rights as tenant by curtesy in lands in which his wife had an estate in remainder whereshe died before the expiration of the life tenancy, and never had a right to the possession.

(Pardee and Carpenter, JJ., dissent.)

(October 30, 1899.)

ON reservation upon demurrer to the answer from the Superior Court for New Haven County, for the opinion of the Supreme Court of Errors, of an action brought to recover possession of a dwelling-house and lot from one claiming it as tenant by the curtesy. *Judgment for plaintiffs advised.*

The facts are fully stated in the opinion.

Messrs. William K. Townsend and George D. Watrous, for plaintiffs, in support of the demurrer:

By the common law of England, and by the decisions of every State in which the question has arisen, there can be no curtesy in a reversion or remainder, expectant upon a prior estate for life, unless the life estate ends during the coverture.

2 Bl Com. p. 127; Tiedeman, Real Prop.

NOTE.—*Tenancy by the curtesy of wife's estate.*

Tenancy by the curtesy is an estate for life created by the act of law. When a wife is seised at any time during coverture of an estate of inheritance, in severalty, in coparcenary, or in common, and hath issue by her born alive, and which might by possibility inherit the same estate as her heir, and she dies in the lifetime of her husband, he holds the estate during his life. 4 Kent, Com. 27; Litt. 11 35, 53; Co. Litt. 29 b; Paine's Case, 8 Coke, 24; Barker v. Barker, 2 Sim. 249; Marsellis v. Thalheimer, 2 Paige, 35; 2 Bl. Com. 128.

He is a tenant by the curtesy of a vested remainder in fee. Young v. Langbein, 7 Hun, 151.

Four things are requisite to an estate by the curtesy, viz.: marriage, actual seisin by the wife, issue and death of the wife. The husband's estate is initiated on issue had, and becomes consummate on the death of the wife. 2 Kent, Com. 28.

If the wife has an equitable estate of inheritance, notwithstanding the rents and profits are to be paid to her separate use during coverture, the husband is tenant by curtesy, and so where she has a seisin in equity as a *cestui que trust*. Cochran v. O'Hern, 4 Watts & S. 95; Clepper v. Livergood, 5 Watts, 113; Vrooman v. Shepherd, 14 Barb. 441; Bennet v. Davis, 2 P. Wms. 316.

A husband has curtesy of a trust estate as well as of a legal estate; of an equity of redemption; of a contingent use, or of money to be laid out in land. Robinson v. Codman, 1 Sumn. 121; Dunscomb v. Dunscomb, 1 Johns. Ch. 503; Schermerhorn v. Miller, 2 Com. 439; Sweetapple v. Bindon, 2 Vern. 536; Casborne v. Scarfe, 1 Atk. 603; Cunningham v. Moody, 1 Ves. Sr. 174; Dodson v. Hay, 3 Bro. Ch. 404.

Where husband and wife hold premises jointly, on the death of the wife the husband becomes a tenant by the curtesy, and no right of action exists in the children to recover the land until the estate 7 L. R. A.

§ 107; Stoddard v. Gibbs, 1 Sumn. 263; Ferguson v. Tweedy, 43 N. Y. 543; Orford v. Benton, 36 N. H. 395; Shores v. Carley, 8 Allen, 426; Webster v. Ellsworth, 147 Mass. 602; Watkins v. Thornton, 11 Ohio St. 367; Reed v. Reed, 3 Head (Tenn.) 491, 75 Am. Dec. 777; Hittner v. Eye, 23 Pa. 305; Stewart v. Barclay, 2 Bush, 550; Rodus v. Hayden, 48 Miss. 614; Mackey v. Proctor, 12 B. Mon. 433; Baker v. Flournoy, 58 Ala. 650; 4 Am. & Eng. Encyclop. Law, p. 961.

The common law has been abrogated in this State.

In neither *Bush v. Bradley*, 4 Day, 298, nor *Kline v. Beebe*, 6 Conn. 494, relied on by defendant, was there any question raised as to the right to curtesy in a reversion or remainder.

This "ownership," which is sufficient in this State to give curtesy plainly connotes a right of immediate possession, or, as Washburn says, when commenting on this case, a "right of entry."

1 Washb. Real Prop. 5th ed. p. 182. See also 1 Sharswood, Bl. note, p. 488.

The maxim *seisina facit stipitem* has been abolished in Ohio, Tennessee and Pennsylvania, and yet each has held that there can be no curtesy in a reversion or remainder, expectant upon a prior undetermined freehold.

Borland v. Marshall, 2 Ohio St. 309; *Watkins v. Thornton*, 11 Ohio St. 367; *Guion v. Anderson*, 8 Humph. 298; Tenn. Stat. 1784,

by the curtesy terminates. *Berry v. Hall*, 11 Ky. L. Rep. 30, 11 S. W. Rep. 474.

In case of a conveyance of land to a daughter for life and to the heirs of her body after her death, the daughter takes a conditional fee, and her husband is entitled to hold as tenant by the curtesy after her death. *Odum v. Beverly* (S. C.) 10 S. E. Rep. 835.

Where, upon the death of an intestate, the title to his land becomes vested in his only daughter and heir, subject to the dower of his widow, if such daughter subsequently marries and has a child, the widow's quarantine right will not prevent the husband of such daughter, upon her death, from taking an estate by the curtesy. *Mettler v. Miller*, 129 Ill. 630.

Effect of statute upon husband's right.

The right is not affected by the Enabling Act, in relation to married women, passed in New York State in 1843, or the amendments thereto in 1849. *Zimmerman v. Schoenfeldt*, 3 Hun, 692.

The effect of § 4624, Mansf. Dig., and Const. 1874, upon the rights of husband and wife in her real estate, was to exclude his marital rights during her life and to secure to her the right to use and dispose of it at will; but if she makes no disposal of it, and there be issue of the marriage, born alive, the title by curtesy consummate attaches at her death as at common law. *Neely v. Lancaster*, 47 Ark. 175.

The inchoate right of the husband to curtesy, and to redeem his wife's choices in action, not being vested, may be interrupted by legislative enactment. *Alexander v. Alexander* (Va.) 1 L. R. A. 125.

But unless destroyed by statute, by express words, by necessary implication or by a lawful disposition of the property by the wife, the husband will be held to have an estate by the curtesy at her death. *Bozarth v. Largent*, 128 Ill. 95.

The Illinois Act giving a wife the right to own

chap. 22; *Prater v. Hoover*, 1 Cold. 544; *Reed v. Reed*, 3 Head, 461, 75 Am. Dec. 777; *Buchanan v. Duncan*, 40 Pa. 83; *Stoolfoos v. Jenkins*, 8 Serg. & R. 167; *Chew v. Southwark Comrs.* 5 Rawle, 161.

Reasoning from the analogous institution of dower, the defendant's position cannot be sustained. There can be no dower in an estate in remainder or reversion.

1 Washb. Real Prop. *154; 4 Kent, Com. p. 89; *Moody v. King*, 2 Bing. 447; *Adams v. Beekman*, 1 Paige, 681; *Medley v. Medley*, 27 Gratt. 568; *Brooks v. Everett*, 13 Allen, 457; *Durando v. Durando*, 23 N. Y. 331; 5 Am. & Eng. Encyclop. Law, 893.

"Ownership is essential to curtesy." Where there is no right of possession there is no ownership.

Bush v. Bradley, 4 Day, 298.

The word "ownership" is here used in its strict legal sense.

Chalker v. Chalker, 1 Conn. 88.

The legal meaning of "ownership" is "the possession, the right of possession and the right of property."

Shelton v. Alcox, 11 Conn. 249.

Messrs. L. E. Munson and C. R. Ingersoll, for defendant, *contra*:

Mrs. Oviatt took by her father's will the fee of the property subject to the life estate of her mother.

The estate was a vested remainder.

1 Swift, Dig. *96.

She was "seised" of this estate—constructively by the common law of England, actually by the common law of Connecticut.

1 Swift, System of Com. Laws, 313; *Wrotesley v. Adams*, 1 Plowd. 191; 1 Washb. Real Prop. 5th ed. pp. 65, 66, 77, *37; 3 Washb. Real Prop. p. 135, *483; 1 Swift, Dig. 96; *Cook v. Hammond*, 4 Mason, 488.

Ownership, vested title, present right of property, has always meant "seisin" with us—this ownership being publicly shown by the record title.

Hillhouse v. Chester, 3 Day, 166. And see 1 Swift, System of Com. Laws, 313; *Bryan v. Bradley*, 16 Conn. 480.

Where the distinction between actual and constructive seisin has been maintained, Mrs. Oviatt would be regarded as seised in law, though not in deed.

Stoddard v. Gibbs, 1 Sumn. 263.

In Connecticut the ancient rule *seisina facit stipitem* was never a part of the common law.

In *Bush v. Bradley*, 4 Day, 298, it was held, as the logical necessity of *Hillhouse v. Chester*, that seisin of the wife, in the sense of the ancient common law of England, was not necessary to constitute a tenancy by the curtesy, in Connecticut, and that ownership, or present right of property, that is, seisin in the sense of Connecticut common law, was sufficient.

See also *Kline v. Beebe*, 6 Conn. 494.

Seisin now means ownership.

Anderson, Law Dict. *Seisin* (1889); and see *Jenkins v. Fahey*, 78 N. Y. 355; *Vanderheyden v. Orandall*, 2 Denio, 21.

We have never had common-law dower in Connecticut. Nor has actual seisin ever been

property free from the disposal, control or interference of her husband, does not destroy his estate by the curtesy in her separate property after her decease. *Ibid*.

Seisin during coverture essential; rule at common law.

The wife, according to English law, must have been seised in fact and in deed, and not merely in law, of an estate of inheritance, to entitle the husband to his estate by curtesy. Co. Litt. 29 a; 4 Kent, Com. 26; Cruise, Dig. chap. 2, §12, 16; Tayloe v. Gould, 10 Barb. 388; Barr v. Galloway, 1 McLean, 476; Gibbs v. Eady, 23 Hun, 266.

The husband cannot have curtesy where his wife was never seised of the estate. *Bogy v. Roberts*, 48 Ark. 17.

At common law, either the wife, or the husband, in right of his wife, must have had a seisin in deed, which is actual possession of the land. *Nixon v. Williams*, 95 N. C. 103.

Where the wife of the plaintiff, now dead, was entitled to the land in dispute as heir-at-law, and her husband rented it as tenant of the ancestor's widow, but the wife lived on the land, it was held that she had such seisin as entitled her husband to an estate by the curtesy. *Ibid*.

Qualification of the rule.

A qualification of the rule relative to seisin in fact by the wife has been rendered necessary in this country, and under the ownership of waste, uncultivated lands, she is deemed seised in fact thereof, so as to entitle her husband to his right of curtesy. *Pond v. Bergh*, 10 Paige, 140; *Jackson v. Sellick*, 8 Johns. 262; *Green v. Lister*, 12 U. S. 8 Cranch, 249 (8 L. ed. 550); *Smoot v. Lecatt*, 1 Stew. (Ala.) 590; *McCorry v. King*, 3 Humph. 276.

The common-law rule requiring actual posses-

sion as a condition precedent to curtesy does not apply to such lands owing to circumstances and the changed conditions which obtain in this country. *Mettler v. Miller*, 129 Ill. 630.

But a right of possession in the wife during coverture is in general necessary to support a tenancy by the curtesy. *Ferguson v. Tweedy*, 43 N. Y. 543.

It is sufficient for the claim of curtesy that the wife had title to the land, though she was not actually seised. *Sterling v. Penlington*, 7 Viner, Abr. 149, pl. 11.

Entry on land.

In general there must be an entry on the land of the wife by the husband to enable him to claim as tenant by the curtesy. *Mercer v. Selden*, 42 U. S. 1 How. 37 (11 L. ed. 38).

But an actual entry *pedis possessio* during coverture is not necessary to create the tenancy. *Buckley v. Buckley*, 11 Barb. 43, 65.

Executors, by paying taxes and selling a portion of the estate in coal, which is reserved from the sale of the surface of the ground, but who are not in the actual occupancy or possession of the property, and have no interest except a power of sale, are in no such possession as to prevent a claim of curtesy by her husband after her death. *Rankin's App.* (Pa.) 2 L. R. A. 429.

Where a husband bringing ejectment for his curtesy dies, his administrator may be substituted, and recover mesne profits to the time of such death. *Hart v. McGrew* (Pa.) 10 Cent. Rep. 312.

By reason of husband's curtesy initiate a married woman during coverture has no right of action to recover possession of her fee-simple lands from a stranger, that right being in her husband; and after her death her heirs have no right of action until her husband's death; and hence the Statute of Limitations does not commence to run against them until after the death of her husband. *Valle v. Oben-*

required in Connecticut dower. "Legal title" is alone sufficient.
1 Swift, Dig. *85.

Loomis, J., delivered the opinion of the court:

The complaint in this action demands the possession of a certain house and lot in the City of New Haven. The answer of the defendant, which was demurred to by the plaintiffs, sets forth the facts that control the case.

Elam Hull of New Haven died in 1868, leaving a valid will, which gave to his widow, Nancy Hull, the real estate described in the complaint, during her natural life, with remainder to his daughter, Louisa Oviatt, then wife of the defendant, Henry N. Oviatt, and to her heirs forever. Mrs. Oviatt, the devisee of the remainder, died in 1861 before her mother, having had two children of her marriage with the defendant, who are the plaintiffs in this action and her heirs-at-law. Mrs. Hull, the devisee of the life estate in the demanded premises, died in 1869.

The gist of the answer is, that the defendant, as surviving husband of Mrs. Oviatt, is entitled to the possession of the premises in question as tenant by the curtesy; and the point of the demurrer is that, as Mrs. Oviatt died before the expiration of the life tenancy of her mother, she never had even a right to the possession, and consequently there was no legal seisin in the wife to furnish one of the indispensable requisites of title by the curtesy in the surviving husband.

The sole question for discussion as presented by the pleadings is, May a husband be tenant by the curtesy in lands of which his wife had only a remainder, expectant on a prior estate which did not determine during coverture?

The four requisites to make a tenant by the curtesy, as stated in Blackstone's Commentaries, and in all the treatises on the common law that include this subject, are marriage, seisin of the wife, birth of issue capable of inheriting and the death of the wife. No one of these requisites up to the present time has ever been dispensed with by the courts of England or the United States, unless pursuant to some statutory enactment.

Some disparity, however, exists in the definition or application given by different courts to the word "seisin." Blackstone (vol. 2, p. 127), after stating the requisites as above, adds: "The seisin of the wife must be an actual seisin or possession of the lands; not a bare right to possess, which is a seisin in law, but an actual possession, which is a seisin in deed." This is still the general rule; but certain exceptions have been recognized and adopted by several courts. The possession of a lessee under a lease for years reserving rent is regarded as an actual seisin in the wife as reversioner, so as to entitle the husband to an estate as tenant by the curtesy, although he never received or demanded rent during the life of the wife. *Ellsworth v. Cook*, 8 Paige, 646; *De Grey v. Richardson*, 3 Atk. 469; *Watts v. Ball*, 1 P. Wms. 108.

Wild uncultivated lands may be constructively in the wife's possession unless in the ad-

house, 68 Mo. 81, overruled, *Dyer v. Wittler*, 4 West. Rep. 673, 89 Mo. 81.

For notwithstanding the sweeping language of the first section of the Act, no person is embraced in or contemplated by that or any other section of the Statute, except such as have a present existing right to commence an action or make an entry. *Dyer v. Brannock*, 68 Mo. 422; *Johns v. Fenton*, 4 West. Rep. 64, 88 Mo. 64; *Harris v. Ross*, 86 Mo. 80; *Kelly v. Hurt*, 74 Mo. 562; *Adams, Eq. 227*; *Wood, Lim. 584*.

Can be no seisin of a vested remainder, or in a life estate.

There can be no seisin in deed or in law of a vested remainder limited upon a precedent freehold estate; so where a daughter, a *feme covert*, dies in her mother's lifetime her husband is not entitled to curtesy, in the third assigned as dower, even after termination of the widow's life estate. *Re Cregier*, 1 Barb. Ch. 598; *Green v. Putnam*, 1 Barb. 506; *Taylor v. Gould*, 10 Barb. 401; *Ferguson v. Tweedy*, 43 N. Y. 649.

There cannot be an estate by the curtesy in a life estate. *Phillips v. Laforge*, 4 West. Rep. 683, 89 Mo. 72.

An estate settled on a *feme covert* for life, with a power of appointment at her death in fee, does not give her such an estate as will entitle the husband to curtesy if she fails to appoint. *Graves v. Trueblood*, 96 N. C. 426.

Where the fee of a testatrix's estate is devised to a trustee, and a life estate in part carried out for her surviving husband, with remainder in fee vested in the trustee, the devisee of the life estate takes no more than that carved out for him, and he may elect as to his claim in virtue of his marital right. *Wright v. Jones*, 2 West. Rep. 360, 105 Ind. 37; *Langley v. Mayhew*, 3 West. Rep. 726, 107 Ind. 198, 7 L. R. A.

When estate by the curtesy fails.

Where a woman entitled to a remainder subject to a life estate dies before the life tenant, her husband takes no estate by curtesy. *Webster v. Ellsworth*, 147 Mass. 602.

The husband of a mortgagee in fee has no curtesy, unless the equity of redemption has been barred by time. *Chaplin v. Chaplin*, 3 P. Wms. 234; 7 Vin. Abr. 159, pl. 22; 4 Kent, Com. 82.

A separate estate created by the husband to or for his wife, whether directly or through a trustee, presumptively excludes the husband from tenancy by the curtesy. *Dugger v. Dugger*, 84 Va. 130.

A deed to a married woman, "to her sole and separate use and free from the interference of her husband," etc., defeats the right to curtesy in the premises on the grantee's death. *Haight v. Hall*, 3 L. R. A. 857, 74 Wis. 162. See also *McCulloch v. Valentine*, 24 Neb. 215.

The willful desertion of a wife by a husband for a year or more immediately preceding her death deprives him of his right of curtesy, under the Pennsylvania Act of May 4, 1855. *Bealor v. Hahn*, 9 Cent. Rep. 599, 117 Pa. 169.

A deed by a husband and wife may convey the interest of the husband as a tenant by the curtesy, although ineffective to convey the wife's interest because of a defective acknowledgment by her. *Mettler v. Miller*, 129 Ill. 630.

But an estate by curtesy is not barred by a deed of land to a daughter "and to her heirs and assigns, exclusively of her husband." *Rank v. Rank*, 1 Cent. Rep. 424, 120 Pa. 191.

Not forfeitable for his wrongful acts.

Though a wife may lose her dower by her act of adultery, no such forfeiture of his curtesy attaches to the adulterous act of the husband. *Buckworth v. Thirkell*, 3 Bos. & P. 652, note; *Co. Litt. 241 a*, But

verse possession of another. *Pierce v. Wanett*, 10 Ired. L. 446; *Davis v. Mason*, 26 U. S. 1 Pet. 507 (7 L. ed. 240); *Clay v. White*, 1 Munf. 162.

Recovery in ejectment has been held equivalent to actual entry. And where the wife takes under a deed actual entry is not necessary. *Jackson v. Johnson*, 5 Cow. 74, 97; *Adair v. Lott*, 8 Hill, 182, 186.

And in the States of Connecticut, Pennsylvania, Ohio, Mississippi and Tennessee, a right of entry on the part of the wife would be a sufficient seisin, although the premises were in the adverse possession of another. *Stoolfoos v. Jenkins*, 8 Serg. & R. 175; *Borland v. Marshall*, 2 Ohio St. 308; *Redus v. Hayden*, 43 Miss. 624; *Bush v. Bradley*, 4 Day, 298; 1 Washb. Real Prop. 8d ed. top p. 160.

But this is substantially the extent of the modifications of the common-law idea of seisin of the wife as applicable to the husband's right to an estate by the curtesy. And there is on the other hand a remarkable consensus of judicial opinion in the courts of England and the United States, and among all the text-writers upon the subject, to the effect that if there be an outstanding estate for life the husband cannot be the tenant by the curtesy of the wife's estate in reversion or remainder unless the particular estate be ended during coverture. 1 Bishop, Married Women, § 489; 1 Washb. Real Prop. 4th ed. top p. 175, § 33; Tyler, Infancy and Coverture, 2d ed. § 284; 4 Kent,

Com. 59; *Moody v. King*, 2 Bing. 447; *Ferguson v. Tweedy*, 43 N. Y. 543; *Shores v. Carley*, 8 Allen, 426; *Brooks v. Everett*, 18 Allen, 457; *Flak v. Eastman*, 5 N. H. 240; *Orford v. Benton*, 36 N. H. 395; *Hitner v. Ego*, 23 Pa. 805; *Watkins v. Thornton*, 11 Ohio St. 367; *Stoddard v. Gibbs*, 1 Sumn. 263; *Medley v. Medley*, 27 Gratt. 568; *Adams v. Logan*, 6 T. B. Mon. 175; *Planters Bank v. Davis*, 31 Ala. 626; *Malone v. McLaurin*, 40 Miss. 161; *Reed v. Reed*, 8 Head, 461; 4 Am. & Eng. Encyclop. Law, 961, and cases there cited.

The proposition established by such a weight of authority, being identical with the question in this case, ought to control, unless it is found to contravene some peculiar policy, system or precedent, already established in this State, or unless it is productive of injustice or great inconvenience.

And here the counsel for the defendant earnestly contend that the proposition is in direct contravention of our peculiar system and opposed to some early decisions of this court. They rightfully claim that credit is due the courts of this State for repudiating at an early day one of the fruits of the feudal system, which has come down to us preserved in the common-law maxim, "*non jus sed seisinam facit stipitem*," it is not the right but seisin that makes the stock or root. But we cannot yield a like hearty assent to the claim that, because we have repudiated mere seisin as the stock of inheritance in distributing the estate of a de-

ler's note, 170; Roper, Husb. and W. 36, 37; 3 Prest. Abs. Title, 384; Park, Dower, 172, 186; 4 Kent, Com. 34.

A tenant by the curtesy infatigable has not an estate forfeitable upon his attainer for treason. *Pemberton v. Hicks*, 4 U. S. 4 Dall. 168 (1 L. ed. 785).

A conveyance in fee, by a tenant by the curtesy or a tenant for life, is not a forfeiture of his estate. *M'Kee v. Pfout*, 3 U. S. 3 Dall. 496 (1 L. ed. 690).

Estate once vested is liable for husband's debts.

Where the estate by the curtesy is once vested in the husband, it becomes liable for his debts, and cannot be devested by his disclaimer (*Watson v. Watson*, 13 Conn. 63), and may be sold by his creditors on execution at law. *Canby v. Porter*, 12 Ohio, 79.

A voluntary settlement of curtesy, when vested, upon his wife, is void as to his creditors. *Vanduzer v. Vanduzer*, 6 Paige, 366; *Wickes v. Clarke*, 8 Paige, 161.

An estate of curtesy is liable to seizure and sale on execution against the husband. *Gay v. Gay*, 11 West. Rep. 603, 123 Ill. 221.

A husband's estate by curtesy is exempt, during coverture, from execution for his sole debt, under Mo. Rev. Stat., § 3246; and the purchaser cannot sue in ejectment therefor after his wife's death. *Churchill v. Hudson*, 34 Fed. Rep. 14.

An estate by the curtesy consummate exists in the wife's lands unaliened by her during her lifetime though devised by her will. It is subject to the liens of her husband's creditors in preference to the general liens of her creditors. *Browne v. Bockover*, 34 Va. 424.

Where levy was made upon property of a married woman, under an execution against her husband for debts contracted after the passage of an Act providing that her property should be as absolute as if she were unmarried, and not subject to his disposal or liable for his debts, it was held that he had no interest, as tenant by the curtesy, which could be the subject of a sale, but that the

law had placed the wife, in regard to her property, in the condition of a *feme sole*. *Hitz v. Nat. Metropolitan Bank*, 111 U. S. 722 (23 L. ed. 577).

Disposal of estate by wife.

Where the wife by her will gave a pecuniary legacy to her husband, "which is to be in full settlement of all his demands upon my estate," and devised to others all of her real estate, she thereby did "provide otherwise by her will" than that her husband should have one half of her land for his life, in pursuance of the statute. *Burke v. Colbert*, 3 New Eng. Rep. 788, 144 Mass. 160.

A married woman may, with the written consent of her husband, by will make a disposition of his right as tenant by the curtesy which will be valid against his creditors as well as against himself, notwithstanding the inhibition of the statute. *Rev. Stat. N. J. 638, § 9. See Steward v. Middleton* (N. J.) 17 Atl. Rep. 294.

The husband's consent is not necessary to give validity to a will executed by the wife, or to affect its operation, except as it may deprive him of his right as tenant by the curtesy. *Burke v. Colbert*, 3 New Eng. Rep. 788, 144 Mass. 160.

The Pennsylvania Married Woman's Act of June 3, 1837 (Pub. Laws, 332), § 5, providing that a married woman may dispose of her property, real and personal, by last will and testament, in the same manner as if she were unmarried, does not enable the wife to deprive her husband of his right as tenant by curtesy. *Re Teacle's Estate* (Pa.) 25 W. N. C. 379.

The failure to renounce a provision for him in his wife's will does not bar his right to curtesy, but bars his right to a distributive share. *Cunningham v. Cunningham*, 30 W. Va. 569.

Where a husband conveyed to a trustee for the use of his wife, and the wife devised the land to her children, her husband is entitled to curtesy in the estate. *Soltan v. Soltan*, 12 West. Rep. 115, 93 Mo. 307.

ceased person among his heirs, a logical necessity must compel this court to cast upon a surviving husband a tenancy by the curtesy in lands which his wife could by no possibility have enjoyed during the existence of the marriage relation.

The position of the husband in relation to property belonging to his wife and to her children is very different from that between an intestate and his natural heirs in reference to the estate to be distributed. It does violence to the dictates of natural affection and our sense of justice to see a purely artificial and arbitrary rule erected between an intestate and the natural objects of his bounty. The very maxim that embodies the rule contains an implied confession that it is wrong, for the language is, "not right, but seisin." But, on the other hand, to adopt the language of Hosmer, *Ch. J.*, in *Heath v. White*, 5 Conn. 285, "the system of tenure by the curtesy is at least pretty artificial, and is what it is because *ita lex scripta est*."

Its origin is not very well known, nor is there any principle to which by common consent it is referable. But the counsel for the defendant contend that the reason for requiring actual seisin in the wife is to be found in the fact that the common law confined inheritance to the stock of actual seisin. If it clearly appeared that this was the sole reason, the defendant would be entitled to the benefit of the rule "that when the reason of any particular law ceases, so does the law itself."

The citation from 2 Blackstone's Commentaries, 128, and from 1 Greenleaf's Cruise, title *Curtsey*, § 28, to the effect that the rule as to seisin in curtesy probably arose from the rule as to inheritance, at first impressed us as furnishing strong support for this position. But on turning to Williams' able treatise on Real Property, 4th edition, appendix E, *491-502, we found an exhaustive discussion of this question in which he clearly shows by many citations from Coke, Littleton and Blackstone, as well as by other reasons, that this supposition is not true; and his conclusion is "that the reason why an actual seisin was required to entitle the husband to curtesy was that his wife may not suffer by his neglect to take possession of her lands, and in order to induce him to do so the law allowed him curtesy of all lands of which an actual seisin had been obtained, but refused him his curtesy out of such lands as he had taken no pains to obtain possession of."

In 2 Blackstone's Commentaries, *181, under the head of dower, it is said: "A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowerable; for it is not in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with regard to the wife's lands; which is one reason why he shall not be tenant by the curtesy but of such lands whereof the wife, or he himself in her right, was actually seised in deed." Lord Coke also has a statement to the same effect.

Bishop, in his treatise on the "Law of Married Women," argues that curtesy does not depend solely on the right of issue to inherit, but upon the nature of the wife's estate as well—that it was one that might have been made to yield sustenance to the married parties during coverture. After an able review of all the lead-

ing authorities, he says (§ 499): "The result of this reasoning seems to be that, while the possibility of the issue inheriting is essential to curtesy, actual possession of the hereditaments by the wife is also essential, curtesy not arising except where the two concur. In this respect the analogy of curtesy to dower is complete. If we suppose that dower was given to assist the widow in her own maintenance and curtesy to assist the husband in maintaining the children, the analogy ought to be complete; and the law is not unreasonable in declining to give, after death, the use of what was not in use during life."

These considerations would seem to be ample to show that the abolition of the common-law maxim requiring seisin for the stock of inheritance does not logically determine the right of the husband to curtesy in a remainder which could not by possibility have vested in possession during coverture. And finally, the fact that nearly or quite all the States in this country, and England also, have abolished the maxim referred to, and now distribute the estates of intestates among the heirs without any reference or regard to the actual seisin of the ancestors, and yet at the same time hold firmly to the doctrine that either actual or legal seisin is an indispensable requisite to title by the curtesy, affords the strongest presumption against the correctness of the defendant's position.

But all this discussion will be in vain if the precise question under consideration has already been decided by this court in the way counsel for the defendant contend. Only two cases are relied upon in support of this contention—*Bush v. Bradley*, 4 Day, 298, and *Kline v. Beebe*, 6 Conn. 494.

In the first of these cases the facts, so far as they relate to curtesy, were as follows: Robert Woodhouse died actually seised of the premises in 1775. On his death they descended to Mary, his only child, who married James Goldear in 1794. She died in 1807, her husband surviving her, having had children who could have inherited the premises. Neither Goldear nor his wife ever had actual possession of them during coverture, but the defendant had been in possession adversely for more than twenty years. The question was whether Goldear was tenant by the curtesy. There is no doubt that the court, by a majority of its members, held that actual seisin was not necessary to make the husband tenant by the curtesy. But whether or not the court intended to hold constructive seisin or a seisin in law to be necessary is left in some doubt. There existed a right during coverture to recover the possession, so that the case was in fact one of constructive seisin. If we except a single passage at the close of the opinion of the majority of the court, given by Reeve, J., the reasoning is strictly confined to the precise case before the court, where there was a constructive possession. It is as follows: "We have always considered ownership of real property sufficient to maintain an action of trespass against every intruder; but by the English law actual possession by entry is necessary. We have always considered ownership as giving a right to possession of real property, as much so as ownership of personal property. Ownership in the one case draws after it possession as much as in the

other case; and whenever a right of possession is lost, all title and ownership are lost. . . . The English law distinguishes betwixt a right of possession and a right of property; but our law does not. Wherever there is a right to real property, there is of course a right of possession." The concluding interrogatory—why seisin should be thought necessary to curtesy, since it had been dispensed with in cases of descent, may have been intended, notwithstanding its unlimited terms, merely to furnish an argument for dispensing with actual seisin only; otherwise it would seem impossible to explain why so much stress had been placed in all the previous reasoning on the right to take possession as the controlling fact.

But in the argument for the defendant our attention was repeatedly called to the word "ownership" as constituting seisin. The meaning, however, is explained, we think, in the same opinion, as involving not abstract title alone, but also the right of possession; and it is explained again in *Chalker v. Chalker*, 1 Conn. 87, 88. Trumbull, J., after citing a passage from the opinion in *Bush v. Bradley*, said the word "ownership" was there used in its strict legal sense, and added: "It is a mistake to suppose that our courts have arbitrarily disregarded the rules of the common law, for I hold that in this State we have adhered to them as strictly in all these points as has been done in England, and that every deviation is either directly enacted in express words or clearly deducible from the legal construction of our own statutes;" and it was held in that case that an actual entry was necessary to revest a freehold estate forfeited for breach of a condition in a deed.

In *Shelton v. Alcoa*, 11 Conn. 249, Williams, Ch. J., in giving the opinion of the court, said: "When we say a man has the title to a farm, we mean he is the owner of it, and *vice versa*. And this corresponds with the legal meaning. He who has the possession, the right of possession and the right of property, has a perfect title."

In *Kline v. Beebe*, *supra*, the land in question had been devised to Deborah Bolles for life or during widowhood, with remainder to her daughter Patty, who married the plaintiff in 1795. Four years before her marriage, when she was only eighteen years of age, she deeded the property to the defendant's grantor. She arrived at full age more than a year before her marriage, and died in 1815, having had children by the plaintiff. Her mother Deborah also died during the same year, but whether it was before or after the death of Patty the record nowhere discloses. The question of curtesy was not brought up for review at all by the motion for a new trial, if we may judge by the brief and argument in support of the motion, for there is no hint or allusion to the question at all. Moreover the record expressly says: "The plaintiff had children by Patty, and was without question tenant by the curtesy of lands whereof she was seised during the coverture."

There was no discussion or reasoning by the court except upon the three points made as to the validity of the deed given by Patty when she was under age, in respect to which the court determined: (1) that the deed was not

void by statute as she was not under the government of a parent or guardian; (2) that at common law the deed was not void but voidable only; and (3) that after the arrival of the grantor at full age it was ratified and affirmed. The only allusion to curtesy consisted of a preliminary remark by Hosmer, Ch. J., before he came to the questions for review, as follows: "The title of the plaintiff as tenant by the curtesy is not defective for want of actual seisin in his wife. A husband in this State may be tenant by the curtesy of lands, although his wife was not seised during the coverture. *Bush v. Bradley*, 4 Day, 293."

This at most merely affirms the former case, or, if it does any more, it clears up that decision by showing by implication that a seisin in law is the seisin required, the term "actual seisin" being almost invariably used in contradistinction to seisin in law. It is probable that the court made this statement because counsel for the defendant had said: "The plaintiff is not entitled to recover as tenant by the curtesy, his wife not having had possession in fact of the land during coverture. Further, as her deed was only voidable, and it was not avoided during her life, she had no ownership or right of possession during the coverture, within the principle of *Bush v. Bradley*, 4 Day, 293."

This claim strikes us as very significant, for it shows that the very eminent counsel who made the point understood that the principle of *Bush v. Bradley* was, that a right of possession made a sufficient seisin as distinguished from "possession in fact," and it is also implied that counsel believed the life estate of Deborah had determined during the coverture, for the only reason given why there was no right of possession in Patty was, that she had given a deed of all her rights which vested all her interest in the grantee, until at least the deed was avoided, which was never done. If the estate for life had not determined, counsel would surely, as it seems to us, have mentioned that fact, having their minds directed specifically to the point whether there was a right of possession during coverture. Counsel for defendant in the case at bar claimed that, in the dissenting opinion of Peters, J., a suggestion was made indicating that the mother survived Patty. The remark was: "The grantor was *sui juris* one year only before she died, during the existence of the particular estate and when she had no right of entry. But this manifestly refers to the year 1794-95, when she was of full age and before her marriage. Hosmer, Ch. J., in considering the question whether Patty had ever affirmed her deed, on page 505 states the same fact, that she "arrived at full age more than a year before her intermarriage with the plaintiff and about three years after the deed was executed."

It seems to us that this case cannot be regarded as an authority supporting the contention of the defendant. At the most and without discussion it simply affirms the proposition that actual seisin in the wife is not essential to curtesy in this State.

We must then recur to the question, What was decided in *Bush v. Bradley*? It seems to us that the construction claimed by the defendant's counsel ought manifestly to be the true one, to justify this court in taking a position

utterly opposed to the settled law of all other jurisdictions. Instead of being manifest, it must be conceded to be very doubtful whether the court intended to go, or did go, beyond dispensing with the necessity of seisin in fact, and substituting a right to possession, or seisin in law. If not so in doubt how does it happen that on the one hand such able and accurate text-writers as Washburn, Bishop, Sharswood and Williams, as well as others, restrict the decision to the above point; while on the other hand *Chancellor Kent* and some others seem to give the decision larger scope.

Referring to our own text-writers, we find it stated in 1 *Swift's Digest*, top page 87, that "in this State it has been decided that a legal right to lands without actual seisin or possession is sufficient to entitle the husband to curtesy." This fails to clear up the doubt, although it is consistent with the position that only actual and not constructive seisin is dispensed with.

In *Dutton's Digest*, p. 53, it is said: "In this State the husband may be a tenant by the curtesy of land to which the wife had title, but of which she was not actually seised during coverture. *Kline v. Beebe*, 6 Conn. 499.

The same principle was previously adopted in *Bush v. Bradley*, 4 Day, 298, although a seisin in law of the wife during coverture is requisite."

It seems to us that this last sentence clearly shows that *Judge Dutton* construed these decisions precisely as we do. A mind so acute and well stored with legal definitions as was his must have understood that seisin in law in such connection is always used in contra-distinction to a seisin in fact or in deed, and imports a right to the possession.

In *Hawkins v. Shewen*, 1 Sim. & Stu. 260, it is said that "seisin in deed is actual possession of the freehold, and seisin in law is a legal right to such possession."

Blackstone, in the citation previously made, makes the same distinction and gives the same definition to the term "seisin in law," and adds that "therefore a man shall not be tenant by the curtesy of a remainder or reversion."

In 2 *Bouvier's Law Dictionary*, p. 509, it is said that "seisin in law is a right of immediate possession," and this we think is the precise idea that *Judge Dutton* intended by the same expression.

Our conclusion is that there is nothing in the decisions referred to, properly construed, to compel us to occupy the isolated position of holding that there can be curtesy in a remainder expectant upon a prior undetermined freehold.

It may be suggested that, if we discard actual seisin and still require seisin in law, we shall still be opposed to the great weight of judicial authority. This may be so; nevertheless, in holding a constructive seisin or seisin in law sufficient we are not without strong support. *Merritt v. Horne*, 5 Ohio St. 307; *Watkins v. Thornton*, 11 Ohio St. 367; *Wass v. Bucknam*, 38 Me. 356; *Day v. Cochran*, 24 Miss. 261; *Stephens v. Horne*, 25 Mo. 349; *Stoolfoos v. Jenkins*, 8 Serg. & R. 167.

If curtesy was to be favored it would seem natural and reasonable perhaps, having abolished the common-law requirement of actual seisin, to do away with constructive seisin also

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as a requisite to support the estate; but jurists agree that it is not to be favored. *Chancellor Kent* says the extent of the law of curtesy may be justly complained of. The obvious reason is that it gives to the husband what would otherwise belong to the heir of the wife. It has no moral foundation to rest upon, and hence the spirit and tendency of the times is toward its abolition rather than its extension. The Legislature of this State twelve years ago abolished it as to all subsequent marriages, and several other States have done the same thing.

We advise the Superior Court to render judgment for the plaintiffs.

In this opinion *Andrews, Ch. J.*, and *Beardley, J.*, concurred.

Pardee, J., dissenting:

The question is, Can there be a tenancy by the curtesy in a reversion expectant upon a prior estate for life, that estate having extended beyond the life of the wife owning the reversion?

The answer in the negative, given by a majority of the court, is undoubtedly the law in most, if not in all, jurisdictions other than our own.

In *Bush v. Bradley*, 4 Day, 298, *Josiah Woodhouse* died, seised of the premises in question, in 1766. His son *Robert* inherited and occupied, and died seised in 1775. His only child, *Mary*, born in 1774, inherited; she intermarried with *James Goldear* in 1794, before she arrived at the age of twenty-one years. She continued a *feme covert* until her death in November, 1807, leaving her husband *James Goldear* living, having had children by him. These died before their mother. If they had survived her they could have inherited the premises. *James Goldear* had never been in actual possession of the premises. His wife had not been in possession since her intermarriage with him, for this reason, that the defendant, before 1788, more than twenty years prior to the commencement of the action, having purchased the premises for a valuable consideration, went into possession of the same, and from that time to the time of trial had held possession adversely to all others. The plaintiffs were the heirs at law of a sister of *Josiah Woodhouse*, the original owner. The defendant objected to a recovery on the ground that *Goldear*, being now living, was tenant by the curtesy of the premises, although neither he nor his wife had ever been in actual possession during coverture; and the court directed the jury to find a verdict for the defendant on that ground solely. The plaintiffs moved for a new trial. The court said substantially as follows:

"As to the point respecting the curtesy, there is no question but what there must have been by the English law an actual seisin of the wife of the premises during the coverture, to entitle the husband to the curtesy. It is said that unnecessary departures from the common law of England are not to be favored; that by such means everything is rendered uncertain. I am fully of opinion that few maxims of our law are more important than that of *stare decisis*; but it must be acknowledged by all that our system of law respecting real property is, in many instances, very different from the Eng-

lish system. We have in some instances, when we have adopted the principles of the English law, extended them to cases which, by the adjudications of the English courts, have not been supposed to fall within the governing principle; in others we have adopted entirely different principles; and in all such cases where this has been done, which are *pari ratione* with those already settled, if we reject our own and adopt theirs, we shall mar the symmetry of our law; and the preservation of symmetry in our system I also view as a most important consideration. In England it is not sufficient that a man is proprietor of real property, and has a perfect right to it when he dies, to cause it to descend to his heirs-at-law. No, he must be actually seised thereof. The maxim is *seisin facit stipitem*; and the person that is heir to that property will be heir to him that was last seised. If A should die, who owns Whiteacre, which descended to him from his father, but has not been actually seised, leaving a brother of the half blood, B, and a sister, C, of the whole blood, this estate cannot descend to C, his sister and heir; for B, being of the half blood, cannot by their law inherit to his brother; but yet the same will descend to B, who is heir to his father, who was the last seised. Had A been seised, the estate would have descended to C. The maxim of *seisin facit stipitem* is an unyielding maxim of their law, and what governs the descent of property. But this is not our law. It is settled that it shall descend to the heirs of him who owns the property, whether he was seised or not. Seisin directs the descent with them; ownership with us.

"By the English law a devise will not operate upon real property of which the devisor is disseised. Seisin is an indispensable requisite to give effect to the devise. A devise, by our law, is good although a man is disseised. Seisin is necessary in their law and nothing but ownership in our law. We have always considered ownership of real property sufficient to maintain an action of trespass against every intruder; but by the English law actual possession by entry is necessary. We have always considered ownership as giving a right to possession of real property, as much so as ownership of personal property. Ownership in the one case draws after it the possession as much as in the other case; and whenever a right of possession is lost, all title and ownership are lost. So the Statute of Limitations respecting lands has always been construed. The Statute, in the words of it, does not take from the original proprietor his title; it only tolls his right of entry; and yet this Statute has been always considered as barring all claims of title, whilst the same words in the English Statute have been considered, not as having any effect on the title, but only on the right of entry, and the lands may be recovered by a form of proceeding proper for such a case. The English law distinguishes betwixt a right of possession and a right of property; but our law does not. Wherever there is a right to

real property, there is of course a right of possession, and the Statute which takes away the right of possession, takes away the right of property; and this is the reason that this Statute has received a construction altogether different from the construction given to the English Statute; and this is perfectly analogous to every other case of real property in this State. Wherever you find a right of property you find a right of possession, and all the consequences of ownership attending it that you find in England where there is an actual seisin; and, on the other hand, where there is no right of possession there is no ownership. So in this case, Mary Goldear had title to the land, and though not actually seised, her husband acquired the same rights on her death as if she had been seised. Since seisin is not necessary in case of descent to the heirs, neither is necessary to pass lands by a devise, why should it be thought necessary to the husband's title by the curtesy?

"The decision of the court in this case is no departure from fixed rules and precedents. The departure from the English rule respecting the efficacy of seisin has long since been departed from; and to adhere to it in this case would mar the symmetry of our law."

In *Kline v. Beebe*, 6 Conn. 494, it is said in the marginal note that "in this State the husband may be tenant by the curtesy of land to which the wife had title, but of which she was not actually seised, during the coverture," citing *Bush v. Bradley*, 4 Day, 298.

In 4 Kent's Commentaries, 5th ed. 30, it is said as follows: "The rule has been carried still further in this country; and in one State, where the title by curtesy is in other respects as in England, it is decided that it was sufficient for the claim of curtesy that the wife had title to the land, though she was not actually seised nor deemed to be so. The law of curtesy in Connecticut is made to symmetrize with other parts of their system, and in that State ownership without seisin is sufficient to govern the descent or devise of real estate,"—citing *Bush v. Bradley*, 4 Day, 298, and *Kline v. Beebe*, 6 Conn. 494.

A vested remainder expectant upon a life estate is a fixed present right of property, alienable, devisable, descendible; indeed it has all of the incidents of any other kind of present interest in real property. Ownership of, that is, the present right of property in, the reversion expectant upon a life estate, stands upon a plane with ownership of the fee. And upon the cited precedents in this court, ownership is perfect in utter disregard of the question as to possession. Ownership has displaced and stands for the actual seisin, the investiture by turf and twig of the common law. It matters not that the rightful owner in fee is kept from possession by a tortfeasor, or by rightful possession by the life tenant. In each case alike there is a valuable vested present right of property, susceptible of ownership in the highest sense. To such ownership, in both cases, tenancy by the curtesy is legally incident equally.

In this opinion *Carpenter, J.*, concurred.

OHIO SUPREME COURT.

OHIO SOUTHERN R. CO.

v.

George A. MOREY.

(47 Ohio St.....)

*1. **Sec. 5027, Rev. Stat., prescribing the counties within which a railroad company may be sued**, relates solely to the jurisdiction of the person, and it is not necessary that the petition should state that its road passes into or through the county where the action is brought; a railroad company, like a natural person, submits itself to the jurisdiction of the court by appearing for any other purpose than to object to such jurisdiction.

2. **Where a written proposition is made by one party, which, after a parol modification of some of its terms has been made, is accepted by the other party in parol, such written proposition is the best evidence of so much of the resulting contract as it contains.**

3. **One who causes work to be done is not liable, ordinarily, for injuries that result from carelessness in its performance by the employees of an independent contractor to whom he has let the work, without reserving to himself any control over the execution of it.** But this principle has no application where a resulting injury, instead of being collateral and flowing from the negligent act of the employé alone, is one that might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care is omitted in the course of its performance. In such case the person causing the work to be done will be liable though the negligence is that of an employé of an independent contractor.

(March 25, 1890.)

ERROR to the Circuit Court for Fayette County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action to recover damages for injuries to plaintiff and his horse by reason of their falling into an unguarded ditch for which defendant was alleged to be responsible. *Affirmed.*

Statement by Bradbury, J.:

The defendant in error, George A. Morey, brought in the Court of Common Pleas of Fayette County an action against the Southern Ohio Railroad Company, plaintiff in error, to recover damages claimed to have been sustained by him on account of himself and horse falling into a ditch that the plaintiff in error had caused to be dug, and left unguarded across Water Street, in the Town of Washington, in said county, on the night of November 9, 1885.

The record discloses that the plaintiff in error, at the time of the accident, owned and operated a railroad which ran through said Town of Washington, and occupied part of said Water Street, with its tracks, and owned and occupied a depot situate on lots owned by it that were adjacent to said street. That the ditch causing the injury had been dug during the day, the night of which the accident oc-

curred, for the purpose of laying tilling for a drain from the depot above mentioned; that the ditch was dug entirely across that part of said street which was, or could be, used for travel; that it was from four to six or seven feet deep, about two and one half feet wide at the top, and about two feet wide at its bottom, and the earth from it thrown out two or three feet high on both sides; that the night was very dark, and the ditch left wholly unguarded; that the defendant in error, having no knowledge that the ditch had been dug, and without fault on his part, fell into it, together with his horse, and thereby received the injuries of which he complained, and that the ditch was, in fact, dug by a man employed by the firm of R. P. Willis & Son, who did the plumbing work for the depot.

The main contention between the parties at the trial was whether this plumbing was done under such an independent contract as would exonerate the Railroad Company from liability for the negligence of the contractor and his immediate servants.

The defendant in error recovered a judgment in the court of common pleas, which the circuit affirmed, and this proceeding was brought to reverse both judgments.

Any further statement of the facts requisite to a decision of the case will be found in the opinion.

Messrs. W. O. Henderson, C. W. Fairbanks and Pavey & Pavey for plaintiff in error.

Messrs. Van Deman & Chaffin for defendant in error.

Bradbury, J., delivered the opinion of the court:

1. Plaintiff in error contends that § 5027, Rev. Stat., prescribing the counties within which a railroad company may be sued, renders the action local, and to give the court jurisdiction of it, the petition must show that the railroad runs through or into the county where the action is brought, and that if it does not so appear, the defect can be reached by a general demurrer. In this view we do not concur. "The division of personal actions into local and transitory is not known in Ohio." *Genin v. Grier*, 10 Ohio, 209.

This doctrine is as applicable to our present method of procedure as it was to that in use in 1840, when it was announced by this court. Section 5027 provides that "an action against a railroad company may be brought in any county through or into which such road . . . passes." This section, like the other sections of chapter 5 of the Code of Civil Procedure, that merely prescribe the county in which a defendant may be sued, relate only to the jurisdiction over the person. Neither a railroad company nor other corporation, nor even a natural person, is bound to appear in an action in obedience to a summons served out of the prescribed county. It is a privilege, however, that is personal, and may be waived; and this court has uniformly held that a defendant by appearing in court, and, without objecting to its jurisdiction over his person, invoking any

*Head notes by the Court.

action in the cause, waives this privilege, and submits his person to the jurisdiction of the court. *Harrington v. Heath*, 15 Ohio, 488, 487, 488; *Gilliland v. Sellers*, 2 Ohio St. 228; *Wood v. O'Ferrall*, 19 Ohio St. 427; *Thomas v. Pennrich*, 28 Ohio St. 55; *Fitzgerald v. Cross*, 80 Ohio St. 450; *O'Neal v. Blessing*, 84 Ohio St. 83; *Handy v. Ins. Co.* 37 Ohio St. 366; *Elliott v. Lawhead*, 43 Ohio St. 171, 1 West. Rep. 162.

The plaintiff in error not only appeared without objecting to the jurisdiction of the court of common pleas over its person, but moved to strike from the petition certain averments deemed by it to be objectionable, and on that motion being overruled, filed a general demurrer to the petition, which being in turn overruled, it filed an answer, and went to trial upon the merits. It thus, in the most ample manner, submitted its person to the jurisdiction of the court.

2. After the plaintiff below had introduced his evidence, counsel for the Railroad Company moved the court to arrest it from the jury, and to direct a verdict in its favor on the ground that it did not tend to prove the facts in issue. This motion was overruled and this ruling is now before us for review. The only controverted averment of the petition which it is contended the evidence did not tend to prove, is that which states that the plaintiff in error, defendant below, caused the ditch to be dug. That the plaintiff in error owned the lots upon which the depot stood, and used and occupied the depot was averred in the petition and not denied by the answer; the evidence of the plaintiff below showed that the ditch was dug for the purpose of draining the depot, and that the agent of the Railroad Company was present and knew that it was being done. This we think not only tended to prove that the Railroad Company caused the ditch to be dug, but was sufficient to establish that fact *prima facie* at least.

One observing a ditch freshly dug and extending from a valuable building to a lower level, on being informed that it was to be used for the purpose of draining the building, would be fully justified in inferring from those facts that the owner of the building caused the ditch to be dug.

3. The plaintiff in error in attempting to show that the ditch was dug by an independent contractor, for whose negligence it was not responsible, offered evidence tending to prove that it was dug by R. P. Willis & Son, gas fitters and plumbers of Springfield, O., in putting the water-closets, urinals, etc., in the depot. It was shown that this firm had submitted to the Railroad Company a written proposition, containing the terms on which they would perform the work, and that, with two parol modifications, it was accepted in parol by the Railroad Company, and the work awarded to them. Counsel for the Railroad Company then attempted to prove by parol this entire contract. To this objection was made by counsel for plaintiff below on the ground that the written proposition in so far as it contained the terms of the contract was the best evidence thereof; this view was adopted by the court and the parol evidence excluded. In this there was no error. A contract may rest partly in writing and partly in parol, and in that case

while the part resting in parol must of necessity be proved by parol, nevertheless the writing itself is the best evidence of the part thereof of which it contains. This proposition rests not only upon principle, but is supported by numerous authorities, only a limited number of which need be cited. 2 Parsons, Cont. 553; *Domestic Sewing Mach. Co. v. Anderson*, 23 Minn. 57; *Thurston v. Ludwig*, 8 Ohio St. 1-8.

4. The record discloses a number of other questions that counsel for the Railroad Company propounded to its witnesses, but except in two instances the testimony the witness was expected to give does not appear at all, and in the other two only inferentially as follows: "The defendant, proposing to prove that R. P. Willis & Son had never done any work for defendant as its agent or servant, asked the following question of John S. Willis: Did you ever do any work for the Ohio Southern Railroad Company as the agent or servant of said Company?"

This question was objected to by counsel for plaintiff below, and ruled out by the court, to which exception was taken. Conceding that the introduction to the question sufficiently states what counsel expected to prove by the witness, yet there was no error in the ruling of the court for the question was leading in form; but had it been free from fault in this respect yet the evidence to be given in response to it as indicated by the introduction was not competent. It was not the province of the witness to state whether or not the firm of R. P. Willis & Son was the agent or servant of the Railroad Company in what they did; that depended upon the contract under which they operated. It was competent for the witness to state the terms of the contract in so far as they could be established by parol, but the relation which they bore to their employers was a question for the jury under proper instructions from the court.

5. The only serious question in the case is presented by charges given or refused by the court.

The court among other things charged the jury as follows:

"If the necessary or probable effect of the performance of the work would be to injure third persons, or create a nuisance, then the defendant is not relieved from liability, because the work was done by a contractor over which it had no control in the mode and manner of doing it."

To this the plaintiff in error excepted.

The question is here presented whether the owner of real estate who causes work to be done in relation to it the probable consequences of the performance of which will be to endanger others or to create a nuisance, can shift from himself all responsibility for these probable consequences by letting the work to an independent contractor over whom he reserves no control? Will a sound public policy permit this to be done? If so, then we may expect the prudent proprietor, when he has work to be done which involves these probable consequences, to provide for its performance by a carefully guarded contract by which he retains no control over it whatever.

The case of *Clark v. Fry*, 8 Ohio St. 353, is relied upon by counsel for plaintiff in error.

builder and yielded to him during the entire period covered by the construction the exclusive possession and control of the premises. The plan of the building and the contract for its construction contemplated an excavation for an area extending six feet into the street, which was about eighty feet wide, and the record leaves it in doubt whether the excavation extended out to the traveled sidewalk or not, and it nowhere appears that it caused any material interruption of or inconvenience to transit along the street by the public. The excavation was made by a sub-contractor, and Fry without fault fell into it, receiving injuries therefrom, for which he brought suit. Clark set up the contract in defense of the action, under that state of facts. The trial court charged the jury that the excavation was unlawful and created a nuisance, for which Clark was liable. This was held to be error. The question involved in that part of the charge in this case now under consideration was not discussed by the court in *Clark v. Fry, supra*. The court there, indeed, laid down the rule, that where the thing to be done under the contract was unlawful or necessarily injurious to third persons, the employer as well as the employé would be liable for an injury resulting therefrom, but there was nothing in the issues made by the pleadings or in the charge of the court that presented the questions which are raised by the charge of the court now under review. That one upon whom the law devolves a duty cannot shift it over upon another so as to exonerate himself from the consequence of its nonperformance is, we think, quite clear (Shearm. & Redf. Neg. §§ 174-176; *Railroad v. Van Dorn*, 1 Circuit Ct. Rep. 292; Wood, Mast. and S. § 316; Wharton, Neg. § 185); and we think it equally clear that the law devolves upon everyone about to cause something to be done which will probably be injurious to third persons the duty of providing that reasonable care shall be taken to obviate those probable consequences.

In this class of cases the doctrine of *respondet superior* has no application; his liability is based upon the principle that he cannot set in operation causes dangerous to the person or property of others without taking all reasonable precautions to anticipate, obviate and prevent these probable consequences. This doctrine was recognized by Judge McIlvaine in *Hughes v. Cincinnati & S. R. Co.*, 39 Ohio St. 476, in the following language: "The employer cannot relieve himself from liability by contracting with others for the performance of work, where the necessary or probable effect of the performance of the work will be to injure third persons." *Carman v. Steubenville & I. R. Co.*, 4 Ohio St. 399; *Circleville v. Neuding*, 41 Ohio St. 465; *Bowser v. Peate*, L. R. 1 Q. B. Div. 321.

The court also charged the jury as follows:

"The making of an excavation across a public highway, which materially interferes with public travel, is an unlawful act, unless authorized by proper authority, and this because such excavation creates a nuisance. If the defendant caused such an excavation to be made, it cannot shield itself from liability if injury re-

control, unless it caused all reasonable precaution to be taken to prevent such injury."

This proposition also is claimed to be in conflict with the rule laid down by the court in *Clark v. Fry, supra*. This may be true if it is so regarded as the enunciation of a general proposition applicable to all excavations made in a public highway, or even to all ditches dug across them; but the doctrine of *Clark v. Fry* is not to be extended beyond the facts upon which it rests. Since that case (*Clark v. Fry, supra*) arose, the Legislature has declared it to be an offense to obstruct a highway, street or alley. § 6921, Rev. Stat.

Notwithstanding this Statute, however, we do not want to be understood as holding that in all cases where an excavation is made in a highway, street or alley it necessarily constitutes a nuisance. The issues in the case before us, however, were widely different from those in *Clark v. Fry, supra*, as was the extent and character of the excavation. In the case before us the only question, except as to the amount of damages, submitted to the jury, was whether or not the Railroad Company caused the excavation to be made. The record discloses that no contention was in fact had over any other material fact. That the ditch causing the accident extended entirely across the highway was not disputed, and from its depth and width it could not be otherwise than highly dangerous to everyone who might in the night-time pass along the street across which it was dug, and the language of the court must be construed in connection with the undisputed facts, the issue being tried and the evidence material to it. There was evidence tending to show that the plan of the work prepared by the engineer of the railroad contemplated that the drain would cross the street at this particular point. The ditch was dug in the usual way and the agent of the defendant at Washington had full knowledge of the place where and the manner in which it was being dug. The chief engineer who let the contract testified that he did not at the time know of the existence of the street. This was no excuse; he was bound to take notice of public highways, but it is a strong circumstance tending to show that the Railroad Company caused the ditch to be dug and left exposed in the manner in which it was in fact done; it was supposed by them to be on their own premises, and that no duty rested on them toward travelers who might intrude themselves there. On no other theory can the indifference of all who were concerned in digging the ditch and leaving it exposed be explained. It would have been criminally careless in them to have left over night in a highway, known by them to be such, a pitfall so dangerous as this was shown to be.

There was evidence, therefore, from which the jury could find that the railroad caused this ditch to be dug in the particular manner that the work was done, and if the jury so found it was liable for the consequences whether it did so by its own servants, or by the hand of an independent contractor.

"A ditch cannot be dug in a public street.

and left open and unguarded at night without imminent danger of such casualties. If they do occur who is the author of the mischief? Is it not he who causes the ditch to be dug, whether he does it with his own hands, employs laborers, or lets it out by contract? If by contract then I admit that the contractor must respond to third parties if his servants or laborers are negligent in the immediate execution of the work. But the ultimate superior or proprietor first determines the excavation shall be made, and then selects his own contractor. Can he escape responsibility for putting a public street in a condition dangerous for travel at night by interposing the contract which he himself has made for the very thing which creates the danger? I should answer this question in the negative. Comstock, J.,
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in *Storris v. Utica*, 17 N. Y. 108; *Chicago v. Robbins*, 67 U. S. 2 Black, 418 [17 L. ed. 298]; *Robbins v. Chicago*, 71 U. S. 4 Wall. 657 [18 L. ed. 427].

"Where the obstruction or defect caused or created in the street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable; but where the obstruction or defect which occasioned the injury results directly from the acts which the contractor agreed and was authorized to do, the person who employs the contractor and authorizes him to do those acts is equally liable to the injured party."

There was no error in the charge.
Judgment affirmed.

TENNESSEE SUPREME COURT.

J. H. SNODDY, *Plff. in Err.*,
v.
AMERICAN NATIONAL BANK.

(.....Tenn.....)

A negotiable note is not valid, even in the hands of a bona fide holder, where it grows out of

(February 23, 1890.)

NOTE.—Promissory note, when invalid.

To entitle a purchaser of a note which was illegal or fraudulent in its inception to recover thereon, he must have been a good-faith purchaser. *Goodrich v. McDonald* (Mich.) 48 N. W. Rep. 1019; *Manning v. Manning*, 8 Ala. 188; *Ivey v. Nicks*, 14 Ala. 564; *Fuller v. Hutchings*, 10 Cal. 523.

A note given to secure the payee for margins advanced by him to the maker upon a joint option contract in grain, there being no intention to actually receive or deliver or pay for the grain, is without valid consideration; and when the maker sets up such defense, there can be no recovery. *Davis v. Davis*, 119 Ind. 511.

The defense that a note was given in pursuance of an unlawful contract is available to the indorser. *Jones v. Hanna*, 81 Cal. 507.

The defense that the contract sued on was a wagering contract must be specially pleaded. It cannot be shown under the general issue. *Comiskey v. Williams*, 2 West. Rep. 604, 20 Mo. App. 606.

But the plea need not state the kind of game. *Jordan v. Locke*, 1 Minor (Ala.) 254.

Evidence of the uniform habit of the maker of a note to gamble when drunk is not admissible to show that a promissory note made by him was given for money lost at play. *Thompson v. Bowie*, 71 U. S. 4 Wall. 463 (18 L. ed. 423).

Where there is no evidence whatever that a written contract was a gambling contract on the prices of produce, evidence of what other people intend by other contracts of a similar character, however numerous, is not competent to prove the contract to be of that character. *Bountree v. Smith*, 108 U. S. 299 (27 L. ed. 722).

Generally, in this country all wagering contracts are held to be illegal and void as against public policy. *Irwin v. Williar*, 110 U. S. 499 (23 L. ed. 225). See note to *Harvey v. Merrill* (Mass.) 5 L. R. A. 200.

A policy of life insurance payable to one who has no insurable interest in the life of the insured is a wagering policy and void. *Cammack v. Lewis*, 82 U. S. 15 Wall. 643 (21 L. ed. 244); *Conn. Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457 (24 L. ed. 251); *Etna L. Ins. Co. v. France*, 94 U. S. 561 (24 L. ed. 287); *Warneck v. Davis*, 104 U. S. 775 (26 L. ed. 924); *Conn. Mut. L. Ins. Co. v. Lucho*, 108 U. S. 498 (27 L. ed. 800).

A note given for a bet on an election is void. *Russell v. Pyland*, 3 Humph. 131.

One who sells a note which is void in his hands on grounds of public policy, fraudulently representing it to be good, is liable to the purchaser for the money paid therefor, when the maker has refused payment, although the purchaser, as a bona fide holder, might have collected it from the maker. *Evans v. Stubbberg* (Mich.) 6 L. R. A. 501.

A bond given for money won at a horse race, or to secure a forfeiture for failure to run a horse at the race, is void. *Tatham v. Strader*, 23 Ill. 496; *Hayden v. Little*, 35 Mo. 422; *Shropshire v. Glascock*, 4 Mo. 536; *Boynton v. Curle*, 4 Mo. 599.

A due bill given by an agent for the sale of lottery tickets is not enforceable in the courts. *Lanahan v. Pattison*, 1 Flipp. 410; *Rothrock v. Perkins*, 61 Ind. 39.

7 L. R. A.

a wager contract, which is made a crime by statute, and a transfer of such note to a party ignorant of its illegality is also made a crime, although the statute does not expressly declare that such note shall be void in the hands of innocent holders.

A lease of premises to be used for the sale of lottery tickets is void. *Edelmuth v. McGarren*, 4 Daly, 487.

For other cases, see *Yellowstone Kit v. State* (Ala.) ante, 699.

Securities given for money lost at play.

A note or other security given in consideration of money won at gambling is void. *Munroe v. Smelly*, 25 Tex. 586; *Conner v. Mackey*, 20 Tex. 747.

Notes given for a gaming consideration are void even in the hands of a bona fide holder for value without notice of the illegality of the consideration. *Chapin v. Duke*, 57 Ill. 296; *Eagle v. Kohn*, 84 Ill. 232; *Unger v. Boas*, 13 Pa. 601; *Vallett v. Parker*, 6 Wend. 615; *Pace v. Martin*, 2 Duv. (Ky.) 522; *Holman v. Ringo*, 36 Miss. 690.

So a note given for money lent to gamble with is void. *Williams v. Judy*, 8 Ill. 232; *Buckman v. Bryan*, 3 Denio, 340; *Morgan v. Groff*, 5 Denio, 364; *Tidmore v. Boyce*, 2 Mill. Const. Rep. (S. C.) 200; *Mordecai v. Dawkins*, 9 Rich. L. 262; *Machir v. Moore*, 2 Gratt. 237.

So the indorsement of a valid draft in payment of a gambling debt conveys no title. *Williams v. Wall*, 60 Mo. 318.

But where a person who has lost money at gambling gives his note to a third person, who thereupon pays an adequate consideration to the winner, the note is not void. *Jones v. Sevier*, 1 Litt. (Ky.) 50; *Mooring v. Stanton*, Mart. (N. C.) 52.

So where an innocent holder is induced to take a note given in consideration of money won at gambling, by the representations of the maker, he may recover. *Manning v. Manning*, 8 Ala. 188; *Fuller v. Hutchings*, 10 Cal. 523; *Ivey v. Nicks*, 14 Ala. 564. Compare *Carson v. Lambert*, 3 Bay, 560.

The same rule applies to the assignee of a bond given for a gambling consideration. *Woodson v. Barrett*, 2 Hen. & Mun. 80; *Buckner v. Smith*, 1 Wash. (Va.) 296.

The assignment of a bill of goods lost at a gambling table, unaccompanied by actual delivery of the goods, is no consideration for a note or check. *Hockaday v. Willis*, 1 Speers, L. 379.

Bonds given for a gambling consideration are invalid.

A bond to convey land, given for a gambling consideration, does not bind the obligor; but if it be assigned to a bona fide purchaser for value, and conveyance of the land be made to him, neither the obligor nor his heirs can afterward question the consideration where the statute against gambling vitiates deeds only in the hands of the winner. *Chiles v. Coleman*, 2 A. K. Marsh. 206.

So where one obtains a bond by gambling and collects part of it from the obligor, who gives a new bond for the balance, such new bond is invalid, the original bond being based on a gambling consideration. *Stone v. Mitchell*, 7 Ark. 91.

A bond taken on the compromise of an action on a gambling contract, if the money won is a part of the consideration, is void. *Turner v. Peacock*, 2 Dev. L. 308.

ERROR to the Circuit Court for De Kalb County to review a judgment in favor of plaintiff in an action upon a promissory note which was alleged to be void because founded upon a wagering consideration. *Reversed.*

The facts are fully stated in the opinion.

Mr. Dan Williams for plaintiff in error.

Messrs. John M. Gaut and Will. T. Hale, for defendant in error:

The money was advanced by Williams & Co., after the transaction was closed and the loss incurred, and was simply a loan of money made by the agent to the principal not to induce him to enter into an illegal transaction, or to carry through one already entered upon, but simply to pay his loss, after it had already been sustained; and a note given therefor was valid.

Marshall v. Thurston, 3 Lea, 740.

In the absence of positive enactment, a bona fide holder of a bill or note may recover thereon, if he had no notice of the illegality at the time he became the holder.

Chitty, Bills, pp. 81, 82.

The "positive enactment" referred to means a positive enactment not merely that the gaming contract shall be void but that all negotiable instruments based thereon shall be void.

Lowe v. Waller, 2 Doug. (Eng.) 736; **Vallett v. Parker**, 6 Wend. 617; Chitty, Bills, 81, 82, 104, 105; 1 Daniel, Neg. Inst. §§ 197, 198.

Snodgrass, J., delivered the opinion of the court:

The only question in this case is whether an innocent holder of a note founded on a gaming consideration can recover of the maker. The note sued on was void in the hands of the payee. It was given in settlement of loss sustained by plaintiff in error while dealing in futures with Williams & Co. There was no intent to take or deliver grain pretended to be purchased on the one hand or sold on the other. The contract to do so was therefore gaming, and void by express statute. Act 1883, p. 381; **McGrew v. City Produce Exchange**, 85 Tenn. 572.

Nor does it matter that Williams & Co. pretended to be, or were, mere agents in the transaction. They knew of and participated in its illegality, and could maintain no action on the note given them for the loss sustained by their alleged principal. **Beadles v. Owenby**, 16 Lea, 424.

But they transferred the note taken by them in settlement of the loss sustained by plaintiff in error to the American National Bank, before due, for value; and the Bank had no notice of the illegality of consideration. It is therefore insisted the Bank may recover as an innocent holder, and the circuit judge so held.

Our Statute makes all wagering contracts void to the extent of the wagering consideration, and provides that no money or property won by any species or mode of gaming shall be recovered by action, and that any money or property so paid or delivered may be recovered back by the payor, his wife, children, next of kin or creditors. Code, § 2438 *et seq.*

The particular species of gaming now being considered is made a misdemeanor, and punished as such, the limitation as to the least

punishment being more severe than that of ordinary gaming. Act 1883, § 8.

Thus it appears that such contract is not only against public morals, and public policy, and public statute,—*malum in se*, and *malum prohibitum*,—and that it is declared void, but it is also made a crime, and punished as such. The general rule that, as between the innocent holder and the maker, the consideration cannot be inquired into, is subject to the exception that it may be done if the consideration was gaming or usurious. 3 Kent, Com. 9th ed. 99.

By the great weight of authority, notes given in consideration of a contract against morals, public policy and public statute are void in any hands. 2 Am. & Eng. Cyclop. Law, 368, and notes.

Perhaps there are no exceptions where, in addition, the transaction is also criminal.

It is insisted, however, that the Statutes referred to do not in express terms declare that negotiable notes so executed are void in the hands of innocent holders, and that, unless the Statute so declares, they will be held good; and for this proposition Chitty on Bills, 104, 105, Daniel on Negotiable Instruments, §§ 197, 198, and several cases are cited. But these authorities (and to the same effect is § 192, Story on Promissory Notes, from which Mr. Daniel copies the greater part of sections cited) show that the Statute need not expressly declare such notes void. If it does so by necessary implication, it is sufficient. We hold that the Statutes referred to do by necessary implication make such notes void, in making the contract under which they are executed void and criminal. But the Statute goes further. It affirmatively shows that such negotiable notes are not to be used, and makes the transfer of such a note to a party ignorant of its illegality a criminal offense. Code, §§ 2444, 5708.

It results, therefore, that the Bank cannot maintain an action on the note in controversy, and the judgment of the circuit judge must be reversed, and judgment entered here in favor of plaintiff in error. The costs of both courts will be paid by the Bank.

M. T. CARTWRIGHT, *Appt.*,

v.

J. M. DICKINSON, Assignee, etc., of the Grubbs Cracker Co.

(...Tenn....)

1. An attempt to release a stockholder from his stock-subscription contract by the general manager of a corporation, who is also

NOTE—Stockholder cannot be released from his subscription contract.

A corporation has no legal capacity to release an original subscriber to its capital stock from payment of it, in whole or in any part. **Morgan v. Struthers**, 181 U. S. 245 (38 L. ed. 182); **Burke v. Smith**, 88 U. S. 16 Wall. 390 (21 L. ed. 361); **Bedford R. Co. v. Bowser**, 43 Pa. 29; **Green's Brice**, *Ultra Vires*.

Yet a subscriber may make any arrangement for the security of his shares provided it does not lessen the amount of his subscription. **Morgan v. Struthers**, *supra*.

its largest stockholder, secretary and treasurer, on the stockholder's request that he would dispose of his stock, whereby he causes entries to be made on the books charging off the balance due for unpaid calls and crediting to the stockholder the sums paid by him, will not avail to release the stockholder where no attempt is made to transfer his shares, although the manager secures new subscriptions to the stock in place thereof, and both parties suppose that he is authorized to substitute new subscriptions and release the old ones.

2. The fact that an over-issue of stock will be the result where stock is issued to new subscribers as a substitute for that of stockholders who wish to withdraw, unless an attempted cancellation of the earlier subscriptions, made with supposed authority to effect such substitution, shall be upheld, will not aid such invalid attempt at cancellation.

3. A stockholder who is misled by statements of the manager of the corporation whom he has requested to dispose of his shares, to the effect that they have been sold when in fact an invalid attempt to cancel them merely has been made, is not thereby released from his contract. If injured his remedy is against his agent, the manager.

4. A mistake of law does not relieve in equity any more than at law.

5. An assignee of a corporation who has not resigned his trust, where there are creditors whose claims he must provide for, is not prevented from bringing suit to enforce the liability of a stockholder on his stock subscription by the fact that he has suffered the stockholders to resume business with the machinery assigned to him, taking a bond for its protection.

(February 4, 1890.)

A PPEAL by complainant from a decree of the Chancery Court for Davidson County,

in favor of defendant in a suit by an alleged creditor of an insolvent corporation to enforce payment of his claim out of assets in the hands of its assignee, in which a cross-bill was filed to enforce complainant's liability upon his stock subscription. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. E. B. Rucker and Whitman & Gamble, for appellant:

Mr. Cartwright was never a stockholder in this company, for he simply subscribed for eighty shares of stock, but did not pay for one of them. A subscriber is not a stockholder, but has only placed himself in a position to become one.

Cook, Stock and Stockholders, No. 4, § 208.

When stock has been subscribed and paid for, and, before a certificate is issued to the subscriber, another subscribes, pays for and secures a certificate of stock, the remedy of the first subscriber is not against the company and the certificate-holder to set aside the certificate, and have the company issue him one, but against the company to recover his money back, and damages for the breach of the contract.

Cook, Stock and Stockholders, § 74.

For the refusal of the corporation to issue original stock to a subscriber the measure of damages is the difference between the price contracted for and the market value on the day when the issue ought to have been made.

Cook, Stock and Stockholders, § 74, note 8; *Van Allen v. Illinois Cent. R. Co.* 7 Bosw. 515; *Baltimore City Pass. R. Co. v. Sewell*, 35 Md. 238; *Finley Shoe & L. Co. v. Kurtz*, 34 Mich. 89; *Wallace v. Townsend*, 1 West. Rep. 806, 43 Ohio St. 537.

The company reported that it had paid back to Cartwright \$2,000. A corporation has the right to purchase its own stock.

The directors or trustees of a company are incompetent to release an original subscriber, or to make any arrangement with him by which the company, its creditors or the State shall lose all of the benefit of his subscription. *Putnam v. New Albany & S. C. J. R. Co.* ("Burke v. Smith") 83 U. S. 16 Wall. 390 (21 L. ed. 361); *Upton v. Tribblecock*, 91 U. S. 45 (23 L. ed. 203); *Bouton v. Dement*, 11 West. Rep. 437, 123 Ill. 142.

No by-law or resolution of the stockholders of a corporation, opposed to the rights of creditors, can authorize the release of the obligation of a solvent stockholder to pay for stock taken by him, even though such release be in consideration of his surrendering his stock. *Farnsworth v. Robbins*, 36 Minn. 369.

The liability imposed upon stockholders is a security over which corporate authorities have no control; it is not a primary source for payment of the corporation debts. *Falkenbach v. Patterson*, 1 West. Rep. 159, 43 Ohio St. 359.

A provision in the charter of a bank that stockholders shall be liable to the amount of their stock means liable in a sum equal to the amount of the balance unpaid of the subscription for stock. *Root v. Slinnack*, 8 West. Rep. 674, 120 Ill. 360.

Capital stock a trust fund.

The capital stock of the corporation defendant, and any unpaid portions of such capital stock, must be considered in equity as a trust fund specifically charged with the payment of the debts of the corporation. *Nathan v. Whitlock*, 9 Paige, 152; *Winans v. McKean R. & Nav. Co.* 6 Blatchf. 222; *Fort Ed- 7 L. R. A.*

ward & Ft. M. Pl. Road Co. v. Payne, 17 Barb. 576; *Union Nat. Bank v. Douglass*, 1 McCrary, 91; *Spear v. Grant*, 16 Mass. 9; *Wood v. Dummer*, 3 Mason, 308; *Briggs v. Penniman*, 8 Cow. 387; *Slee v. Bloom*, 19 Johns. 466, 474; *Hume v. Winyaw & W. Canal Co.* 4 Am. Law Mag. 92, 1 Carolina L. J. 217; *Ward v. Griswoldville Mfg. Co.* 16 Conn. 693; *Mann v. Pentz*, 3 N. Y. 422; *Dayton v. Borst*, 31 N. Y. 493; *Vose v. Grant*, 15 Mass. 505.

No agreement, device or artifice between the company and its stockholders, the effect of which is to deprive the creditor of the benefit of this fund, or any portion of it, is valid against creditors. *Sawyer v. Hoag*, 34 U. S. 17 Wall. 610 (21 L. ed. 731); *Mann v. v. Cooke*, 20 Conn. 188; *Slee v. Bloom*, 19 Johns. 477; *Sagory v. Dubois*, 3 Sandf. Ch. 466; *Peychaud v. Hood*, 23 La. Ann. 732; *Abler v. Milwaukee Pat. Brick Mfg. Co.* 13 Wis. 57; *Upton v. Hansbrough*, 3 Biss. 417; *Mangles v. Grand Collier Dock Co.* 10 8im. 519; *Society for Ill. of Pract. Knowledge v. Abbott*, 2 Beav. 559; *Leeke's Case*, L. R. 11 Eq. 100; *Re Diederl*, L. R. 11 Eq. 245.

An agreement of a corporation that no calls or assessment shall be made upon the stockholders is void as to creditors. *Sanger v. Upton*, 91 U. S. 56 (23 L. ed. 220); *Soovill v. Thayer*, 105 U. S. 143 (26 L. ed. 968).

If the directors of a private corporation fail to make the assessments and collections necessary to meet the demands of creditors, a court of equity will take jurisdiction, at the instance of creditors, and enforce the necessary assessments. *Glenn v. Semple*, 30 Ala. 156; *Hatch v. Dana*, 101 U. S. 205 (25 L. ed. 885).

Cook, Stock and Stockholders, §§ 168, 193, note 3, 811; *First Nat. Bank v. Salem O. F. M. Co.* 39 Fed. Rep. 96; *Jackson v. Stigo M. & M. Co.* 1 Lea, 210.

The only call that was made by said company was made while it only had of the \$40,000 fixed as its capital stock \$36,800 subscribed. The whole amount of stock must be subscribed before the subscriber can be legally called on for his subscription.

Read v. Memphis Gayosa Gas Co. 9 Heisk. 551; *Green's Brice, Ultra Vires*, p. 153.

When all the capital stock of the corporation is subscribed for and taken, no other person can become a subscriber. The corporation in such a case has no stock at its disposal, neither can the corporation if it has issued the full amount of stock, recover on subscriptions in excess of such certificates, nor can corporate creditors even enforce any such subscriptions.

Cook, Stock and Stockholders, § 72; *Seignourit v. Home Ins. Co.* 24 Fed. Rep. 332; *Grangers L. & H. Ins. Co. v. Kamper*, 73 Ala. 325.

As soon as the company had issued certificates to \$40,000, its power and authority to issue others ceased.

Scovill v. Thayer, 105 U. S. 143 (26 L. ed. 968); *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Chicago City R. Co. v. Allerton*, 85 U. S. 18 Wall. 234 (21 L. ed. 902).

A change in the amount of the capital stock will work a discharge of the subscriber not consenting thereto.

Cook, Stock and Stockholders ; *Green's Brice, Ultra Vires*, p. 84.

When the subscribers who paid for the \$40,000 of stock received certificates of stock therefor, they became genuine stockholders in the company, and as between them and the company it made no difference whether they were subscribers for the first \$40,000 subscribed, or the subscribers for the last \$40,000.

Winters v. Armstrong, 37 Fed. Rep. 522; *Butler v. Aspinwall*, 33 Fed. Rep. 217; *Delano v. Butler*, 118 U. S. 634 (30 L. ed. 260).

An amendment by the corporation, whereby its capital stock is attempted to be increased, will work a discharge to the subscriber.

Green's Brice, Ultra Vires, 133, note a; *Hughes v. Antietam*, 34 Md. 316; *Cook, Stock and Stockholders*, 281, 502; *Deaderick v. Wilson*, 8 Baxt. 126; *Scovill v. Thayer*, 105 U. S. 143 (26 L. ed. 968); *Grangers L. & H. Ins. Co. v. Kamper*, 73 Ala. 325.

Among the amendments that will release a stockholder from his subscription is that of issuing preferred stock.

Eberhart v. West Chester & P. R. Co. 28 Pa. 339; *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

When the subscribers other than Cartwright permitted the issuance of certificates of stock to other parties, or agreed to release him, he ceased to be any longer bound upon his subscription.

Cook, Stock and Stockholders, § 169, notes 1, 3; *Stuart v. Valley R. Co.* 32 Gratt. 146.

Messrs. Dickinson & Frazer, for appellee:

Subscriptions are binding from the time they are made.

Morawetz, Priv. Corp. § 59.

Unpaid capital stock is a fund for payment of debts.

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Code, § 1708; *Chase v. East Tennessee, V. & G. R. Co.* 5 Lea, 416; *Paducah & M. R. Co. v. Parks*, 86 Tenn. 560.

Shareholders cannot be released by the company or agents from liability to creditors, on stock subscription.

Morawetz, Priv. Corp. §§ 824, 841; *Sanger v. Upton*, 91 U. S. 60 (23 L. ed. 222).

Nor can they be released by directors.

Chase v. East Tennessee, V. & G. R. Co. 5 Lea, 417; *Moses v. Ocoee Bank*, 1 Lea, 408.

It requires the unanimous consent of stockholders and creditors.

Morawetz, Priv. Corp. §§ 109, 302, 306; *Cook, Stock and Stockholders*, 168, 169.

Nor can subscribers release themselves from liability to future creditors to contribute capital.

Morawetz, Priv. Corp. § 824; *Burke v. Smith*, 88 U. S. 16 Wall. 390 (21 L. ed. 361); *Upton v. Tribblecock*, 91 U. S. 45 (23 L. ed. 203).

Nor can the corporation purchase the stock and thus release the subscriber.

Morawetz, Priv. Corp. §§ 111, 113.

Excessive subscriptions do not alter the contract between the existing members.

Morawetz, Priv. Corp. § 58; *Cook, Stock and Stockholders*, 75.

An increase of stock beyond the amount authorized is void, but the subscribers to the valid amount are liable to assignees.

Scovill v. Thayer, 105 U. S. 143 (26 L. ed. 968); *Morawetz, Priv. Corp.* §§ 58, 115, 116. See *Pullman v. Upton*, 96 U. S. 328 (24 L. ed. 818); *Chubb v. Upton*, 95 U. S. 667 (24 L. ed. 524).

Lurton, J., delivered the opinion of the court:

The Grubbs Cracker Company is a corporation organized July, 1885, under the General Incorporation Law of this State. In October, 1887, being insolvent, it made a deed of assignment to Dickinson as trustee, to equally secure all creditors. The original bill was filed by Cartwright, claiming to be a creditor of the corporation, for the purpose of enforcing payment out of the assets in defendant's hands. One of the demands set up is not now resisted. The other is contested as being without consideration. The assignee, after answering, filed a cross-bill to recover some \$6,000 alleged to be due upon unpaid calls on stock owned by Cartwright in the Cracker Company, and to recover \$1,000 paid back to him by the secretary and treasurer of that company upon an alleged insufficient cancellation and rescission of his liability as a subscriber for stock. Cartwright, before the charter was obtained, subscribed for \$8,000 of the stock of the proposed corporation. A charter was obtained by the usual application provided for by the Act of 1875. The subscribers thereupon met, and organized, by accepting the charter, adopting by-laws and electing directors. He was present at this meeting, and was elected a director, and acted as such for a year thereafter.

The Act of 1875 does not require the amount of the capital stock of a corporation to be stated in the application for the charter, but authorizes the capital to be fixed subsequently by by-laws. Such a by-law was adopted at the organization, and the capital settled at \$40,000, to be divided into shares of \$100 each. A few

the receipt of the secretary and treasurer for that sum, as a payment upon his stock. The remainder of the sum due, \$6,000, he has never paid, and now claims that his contract has been canceled or rescinded, and that he is not liable therefor. The facts upon which this defense is placed are these: In July, 1886, one year after the company began business, Cartwright, desiring to withdraw therefrom, spoke to Mr. Grubbs, and asked him to dispose of his stock. Grubbs was the brother-in-law of Cartwright, was the largest stockholder in the corporation, and was its secretary and treasurer and general manager. Grubbs, it seems, did accordingly undertake to dispose of his stock, which appears at that date to have been salable at par, September 2, 1886. Grubbs told him he had made a disposition of the shares, and by his direction the proper entries were made on the books of the company, by which the balance due for unpaid calls was charged off, and the \$2,000 theretofore paid in on first call was credited to the personal account of Cartwright. Of this credit, \$600 were then paid in cash, same being credited on the stock receipt previously taken for amount of first call. Subsequently this receipt was surrendered, and the note of the corporation executed to Cartwright for the remainder. This note was afterwards reduced by payment, and a new note executed which is the smaller of the two demands upon which the original bill is filed.

What Grubbs did, which he supposed authorized him to rescind the contract by which Cartwright had purchased shares, was this: He went upon the streets, and solicited new subscriptions to the stock of his company; and when he had obtained these he regarded himself as authorized to rescind the contract of Cartwright, and release him from all obligation as a shareholder indebted on account of his shares. To carry out his purpose, he caused the books to show that Cartwright, instead of being debtor, was a creditor, to the extent of the capital which he was allowed to withdraw. The proof does not show any transfer of Cartwright's stock to other persons, or any agreement that it should be transferred to others, or that they should be substituted to his rights and liabilities. There is no pretense of the purchase of shares from Cartwright by other persons. On the contrary, they were procured to subscribe for new shares, just as Cartwright had done in the first instance.

Before the organization of the corporation, and acceptance of the subscription of Cartwright, the promoters might, perhaps, agree to release a subscriber by substituting other names for his, and erasing from the list that of the recalcitrant. Cook, Stock and Stockholders, § 75.

But, at the moment when the conditions required by law as preliminary to the granting of a charter were complied with, the subscribers became shareholders, entitled to a voice, as shareholders, in all subsequent proceedings, and to compel a specific performance of the contract of membership. At the same time, all the obligations of a shareholder were assumed, and the liability to pay the amount of

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upon the shares is a mere incident of membership; and the fact that such payments have not been made does not affect the status of the member as a shareholder until a forfeiture has been declared in such manner as provided by the charter. The fact that certificates of shares have not been issued does not affect the question. Such certificate is never essential to constitute one a shareholder, being mere evidence of ownership of shares. 1 Morawetz, Priv. Corp. § 56, and cases cited.

This view of the effect of a certificate has been heretofore settled in this State. *Cornick v. Richards*, 3 Lea, 1; *State v. Butler*, 86 Tenn. 621; *Young v. South Tredegar Iron Co.* 85 Tenn. 189.

It follows that Cartwright was the owner of eighty shares of the capital stock of this corporation. This stock he has never assigned or transferred to any other person. No other person claims to own his stock, or to be in any way legally or equitably entitled to have it transferred to him. The cancellation of his subscription was inoperative to cancel his shares, or discharge his obligations to pay for them. Unless the charter authorizes a forfeiture of shares for nonpayment of calls, there is no power in the corporation to forfeit, cancel or annul shares once lawfully issued. The contract of shareholders is a mutual one. Without the consent of all, one cannot be released from liability. Even a board of directors cannot discharge the contract of a shareholder to pay for his shares according to his contract, or disfranchise him by a forfeiture declared without express authority of law. *Chase v. East Tennessee, V. & G. R. Co.* 5 Lea, 415; 1 Morawetz, Priv. Corp. § 309, and cases cited.

The argument that, if in fact the corporation received from their new subscribers the same amount of money which Cartwright was to contribute, in that case, whatever was done would in effect be the substitution of the capital of one for that which another was bound to contribute, is plausible, but is unsound in law, and unsustained by the facts of this case,—unsound in law, because the mere fact of obtaining certain new and original capital cannot operate to empower the corporation to return capital theretofore embarked in the enterprise. These new subscribers, by their subscription, undertook to contribute additional capital, and not to substitute their capital for money to be withdrawn. This was not their engagement. This is the difference between the purchase of Cartwright's shares and the subscribing for new shares, and the distinction between the effect of buying shares already issued and subscribing for new shares. In the latter case, new capital is contributed, while in the former only the legal title of shares is changed. The new subscriber, as well as the old, had a right to demand that every shareholder be compelled to pay his shares up according to contract. There was no more authority to cancel Cartwright's shares, and release him from liability, after this additional capital was contributed than there was before. The contention is not sound in fact. Mr. Grubbs seems to have supposed that he had the

right to release shareholders from their obligations, just as suited them or him. He seems likewise to have supposed that he was authorized to take new subscribers, to take the place of such as chose to withdraw, and to furnish new capital as the necessities of the business demanded.

The share list shows several shareholders, who, after experimenting with the cracker business, withdrew, and had their money returned. So, when Mr. Grubbs undertook to get new stock, to take the place of old stock owned by Cartwright, he seems to have had other arrangements of some sort to carry out; for he says that he got these new subscribers to "cover" Cartwright's stock, and that of others to whom he made the same promise. The fact that the authorized limit of \$40,000 had been reached does not seem to have been any embarrassment whatever. He says he got an amount of new subscriptions, after he agreed to place Cartwright's stock, equal to his, or greater. In this he is shown, by a careful examination of the stock list, to have been mistaken. The total of stock subscriptions July 1, 1886, was \$50,000. The stock in October, 1886, inclusive of Cartwright's, was about \$57,000. Then, to cover Cartwright's \$8,000, and that of others to whom he had made the same promise, there could not have been over \$7,000 obtained. Then it is not even the case of money of a new subscriber having fully taken the place of an old one suffered to withdraw. That the corporation at the time had actually received the full sum of \$40,000, and that that was the limit of its authorized capital, cannot avail Cartwright. If the shares subscribed after the limits of \$40,000 had been reached were valid and lawful, then the corporation was entitled to a much larger sum than \$40,000. If, on the other hand, these subscriptions were void, then they were not enforceable, and money actually paid could not be lawfully held, if demanded by such subscriber, creditors out of the way. If the transaction be looked at as a purchase of the shares held by the corporation, then it is equally ineffective. Whatever power a corporation may have to deal in its own shares for purpose of sale, or to secure a debt, it is too clear for argument that it cannot reduce its authorized capital by purchasing its own shares for cancellation. 1 Morawetz, Priv. Corp. §§ 111-118.

The case of *Jackson v. Sligo M. & M. Co.*, 1 Lea, 210, does not hold a contrary doctrine, as argued by counsel. The sale of stock sustained in that case was not a sale to the corporation, but to one Sloan, a stranger.

The next defense urged is that the corporation has violated its charter by increasing its capital stock, and that it has already issued stock certificates in excess of its lawful capital, and that therefore it is not in the power of the corporation to issue valid shares to him. The capital fixed by by-law, of \$40,000, was, as we have already seen, exceeded by the action of Grubbs, in obtaining subscriptions in excess of that limit. This was unauthorized by the shareholders, or the directors. Such subscriptions for new shares, after \$40,000 had been taken, were null and void. In February, 1887, the shareholders amended their by-laws so as to

increase their authorized capital to \$100,000. This was intended to legalize the excess of shares already taken, and authorized a further increase. Under this amendment new stock was taken, until the whole list reached about \$76,000. After the assignment to Dickinson, a scheme for the reorganization of this business was conceived, and the shareholders again amended their by-laws so as to declare all stock theretofore issued "common" stock, and to authorize issuance of "preferred" stock to the amount of \$30,000, the latter to have a preference, to the extent of 6 per cent, in payment of dividends, over the common stock. It appears that under this scheme some \$23,000 of preferred stock has been sold, thus bringing the total of shares, excluding Cartwright's, to something over \$99,000. Neither of these amendments of the by-laws were made in pursuance of the Act of 1883, p. 212, concerning the amendment of charters so as to allow an increase of capital stock. The question as to whether the capital stock, having been once fixed by by-law, as provided by the General Incorporation Law of 1875, can be increased without an amendment of the charter in the manner pointed out by the Act of 1883, is a grave one, and is reserved, for the reason that, in the view we have of this case, it need not be decided. This question cannot affect Cartwright's liability to pay for his shares. By his subscription, as we have seen already, he became a shareholder. His shares are not affected by the subsequent issue of shares in excess of charter limits. If these shares were issued without power upon the part of the corporation to issue them, they are absolutely void, and confer no rights of membership upon those who hold them. In a contest between them and the holder of shares subscribed before the capital was all taken they would be excluded from all participation in the management or profits of the business. *Scovill v. Thayer*, 105 U. S. 143 [28 L. ed. 968].

That the corporation has been guilty of a violation of its charter in this or any other matter is no defense to an action for calls due from a shareholder upon his shares. The remedy was against the corporation, to restrain such alleged illegal action, or is against the agents personally, for any wrong and injury done him. It furnishes no reason why he shall not carry out his own contract. The usual rule, by which the breach of a contract upon one side justifies its breach or abandonment by the other, has little application in cases of this character. 1 Morawetz, Priv. Corp. § 116, and cases cited.

The question as to whether the issuance of preferred stock was valid and effectual as against shareholders not assenting then or subsequently we do not determine. Operative or inoperative, it does not affect the contract to pay for the shares by the owner because of his contract of subscription. The fact that he has not had notice of subsequent meetings of shareholders, or opportunity to attend, or protect himself against the action of the other shareholders affecting the value of his stock, cannot operate to release him from his contract. Neither the directors nor the shareholders had any knowledge of the arrangement by which he supposed he was released. In January, 1887, several months after his arrangement with Mr. Grubbs had been perfected, the latter informed

The board of directors that there was a vacancy in the board, Mr. Cartwright having sold his stock. The vacancy was thereupon filled. The directors and shareholders thereafter assumed that his shares had been in fact sold to others. Grubbs, in so far as he undertook to dispose of his shares, was the agent of Cartwright in such disposition. If Cartwright was misled and deceived by the statement of Grubbs that he had sold his shares, and thereby lulled into a course of action or non-action, whereby he has suffered, he can look only to his agent for recoupment. If, on the other hand, he knew the exact facts upon which Grubbs assumed authority to cancel his shares, and acted either upon the opinion of Grubbs or his own opinion, or their concurrent opinion, that upon such facts the law empowered Grubbs to do what he did do, and that he had a legal right to release him from his contract, then both mistook the law. That a shareholder should release himself from liability to pay for his shares by proof that he was misinformed as to a fact by his own agent, or misled as to the effect of certain known facts upon his contract, or was ignorant of the law which prevented any shareholder from being released, or his subscription canceled, without the consent of the other shareholders, would be a most disastrous doctrine. The rule that a mistake of law does not relieve in equity any more than at law is well settled. *Upton v. Tribilcock*, 91 U. S. 50 [23 L.ed. 206].

The next and last assignment of error necessary to consider is that this action cannot be maintained by Dickinson as assignee. This argument is based upon the facts that subsequent to the assignment the shareholders, other than himself, by means raised by the issuance of preferred stock, heretofore mentioned, and with borrowed money, compromised the greater part of the debts of the corporation, and that the assignee has suffered them to resume business with the machinery assigned to him, they having given bond for its protection. The assets thus in their hands are probably abundant to pay such creditors as have not yet been settled with. The only effect of this is to strip the assignee of any advantages which creditors might be supposed to have in a suit to compel a shareholder to pay his call, over the same action by the corporation. We have accordingly treated each question just as if it were a controversy between Cartwright and the Grubbs Cracker Company. That Dickinson is entitled to maintain this suit follows from the fact that he has not resigned his trust, and that there are creditors whose claims he must provide for. The claim is an asset in his hands, and it, together with other assets, remains in his control as trustee, and he may and ought to reduce them to money, and pay off remaining creditors, and account for the surplus to the assignors.

The decrees of the chancellor must be affirmed, with costs.

PENNSYLVANIA SUPREME COURT.

Conrad SCHROEDER

v.

Anna M. GALLAND *et al.*, *Appts.*

(....Pa.....)

A sub-contractor who agrees with the principal contractor, knowing him to be such, to execute a part of the work upon a building which the latter has undertaken to construct, is bound to take notice of the terms of the original contract, and his right to a lien on the building is controlled thereby; hence, if such contract provides that the building shall be delivered free of all liens, he cannot acquire a lien thereon.

(April 21, 1890.)

NOTE.—Mechanic's lien; sub-contractor.

The covenant of a contractor, that he will not suffer or permit any mechanic's lien or liens to be filed, is a waiver of the right to file or cause to be filed a claim for a lien in his own favor. *Long v. Caffrey*, 93 Pa. 523, followed in *Scheid v. Rapp*, 121 Pa. 593.

Where one subscriber to the stock of a company having a contract with the company to build an ice-house made a contract with another to build it, the company is the real party to the contract, is bound by it, and subject to a lien therefor, which cannot be defeated on the ground that the work was done by a sub-contractor. *McFall v. McKeesport & Y. Ice Co.* 123 Pa. 253.

A mechanic's lien by a sub-contractor cannot be filed, where the items furnished within six months were only to supply defects. *Women's Homeo-* 7 L. R. A.

A PPEAL by defendants from a judgment of the Court of Common Pleas for Lackawanna County in favor of plaintiff in an action to enforce an alleged mechanic's lien. *Reversed.*

At the trial defendants submitted certain requests for instruction, which, together with the answers thereto, are as follows:

"A contractor may contract with the owner of a lot of land to erect a building upon the same and deliver it to the owner free of all liens and incumbrances that may arise under any action of his or her legal representatives under the contract, and having so contracted he cannot file a mechanic's lien."

Answer: "This is not affirmed." [Third assignment of error.]

pathic Assn. v. Harrison, 12 Cent. Rep. 292, 120 Pa. 28; *McKelvey v. Jarvis*, 87 Pa. 414.

For a discussion of the systems prevailing in the various States, see *Merrigan v. English* (Mont.) 5 L. R. A. 837.

Statutes of Montana distinguished.

A sub-contractor has a direct lien, under the Montana laws. *Merrigan v. English* (Mont.) 5 L. R. A. 837.

His rights are not limited by the rights of the contractor. *Ibid.*

When seeking to maintain and enforce a lien for materials furnished, he must, at or before the time at which they were furnished, notify the owner of the sum at which they are valued. *Whiteside v. Lebocher*, 7 Mont. 473.

contract is dependent upon the principal one, so that a sub-contractor's right to file a mechanic's lien is limited by the terms of the contract between the builder and the owner."

Answer: "This is true to a certain extent, as to the time and mode of payment, but they cannot, by their contract, deprive the sub-contractor of a right to a lien." [Fourth assignment of error.]

"If the jury believe from the evidence that Conrad Schroeder sub-contracted with Olmstead to furnish a part of the material, to perform a part of the work and labor in the erection and building of Mrs. Galland's house, and that Olmstead had contracted with Mrs. Galland to build the house at a price agreed upon between them, and deliver it over to her free of all liens and incumbrances or any claims whatsoever that might arise under any action of his or her legal representatives under the contract, Schroeder cannot file a mechanic's lien against Mrs. Galland's house for the work and labor done and materials furnished under his contract with Olmstead."

Answer: "This is not affirmed. If an owner making a contract with another to erect a house, provides in his contract that no mechanic's liens shall be filed against it, that is binding upon the person with whom the contract is made, but it is not binding upon a sub-contractor. Parties to the contract may lay down the law between themselves; they cannot repeal the Mechanic's Lien Law as to a sub-contractor." [Fifth assignment of error.]

"Under all the law and the evidence in this case the verdict must be for the defendants."

Answer: "This point is not affirmed." [Sixth assignment of error.]

The facts fully appear in the opinion.

Messrs. S. B. Price and Lemuel Amerman, for appellants:

If a contractor agree that no liens shall be filed against a building which he is about to erect, the contract will be enforced, and he will be prevented thereby from filing a lien.

Long v. Caffrey, 98 Pa. 526; *Scheid v. Rapp*, 121 Pa. 598.

Where there is a special contract with the owner, the party who deals with the contractor must provide for his own security, and cannot rely upon the remedy provided by the Mechanic's Lien Law.

Halcy v. Prosser, 8 Watts & S. 133. See also *Campbell v. Scatfe*, 1 Phila. 187; *Given v. Bethlehem Church*, 11 W. N. C. 871.

The terms of the original contract controlled the rights of the sub-contractor to lien, and he is presumed to have notice of the terms of the principal contract.

Henley v. Wadsworth, 38 Cal. 356; *Shaver v. Murdock*, 36 Cal. 298. See also *Narlan v. Rand*, 27 Pa. 511; *Duff v. Hoffman*, 63 Pa. 191; *Brown v. Cowan*, 1 Cent. Rep. 623, 110 Pa. 588, 598.

Mr. E. N. Willard, for appellee:

The law makes a contractor the agent of the owner, and the owner is responsible for his agent's acts within the scope of the agent's authority, notwithstanding a secret limitation of his authority of which the other party had no notice.

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where the materials furnished are of the kind that would induce a careful, prudent and skillful man, acquainted with the building, to believe that they could be used in its erection, and if they could in fact be usefully employed in its construction, then the materialman is not bound to inquire into the character of the materials which the contractor had agreed with the owner of the building to use in its construction.

Odd Fellows Hall v. Masser, 24 Pa. 510.

When a contract is made for the erection of a house the materialman has a lien, notwithstanding notice to him from the owner that he must look solely to the contractor for payment.

Hall v. Parker, 94 Pa. 109. See also *Cattinach v. Ingersoll*, 1 Phila. 286.

An agreement of the contractor with the owner not to make the building liable to liens of others, will not prevent liens from arising in favor of materialmen.

Trickett, Pa. Liens, p. 29.

Green, J., delivered the opinion of the court:

The plaintiff, Schroeder, was a sub-contractor under the principal contractor, Olmstead, for the execution of a part of the work of the construction of a house for the defendant, Galland. In the contract between the owner and the principal contractor it was expressly stipulated that the building should be built, finished and delivered over to the owner, "free of all liens and incumbrances, or any claims whatever that might arise under any action of the party of the second part, or his legal representatives under this contract." And again it is provided that the payments were to be made to the party of the second part "provided the wages of all artisans and laborers and all those employed by, or furnishing materials to, the said party of the second part, on account of this contract, shall have been paid and satisfied;" and further, "In case the party of the second part fails to pay and satisfy all and every legal claim and demand, as aforesaid, against the building, the said party of the first part, if he deems proper so to do, retain from the moneys due and coming to the party of the second part enough to satisfy such claims and demands; and if there be not enough due or coming, then the said second party covenants and agrees to pay the same. Said second party also agrees to pay sub-contractors and parties furnishing materials on account of this contract *pro rata* at each estimate."

The owner seems to have guarded himself as well as it was possible to do, by these provisions against liens, claims, demands and liabilities of and to any and all other persons than the principal contractor. The stipulation against liens is undoubtedly obligatory upon the principal contractor, and so far as he is concerned no lien could be filed. *Long v. Caffrey*, 98 Pa. 526; *Scheid v. Rapp*, 121 Pa. 598.

The controlling question of this case is, Can the sub-contractor file a lien for the work and materials done and furnished by him, notwithstanding the stipulations of the principal contractor? If he can the owner instead of

paying \$9,000 for the completed house according to the contract will be obliged to pay therefor nearly \$11,000. The plaintiff filed his lien as a sub-contractor, under Schroeder, whom he described as contractor and with whom he contracted. He says in his claim of lien: "The name of the person with whom Conrad Schroeder contracted is named Charles Olmstead." He also states that the name of the owner is Anna M. Galland, the wife of B. Galland. He therefore knew that he was dealing and contracting, not with the owner, but with one who was a contractor for the construction of the building. The only connection between the owner and this sub-contractor was through, and by means of, the written contract between the owner and the principal contractor. He could not, in such circumstances, contract with this person without being charged with notice of the contract of the latter with the owner, and, by necessary consequence, with notice of all its terms and stipulations. A sub-contractor for construction is certainly bound to know the kind of building that is to be erected, the materials of which it is to be built, the price to be paid for it and the manner and times of payment. He cannot, under a contract for the erection of a building at a cost of \$1,000, furnish work and materials to the amount of \$5,000. He cannot furnish wood as material for the erection of a building to be built of marble or stone or bricks. Nor can he furnish unsuitable materials, even of a kind demanded by the contract, and entitle himself to a lien therefor.

In the case of *Harlan v. Rand*, 27 Pa. 511, we decided that to entitle a materialman, who deals with the contractor, to have his lien, he must furnish materials suitable for the building and apparently adapted to it. There the contractor made a contract with a sub-contractor to furnish a heater of a new construction to heat the building. The sub-contractor employed the plaintiff, who claimed a lien, to do the work. The contract with the sub-contractor stipulated that if the heater did not answer the purpose of heating the building, it was to be removed at his expense. The claimant, who did the work, filed a lien for it and this court held he was bound by the provisions of the contract with his employer, the sub-contractor, though he was no party to it, and rejected his lien. Lowrie, J., in delivering the opinion said: "There are several cases that show that the materialman cannot justly charge the building for all the materials that he may choose to furnish on its credit, without reference to the quantity or quality needed. He must, in his supplies, regard the size and apparent character of the building, and his lien cannot go beyond what these show to be reasonable. *Odd Fellows Hall v. Masser*, 24 Pa. 510. . . . And no one would think of saying that a materialman shall have a lien for materials furnished for a particular purpose and which are unfit for it. . . . If they are furnished on the order of the owner of the house, of course this rule does not apply; for a man may pledge his own property for any kind of materials. But it is involved in the very fact of furnishing them to a contractor of the building on its credit, that he should know its character,

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and that they must, at least apparently, be adapted to it."

On another branch of the case the same judge said: "When the owner employs a house builder to erect a house for him, the parties are directly connected by contract, and the lien must be founded on it."

The same thought is expressed and enforced in the recent case of *Brown v. Cowan*, 110 Pa. 588, 1 Cent. Rep. 623. We there say: "It is the plain and obvious duty of one who deals with an alleged contractor to know the relation which he bears to the owner. Falling in this he furnishes labor or materials at his peril."

Of course it cannot be questioned for a moment that a sub-contractor who undertakes the construction, in whole or in part, of a building, under a contract with the principal contractor, is absolutely bound by all the plans and specifications expressed in the original contract of the owner with the builder. He must conform to the original contract in all matters, and in the minutest detail, precisely as the builder would be obliged to do. It is most obvious that he cannot depart in any respect either from the designs, the dimensions, the materials, the plans, shapes and sizes, that are expressed in the original contract. And the reason is most manifest. He is the representative of the builder. He undertakes to perform the contract of the latter with the owner either in whole or in part and of course he must conform to that contract in every particular. It would be of no use for him to say that he did not know the particulars of that contract; he is bound to know them. It is a legal necessity arising from the fact that he has undertaken to do the work which his principal has engaged to do. He certainly cannot furnish pine wood for interior wood work when the owner's contract with the builder calls for walnut or cherry or ash. He cannot furnish stone when the contract requires marble, or bricks when stone is designated, or one kind of stone when another kind is expressed, or wood instead of bricks. He cannot furnish a building of two stories when three are demanded by the contract, or of six rooms when ten are required. These conclusions are readily appreciated and will be at once conceded. But to go further and into greater detail, it must be equally plain that one who, as a sub-contractor, agrees with the principal contractor to furnish materials only for the building is just as precisely bound as his principal by the stipulations of the original contract. If that contract requires the mantels to be of marble he must make them of marble, and he not only could not acquire a right to a lien if he made them of slate or of wood, but he would not be entitled to any payment whatever from the owner for his work. And *vice versa*, if they were required to be of wood he could not make them of marble or slate. And so if a carpenter should take a sub-contract for the wood work he could not furnish hemlock flooring when the owner's contract required pine or ash, or doors of pine when doors of walnut were specified. And so of painters and glaziers and plasterers who take sub-contracts for the execution of their several specialties, they are all bound by the owner's con-

to be ignorant of his limitations or to plead such ignorance as an excuse for insufficient performance; and the reason for it all is most manifest. They are bound to do just what their principal was bound to do, because they assumed to perform his contract with the owner, to the extent of their undertaking, and of course they must perform according to his express limitations. In other words they necessarily have notice of the terms and stipulations of his contract with the owner, and that means not a part, but all, of those terms and stipulations. Upon the plainest legal principles applicable in all other cases, they cannot have the benefits of the builder's contract without accepting the conditions upon which those benefits are conferred. If they could, they would defeat the explicit contract of the owner upon a point without which, it may easily be, he would never have consented to it. If the law would tolerate this method of dealing with building contracts, it would only be necessary for the original contractor to sublet his contract by portions to different persons, and the prohibition against liens would be utterly destroyed and a contract would be enforced against the owner to which he never consented.

There is no hardship to sub-contractors in enforcing a provision prohibiting liens against them, because they are bound to know, by necessity, all the terms of the contract made by their principal in any event, and they therefore know of the prohibition. But the owner has no opportunity of protecting himself because he cannot know to what persons the contract or portions of it may be sub-let. He has done all he could by prohibiting liens in plain terms in his written contract, and of that prohibition all sub-contractors are bound to know and may abstain from contracting on such terms if they choose. We know of no good reason for giving such an extraordinary privilege to sub-contractors as the right to repudiate one of the most important terms to which their contracts are subject, or of taking away from an owner the right to insist upon the performance of his contract according to its literal terms.

We take away houses and lands from their owners by means of some secret lien or trust of which they know nothing, by applying the doctrine of constructive notice, and it would be passing strange for us that the right of a sub-contractor for part of a building is of so sacred a character that it shall not be bound by the express limitations of a written contract under which and by force of which his own contract must be performed. His right of lien has no existence at common law or in equity. It is a creature of statute alone, but the statute confers upon him no special prerogative to transcend the most familiar principles of the law and to claim privileges which are denied to all other citizens in the determination of their contract rights.

Let it be granted that a contractor as well as the owner has power to bind the building by a lien for work and materials, we have never yet held that he may confer that right
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possess the right himself. The question is one of first impression. Heretofore it has never been before us. It is with us now, and we are at liberty to decide it in accordance with our views of right and justice, and with those principles of the interpretation and administration of contracts between citizens which we unflinchingly apply in all other cases.

In an old case decided many years ago by the District Court of Allegheny County (*Campbell v. Seafie*, 1 Phila. 187) the same conclusion we have reached was expressed and applied. The decision is of no binding authority upon this court, but the reasoning of the opinion is of such clearness and force that some of it may well be repeated here. The learned court says: "The owner contracts with the builder to erect a house on certain terms, and the builder makes a sub-contract with a materialman to supply the materials. The chain of relationship consists of two links, the second of which hangs by the first, and will bear no greater weight. The sub-contractor comes in by reason of his direct contract relation to the builder, and the right of lien of the former for his claim is, *pro tanto*, substitutionary to that of the latter. As against the owner, the terms of the original contract, and as against the builder, the terms of the sub-contract, limit and qualify the lien of the sub-contractor, so as to prevent his claim from abating the terms of either contract. The allowance of any lien at all to a sub-contractor is a special privilege granted only in case of buildings; and it is not unreasonable to require him to look at the principal contract, to ascertain whether it is such as to justify him in becoming a contractor under it. The argument that the law and the principal contract make the builder the agent of the owner proves nothing. Suppose the fact to be so, still his agency is only special, limited by the terms of the contract. He is to employ men to build the house in the manner and on the terms there indicated. For anything beyond that he exceeds his authority, and does not bind his principal."

In the case of *Dickinson College v. Church*, 1 Watts & S. 482, *Mr. Justice Rogers* in delivering the opinion of this court said: "It is a great mistake, which cannot be too soon corrected, if any suppose that when a person undertakes to furnish lumber to a contractor on the credit of a building, that he is relieved from inquiring into the nature of the building he trusts, whether it is brick or frame, whether it is a one or three story house, or whether it is large or small; that in short he can furnish materials enough to complete a three-story house of the largest dimensions, when the materials are intended for a house of the most inferior description. The very fact that he credits the building and does not depend altogether on the personal responsibility of the contractor should, it would seem, suggest the propriety of making the necessary inquiries as to the size, materials and nature of the intended erection."

In the State of California it has been held by their court of last resort in two cases that the right of the sub-contractor to lien is controlled

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *ex rel.*
William KEMMLER, *Appt.*,

v.

Charles F. DURSTON, Agent and Warden
of Auburn Prison, *Resp't.*

(....N. Y.....)

1. **The Legislature has power to change** the manner of inflicting the penalty of death.
2. **The testimony of expert or other witnesses** is not admissible to show that in carrying out a law enacted by the Legislature some provision of the Constitution may possibly be violated.
3. **Whether the use of electricity as an agency for producing death** constitutes a more humane method than hanging for executing the judgment of the court in capital cases is a question for the determination of the Legislature. The determination of that question in the affirmative, after careful deliberation, is conclusive upon the courts, and therefore such method, when adopted, cannot be declared a violation of the constitutional provision against cruel and unusual punishment.

(March 21, 1890.)

A PPEAL by relator from an order of the General Term of the Supreme Court, Fifth Department, affirming an order of the Cayuga County Court dismissing a writ of habeas corpus sued out for the purpose of determining the legality of his detention in custody and remanding him to the custody of respondent. *Affirmed.*

The case fully appears in the opinion.

Mr. W. Bourke Cockran, with Mr. Charles S. Hatch, for appellant.

Mr. Charles F. Tabor, *Atty-Gen.*, with Messrs. A. P. Rich, *Dist. Atty.* of Cayuga County, and George T. Quinby, *Dist. Atty.* of Erie County, for respondent.

O'Brien, J., delivered the opinion of the court:

The respondent is the agent and warden of the state prison of Auburn, and the relator, being in his custody, applied for a writ of habeas corpus to inquire into the cause of detention, which was made returnable by the officer granting it before the County Judge of Cayuga County. The relator, in his petition for the writ, stated that the cause or pretense of the imprisonment complained of was that after his indictment and trial for the crime of murder in the first degree and his conviction thereof in the court of oyer and terminer he was sentenced by that court to undergo a cruel and unusual punishment for that crime, contrary to the Constitution of this State and of the United States, and was threatened with deprivation of life without due process of law by reason of such illegal sentence and judgment of the court. The writ was duly served upon the respondent, who made return thereto that he detained the relator in his custody as agent and warden of the prison by virtue of the judgment of the court of oyer and terminer, held in the County of Erie, whereby the relator was duly convicted of the crime of murder in the first degree, and also by virtue of a warrant duly delivered to him under the hand and seal of a justice of the supreme court presiding at the said court of oyer and terminer where the relator was convicted, which recited the indictment, trial, conviction and sentence of the relator and directed the respondent to carry the same into effect in these words: "Now, therefore, you are hereby ordered, commanded and required to execute said sentence upon him, the said William Kemmler, otherwise called John Hort, upon some day within the week commencing on Monday, the twenty-fourth day of June, in the year of our Lord one thousand eight hundred and eighty-nine, and within the walls of Auburn state prison, or within the yard or enclosure adjoining thereto, by then and there causing to pass through the body of him, the said William Kemmler, otherwise called John Hort, a current of electricity of sufficient intensity to cause death, and that the application of such current of electricity be continued until he, the said William Kemmler, otherwise called John Hort, be dead."

This command and direction to the warden was in accordance with the sentence actually passed upon the relator after conviction, in these words: "The sentence of the court is, that within the week commencing on Monday, the twenty-fourth day of June, in the year of our Lord one thousand eight hundred and eighty-nine, and within the walls of Auburn state prison, or within the yard or enclosure adjoining thereto, the defendant suffer the punishment of death, to be inflicted by the application of electricity, as provided by the Code of Criminal Procedure of the State of New York, and that in the mean time the defendant be removed to, and until the infliction of such punishment be kept in solitary confinement in, said Auburn state prison."

On the return day of the writ, the relator and the respondent appeared by counsel before the county judge, and by agreement of counsel the production of the relator, pursuant to the command of the writ, was waived. Counsel for the relator then offered to prove that the infliction of the penalty named in the sentence, namely, death by the application of electricity, is a cruel and unusual punishment within the meaning of the Constitution, and cannot therefore be lawfully inflicted. The attorney-

general objected, on the ground that the court had no authority to take proof in regard to the constitutionality of the Statute. This objection was overruled by the county judge, and the counsel for the respective parties agreed that a referee be appointed for the purpose of taking the testimony in pursuance of the offer.

In this way a mass of testimony was given upon both sides, certified by the referee to the county judge, and embraced in the extended record before us. The result was, that after a hearing upon the report of the referee, the county judge dismissed the writ, and remanded the relator to the custody of the respondent. When it appeared from the return of the respondent that he detained the relator in custody under and by virtue of the judgment of a court of competent jurisdiction, wherein the relator was convicted of murder, it was the duty of the county judge to dismiss the writ and remand the relator to the custody of the agent and warden of the prison, unless it could be shown that the court of oyer and terminer was without jurisdiction to pass the sentence which it did. *People v. Warden of N. Y. Co. Jail*, 100 N. Y. 20, 1 Cent. Rep. 173; *People v. Liscomb*, 60 N. Y. 559.

It is not denied that the court had such jurisdiction, providing that the Legislature had power under the Constitution to enact chap. 489 of the Laws of 1888, entitled "An Act to Amend §§ 491, 492, 503, 504, 505, 506, 507, 508, 509 of the Code of Criminal Procedure in Relation to the Infliction of the Death Penalty, and to Provide Means for the Infliction of Such Penalty." Prior to the passage of this Statute, the punishment by death in every case was to be inflicted by hanging the convict by the neck until he was dead. This provision of law was changed by the Amendments of the Code above referred to, and now the section (505) reads as follows: "The punishment of death must in every case be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead."

The only question involved in this appeal is whether this enactment is in conflict with the provision of the State Constitution which forbids the infliction of cruel and unusual punishment. Const. art. 1, § 5.

This provision was borrowed from the English Statute, passed in the first year of the reign of William and Mary, being chapter 2 of the Statutes of that year, entitled "An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown," usually known as the Bill of Rights. It enacts, among other things, that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." When this Statute was made part of the Constitution of the United States, the word "shall" was substituted for the word "ought," and in this form it first appears in the Constitution of this State, adopted in 1846. It is not very clear whether the provision as it stands in our Constitution was intended as an admonition to the Legislature and the judiciary, or as a restraint upon legislation inflicting punishment for criminal offenses. When the Statute referred to was enacted in England, it was not

intended as a check upon the power of Parliament to prescribe such punishment for crime as it considered proper. Its enactment did not change any law then existing, nor did it mitigate the harshness of criminal punishments in that country, for more than half a century after it appeared on the statute book, a long catalogue of offenses were punishable by death, many of which were not visited with that extreme penalty before the Bill of Rights was passed. 2 Sharsw. Bl. Com. chap. 83, p. 440.

The history of the times in which this provision assumed the form of a law shows that it was, after all, intended to be little more than a declaration of the rights of the subject. The English people were about to place upon the throne, made vacant by revolution, a foreign prince, whose life had been spent in military pursuits, rather than in the study of constitutional principles and the limitations of power as then understood in the country he was to govern. This was considered a favorable opportunity to enact, in the solemn form of a statute, a declaration of the principles upon which the people desired the government to be conducted. But whatever the purpose of this Statute was in the country where it originated, we think that its presence in the Constitution of this State confers power upon the courts to declare void legislative Acts prescribing punishments for crime, in fact cruel and unusual. This is the power that is invoked against the amendments to the Code of Criminal Procedure above referred to, by the learned counsel for the relator, in an argument addressed to us interesting on account of its great political and scientific research. We entertain no doubt in regard to the power of the Legislature to change the manner of inflicting the penalty of death. The general power of the Legislature over crimes, and its power to define and punish the crime of murder, is not and cannot be disputed. The amendments prescribed no new punishment for this offense. The punishment now, as before, is death. The only change made is in the mode of carrying out the sentence. The infliction of the death penalty in any manner must necessarily be accompanied with what might be considered in this age some degree of cruelty, and it is resorted to only because it is considered necessary for the protection of society. The Act on its face does not provide for any other or additional punishment.

In behalf of the relator this legislation is assailed in no other way than by attempting to show that the new mode of carrying out a death sentence subjects the person convicted to the possible risk of torture and unnecessary pain. This argument would apply with equal force to any untried method of execution, and, when carried to its logical results, would prohibit the enforcement of the death penalty at all. Every Act of the Legislature must be presumed to be in harmony with the fundamental law until the contrary is clearly made to appear. *Metropolitan Board of Excise v. Barria*, 34 N. Y. 606, 668; *People v. Briggs*, 50 N. Y. 553, 558; *People v. Home Ins. Co.* 92 N. Y. 838, 844; *People v. Alvertson*, 55 N. Y. 50, 54; *People v. Wilson*, 109 N. Y. 389, 397, 12 Cent. Rep. 616; *People v. King*, 110 N. Y. 418, 1 L. R. A. 298.

from matters of which a court can take judicial notice, then the Act must stand. The testimony of expert or other witnesses is not admissible to show that in carrying out a law enacted by the Legislature some provision of the Constitution may possibly be violated. *People v. Alberson, supra; People v. Draper*, 15 N. Y. 582; *Re New York Elevated R. Co.* 70 N. Y. 327.

If the Act upon its face is not in conflict with the Constitution, then extraneous proof cannot be used to condemn it. The history and origin of the enactment we are now considering may very properly be referred to to test its validity, and ascertain its true intent and proper interpretation. It has been said that courts will place themselves in the situation of the Legislature, and by ascertaining the necessity and probable objects of the passage of a law, give effect to it, if possible, according to the intention of the lawmakers, when that can be done without violating any constitutional provision. *People v. Columbia Co.* 43 N. Y. 180.

Chapter 852 of the Laws of 1886, entitled "An Act to Authorize the Appointment of a Commission to Investigate and Report to the Legislature the Most Humane and Approved Method of Carrying into Effect the Sentence of Death in Capital Cases," provided for the appointment of a commission consisting of three eminent citizens, who were named therein, and required them to investigate and report to the Legislature on or before the fourth Tuesday of January, 1887, the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases.

To enable this commission to make its investigation most thorough, the Legislature extended the time for it to report for a year longer by chapter 7 of the Laws of 1887. This commission early in the legislative session of 1888 made its report accompanied with a proposed bill which the Legislature afterwards, and during the same session, enacted, and this is the Statute which is now attacked in behalf of the

death with care and caution and unusual deliberation. It would be a strange result, indeed, if it could now be held that its efforts to devise a more humane method of carrying out the sentence of death in capital cases have culminated in the enactment of a law in conflict with the provisions of the Constitution prohibiting cruel and unusual punishments. Whether the use of electricity as an agency for producing death constituted a more humane method of executing the judgment of the court in capital cases, was a question for the determination of the Legislature. It was a question peculiarly within its province, and the means at its command for ascertaining whether such a mode of producing death involved cruelty, within the meaning of the constitutional prohibition, were certainly as satisfactory and reliable as any that are consistent with the limited functions of an appellate court. The determination of the Legislature of this question is conclusive upon this court. The Amendment to the Code of Criminal Procedure changing the mode of inflicting the death penalty does not upon its face, nor in its general purpose and intent, violate any provision of the Constitution. The testimony taken by the referee, while not available to impeach the validity of the legislation, may, we think, be regarded as a valuable collection of facts and opinions touching the use of electricity as a means of producing death, and for that reason as part of the argument for the relator, but nothing more.

We have examined this testimony and can find but little in it to warrant the belief that this new mode of execution is cruel, within the meaning of the Constitution, though it is certainly unusual. On the contrary, we agree with the court below that it removes every reasonable doubt that the application of electricity to the vital parts of the human body, under such conditions, and in the manner contemplated by the Statute, must result in instantaneous, and consequently in painless, death.

The order appealed from should be affirmed.

All concur.

MICHIGAN SUPREME COURT.

PEOPLE of the State OF MICHIGAN

v.

DETROIT, GRAND HAVEN & MILWAUKEE R. CO., *Appt.*

(....Mich.....)

1. A statute requiring existing railroad companies to build, at their own expense, a crossing for any individual whose residence is separated by the railroad from a public highway is, if such crossing is to be considered as for a public use, unconstitutional in taking the property of the company for public use without compensation.
 2. A railroad company cannot be compelled to erect and maintain crossings at its own expense for persons whose residences
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are cut off by the railroad from a public highway when no statute requiring them to make such crossings existed at the time of the construction of the road.

(*Morse, J., files separate opinion.*)

(February 20, 1890.)

APPEAL by defendant from a judgment of the Circuit Court for Oakland County in favor of plaintiffs in an action to recover the statutory penalty for refusal to erect a residence crossing. *Reversed.*

The facts are fully stated in the opinion.

Messrs. E. W. Meddaugh and George Jerome, for defendant, appellant:

The Act infringes § 14, art. 18, of the Constitution of Michigan, which provides that "the

277; *Chicago & G. T. R. Co. v. Hough*, 61 Mich. 507; *Grand Rapids v. Grand Rapids & I. R. Co.* 58 Mich. 641; *Grand Rapids, N. & L. S. R. Co. v. Grand Rapids & I. R. Co.* 85 Mich. 265.

A railroad corporation is not subject to any other or different rule respecting its duty to either individuals or the public than a natural person would be, in the same conditions.

Grand Rapids, N. & L. S. R. Co. v. Grand Rapids & I. R. Co. 35 Mich. 273.

If the owner of land has the right to a crossing, the jury should take into account the expense of constructing and maintaining such crossings in awarding damages for the taking of the right of way.

Atchison & N. R. Co. v. Gough, 29 Kan. 94; *Kansas Cent. R. Co. v. Allen*, 22 Kan. 285.

The right of crossing, in the absence of a statutory grant existing at the inception of the railroad company's title, is open to question.

Jackson v. Rutland & B. R. Co. 25 Vt. 159.
Messrs. S. V. R. Trowbridge, Atty-Gen., and George W. Smith, Pros. Atty., for plaintiffs, appellees.

Grant, J., delivered the opinion of the court:

The people bring their suit under Act No. 165, Laws 1889, to recover a penalty for the failure of the defendant to provide an open, unobstructed residence crossing, suitably guarded, in front of the residence buildings of one Henry Fall, in the Township of Bloomfield, Oakland County. Judgment was rendered against the defendant for \$140, and it appeals. The following facts were stipulated, and constitute all the evidence that was introduced upon the trial, viz.:

"(1) That the defendant is a corporation, and owns and operates a railroad between the City of Detroit and the City of Grand Haven, in the State of Michigan, which runs through the Township of Bloomfield, in the County of Oakland, in said State. (2) That at a point on defendant's road about one mile northerly of the Village of Birmingham, in said County of Oakland, one Henry Fall owns a farm on the northerly side of said road, and has his residence there adjacent to the said railroad, and the railroad is between his residence and the usually traveled public highway, and immediately adjacent to said road, and is parallel to said road. (3) That said Henry Fall has a farm crossing, which was provided and is maintained by the defendant Company, with suitable openings and gates thereto, affording him ingress and egress across defendant's road, between his residence and the highway. (4) That the defendant and said Henry Fall derived title to their said real properties independently from the same common remote grantor, the said Fall having purchased since defendant's right of way was obtained and its road constructed. (5) That the defendant Company has been in possession of the right of way through said Township of Bloomfield, adjacent to said Fall's farm and residence, and in operation of its railroad, for more than forty years last past. (6) That the commissioner of rail-

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said Fall, all substantially as alleged in the declaration, a copy of which order was duly served upon the defendant Company as alleged, requiring it, in pursuance of the provisions of § 15, art. 4, of Act No. 198, Sess. Laws 1873, as amended by Act No. 165, Sess. Laws 1889, within ten days from said date, to construct an open, unobstructed residence crossing, suitably guarded, substantially as provided for highway and street crossings, and thereafter to efficiently maintain the same, so as to give Henry Fall a near, safe and convenient outlet or passage-way from his residence or real property over defendant's track to the highway running in front of the same, to wit, at the place of residence of said Henry Fall, on the line of defendant's railway as aforesaid. (7) That defendant has neglected and refused, and still neglects and refuses, to comply with such order, substantially as alleged in plaintiff's declaration."

That portion of Act No. 165, above mentioned, imposing upon railroad companies the duty to provide and maintain these crossings, reads as follows:

"And in cases where a railroad is immediately adjacent to or laid upon a highway, open, unobstructed residence crossings, suitably guarded, substantially as are provided for highway and street crossings, shall be provided and maintained by the railroad corporation operating said railroad. provided, the same shall be so ordered by the railroad commissioner."

The defendant contends that this provision infringes section 14, art. 18, of the Constitution of Michigan, which provides that "the property of no person shall be taken for public use without just compensation therefor."

The argument for plaintiff is: (1) It is an exercise of the general police power over railroads. (2) It is an exercise of the police power regulating the special duties imposed upon railroad companies. It is apparent that this provision of the Statute, enacted in 1889, imposes additional burdens and expense upon railroad companies. It requires them to construct and maintain residence crossings at their own expense, in addition to highway and farm crossings. Except as imposed by statute, no obligation exists on the part of a railroad company to give a right of way over its road to private individuals. While it is a quasi public corporation, still, in the holding and use of its land, it is entitled to the same protection as are natural persons.

The following propositions can be regarded as well settled:

1. The police power of the State over railroads includes all those regulations which are necessary for the safety and protection of persons and property in transit over them, or crossing them upon the public highways. The State may therefore require the use of air-brakes, the erection of fences and cattle-guards, the stopping of trains at the crossings of other railroads, the use of bells and whistles, and many other things which will readily suggest themselves. This principle is commended by good sense, and is too well established to require the citation of authorities.

2. The power to require railroads to erect and maintain farm crossings has been the policy of this State from the beginning. Comp. Laws 1857, § 1987.

The original charters of the Detroit & Pontiac Railroad Company, and of the Oakland & Ottawa Railroad Company, to which the defendant succeeded, require it. Nearly, if not all, the railroad companies of Michigan have acquired their rights of way under statutes containing this provision. They have condemned lands and paid the owners compensation with this in view. There has therefore been no hardship or injustice in these requirements, nor in compelling the companies to fulfill them. So far as I have investigated, our sister States have similar statutes, and their constitutionality has been generally sustained as within the police power lodged in the State.

3. Municipal authorities, although expressly authorized by statute, cannot lay out a highway across the road-bed of a railroad, and compel the erection and maintenance of cattle-guards, etc., without compensation. The Statute conferring this authority was held to be repugnant to the Constitution of Michigan, and void. *People v. Lake Shore & M. S. R. Co.* 52 Mich. 277; *Chicago & G. T. R. Co. v. Hough*, 61 Mich. 507; *Grand Rapids v. Grand Rapids & I. R. Co.* 58 Mich. 641.

4. The land of a railroad company can no more be taken for the use, benefit or convenience of an individual than can the property of a natural person. This principle is held applicable to the case of one railroad crossing the track and road-bed of another railroad. *Grand Rapids, N. & L. S. R. Co. v. Grand Rapids & I. R. Co.* 35 Mich. 265.

Such benefit and convenience are not enough. Something must be shown to fairly bring the case within the general police power which the State may exercise over railroads. Now, an examination of the record shows that Fall applied for an "open, unobstructed residence crossing, suitably guarded, as required by section 15 of said Act." It is not an application for improving, changing or constructing the farm crossing, referred to in paragraph 3 of the stipulated facts. That crossing therefore has no bearing upon the controversy. We pass no opinion upon the duty of defendant to change this farm crossing so as to conform to the requirements of the Statute in that regard. That question is not in the case. Nothing in the record shows whether the residence crossing was located in the same place as the farm crossing or not. We must therefore consider this as an application *de novo*, and the sole question in the case to be whether a railroad company can be compelled to make a crossing over its track from a highway to a person's residence, where none existed before. The answer to the question depends upon whether the facts agreed upon make a case for the exercise of the police power of the State. Plaintiffs concede that the property in this case is not taken for public use. Its taking, therefore, can only be justified upon the ground of police regulation. The burden of proof was upon the plaintiff. No inference can be drawn, unsupported by proofs, to sustain the action of the commissioner, or to bring it within the rule. His action is final only when, as in the

verdict of a jury, there is evidence to support it. Fall purchased the premises with the situation just as it is now, and as it has been for many years, possibly forty, the length of time that the defendant's railroad has been built. The record is silent as to whether he has any other access to a highway, or as to the character and extent of his business, except that he owns a farm. But whether it is a fruit, grain or stock farm; whether it contains one acre or more; whether he requires the crossing to drive stock over; or whether he requires it for any other purpose, except for the passage of himself and family,—we are not informed. The irresistible conclusion from the whole record is that Fall's application and the order of the commissioner were made with sole reference to his (Fall's) benefit and convenience. It is apparent that every open crossing into the public highway across a railroad track increases, rather than diminishes, the danger of travel, by giving animals the opportunity to get upon the track in front of passing trains. These residence crossings cannot, therefore, be justified on the ground of protection and safety to passengers and property. The Statute applies to all residence buildings.

If plaintiff's contention be correct, then a land owner, across whose land a railroad has been constructed, and who has been amply compensated in damages, may erect twenty or more residence buildings on the land fronting the railroad and the highway, sell them, together with the lands on which they are situated, and compel the railroad company to construct and maintain as many residence crossings. Such action would seriously increase the dangers of travel, and impose heavy additional burdens upon railroads. If it is the duty of the State to provide access for every citizen to the public highway, so that he may obey the *verdict* of the courts, pay his taxes, vote, send his children to school and exercise all the prerogatives of citizenship, the State cannot perform this duty by taking the property of one citizen, and giving it to another, without compensation.

We therefore conclude (1) that the Act above mentioned, in so far as it provides for taking the property of a railroad company for public use without compensation, is unconstitutional and void; (2) railroad companies cannot be compelled to erect and maintain residence crossings at their own expense, for the use and benefit of individuals, when no statute requiring them existed at the time of the construction of the road; (3) the facts in this case do not bring it within the power of police regulation.

Judgment must be reversed, and no new trial ordered.

Champlin, Ch. J., and Campbell and Long, JJ., concur.

Morse, J.:

Act No. 165, Pub. Laws 1889, of this State, provides, among other things, as follows: "And in cases where a railroad is immediately adjacent to or laid upon a highway, and intervenes between said highway or the usually traveled portion thereof and the residence buildings of real property fronting upon said high-

way, unobstructed residence crossings, suitably guarded, substantially as are provided for highway and street crossings, shall be provided and maintained by the railroad corporation operating said railroad; provided, the same shall be so ordered by the railroad commissioner." I think this provision of the Act is valid, as a proper exercise of the police power of the State and its control over railroads, as applied to all such roads built after its passage; and perhaps it might not be unconstitutional as applied to cases of railroads built and operated before this Act took effect, when the residence building was upon the premises before the Railroad Company ran its road between it and the highway.

But in this case it appears that the Railroad Company and the residence owner acquired title from the same grantor, and that the Railroad Company got its title first. Whether the Company has a title in fee or only a right of way does not appear, and, if a right of way, whether its title was acquired by condemnation or purchase. Under these circumstances, I concur in the opinion that Mr. Fall, the residence owner, cannot, under this Act, compel the defendant to open and maintain at its own expense the crossing provided for in this Act. The law cannot be given such a retroactive effect as to destroy property rights in real estate, vested for more than forty years in the defendant, without compensation, and throw additional burdens for all time upon such real estate,—burdens not contemplated nor necessary for any reason when such property was acquired. This being a penal action, it must be considered under the finding that the defendant obtained its title before Mr. Fall purchased his farm, and that both hold their lands by deeds from a common grantor; that the residence was not built at the time the railroad was, or, if built, that the owner of it, this common grantor, received at that time adequate compensation for the inconveniences resulting from the running of the railroad between the house and the highway. For this reason I agree in the result of this case as announced by my brethren.

But I am satisfied that a railroad company does not stand, as to the exercise of state control, upon the same footing as private persons, and that its property can be subjected to burdens not imposed on the mere owners of private property, used purely and exclusively for private interests and purposes, for the reason that all property devoted to public uses takes on quasi public qualities, and is therefore subject to limitations on such use by the State, and to legislative control, when such control seems necessary to the Legislature, and is reasonable; and of the necessity of such control the Legislature is the sole judge, and courts can only inquire into the reasonableness of the methods of such control. A railroad may be required to fence its tracks and construct cattle-guards and to construct farm crossings. The railroads of this State have always been subject to regulations of this kind imposed upon them by the State, and no one has doubted the right of the Legislature to regulate and control them in this respect. And I am not prepared to say that this Act could not reach back, and be operative and valid, in

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a case where the dwelling-house was upon the land at the time the road was built, and the owner of the land acquired his title first, and the company obtained its right of way by condemnation, and the residence owner has no access to any other highway. In other words, I am satisfied of the authority of the Legislature, under the general police power of the State, to make the regulation as to residence crossings found in this Act, and that it is a reasonable one, as applied to cases arising after the Act became a law. Whether or not it can be applied to cases where the conditions of the premises, railroad and highway are the same as they were before the passage of the Act, in my opinion depends upon the reasonableness of the regulation as applied to each particular case. While conceding the potency of the police power of the State, I do not think it omnipotent; and as said before, in *Whitney v. Grand Rapids Twp.* (Mich.), 39 N. W. Rep. 42, the Legislature cannot arbitrarily and without reason, and in defiance of right, pass any statute it may see fit under this power. This Statute, while reasonable and proper and valid as to all conditions and circumstances of residence crossings coming within its provisions hereafter, cannot be arbitrarily, unreasonably and in defiance of right applied to the case in hand.

Jacob LANG, *Appt.*,

v.

Moses SALLIOTTE *et al.*

(.....Mich.....)

A dispute as to the ownership of a strip of land, claimed by each party in fee simple, under a deed which includes it, cannot be settled by arbitration under How. Stat., § 8475, which allows arbitration to settle boundaries of lands, but not to determine a claim to any estate in fee or for life.

(February 20, 1890.)

ERROR to the Circuit Court for Wayne County to review a judgment denying a motion to set aside the award of arbitrators appointed to settle a dispute as to the proper position of a boundary fence. *Reversed.*

The case sufficiently appears in the opinion.

Messrs. Powell & Dorland, for plaintiff, appellant:

In their decision the arbitrators have made the title to plaintiff's land variant from the paper title, which it was not in their province to do.

Gallagher v. Kern, 81 Mich. 138; How. Stat. § 8475.

The submission is relative to the boundary, while the award is as to ownership in fee. An award upon matters not submitted is void.

Smith v. Cutler, 10 Wend. 589, 25 Am. Dec. 580; *Curd v. Wallace*, 7 Dana, 190, 82 Am. Dec. 85.

Messrs. Stewart & Galloway for defendants, appellees.

Morse, J., delivered the opinion of the court:

March 2, 1887, the plaintiff entered into an agreement in writing with defendants to settle

their difficulties as to whether a certain fence between them, and then marking the boundary line, was in its proper position, the defendant's claiming, as set forth in the agreement to arbitrate, that the fence stands in its proper place to mark the boundary line, and the plaintiff claiming that said fence is "considerably west of its proper location."

The writing states further: "It is hereby agreed, by and between said party of the first part (Lang), and the said parties of the second part (Salliotte and Dronillard), to submit the determination of the boundary between the premises of the said party of the first part and those of said parties of the second part under the Statutes in such cases made and provided (being chap. 292 of Howell's Compilation) to two arbitrators," giving the two selected, Frederick W. Kurth and Charles C. Stewart, the right to call in a third person if they failed to agree. The parties also covenanted not to sue each other, or to allow any suit to be brought concerning this boundary line, and that they would each faithfully obey and carry out the decision of the said arbitrators, and that, if either party failed to do this, the other could compel him to do so in the Wayne Circuit Court.

The two arbitrators met, the matter was submitted to them, and they made a written finding and determination March 30, 1887, which on the 18th day of April, same year, was filed with the clerk of the Wayne Circuit Court, and notice of such filing duly served upon Lang. Lang thereupon moved the circuit court to set the award aside, on the ground that the arbitrators had exceeded their powers. This motion was denied, and judgment entered upon such award in favor of the defendants. Plaintiff comes here upon writ of error. The arbitrators decided that "the fence, as it now stands, marks the proper boundary between the lands of the said Jacob Lang, party of the first part, and those of the said Moses Salliotte and Joseph Dronillard, parties of the second part, and that the fence in the rear shall be built on the line indicated by the fence now standing between the lands of said first party, and those of said parties of the second part in front." But it appears from their own award that they arrived at this decision by examining into the title of the parties to the land, and by determining that the deed of Lang was wrong in its description, and should be corrected. They found: *First*. That the deeds under which Lang occupied and held his land did, in terms, convey to him 103 feet beyond the fence mentioned in the submission. *Second*. That Lang's grantor did not own this 103 feet when he deeded to Lang, and never was the owner of the same. Therefore the land was not conveyed. *Third*. That Moses Salliotte became the owner of this 103 feet, November 7, 1845, by a deed from Hyacinth Salliotte and wife; that prior to this Hyacinth Salliotte was the owner of this 103 feet,

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and also of the land now occupied by Lang, and that he never made any other conveyance of the 103 feet, except this one to Moses Salliotte; that he deeded the land occupied by Lang, November 22, 1853, to Antoine Reno, who deeded the same to Alexis M. Salliotte by two deeds, one dated December 15, 1858, and the other December 10, 1859, neither of which deeds purported to convey this 103 feet. They therefore decide that the deeds from Alexis M. Salliotte to Peter Jager, and the deed from Jager to Lang, which purport to convey the 103 feet, should read (inserting description so as not to contain this 103 feet; and as to this strip of 103 feet, which said Jager assumed to convey to Lang, "the said Lang's proper remedy is by suit against the said Jager for breach of warranty, unless he has lost the same through the Statute of Limitations."

It will be seen that the arbitrators did not pass upon the boundary line between two land holders, holding titles that did not conflict as to description, but they examined and passed upon the respective titles of the parties in fee, both of whom were claiming under their deeds the title in fee to this same strip of land. In order to do this, they had to determine, and did determine, that the deeds under which Lang claimed title to this strip did not convey the land for want of title in his grantors, although in express terms the strip was conveyed by them, and passed in fee to Lang. The contest turns out not to be over a mere boundary line between adjoining properties, but the dispute to be settled is the ownership of a strip of land 103 feet wide, claimed by both parties in fee simple. This contest or dispute cannot be settled by arbitration, under the Statute. Section 8475, How. Stat., provides that "no such submission shall be made respecting the claim of any person to any estate, in fee or for life, in real estate; but any claim to an interest for a term of years, or for one year or less, in real estate, and controversies respecting the partition of lands between joint tenants or tenants in common, or concerning the boundaries of lands, or concerning the admeasurement of dower, may be so submitted to arbitration."

The effect of the finding of the arbitrators was to establish the ownership of this strip in the defendants, or one of them, when it was claimed by plaintiff, whose deed upon its face included it. This was beyond their jurisdiction, and they therefore exceeded their powers under the Statute. *Gallagher v. Kern*, 31 Mich. 138.

The motion to set aside the award should have been granted, and the judgment entered thereon must be vacated and set aside, with costs of both courts to the plaintiff.

Champlin, Ch. J., and **Campbell and Grant, JJ.**, concurred; **Long, J.**, did not sit.

Heber H. HANFORD *et al.*, *Repts.*,

v.

ST. PAUL & DULUTH R. Co., *Appt.*

(....Minn....)

1. The right of a riparian proprietor upon navigable waters to improve, reclaim and occupy the submerged lands out to the point of navigability, although originally incident to the riparian estate, may be separated therefrom, and be transferred to and enjoyed by persons having no interest in the original riparian estate, overruling *Lake Superior Land Co. v. Emerson*, 38 Minn. 406.
2. A condemnation by a railroad corporation of the upland abutting upon the water,—*Held*, to embrace also the incidental riparian right of improvement and occupancy of the submerged lands, although no specific mention is made of riparian rights.
3. The specific mention and including in the same petition of riparian rights in respect to other lands belonging to other persons.—*Held*, not to affect this construction of the petition and proceedings in respect to the land in question.

(April 3, 1890.)

APPEAL by defendant from an order of the District Court for St. Louis County overruling its motion for a new trial of an action brought to enjoin it from constructing its road over land covered by the waters of the Bay of St. Louis the right to use which was alleged to belong to plaintiffs, in which judgment had been rendered in their favor. *Reversed.*

In 1869 the Lake Superior & Mississippi Railroad Company, to whose rights this defendant succeeded, commenced proceedings in the County of St. Louis to condemn for its use for railroad purposes lands in that county, some of them lying near to or touching upon the Bay of St. Louis, or on Superior Bay, or on Lake Superior. The petition by which the proceedings were instituted described the land more particularly involved here by describing certain lines, and then continuing: "Including all the premises between the lines so described and the said Bay of St. Louis," so that the land thus described abuts on the bay. The description makes no mention of riparian rights. The petition described thirty-five distinct tracts of land, parts of which were proposed to be taken, in three of which descriptions of lands to be taken were these or equivalent words: "Including all riparian rights and privileges." The award of the commissioners followed the petition in this respect. The condemnation proceedings were carried to a close by the assessment of damages for the taking and payment thereof. Opposite the land thus taken, and involved therein, between the water line of the bay and the point of navigability, is shallow

*Head notes by DICKINSON, J.

NOTE.—Rights of riparian owners on navigable streams; rules in the various States. See notes to *Parker v. West Coast Packing Co.* (Or.) 5 L. R. A. 61; *Fulmer v. Williams* (Pa.) 1 L. R. A. 603. 7 L. R. A.

water for a distance of several hundred feet into the bay. In this space of shallow water, and in front of and about sixty feet from the water line, the defendant has commenced the construction of a railroad track, driving piles for that purpose. The plaintiffs, claiming through conveyance from the owner at the time the petition for condemnation was filed, bring this action to enjoin the defendant from constructing its railroad in said shallow water. No question is made as to the validity of the condemnation proceedings.

The court handed down a decision on June 10, 1889, in which it held that riparian rights exist only as incident to the abutting land, and cannot be so severed therefrom as to be rights in gross not appurtenant to any land in connection with which they may be used and enjoyed; and that therefore when the Railroad Company condemned for its use the land abutting on the bay, it acquired the riparian rights belonging to it, although the petition for condemnation made no express mention of such rights.

Respondents thereupon filed a petition for a reargument, which was granted.

Memo. Ensign, Cash & Williams, for appellant:

Riparian rights are a part of the bank and cannot be severed from it; they are mere rights incident to the bank and cannot exist in gross. So that if there be an attempt to reserve or except riparian rights, they would nevertheless pass by a conveyance of the bank.

Lake Superior Land Co. v. Emerson, 38 Minn. 406; *Delaplaine v. Chicago & N. W. R. Co.* 42 Wis. 214; *Lyon v. Fishmongers Co.* L. R. 1 App. Cas. 662; *Rose v. Groves*, 5 Man. & Gr. 613; *Stevens v. Paterson & N. R. Co.* 34 N. J. L. 532.

Whether riparian rights are specifically mentioned in the conveyance or not the same estate passes, no more and no less.

Rippe v. Chicago, D. & M. R. Co. 23 Minn. 18; *Union Depot, S. R. & Transfer Co. v. Brunswick*, 31 Minn. 297.

These rights, as the term would indicate, are such as pertain to the shore, the *ripa*, out of which they spring and in connection with which they exist. They depend upon the ownership of the land to which they attach, and not upon the ownership of the submerged lands, at least in States like Minnesota, where the courts hold that submerged land is owned by the State or sovereign in its sovereign capacity, but that the shore owner has certain valuable rights therein by virtue of the ownership of the shore, and to be used in connection therewith.

See *Schurmeier v. St. Paul & P. R. Co.* 10 Minn. 82; *St. Paul & P. R. Co. v. Schurmeier*, 74 U. S. 7 Wall. 273 (19 L. ed. 74); *Dutton v. Strong*, 66 U. S. 1 Black, 23 (17 L. ed. 29); *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497 (19 L. ed. 984); *Morrill v. St. Anthony Falls Water-Power Co.* 26 Minn. 222; *State v. Minneapolis Mill Co.* 26 Minn. 229; *Carls v. Stillwater S. R. & Transfer Co.* 28 Minn. 378; *Red River Roller Mills v. Wright*, 30 Minn. 249; *Union Depot, S. R. & Transfer Co. v. Brunswick*, 31 Minn. 297; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.* 109 U. S. 672 (27 L. ed. 1070); *Chasemore v.*

See also 13 L. R. A. 668; 21 L. R. A. 62.

R. 7 H. L. 248; *Stockport Waterworks Co. v. Potter*, 3 Hurl. & C. 800; *Boorman v. Sunnucks*, 42 Wis. 233; *Diedrich v. Northwestern Union R. Co.* 42 Wis. 248; *New Haven Steamboat Co. v. Sargent*, 50 Conn. 199.

If one person not the ultimate owner in fee has the exclusive use of the bank for a term of years, during such exclusive possession he alone can exercise the riparian rights.

Clement v. Burns, 43 N. H. 609; *Morrill v. St. Anthony Falls Water Power Co.* 26 Minn. 222; *Stockport Waterworks Co. v. Potter*, 3 Hurl. & C. 800; *Hoboken Land & Imp. Co. v. Hoboken*, 36 N. J. L. 540; *New Jersey Zinc & Iron Co. v. Morris Canal & Bkg. Co.* 1 L. R. A. 133, 18 Cent. Rep. 342, 44 N. J. Eq. 398.

Messrs. Julien T. Davies, William H. Bliss and George B. Young, also for appellant:

The strictly riparian rights are as follows: (1) the right of access; (2) the right of alluvion or accretion; (3) the right to wharf or fill out to navigable water.

Rose v. Groves, 5 Man. & Gr. 618; *Lyon v. Fishmongers Co.* L. R. 1 App. Cas. 662; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497 (19 L. ed. 984); *Brisbane v. St. Paul & S. O. R. Co.* 23 Minn. 114; *Gould, Waters*, §§ 76, 155; *Carli v. Stillwater S. R. & Transfer Co.* 28 Minn. 373; *Union Depot, S. R. & Transfer Co. v. Brunswick*, 31 Minn. 297; *Clement v. Burns*, 43 N. H. 609.

They are advantages which result from the adjacency of the water and the bank. They are rights incident to the bank, which pertain directly to the conjoint use of the riparian land and the stream which washes it.

Clement v. Burns, *supra*; *New Orleans v. United States*, 35 U. S. 10 Pet. 662 (9 L. ed. 573); *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.* 109 U. S. 672 (27 L. ed. 1070); *Godfrey v. Alton*, 12 Ill. 29; *Rowan v. Portland*, 8 B. Mon. 232; *Newport v. Taylor*, 16 B. Mon. 699; *Geiger v. Filor*, 8 Fla. 325; *State v. Brown*, 27 N. J. L. 13; *Brown v. Morris Canal & Bkg. Co.* Id. 643; *Hoboken Land & Imp. Co. v. Hoboken*, 36 N. J. L. 540; *Fitzgerald v. Founcee*, 46 N. J. L. 536; *Johnson v. Barret*, Aleyn, 10.

The right to wharf out to navigable waters was always considered a natural right, or at least a "natural equity" belonging to the bank, to be exercised by him who was entitled to the use and enjoyment of the bank, and the same theory as to the connection of the right with the bank obtained in regard to "making land" by filling out from the bank.

Engs v. Peckham, 11 R. I. 210; *East-Haven v. Hemingway*, 7 Conn. 186; *Simons v. French*, 25 Conn. 352; *Mather v. Chapman*, 40 Conn. 382; *State v. Sargent*, 45 Conn. 358; *Gough v. Bell*, 28 N. J. L. 441; *Bell v. Gough*, 28 N. J. L. 624; *State v. Brown*, *supra*; *Stevens v. Paterson & N. R. Co.* 84 N. J. L. 532; *Keyport & M. P. Steamboat Co. v. Farmers Transp. Co.* 18 N. J. Eq. 511; *American Dock & Imp. Co. v. Public School Trustees*, 39 N. J. Eq. 409; *New Jersey Zinc & Iron Co. v. Morris Canal & Bkg. Co.* 1 L. R. A. 133, 13 Cent. Rep. 342, 44 N. J. Eq. 398; *Musser v. Hershey*, 42 Iowa, 356; *St. Clair Co. v. Livingston*, 90 U. S. 23 Wall. 46 (23 L. ed. 59); *Cook v. Burlington*, 30 Iowa, 94; 7 L. R. A.

Ill. 381.

The riparian right in question "is not the subject of sale independently of a conveyance of the land to which it is appurtenant."

Musser v. Hershey, 42 Iowa, 362; *Morris Canal & Bkg. Co. v. Central R. Co.* 16 N. J. Eq. 419.

Mr. William W. Billson, for respondents:

The Railroad Company did not take the title in fee and the owner of the fee had the riparian rights appurtenant thereto together with power to pass the same by deed to his grantees.

Brisbane v. St. Paul & S. O. R. Co. 23 Minn. 114; *Banks v. Ogden*, 69 U. S. 2 Wall. 57 (17 L. ed. 818); *New Jersey Zinc & Iron Co. v. Morris Canal & Bkg. Co.* 1 L. R. A. 133, 13 Cent. Rep. 342, 44 N. J. Eq. 398.

It would lead to singular and oppressive results to hold that without the consent of a property holder a railroad company could, even by expressly claiming and asking for them, acquire riparian rights by condemnation. They are not rights which are necessary to the carrying on of railroad business.

Rensselaer & S. R. Co. v. Davis, 43 N. Y. 187.

By the rules of the common law, the owner of land lying along the shore of a navigable river is entitled to no right either in the shore or waters as incident to its ownership, except the contingent ones of alluvion and reliction. The right of access does not exist.

Lansing v. Smith, 4 Wend. 9; *Jackson v. Bowen*, 6 Cow. 148; *Gould v. Hudson River R. Co.* 6 N. Y. 522; *Tomlin v. Dubuque, B. & M. R. Co.* 32 Iowa, 109; *Stevens v. Paterson & N. R. Co.* 84 N. J. L. 532; *Lyon v. Fishmongers Co.* L. R. 10 Ch. 679.

In this country obstructions by individuals in front of riparian land seem to have been, with substantial uniformity, redressed upon the theory that the wrongful act, although an injury to the public right of navigation, entailed special damage upon the owner of the bank, for which he was entitled to redress; and no resort has been made to the theory of a private right of access in such owner.

Brayton v. Fall River, 113 Mass. 218; *Gould, Waters*, § 123, note 2, and many cases cited.

It is inadmissible to infer that all riparian rights are separable from the bank, or all inseparable, merely because one of them is found to be so. If this is not true, then the separableness of all of them was settled many generations since by the cases adjudging the separableness of the right of fishery.

Hargrave, Law Tracts, p. 5; *Coke*, Litt. 122, and note; *Coulson & Forbes*, Waters, 336.

Riparian privileges are profits a *prendre* and as such clearly alienable as gross rights.

See generally 2 Bl. Com. *34; *Williams*, Prescriptive Rights, 184; *Levman v. Abeel*, 16 Johns. 30; *Martyn v. Williams*, 1 Hurl. & N. 517; *Hooper v. Clark*, 8 Best & S. 150; *Wickham v. Hawker*, 7 Mees. & W. 68; *Pickering v. Noyes*, 4 Barn. & C. 639; *Graham v. Ewart*, 25 L. J. N. S. Exch. 42; *Grubb v. Guilford*, 4 Watts, 223; *Union Petroleum Co. v. Bliven Petroleum Co.* 72 Pa. 181; *Funk v. Haldeman*, 53 Pa. 220; *Waters v. Lilley*, 4 Pick. 145; *Blew-*

ett v. Tregonning, 3 Ad. & El. 554; *Pearson v. Post*, 20. Wend. 128; *Tinicum Fishing Co. v. Carter*, 61 Pa. 89; *Littlefield v. Maxwell*, 81 Me. 142; *Minneapolis Mill Co. v. Hobart*, 28 Minn. 37.

Rights of fishery are alienable.

Gough v. Bell, 22 N. J. L. 463; *Hart v. Hill*, 1 Whart. 182.

So is the right to use water.

Sto kport Waterworks Co. v. Potter, 3 Hurl. & C. 800; *Nuttall v. Bracewell*, L. R. 2 Exch. 14; *Ormerod v. Todmorden J. S. Mill Co.* L. R. 11 Q. B. Div. 155; *Kensit v. Great Eastern R. Co.* L. R. 27 Ch. Div. 122; *Emporia v. Soden*, 25 Kan. 606; *Stein v. Burden*, 24 Ala. 120; *Aegunckanok Water Co. v. Watson*, 29 N. J. Eq. 367; *Earl of Sandwich v. Great Northern R. Co.* L. R. 10 Ch. Div. 707; *Elliot v. Fitchburg R. Co.* 10 Cush. 192; *Lyon v. Fishmongers Co.* L. R. 1 App. Cas. 682; *Hurd v. Curtis*, 7 Met. 114; *Schuykill Nav. Co. v. Moore*, 2 Whart. 477; *Luz v. Hangin*, 69 Cal. 255; *Dewitt v. Harvey*, 4 Gray, 489; *Williams v. Windsorworth*, 51 Conn. 277; *Poull v. Mockley*, 33 Wis. 487; *Amidon v. Harris*, 113 Mass. 59; *Bristol Hydraulic Co. v. Boyer*, 67 Ind. 236; *Bardwell v. Ames*, 22 Pick. 355; *Lonsdale Co. v. Mores*, 21 Law Rep. 664; *Goodrich v. Burbank*, 12 Allen, 459; *French v. Morris*, 101 Mass. 63; *Hall v. Ionia*, 38 Mich. 493; *St. Anthony Falls Water Power Co. v. Minneapolis* (Minn.) 43 N. W. Rep. 56.

So is the right to wharf and occupy.

Simons v. French, 25 Conn. 352; *Parker v. Boyers*, 8 Or. 183; *Bowman v. Wathen*, 2 McLean, 370; *Goodsell v. Lawson*, 42 Md. 843; *Barker v. Bales*, 13 Pick. 255; *Valentine v. Piper*, 22 Pick. 85; *Hay City Gas-Light Co. v. Industrial Works*, 28 Mich. 183.

A riparian proprietor of the shore, or flats adjoining, may convey his upland without his flats, or his flats without his upland.

Barker v. Bates, 13 Pick. 255; *Storer v. Freeman*, 6 Mass. 435; *Watson v. Peters*, 26 Mich. 517; *Richardson v. Prentiss*, 48 Mich. 88; *Smith v. Ford*, 45 Wis. 164; *Rivas v. Colary*, 18 Fla. 122; *Norcross v. Griffiths*, 65 Wis. 599. See also *Providence Steam-Engine Co. v. Providence & S. Steamship Co.* 12 R. L. 358; *Flockton v. Baltimore & N. Y. R. Co.* 32 Fed. Rep. 9; *Union Depot, S. R. & Transfer Co. v. Brunswick*, 31 Minn. 302.

If the record can be construed as showing that plaintiffs' grantor's only means of access to the waters in controversy was over the condemned land, then the Railroad Company by so framing its petition as to reserve the riparian privileges to the owner, also, by implication, reserved a means of enjoying them.

Shepp. Touch, 89, 90; *Seymour v. Lewis*, 13 N. J. Eq. 439; Washb. Easem. *31; *Goddard, Easem.* 110; *St Anthony Falls Water Power Co. v. Minneapolis*, *supra*.

Dickinson, J., delivered the opinion of the court:

After the filing of our decision in this case (*Hanford v. St. Paul & D. R. Co.* (Minn.) 42 N. W. Rep. 596) a re-argument was ordered, upon the application of the respondents, it being considered that great public interests were involved which deserved further consideration by the court, with the aid which further research and argument might afford. The 7 L. R. A.

principal question to which such re-argument was directed was whether the riparian rights, which the owner of land abutting upon navigable waters enjoys in the submerged lands between the outer boundary of his ownership in fee and the point of navigability, may be alienated or be severed from the riparian land, so as to exist as rights or property in gross. In our former decision in this case we declared such rights to be incapable of separate existence, and upon that proposition the decision rested. In the re-argument of this question the principles of the law and the authorities which could be deemed in any way to bear upon it have been exhaustively and ably presented by learned counsel upon both sides, and, although this principle had been understood to have been settled in *Lake Superior Land Co. v. Emerson*, 38 Minn. 406, we have, in view of the importance of the subject, entered into a full examination and reconsideration of it. We have been thus led to the conclusion that the proposition that the riparian proprietor's peculiar right of occupancy and use of lands beyond the boundary of his ownership in fee are inalienable and incapable of existence, apart from the right of occupancy and use of the adjacent bank, should not be adhered to.

While our former decisions were deemed to be in strict accordance with legal principles, and to follow logically from the fact that the riparian rights came into existence as incidents of the proprietorship of the adjacent shore, we are satisfied that we did not sufficiently consider, in their bearing upon the question, the peculiar nature, extent and relation of the private and public rights, respectively, in the lands lying between the boundary of the riparian owners' fee and the point of navigability, and that undue importance was given to the fact that these riparian rights have their origin in the relation of the riparian lands to the water, and are properly incident or appurtenant to the riparian lands. As we proceed now to notice the nature and extent of certain rights growing out of riparian proprietorship, we desire that attention should be given to the facts that those rights partake largely of the ordinary qualities of private property, which is in general divisible and transferable by the proprietor; that they are recognized as valuable property rights in the law; that they are of such a nature that they may be enjoyed separate from the adjacent land to which they were originally appurtenant; and to the absence of substantial reasons, so far as the nature of these rights are concerned, why they may not exist independently of the adjacent riparian estate. We do not affirm that all riparian rights are thus severable. Some, from the very nature of things, may be incapable of separate existence. In this State the title of the proprietor of lands abutting upon navigable waters extends to low-water mark; the bed of the stream, or body of water, below low-water mark being held by the State, not in the sense of ordinary absolute proprietorship, but in its sovereign governmental capacity, for common public use. *Union Depot S. R. & Transfer Co. v. Brunswick*, 31 Minn. 297, and cases cited.

The estate or interest of the riparian owner in the bed of the stream above low-water mark

stricted only by that paramount public right, the riparian owner enjoys valuable proprietary privileges, among which we shall consider particularly the right to the use of the land itself for private purposes. A considerable extent of the shores, not only along tide waters of the ocean coasts, but on our great inland waters, are of such a nature, out to and even beyond low-water mark, as to be in general unavailable by the public for the purposes of navigation, and must remain forever waste and useless lands, unless reclaimed by artificial means from the shallow water covering them, or unless otherwise improved. It is established beyond question in this State, and in other States as well, that the proprietor of the riparian lands may make such improvements. Subject only to the limitation that he shall not interfere with the public right of navigation, he has the unquestionable and exclusive right to construct and maintain suitable landings, piers and wharves into the water, and up to the point of navigability, for his own private use and benefit. *Rippe v. Chicago, D. & M. R. Co.* 23 Minn. 18; *Brisbane v. St. Paul & S. C. R. Co.* Id. 114; *Morrill v. St. Anthony Falls Water-Power Co.* 26 Minn. 222; *State v. Minneapolis Mill Co.* 26 Minn. 229; *Carl v. Stillwater S. R. & Transfer Co.* 28 Minn. 373; *Union Depot, S. R. & Transfer Co. v. Brunswick*, 81 Minn. 297; *Lake Superior Land Co. v. Emerson*, 81 Minn. 400; *Dutton v. Strong*, 66 U. S. 1 Black, 23 [17 L. ed. 29]; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497 [19 L. ed. 984].

And it is obviously immaterial, if the public interests be not prejudiced, whether the submerged land be covered with wharves of timber or stone, or be reclaimed from the water by filling in with earth so that it becomes dry land. The land may be so reclaimed. *Union Depot, S. R. & Transfer Co. v. Brunswick*, 81 Minn. 297; *Clement v. Burns*, 48 N. H. 609; *Bell v. Gough*, 23 N. J. L. 624; *Providence Steam-Engine Co. v. Providence & S. Steamship Co.* 12 R. I. 848, 863.

As the right of private use and enjoyment of the improved or reclaimed premises will continue so long, at least, as it does not interfere with the limited and defined public interests, it is obvious that, in general, it may continue forever.

This private right of use and enjoyment is not, we think, limited to purposes connected with the actual use of the navigable water, but may extend to any purpose not inconsistent with the public right. *Rippe v. Chicago, D. & M. R. Co.* 23 Minn. 18; *Brisbane v. St. Paul & S. C. R. Co.* Id. 114; *Parker v. West Coast Lacking Co.* 17 Or. 510, 5 L. R. A. 61.

As was said in *Morrill v. St. Anthony Falls Water-Power Co.* 26 Minn. 222, 223, referring to the decision in *Dutton v. Strong*, 66 U. S. 1 Black, 23 [17 L. ed. 29]: "The right to encroach upon the shallow water of the lake, by an exclusive appropriation even of the underlying soil, must rest upon the proposition that the riparian owner may make any use of the lake or river opposite his land not inconsistent with the public right." The following language of the *Morrill Case*, just cited, although used with reference to the riparian right to use

posed by the public right; and the private right exists up to the point beyond which it would be inconsistent with the public right." No one but the riparian proprietor has the right to improve and occupy such premises for private purposes, and it does not concern other persons how or for what particular purposes the reclaimed lands may be used, so long as there is no violation of the maxim, *sic utere tuo ut alienum non laedas*. It is for the interest of the State that such lands, not available for the public purposes for which alone the State exercises authority over them, shall be improved and used for profitable enterprises, rather than that they lie forever waste and unproductive. And the State, while recognizing the ancient riparian right of occupancy, has not assumed to prescribe or to limit the purposes or manner of its enjoyment. That seems to have always been left to the discretion of the person in whom the right is exclusive, and the decided cases afford many illustrations of uses in no way connected with the purposes of navigation.

This right of the riparian proprietor, even before it has been in any manner exercised by reclaiming or improving the premises,—the right itself to reclaim, improve or occupy,—is a property right, vested in him, recognized and protected in the law as property. He cannot be deprived of it without due process of law. It cannot be taken from him, and devoted to public use, without compensation. *Brisbane v. St. Paul & S. C. R. Co.* 23 Minn. 114; *Carl v. Stillwater S. R. & Transfer Co.* 28 Minn. 373; *Union Depot, S. R. & Transfer Co. v. Brunswick*, 81 Minn. 297; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497 [19 L. ed. 984]; *Bell v. Gough*, 23 N. J. L. 624; *Delaplaine v. Chicago & N. W. R. Co.* 42 Wis. 214; *Lyon v. Fishmongers Co. L. R. 1 App. Cas. 662*.

Such property is subject to the law of eminent domain. A railroad company, locating its line of road over such submerged lands, might acquire, by condemnation proceedings, and the payment of compensation, the necessary right of way, divesting the riparian owner of so much of his property. But cannot the riparian proprietor voluntarily convey, for an agreed compensation, what the company could thus take from him by legal proceedings *in invitum*? If he were to convey by deed the right to occupy exclusively for railroad purposes the premises in front of the riparian lands, would not the company acquire a right to occupy and enjoy the use of the premises, although it took no interest in the upland estate?

These peculiar property rights of the riparian owner may constitute, estimated in connection with the riparian land, the chief value of the premises. It may even be that the whole value of such real property consists in the right to improve and occupy the submerged lands for private purposes. The extent of the riparian right in this respect is not measured by the value of the upland, nor by the distance to which the owner's estate may extend inland from the shore. The barest strip of upland, though wholly valueless and useless in itself, justifies the owner in the exercise and enjoy-

ment of the 'privileges of riparian proprietorship to the fullest extent.

If it be true, as we have said, that the riparian proprietor may improve and occupy such premises in any manner not inconsistent with the public rights, it follows that, although the origin of this peculiar private right is referable to an adjacent riparian estate to which it was originally incident or appurtenant, still its nature and qualities are not in themselves such as to forbid its alienation, its separation from the riparian estate, and its enjoyment by others than the occupants of the upland. Its enjoyment need not be in aid of or associated with the use to which the upland is devoted, or for the benefit of the upland as such. Thus it is supposed that one acquiring a mere right of way for the purpose of access over the upland to the shore may acquire the riparian owner's rights to improve and occupy the waste land beyond. *New Haven Steamboat Co. v. Sargent*, 50 Conn. 199.

The upland may be used, and be useful, only for purposes to which the use of the adjacent submerged lands, even after reclamation, would be in no manner accessory. The upland may be owned and used exclusively for the purposes of a residence, a church, a hospital, a bank or for any purpose wholly unconnected with the advantages incident to the adjacency of navigable water, or of the intervening waste land; and yet the proprietor might undoubtedly erect a wharf or fill in solid earth, and allow others to use the wharf or reclaimed land. Nor would his right to allow others to use the wharf or made land, or the right of others to use it with his consent, depend upon there being also a license of access to such premises over the abutting upland. We suppose that the land owner might grant to one having no riparian possession in the vicinity the right to use his wharf, or the improved or reclaimed shore lands, for any purpose, whether connected with navigation or not, just as the owner himself might do. No individual whose rights were not prejudiced could complain; and so long as the public rights are not interfered with the State is not interested to oppose such use, but rather is interested to encourage and sanction it, without regard to the fact whether or not the use be associated with the use of the upland.

It has been suggested in some cases that even though such rights cannot be wholly disconnected from riparian lands, and be enjoyed in gross, yet if the person to whom the rights of the riparian proprietor have been relinquished has access to the premises, over the next adjacent estate abutting upon the shore, he may enjoy such rights, although he has no interest in the estate to which they were previously incident (see *New Haven Steamboat Co. v. Sargent*, 50 Conn. 199), and this is spoken of as being possible in *Lake Superior Land Co. v. Emerson*, 88 Minn. 406.

But this would seem to be inconsistent with the doctrine that such rights are not severable from the riparian estate to which they are by nature appurtenant. The whole reason supporting that doctrine is the technical reason that the rights are merely incident and appurtenant to the abutting riparian land. They were not originally incident to other estates

than those adjacent to and in front of which only these privileges might be exercised. The owner of a riparian estate had no peculiar privileges in the submerged land lying in front of the next adjacent estate. If it be conceded that these rights may be separated from the apparent estate, and be enjoyed by the owner of the next estate abutting upon the shore, there is no room for further contention. If such separation is possible, it matters not whether the means of access and opportunities for enjoyment be through the next estate abutting upon the shore, or the next, or by means of a public highway leading to or past the premises in question, or by the navigable water, or in any other manner. Any person who may acquire from the riparian owner his right to improve and occupy such premises may always have access to them by means of the navigable water,—a common highway. He may acquire other means of access. We think that there is nothing in the matter of access which forbids the existence of these rights separate from the abutting estate. In some jurisdictions it is considered that the adjacent riparian owner actually acquires title to the lands improved and reclaimed from the water, although the title was before in the State in actual proprietorship (as in New Jersey); and that he may then convey the reclaimed premises to persons having no interest in the upland. *New Jersey Zinc & Iron Co. v. Morris Canal & Bkg. Co.* 44 N. J. Eq. 386, 1 L. R. A. 122, 18 Cent. Rep. 342; *Bell v. Gough*, 23 N. J. L. 624; *Goodell v. Lawson*, 42 Md. 348, 362; *Nichols v. Lewis*, 15 Conn. 137; *Clement v. Burns*, 48 N. H. 609.

We do not wish to be understood as assenting to the proposition that the title of the State may be thus transferred by acts of the riparian proprietor which the State has no particular reason at the time for opposing. It may be doubtful whether the title does not remain unchanged, and whether if, in the future, it should become necessary for the State to broaden the navigable channel so as to embrace the reclaimed land, it would not have the right to do so. However that may be, we deem these decisions to lend some support to the doctrine that the riparian right to fill and reclaim and use the submerged lands for his own private purposes is not necessarily so annexed to his proprietorship of the upland that it cannot be severed. If the right to occupy and use the premises is transferable after they have been improved by the exercise of the legal rights of the riparian proprietor, we see no sufficient reason why his legal right to improve and occupy and use the premises should not also be transferable. If it be said that in the one case he has the legal title, and in the other he only has the valuable right of occupancy and improvement, with the power thereby to acquire the legal title, it may be answered that such rights are themselves ordinarily a proper subject of transfer. It is remarkable that so few authorities are to be found directly deciding the question of the severability of such riparian rights. The question was directly decided in *Simons v. French*, 25 Conn. 346, it being held that the right of the riparian proprietor to wharf out to navigable water, over the flats (the fee of which was in the State for

the purposes of navigation) was not inseparably incident to the upland estate, but was subject to conveyance or reservation by itself.

It is claimed that *Simons v. French* was overruled or modified in *New Haven Steamboat Co. v. Sargent*, 50 Conn. 199. We do not understand the latter decision to have such an effect. The court was careful to declare that its decision was based upon the peculiar circumstances of that case, and, while there is language suggesting a doubt as to *Simons v. French*, in other parts of the opinion the essential doctrine of that case seems to be reaffirmed. To the same effect as *Simons v. French* is *Barker v. West Coast Packing Co.* 17 Or. 510, 5 L. R. A. 61.

In *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497 [19 L. ed. 984], the owner of a lot on a navigable river (Shepardson), who had begun to build a wharf in front of it into the river, conveyed to Yates the interest he had in the wharf, and in front of the lot to the center of the river, with the right of docking out and making a water front on the river. Yates built the wharf. His right to maintain it came in question in this action against the city. His right was sustained although without any discussion of the question of severability. The court said: "We are of opinion that Shepardson, as riparian owner of a lot bounded by a navigable stream, had a right to erect this wharf, and Yates, the appellant, whether he be regarded as purchaser or as licensee, has the same right."

The court seems to have regarded it as immaterial whether Yates' grantor owned the fee beyond the shore line or not. It would seem that Yates had probably a way of access to the premises covered by the wharf by means of a street leading down past the lot to the water, but we do not regard this as of controlling importance. See also *Bowman v. Wathen*, 2 McLean, 876.

In Massachusetts the fee of the riparian owner extends to low-water mark, not exceeding one hundred rods beyond high-water mark; but, it is held subject to the general public right of navigation, until the premises shall have been so improved as to exclude the public use. *Com. v. Alger*, 7 Cush. 53.

And so in Maine. It would seem that the real beneficial interest which the riparian owner enjoys in such premises in those States does not greatly differ from the rights of riparian owners in this State. But it is there held that he may convey his upland without the submerged lands, or the latter without the former. *Storer v. Freeman*, 6 Mass. 437; *Barker v. Bates*, 18 Pick. 225; *Deering v. Long Wharf*, 25 Me. 51.

These authorities may be regarded, at least, as supporting the proposition that there is nothing in the essential nature of the riparian owner's right to improve and occupy such premises which forbids its separation from the riparian estate.

We have thus considered that the riparian proprietor has the exclusive right—absolute, as respects everyone but the State, and limited only by the public interests of the State for purposes connected with navigation—to improve, reclaim and occupy the submerged land, out to the point of navigability, for any private purpose, as he might do if it were his separate estate; that this right, even though it

may never have been exercised, is recognized and protected by the law as property, of which he cannot be deprived even by the State without just compensation; that the enjoyment of the right—the use of the premises—need not be associated with the use of the upland; that it is for the interest of the State that such waste lands be improved and rendered profitable, while the State is not concerned as to whether the owner of the adjacent upland, or some person to whom he may release his right, make the improvement and enjoy the private benefit; that the rights of other persons are not involved in the question; that when the land has been reclaimed it may be conveyed, according to most of the authorities, apart from the original upland; and that, according to other authorities, the riparian right may be transferred to and enjoyed by the owner of the next adjacent riparian estate. From these considerations, as well as from the authorities cited bearing directly upon the question, we think that the quality of alienability should be deemed to belong to this kind of property, as it does to property in general. See opinion of Bramwell, B., in *Nuthall v. Bracewell*, L. R. 2 Exch. 1, 11.

The only reason opposed to this is the technical one that the right grows out of, and, until severed, is incident to, a riparian estate. We have come to feel that this is unsatisfactory, as a reason why such property should be deemed inseparable from the parent estate, and incapable of a separate existence. If the right in question were created out of, or enjoyed at the expense of, some other estate or property, and were measured and limited by the needs or use peculiar to the riparian estate to which it is annexed, there would be ground for others to urge that the right could not be changed or transferred so as to enlarge the scope of a grant or contract, or so as to prejudice the party complaining. But no such conditions exist. The rights of no one are affected by allowing the riparian owner to convey away this part of his property, as he may his other property. It is only an abstract question whether the right originating in custom, and having originally attached as an incident to his riparian lands, may now be sold and conveyed, and be enjoyed by the purchaser. It is for the interest of the riparian owner that he be allowed to dispose of or use his private property at his own discretion. It is for the interest of the public that such property be subject to purchase and use, where the owner may be incapable of improving it. No one is interested in opposing such unrestricted alienability and use.

Although we have become convinced that the better reason is opposed to our former decision upon this point in *Lake Superior Land Co. v. Emerson*, 38 Minn. 406, we should have deemed it better that a rule of property, although so recently declared, should not be disturbed, were it not that it is supposed that the result of that decision, if adhered to, would be very seriously prejudicial to the tenure of a large amount of very valuable property, which for a long time has been deemed and treated as alienable and enjoyable apart from the riparian lands, and which, according to our present opinion, was rightfully so treated prior to our decision in the *Emerson Case*.

The case before us shows that in front of the riparian land described in the complaint the reclaimable submerged land extends into the Bay of St. Louis about 850 feet to a dock line legally established under the authority of the State (subsequent, however, to the condemnation by the railroad company); and this condition of things is understood to be very general along the shores of the navigable waters about Duluth. Such lands have been platted and sold to various persons, and have been to a considerable extent improved, and, so far as the State is concerned, have practically become private property. No one but the owners of the original riparian estate can question the rights of the purchasers; and in the case of *Miller v. Mendenhall* (Minn.), 44 N. W. Rep. 1141, which was submitted, and is decided, in connection with this case, we hold that, notwithstanding the decision in the *Emerson Case*, a grantor may be estopped by his covenants from disputing the title of his grantee in respect to such lands. We think that we ought to go further, and hold that the riparian right to improve, reclaim and occupy such premises is transferable.

As we reverse our former decision upon this point, upon which alone this case was determined at the former hearing, it becomes necessary to consider whether, upon other grounds, the condemnation proceedings had the effect to vest in the Railroad Corporation the right to use and occupy for its proper purposes the submerged land beyond the shore. We deem it unnecessary to decide whether the interest appropriated by the condemnation proceedings was the whole estate in fee simple, or only an easement. We will assume that it was only an easement. The corporation acquired the right to the exclusive and perpetual use for railroad purposes of the premises which were the subject of the proceedings. Until in some manner the riparian rights should be severed from the riparian estate, they would remain property incident and appurtenant thereto. They would pass by a conveyance of the upland, as being appurtenant, although not specifically designated in the deed. So they would be embraced in a lease of the riparian estate. As in the case of alluvial formations along the shore, the person entitled to the exclusive possession and enjoyment of the riparian land would be also entitled to the benefits legally incident thereto. If in the condemnation proceedings the land appropriated be described in terms fitly designating merely the riparian estate, that would be deemed to include the rights incident to that estate, unless, at least, the terms of description were such as to indicate a contrary intention,—an intention to separate the incidental rights from the principal estate,—or unless in some other manner such intention were made manifest. In proceedings for the taking of the riparian estate, the title of which extends to low-water mark, and from which the rights incident to riparian proprietorship had not been in any manner severed, it is to be pre-

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sumed, in the absence of anything showing a different intention, that the latter were included. Whether in such proceedings (the land owner not consenting to a separation of his riparian rights from the principal estate) a corporation would have the power to appropriate to its use the upland estate merely, neither making compensation for nor assuming to acquire the riparian rights incident thereto, we do not determine.

The condemnation proceedings in question embraced thirty-five distinct tracts of land. These were separately designated in the petition, the several parcels being numbered consecutively from number 1 upwards, the tract in question being the sixth. The land was described by metes and bounds on the landward sides, no line along the shore or water side being given. The last of the lines given is described as extending "into the Bay of St. Louis" the description concluding, "including all the premises between the lines so described and the said Bay of St. Louis." The award of commissioners describes the premises appropriated in the same manner. In the same petition, and in respect to the parcels of land numbered 1, 3 and 5, there was added to the specific descriptions of land the words, "including all riparian rights and privileges," or words of similar import; and it is contended that from the express including of such rights as to such parcels, and from the absence of any reference to riparian rights in respect to the tract in question, it is apparent that it was not intended to embrace them in the condemnation of this land. We think that the conclusion is not justified by this circumstance. While there was but one petition for the appointment of commissioners, the proceeding relates to several parcels of land belonging to different persons, and which in the petition are treated as entirely distinct. The legal effect, as respects the construction of these several descriptions, is not different from what it would have been if separate petitions had been made as to each of the several tracts. In such a case the owner of one of the parcels would not be justified in claiming that the express mention of riparian rights in the petition as to other lands should be deemed to change or modify the natural construction of the terms employed to designate his land, there being no express mention of riparian rights in connection with the latter. There may have been peculiar reasons for the express mention of riparian rights in connection with the other lands embraced in the petition now before us. The relation of those descriptions to that in question is too remote to safely admit the language, adopted with reference to the former alone, to qualify or affect the terms selected for the special purpose of describing the latter particular tract. For these reasons it is considered that the result expressed in our former decision in this case was right, and should not be changed, and the order appealed from is reversed.

ILLINOIS SUPREME COURT.

Thomas GARDNER, Sheriff, *Appt.*

v.

John W. BUNN *et al.*

(.....Ill.....)

1. A judgment by confession entered by a clerk of a court of record in vacation is void, where there is no proof filed of the execution of the power of attorney under which it was confessed, since no jurisdiction is obtained of the defendant.

2. A valid chattel mortgage may be made by the owner of property in possession of another under an execution.

(March 31, 1890.)*

APP^EAL by defendant from a judgment of the Appellate Court, Third District, affirming a judgment of the Circuit Court for De Witt County, in favor of plaintiffs, in an action brought to recover possession of a stock of goods claimed by plaintiffs, but held by defendant under an execution levy. *Affirmed.*

The case sufficiently appears in the opinion.

Messrs. Moore & Warner for appellant.

Messrs. Conkling & Grout for appellees.

Craig, J., delivered the opinion of the court:

This was an action of replevin, brought by John W. Bunn *et al.* against Thomas Gardner, to recover a stock of goods under a chattel mortgage executed by J. R. Turner & Son to them. The principal question presented by the record arises upon the issue presented by the defendant's sixth plea. In this plea the defendant averred that he took the goods, as sheriff, under an execution directed to him from the Circuit Court of De Witt County, in favor of Mack, Stadler & Co. against J. R. Turner & Son, the mortgagors; that the goods were the property of J. R. Turner & Son, and subject to said execution; and that plaintiffs claimed their rights in and to the goods after the levy. To this plea the plaintiffs replied that the execution therein relied upon was void for the reason that the pretended judgment upon which it was issued was not rendered by the court in term time, but was entered by the clerk of the court in vacation, by confession under a pretended power of attorney, and that no affidavit of the execution of the power of attorney was filed. On the trial of the issue thus presented by the sixth plea, the court held that the judgment rendered by confession in favor of Mack, Stadler & Co. against Turner & Son was void, and that the execution issued on that judgment did not justify the sheriff in withholding the property from the plaintiffs. The judgment of the circuit court was affirmed in the appellate court, and the defendant brings the case here on appeal.

Whether a judgment by confession, entered by a clerk of a court of record in vacation,

is void where no affidavit proving the execution of the power of attorney is filed with the power of attorney when the judgment is entered by the clerk, is a question which has never been directly decided by this court; and it is a question not entirely free from difficulty. Section 86, chap. 110, of our statute, which authorizes the confession of a judgment, is as follows: "Any person, for a debt bona fide due, may confess judgment, by himself or attorney duly authorized, either in term time or vacation, without process."

In *Roundy v. Hunt*, 24 Ill. 598, construction was placed by this court on a statute regulating the practice wherein judgments may be confessed in Kane County, which provided that judgments by confession may be entered at any time in vacation, before the clerk, by filing the proper papers with him, and that said judgment shall have the same effect as if rendered at a term of court. It is there said: "As a condition to the right to confess a judgment in vacation, the proper papers must be filed with the clerk. This requirement of the Statute could have referred alone to the established practice in cases of confession of judgments in courts of record. That practice requires the plaintiff to file a declaration on his cause of action; that he shall file the warrant of attorney, with proof of its execution, and a plea of confession. These, under the practice, constitute the proper papers to authorize the confession of a judgment."

If the language of the Act, upon filing the "proper papers," did not change the common-law practice in such cases, but required a full adherence to that practice, as held in the case cited, we see nothing in the present Statute from which it can be inferred that the common-law practice should in such cases be changed. The language of the Statute authorizing the confession of a judgment in vacation by an attorney duly authorized, clearly required proof to be filed with the clerk showing the execution of the power of attorney. The Statute only empowers an attorney to confess judgment who is duly authorized; and how could it be known that the attorney was duly authorized unless proof of the execution of the power of attorney was filed with that instrument? It will be remembered that the clerk of the circuit court before whom the judgment was confessed possessed no judicial powers. He was a mere ministerial officer, intrusted with the power of entering up a judgment in vacation when certain papers had been filed with him. The sufficiency of the papers, however, he could not pass upon or determine. Of course, the clerk could refuse to act unless papers were filed purporting to conform to the requirements of law; but he could not determine the legal sufficiency of such papers, as that would require the exercise of judicial powers. The confession of judgment in vacation is a statutory proceeding in derogation of the common

*A decision was reached in this case reversing the judgment of the lower court and an opinion handed down on June 15, 1888. A rehearing was subsequently granted and the present decision was 7 L. R. A.

reached, affirming the decision rendered below. The former opinion in the case is therefore rendered of no importance, and it is consequently omitted. [Rep.]

law, and a judgment of that character will not be valid unless there is a strict compliance with the law under which it may be authorized.

Again, as held in *Chase v. Dana*, 44 Ill. 263, an attorney in fact is held to a strict compliance with the authority conferred. When he acts, it must, to be sustained, be within the scope of his authority. It must be for the purposes prescribed, and in the mode required. Was there such compliance here? If the attorney who confessed the judgment was not duly authorized, he had no power to act, and his acts would be a nullity. A power of attorney was filed with the clerk, but no evidence was filed that Turner & Son had ever executed that instrument. In the absence of such evidence, there was no authority to enter the judgment. No jurisdiction was acquired over the power of Turner & Son,—an indispensable prerequisite to the rendition of a judgment.

In *Durham v. Brown*, 24 Ill. 94, where a judgment was confessed in vacation, no affidavit having been filed proving the execution of power of attorney, it was held that the judgment was unauthorized. The same rule was announced in *Roundy v. Hunt*, 24 Ill. 600. In the case last cited, it is said: "If the plaintiff should fail to file a declaration, a warrant of attorney, with an affidavit of its execution, and a plea of confession by the attorney, the clerk should refuse to enter the judgment."

In *Tucker v. Gill*, 61 Ill. 236, where a judgment by confession was rendered in vacation for a less amount than conferred by the *cognovit*, the judgment was held to be void. It is there said: "The plea of *cognovit actionem* was one of the papers to be filed, and was indispensable to his [the clerk's] authority to make the entry of judgment; and when filed, he must enter the judgment for the amount confessed, or not at all. . . . The proceeding having been in vacation, conducted, under a special statutory authority, by a mere ministerial officer, we must hold that the entry of this judgment in the manner stated was simply void."

It was also held that the language of the Statute, "upon filing the proper papers," under which the judgment was confessed, includes everything requisite by the common-law practice in such cases.

In *Iglehart v. Chicago M. & F. Ins. Co.*, 85 Ill. 514, it was held to be necessary that proof should have been made of the execution of the warrant of attorney before the judgment is confessed, and when the judgment is confessed in vacation the evidence of that fact must appear on the record.

From the cases cited the only fair conclusion to be drawn would seem to be that a clerk in vacation had no power to enter a judgment by confession without proof of the execution of the power of attorney. A judgment cannot be entered unless jurisdiction is first acquired of the person of the defendant. Here the power of attorney purported to authorize the attorney to appear before the clerk, waive process, enter the appearance and confess judgment; but, unless the power of attorney was executed by Turner & Son,—and there is no evidence of that fact in the record,—the attorney had no authority to enter the appearance, and without

such authority no jurisdiction of the person was acquired, and, if there was no jurisdiction of the person, the judgment was absolutely void.

In *White v. Jones*, 38 Ill. 161, where an appearance was entered one day earlier than authorized by the power of attorney, it was held that there was no jurisdiction of the person, and the judgment was void. It is there said: As a rule of general, if not uniform, application, a judgment is void for all purposes unless the court had jurisdiction of the person of the defendant, and of the subject matter of the suit. It is also said that jurisdiction is acquired by service of process by publication, or by an entry of appearance in person or by attorney.

In the last case the authority of the attorney to enter an appearance may be contested by the defendant; and, if he shows a want of authority, it defeats the jurisdiction of the court.

In *Campbell v. McCahan*, 41 Ill. 47, it was held that jurisdiction of the subject matter and of the person is essential to the validity of a judicial sentence. If either is wanting, the judgment or decree is void.

It is, however, claimed by appellant that a judgment entered in vacation without proof of the execution of the power is not void, but valid, unless set aside, on motion of the party against whom it is entered, in the court where it was rendered. Several cases decided in this court have been cited to sustain the position of counsel, and first, *Fleming v. Jencks*, 22 Ill. 475. In this case the application to vacate the judgment was predicated on the ground that usury constituted a part of the judgment. No question was raised or considered in regard to the proof of the execution of the power of attorney, and we do not think the decision has any bearing on the question involved here.

The next case cited is *Rising v. Brainard*, 36 Ill. 80. The language used in the opinion in this case may be broad enough to maintain appellants' position, if the question presented by this record had been involved in the case cited, but it was not. As shown by the opinion, but one question was presented: "The error assigned is that a judgment was entered in vacation, by confession under a power of attorney, upon a note, more than a year and a day after the note fell due, without proof that the defendant was then alive, or that the debt was then due."

It will thus be seen that the execution of the power of attorney was not involved, and what the court said on that point has no bearing, because the question was not before the court.

Stuhl v. Shipp, 44 Ill. 184, has also been cited. In that case it is said: "The case of *Hinds v. Hopkins*, 28 Ill. 351, was so far modified in *Rising v. Brainard*, 36 Ill. 80, as to render it necessary to apply to the court below to set aside a judgment by confession, and to show some equitable reason therefor, before this court will reverse on the ground that the power of attorney was more than a year and a day old, or its execution not duly proven." This case, like *Rising v. Brainard*, as will be seen upon an examination of the statement of facts, presented no question in regard to the execution of the power of attorney; and what is said on that question is *obiter dictum*. In

both cases, however, it is decided that where a judgment is entered in vacation, under a power of attorney, more than a year and a day after the power was executed, without filing an affidavit showing that the defendant is alive, and the debt due, the proper practice is to apply to the court in which the judgment is entered to set it aside. It is therefore plain, if the same rule is to obtain where a judgment is entered in vacation without proof being filed of the execution of the power of attorney, then the decision of the appellate court in this case was erroneous. We think, however, that the two questions rest upon a different principle, and the same rule cannot be applied to both. As to the latter question, unless there is proof filed when the judgment is entered that the power was executed, there is no jurisdiction of the person, and the judgment is void. But in the other case, the power of attorney being properly executed, as established by the proof, the court has jurisdiction to enter the judgment; and the matter to be addressed to the court is something which has arisen after jurisdiction was conferred. Such matters arising after the execution of the power may render the judgment unjust or erroneous, but not void;

and hence they may, with propriety, be addressed to the court where the judgment was entered; but a void judgment binds no one, and it may be questioned indirectly or collaterally. A few other cases have been cited, but they have no direct bearing on the question, and it will not be necessary to refer to them here.

It is also claimed that, as the property in question was in the possession of the defendant at the time Turner & Son transferred it to the plaintiffs, the interest of Turner & Son was not subject to transfer, so that they could maintain an action in their own names.

In *Jones, Chat. Mortg.*, § 115, p. 102, it is said: "The owner of a chattel not in possession may make a valid mortgage of it, if the person in possession professedly holds under him, and has only a special property in the thing, such, for instance, as that conferred by a pledge or lien."

Here the defendant held under an execution against Turner & Son; and, under the authority cited, they had a right to execute the mortgage under which plaintiffs brought their action.

The judgment of the Appellate Court will be affirmed.

RHODE ISLAND SUPREME COURT.

Casimir de R. MOORE and Wife

Andrew S. THORP *et al.*

(16 R. L....)

1. An equitable claim for unauthorized

NOTE.—Rights acquired by erecting permanent improvements.

By improving land held in common, a tenant in common acquires no right, title or interest in the portion improved; but rather an equitable charge upon it. And he has a lien, to secure compensation for necessary or proper improvements, on the common property. *Curtis v. Poland*, 66 Tex. 511.

The part of the proceeds to be allowed for the improvements must be such proportion as the value of the improvements—that is the excess of the value of the whole over the value of the land—bears to the value of the whole premises. *Hall v. Piddock*, 21 N. J. Eq. 816; *Green v. Putnam*, 1 Barb. 500.

Partition between co-tenants.

A co-tenant asking for a partition against an owner who has made improvements upon the property is entitled to relief only upon condition that any equities thereby arising shall be taken into court; and that in such case where actual partition is made, and it is possible so to do, the improving tenant will be awarded the portion of the land upon which the improvements have been made. *Ford v. Knapp*, 3 Conn. Rep. 413, 102 N. Y. 140, 55 Am. Rep. 784; *Town v. Needham*, 3 Paige, 546; *St. Felix v. Rankin*, 3 Edw. Ch. 323; *Re Heller*, 3 Paige, 199; *Pickering v. Pickering*, 2 New Eng. Rep. 246, 63 N. H. 408; *Fild v. Leiter*, 5 West. Rep. 170, 117 Ill. 841; 1 Story, Eq. § 655, 656b.

In an action of partition where the property is sold, a person who has paid a valuable consideration for the property, received a conveyance and made improvements, without notice of the title or claim of the others, is entitled to compensation for such improvements and for taxes paid, to be allowed out of the proceeds, in addition to the share.

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used improvements by part owners of land held in common may be allowed to them on a sale for purpose of partition, as well as in a case of actual division.

2. The value of a barn erected by a lessee, under an agreement in the lease by a life tenant and the owners of one half the re-

of the property unimproved; but no judgment for the money can be given against the other parties. *Alleman v. Hawley*, 117 Ind. 532.

Although it is not erroneous to permit a counter-claim by defendant in partition, after a finding upon an issue joined by answer, the practice is not to be commended. *Ibid.*

Co-tenant making improvements protected.

Equity may protect the co-tenant who has made improvements on the common property, by setting apart to him, in partition, the portion improved, if this can be done without detriment to the other co-tenants; or he may be protected, in proper cases, by awarding compensation for improvements beneficial to all, or by considering the value of improvements so made in the adjustment of equities growing out of the fact that he has received and become accountable for rents. *Curtis v. Poland*, 66 Tex. 511.

A court of equity will, in a proper case, refuse to assist a co-tenant to make partition, unless he does equity by allowing the benefit of the improvements to the party who made them. *Scott v. Guernsey*, 60 Barb. 179; *Re Heller*, 3 Paige, 199.

In computation for improvements, the co-tenant against whom they are charged should not be charged with their price, but only his proportion of the amount which they add to the value of the premises, with a deduction to which he may have a claim, for use and occupation by the co-tenant who made the improvements. *Cooter v. Dearborn*, 2 West. Rep. 399, 115 Ill. 509.

A co-tenant who bona fide erects improvements is not liable for rents before demand made, or for ground rents. *Johnson v. Pelot*, 24 S. C. 255.

Adjustment, between co-tenants, of improvements erected by one of them, is valid. *Ibid.*

mainder in fee to pay him the fair value thereof on expiration of the lease, should be deducted from the proceeds of the partition sale before distribution thereof, and not be charged upon the interests of those only who signed the lease.

(December 5, 1899.)

BILL in equity for partition. On hearing as to distribution of proceeds after sale.

The facts are fully stated in the opinion.

Messrs. Edwin Metcalf, Charles Bradley and Walter F. Angell for complainants and certain respondents.

Messrs. Louis L. Angell, William W. Douglas and Samuel T. Douglas for other respondents.

Stiness, J., delivered the opinion of the court:

Tristram Burgess devised an estate in Providence, known as the "Hoyle Tavern Estate," to his wife for life, remainder in fee, one half to three daughters, and the other half to those whom his wife should appoint by will. In January, 1878, Mrs. Burgess and the three daughters joined in a lease for a term of fifteen years, covenanteeing therein to pay the lessee, at the expiration of the term, the fair value of a barn to be built on the premises by him, if it should then be standing. Mrs. Burgess died in 1879, but the lease was allowed to run along to the commencement of this suit, just before the lease expired. Partition by metes and bounds being impracticable, a sale of the premises was ordered, free of all claims by the parties, the lease having then expired, which were reserved to be considered in the distribution of the proceeds. The estate, with the barn thereon, has been sold, the proceeds have been paid into the registry of the court, and the question now presented is whether the value of the barn shall be paid by the three heirs who joined in the covenant, or proportionately by all the owners, some of whom are minors. When a part owner makes valuable improvements, courts of equity agree that compensation should be allowed by setting off the improved portions of the land to him who made the improvements, if it is practicable to do so. See Story, Eq. Jur. § 655; Freem. Co-tenancy, 2d ed. § 510, and *note*.

There is, however, some difference about the rule of awarding compensation in the case of unauthorized improvements when partition is made by sale. It has generally been held that a part owner, who has enhanced the value of the common estate at his own cost, is entitled to such equitable compensation as will leave only the value of the estate, without the improvements, to be divided among the tenants in common. *Hall v. Piddock*, 21 N. J. Eq. 811; *Kurtz v. Hibner*, 55 Ill. 514; *Moore v. Williamson*, 10 Rich. Eq. 828; *Dean v. O'Meara*, 47 Ill. 120; *Green v. Putnam*, 1 Barb. 500; *Conklin v. Conklin*, 8 Sandf. Ch. 64; *Swan v. Swan*, 8 Price, 518. See also Story, Eq. Jur. § 656b, and *note 3*; Freem. Co-tenancy, *supra*.

Mr. Freeman (§ 511) refers to cases in Alabama, New York, Arkansas and Indiana as holding a somewhat contrary doctrine.

In *Ormond v. Martin*, 37 Ala. 605, and *Jones v. Johnson*, 28 Ark. 211, it is held that 7 L. R. A.

the claim for improvements cannot be set off against the body of the estate, but only against a demand for rents.

In *Scott v. Guernsey*, 48 N. Y. 106, the court says that no compensation can be had for improvements made without consent, mistake or other equitable ground, and hence, in that case, no relief was granted. But the report of the referee shows that the tenants who put the buildings upon the land had exclusively received rents therefrom largely in excess of their value and interest on the investment. The court remarks that if they had offered to share their rents, upon being paid a due proportion for the improvements, it might have afforded a better ground for compensation.

In *Elrod v. Keller*, 89 Ind. 382, it is held that the mere fact that improvements may enhance the value of common property, not susceptible of division, does not entitle the tenant making them to an allowance for the difference in value; but, in stating the rule, the court concede that the improved part should be set off to him when it can be done by division. It seems to us that this course, in which all courts agree, is decisive of the question before us. If the tenant has an equitable claim upon improvements in case of division, he has an equally equitable claim upon their value in case of sale. If the other tenants are entitled to their share of the value of the whole estate upon sale, why are they not also entitled to the same share in division? Or, further, if a tenant is entitled to compensation for improvements out of rents, why should he not as well be entitled to receive the excess in value which the improvements have produced upon sale? We see no difference in principle in these cases. When it is conceded that a tenant in common, improving the land he may rightfully occupy, has an equitable claim to that part, or to its rental value, in order to secure the fruit of his labor or expenditure, we fail to see how he loses such claim when the land is sold because it cannot be divided. Of course, he cannot, at his pleasure, charge co-tenants for improvements which they may neither agree to nor desire; nor can he ordinarily claim for that which he has done solely for his own advantage, and from which he has reaped the benefit; but, on the other hand, when such improvements enhance the value and proceeds of the estate, the co-tenants should not be enabled to take advantage, to his injury, of improvements for which they have contributed nothing. Controversies may arise as to the reasonableness and extent of an allowance, but the tribunal which is trusted to fairly apportion the estate itself can also be trusted to fairly settle an incidental matter of this sort.

In the case before us the legal obligation to pay the value of the barn rests only upon the three parties who signed the lease. Doubtless the agreement was made for the benefit of the estate; at any rate, all the heirs have shared equally in the rents. It is not now asked that the other heirs be compelled to pay for anything put upon the estate, but that they receive their full and fair share of the estate sold, less the salable value of the barn, for which they have paid nothing, which, presumably, has aided the rental value of the estate for the years they have received rent for it, and for

which it would be manifestly unjust to require others to pay for their benefit. We think it is right that the value of the improvements, so far as they are represented by an enhanced price, should be ascertained and allowed on ac-

count thereof, and the balance, representing the body of the common estate, should be divided according to the respective interests of the parties. *Let a decree be entered in accordance with this opinion.*

TEXAS SUPREME COURT.

STATE of Texas, *ex rel.* W. F. TAYLOR *et al.*,
Appts.,
v.
J. A. EIDSON *et al.*

(76 Tex. 303.)

A town or village authorized to incorporate for school purposes under Sayles, Ann. Stat., art. 5733, cannot be extended to cover twenty-eight square miles of territory, where the true limits of the real town do not extend from its central point more than three fourths of a mile.

(February 25, 1890.)

A PPEAL by relators from a judgment of the District Court for Hamilton County in favor of respondents in a proceeding in the nature of a *quo warranto* to declare void the incorporation of the "Hamilton Corporation" and to oust respondents from the exercise of the function of trustees thereof. *Reversed.*

The case sufficiently appears in the opinion. *Messrs. J. P. Estis and G. L. Freeman*, for appellants:

The judgment of the court is erroneous in respect to the count of the information, charging that defendants acted as a corporation without being legally incorporated, in view of the admitted fact that at the times and place charged in the information the defendants acted as a corporation, while it does not appear from the evidence that they were incorporated, and it does appear from the evidence that the only proceedings had before and by the county judge of Hamilton County for incorporating the pretended and alleged Hamilton Corporation, of which they were acting as trustees, did not incorporate them or anybody else.

Texas Rev. Stat. arts. 506-514, 541 a, 541 b: Gen. Laws Seventeenth Legislature, chap. 102; Texas Gen. Laws, Regular Session Sixteenth Legislature, chap. 62; Texas Rev. Stat. Final Title, § 20; Texas Gen. Laws, Sp. Sess. Sixteenth Legislature, chap. 48; *Jackson v. Butler*, 47 Tex. 428; *Akin v. State*, 14 Tex. App. 143; *Irath v. State*, 12 Tex. App. 401; *Borne v. State*, 10 Tex. App. 419; *Donaldson v. State*, 15 Tex. App. 25; *Cowan v. Nixon*, 28 Tex. 220; *Baker v. Chisholm*, 8 Tex. 157; *Solon v. State*, 5 Tex. App. 801; *Guilford v. Love*, 49 Tex. 748, 744, and Am. Lead. Cas. therein cited; *Withers v. Patterson*, 27 Tex. 491-502; *Peters v. Phillips*, 19 Tex. 78; *Wiederanders v. State*, 64 Tex. 123; *Brokenborough v. Melton*, 55 Tex. 503; *Hearn v. Camp*, 18 Tex. 546, 550; *Humphreys v. Mooney*, 5 Colo. 282; *Molelunne Hill Canal & Min. Co. v. Woodbury*, 14 Cal 427; *People v. Kingston & M. Turpin Road Co.* 23 Wend. 193; *Roderigas v. East River Sav. Inst.* 63 N. Y. 460; *State v. Beck*, 81 Ind. 500; *Lord* 7 L. R. A.

v. Essex Building Assn. No. 4, 37 Md. 320; *Hendrick v. Whittemore*, 105 Mass. 23. *Messrs. G. H. Goodson and J. A. Eidson* for appellees.

Gaines, J., delivered the opinion of the court:

On the 20th day of April, 1889, a petition was presented to the County Judge of Hamilton County, praying him to order an election under the Act of April 6, 1831, to determine whether a certain district embracing the Town of Hamilton, and fully described in the petition, should be incorporated as a town for the purpose only of establishing and maintaining a free school therein. Sayles, Ann. Stat. art. 541a.

The petition purported to be signed by thirty-nine residents of the proposed town. The county judge determined that the petitioners were residents of the territory described in the petition, and that it embraced within its limits the requisite number of inhabitants, and ordered that the election be held. The election was held, and, the returns having been made, he declared that the proposition had carried, and that the town was incorporated for free-school purposes only, and ordered an election for five trustees for the town. At an election held in pursuance of the latter order, the appellees were duly elected. They qualified and entered upon the discharge of their duties as such trustees, and have ever since continued to act in that capacity. Upon the relation of three taxpayers residing in the alleged town, the district attorney of the Twenty-Ninth Judicial District, by leave of the district judge, filed in the name of the State an information in the nature of a *quo warranto*, to declare the Act of Incorporation void, and to oust the appellees from the exercise of the function of trustees under such alleged corporation. Upon the trial the court gave judgment in favor of the respondents, and from that judgment the State appeals.

Among other things, the information alleged, in substance, that the alleged corporation was not confined to the limits of the Town of Hamilton; and, in words, that "In fact the pretended limits of the same, as defined by them, extended far beyond the true limits of the real Town of Hamilton as the same is well known, and for several miles into the country outside of said town, so as to include many farms, ranches and unoccupied surveys of land, in extent many times as large as said town, and constituting no part of it or of any town." Upon the trial "it was admitted that the district of country described in the field notes in the said orders [meaning the order of the county judge for the election for the incorporation and that declaring the result] is on an average

One of the relators testified that he resided in the Town of Hamilton, and that he knew the extent and limits of the town, and that "it does not extend from its central point more than three fourths of a mile, and would be entirely embraced by a circle whose radius is three fourths of a mile in length." This testimony is wholly uncontradicted, and the facts testified to must be taken as established. If they were not true, witnesses could easily have been found to disprove them.

It therefore appears that at the time the election was ordered the real Town of Hamilton embraced an area of not more than two square miles, and the question arises whether the Statute authorizing the incorporation of towns and villages was intended to confer upon the inhabitants of any district of country including a town the power to incorporate with limits embracing many square miles of rural territory. If it be held that this power does not exist then the attempted incorporation under consideration is void, and it is unnecessary to determine any other question in the case. In determining whether the power exists or not, we must not lose sight of the purpose of the Statute under which it is sought to be exercised, nor of other statutes upon similar subjects. It is not the object of the Statute in question to confer the power upon the inhabitants of any district in a county to vote a tax upon themselves for the support of the public schools, in addition to the state tax which is levied for that purpose. That power is conferred upon the inhabitants of the school districts by the Act of February 6, 1894. Sayles, Ann. Stat. art. 8788.

The Statute which authorizes towns and villages to establish by a vote a corporation for school purposes only, is by its terms made a part of that chapter of the Revised Statutes which provides a mode for the incorporation of such municipalities. It is only "towns and villages authorized to incorporate under" that chapter which are authorized to incorporate for school purposes only. *Id.* art. 541a.

The Revised Statutes authorize towns to establish a corporation by an election, provided they contain more than 200 and less than 10,000 inhabitants. Article 506.

No definition of the word "town" is given, and it follows that we must take the word in its ordinary signification,—a collection of inhabited houses. The term carries with it the idea of a considerable aggregation of people

in the country, and engaged in agricultural pursuits, or similar avocations, requiring a considerable area of territory for its support. A section of country so inhabited cannot be called a town, nor treated as part of a town, without doing violence to the meaning ordinarily attached to that word. It follows, from this, that the Legislature did not intend to confer the power of incorporating by election upon a district of country inhabited by people living in residences widely disseminated over its area. The power is conferred only upon towns and villages, and is confined to the actual residents of such localities; and does not carry with it, and confer upon a town, authority to extend the boundaries of the corporation beyond its own actual limits. This ruling is in accordance with the policy of other statutes of a like character. A city already incorporated cannot extend its limits by any one election further than a half of a mile. *East Dallas v. State*, 73 Tex. 370.

The object of the limitation is to prevent a city from extending its limits, so as to take in a population purely rural; and the policy of the limitation is founded upon the idea that it is unjust to subject a people to the burdens of a municipal government who share none of its benefits. We are aware that in the application of the rule here laid down difficulties are likely to arise. In many instances it may be no easy task, without giving to the town a most irregular shape, so to define its limits as to embrace all its residents, and to exclude at the same time all the rural population living in the vicinity. What should be done in such cases, when a few people not properly belonging to the town have been included, we need not now determine. This case presents no question of difficulty of that character. Here the attempt was to establish a municipal corporation, extending over twenty-eight square miles of territory, not more than two of which were covered by the town. We think this cannot be done, and that the attempted Act of Incorporation was without authority of law, and is void.

The judgment of the District Court is therefore reversed, and a judgment here rendered declaring the attempted Act of Incorporation void, and ousting the respondents from the exercise of the functions of trustees of the alleged Town. The respondents are also adjudged to pay all costs, both in this court and the court below.

MISSOURI SUPREME COURT.

STATE of Missouri, *ex rel.* HENDERSON
et al.,
v.

A. A. LE SUEUR, Secretary of State.

(....Mo.....)

1. An association for the encouragement of debating, reading and literature,
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ture, and the enjoyment of rational, social amusements, and the playing of ten-pins, chess and checkers and other lawful games, having no pecuniary profit in view, and no connection with any business purposes, or with politics, and whose articles provide that no saloon shall be kept in connection with it and no drinks sold by the club or any of its members, may be regarded as an educational association, entitled to be incorporated without the payment of a tax on capital

stock, under Const., art. 10, § 21, and Rev. Stat. 1889, §§ 2821 and 2825.

2. Section 2834, Rev. Stat. 1889, which provides for the incorporation of pleasure clubs without requiring them to pay a tax on capital stock, is void in so far as it undertakes to allow the creation of corporations for other than benevolent, religious, scientific or educational purposes.

(Ray, Ch. J., and Brace, J., dissent.)

(February 24, 1890.)

APPPLICATION for a writ of mandamus, to compel respondent to file certain articles of association and to issue a certified copy thereof. *Granted.*

The case is sufficiently stated in the opinion.

Messrs. Gibson, Bond & Gibson for relators.

Mr. John M. Wood, Atty-Gen., for respondent.

Black, J., delivered the opinion of the court:

The relators joined in articles of agreement for the purpose of being incorporated by the name of the "La Fayette Park Club," under art. 10, chap. 42, Rev. Stat. 1889, which article consists of sections numbered from 2821 to 2885. On the petition of the relators, the Circuit Court of the City of St. Louis made a *pro forma* decree, declaring that the articles of agreement and the purposes of the association came within the purview of said article, and were not inconsistent with the Constitution or laws of the United States or of this State. The decree was made pursuant to section 2822.* The articles of agreement and the decree having been duly recorded in the office of the recorder of deeds, the relators presented the same to the Secretary of State, and, without the payment or offer to pay the tax mentioned in section 21 of article 10 of the Constitution, requested him to file the same, and make out and deliver to them a certified copy thereof, that being the final act which gives to the association a corporate existence. The secretary refused to file the articles and issue a certified copy, and hence this proceeding against him by mandamus.

The refusal of the secretary is put upon the ground that the proposed corporation is not one

*The material portions of that section are as follows:

"If the court shall be of the opinion that such articles of agreement and the purposes of the association come properly within the purview of this article, and are not inconsistent with the Constitution or laws of the United States, or of this State, the court shall enter of record an order to that effect, a certified copy of which order shall, by the clerk, be indorsed upon or attached to said articles.

... The Secretary of State shall issue to the petitioners a certified copy of such articles of agreement, with the several certificates thereon as filed in his office, which certificates shall be the charter of incorporation; and thereupon the petitioners, their associates and successors, shall be created and be a body corporate and politic, by the corporate name designated in such charter, and such charter, together with this article, shall be received in all courts and places as legal evidence of the incorporation of such association." [Rep.]

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for benevolent, religious, scientific or educational purposes, and therefore not exempt from the payment of the tax; and on the further ground that this association could only be incorporated for the purposes designated in its charter, under section 2834,† and that that section is unconstitutional and void. The objects and purposes of the proposed corporation, as set forth in the articles of agreement, are as follows: "The purposes and scope of said corporation shall be for the encouragement of debating, reading and literature, and the enjoyment of rational social amusements, and the playing of ten-pins, chess and checkers, and other lawful games of the kind. But it is hereby expressly declared that there shall be no saloon in connection with said club, and no drinks shall be sold by the said club or any of its members. It is further declared that this association shall have no connection with any manufacturing, agricultural or business purposes of any kind, nor shall it have any connection with politics or a political organization, nor shall it have in view any pecuniary profit of any kind, but it shall be limited to the general objects above set forth."

Section 21 of article 10 of the Constitution provides: "No corporation, company or association, other than those formed for benevolent, religious, scientific or educational purposes, shall be created or organized under the laws of this State, unless the persons named as incorporators shall, at or before the filing of the articles of association or incorporation, pay into the state treasury fifty dollars for the first fifty thousand dollars or less of capital stock, and a further sum of five dollars for every additional ten thousand dollars of its capital stock," etc.

Section 2821 of the Revised Statutes of 1889 provides, in general terms, that associations may be incorporated for "benevolent, religious, scientific, fraternal, beneficial or educational purposes;" and section 2825 enters more into details, and, after providing for the formation of corporations for benevolent and religious purposes, provides: "Any school, college, institute, academy or other association formed for educational or scientific purposes, including therein any association formed especially to promote literature, history, science, information or skill among the learned professions, intellectual culture in any branch or department, . . . and, in general, any association, society, company or organization which tends to the public advantage, in relation to any or several of the objects above enumerated, and whatever is incident to such objects, may be created a body corporate and politic."

In the view we take of this case, it is unnecessary to recite other statutory provisions. Section 21 of article 10 of the Constitution is

†That section is as follows: "Any association formed for the purpose of establishing a gymnasium or club-house, or for promoting boating, field sports or other rational amusements, or for any other purpose not excluded by section 2829, lawful in itself and not otherwise specially provided for, may also, by complying with sections 2821 and 2822, become a body corporate and politic and under this article shall possess all the rights and privileges and be subject to the limitations and requirements herein provided, so far as the same are applicable thereto." [Rep.]

without the payment of the tax. This tax, it will be seen, is fixed at \$50 for the first \$50,000 or less of capital stock, and at \$5 additional for every additional \$10,000 of stock. Now, it is plain that the payment of the tax cannot be evaded by organizing a corporation under a law which makes no provision for stock. It is equally clear that the Legislature has no power to authorize the evasion of the payment by allowing corporations to be organized under this "Benevolent Law," as it is called, without a capital stock. This court held in express terms in *State v. McGrath*, 95 Mo. 193, that the payment could not be avoided by reason of a legislative declaration that the corporation was one formed for benevolent purposes, when the law under which it was brought into existence showed that it was a money-making institution. To give effect to the Constitution, corporations, not falling within one of the four classes, must be organized, if at all, under some law providing for capital stock. In so far, therefore, as section 2884 undertakes to allow corporations to be created for other than benevolent, religious, scientific or educational purposes, it is void.

The important question here, however, is whether the proposed corporation can be fairly said to be one for educational purposes. And it is to be observed, in the first place, that the Constitution uses the words, "for benevolent, religious, scientific and educational purposes," in a broad and comprehensive sense. The corporations thus exempted from the payment of the tax are, to a certain extent, mentioned in contradistinction to such as are organized for pecuniary profit. As applied to minors, it has been

and physical. *Booth v. Backer*, 6 Heisk. 395. The following definition appears to have been prepared with care: "'Education' is the bringing up, physically or mentally, of a child, or the preparation of a person, by some due course of training, for a professional or business life or other calling." 6 Am. & Eng. Cyclop. Law, 158.

The objects and purposes of the proposed corporation are: (1) the encouragement of debating, reading and literature; (2) the enjoyment of rational social amusements; (3) the playing of ten-pins, chess, checkers and other lawful games of the kind. The first of these declared purposes is clearly educational, and the others seem to be added as matters of amusement, and incidental to the first. That they are incidental is shown by the subsequent statements, wherein it is expressly declared that there shall be no saloon in connection with the club; that drinks shall not be sold by it, or any of its members; and that the association shall not have in view any pecuniary profit. Had the articles of association specified only the first of the designated objects, still the members of the association, under appropriate by-laws, might indulge in any of these amusements without violating the charter. Some degree of liberality must be allowed in the formation of these associations, where all pecuniary profit is excluded. These articles of association can stand on sections 2821 and 2825, and it is our opinion that the proposed association may be incorporated without the payment of the tax.

A peremptory writ is therefore awarded.

All concur, except *Ray, Ch. J.*, and *Brace, J.*, who dissent.

KANSAS SUPREME COURT.

Jim S. CALLEN, Plff. in Err.,
v.
CITY OF JUNCTION CITY et al.

(...Kan....)

* **Section 1 of chapter 69 of the Session Laws of 1886** is not unconstitutional because it delegates legislative power to a judicial officer. The findings of fact made by a judge of the district court by virtue of that Statute are the exercise of judicial power.

(April 4, 1890.)

ERROR to the District Court for Gray County to review a judgment refusing to grant a temporary order restraining defendants from proceeding to lay out and open streets through plaintiff's land. *Affirmed.*

Commissioner's opinion.

The facts are fully stated in the opinion.

Messrs. H. J. Humphrey and James Humphrey, with *Mr. Jim S. Callen, in personam*, for plaintiff in error:

If the power to enlarge the corporate limits

of a city can be delegated by the Legislature it must be to some other person or body possessing like functions, and not to a court, which is inhibited from the performance of any other than judicial acts.

People v. Stewart, 7 Cal. 143; *Galesburg v. Hawkenson*, 75 Ill. 152; *Blanchard v. Bisell*, 11 Ohio St. 96.

The power to extend corporate limits is a legislative power.

Dillon, Mun. Corp. 126, 167; *People v. Riverside*, 70 Cal. 461; *Cooley, Const. Lim.* 114, 116; *Cooley, Taxn.* 83 (48); *State Auditor v. Atchison, T. & S. F. R. Co.* 6 Kan. 507; *Hardenburgh v. Kidd*, 10 Cal. 402; *Heins v. Lere Comrs.* 86 U. S. 19 Wall. 655, 661 (23 L. ed. 223, 226); *Norford v. Unger*, 8 Iowa, 83; *Bloodgood v. Mohawk & H. R. Co.* 18 Wend. 24; *Cleary v. Hooser*, 9 B. Mon. 830; *Mosier v. Hilton*, 15 Barb. 664; *People v. Bowen*, 21 N. Y. 517; *Riley v. Rochester*, 9 N. Y. 72.

This is an attempt to confer upon the judge another "office of trust" during his term of office, in contravention to section 13 of article 3 of the Constitution.

Mr. Thomas Dever, for defendants in error:

*Head note by *SIMPSON, C.*

7 L. R. A.

See also 33 L. R. A. 638; 39 L. R. A. 214.

The Legislature can neither enlarge nor reduce the corporate limits of a city.

Gray v. Crockett, 30 Kan. 138; *Wyandotte v. Wood*, 5 Kan. 603.

But such power may be conferred upon some tribunal or officer not specially prohibited by the Constitution from exercising such functions.

People v. Provines, 34 Cal. 540.

The jurisdiction exercised by the judge is not legislative in its nature.

Burlington v. Leebick, 43 Iowa, 252; *Wahoo v. Dickinson*, 23 Neb. 426; *Kirkpatrick v. State*, 5 Kan. 673; *Mendenhall v. Burton*, 42 Kan. 570; *Re Johnson*, 12 Kan. 102; *Intoxicating-Liquor Cases*, 25 Kan. 751; *Blanchard v. Bissell*, 11 Ohio St. 96; *Morristown v. Shelton*, 1 Head (Tenn.) 24; *Kayser v. Bremen*, 16 Mo. 88; *Cincinnati, W. & Z. R. Co. v. Clinton Co.* 1 Ohio St. 88.

Simpson, C., delivered the following opinion:

This case was commenced in the district court of Geary County to restrain the City of Junction City, a city of the second class, and the other defendants in error, who were appointed appraisers to assess damages occasioned by laying out and opening streets through the land of the plaintiff in error, from further proceedings. An application was made to the district judge to grant a temporary restraining order, all parties being represented by counsel, and the writ was denied. The case is here to review the order denying the temporary writ. The case was heard below on the petition, answer and reply, and the facts admitted by the pleadings are as follows: The land of plaintiff in error is a three-cornered tract, containing about 28 acres. This tract of land was embraced within the corporate limits of the City by an ordinance approved July 9, 1889, that reads as follows:

"An ordinance relating to and extending the corporate limits of the City of Junction City. Whereas, a petition in due form has, in manner provided by law, been presented to the Hon. M. B. Nicholson, judge of the District Court of Geary, formerly Davis County, Kansas, asking said M. B. Nicholson, as judge of said district court, to make findings as to the advisability of extending the corporate limits of the City of Junction City so as to include therein the body of land adjacent to said City, and commonly known as 'Callen's Field,' the particular description thereof being as follows, to wit: Lot two (2), section one (1), town twelve (12) south, range five (5) east of the sixth (6th) principal meridian in Kansas. And whereas, said M. B. Nicholson, as judge of the District Court of Geary, formerly Davis County, Kansas, on the 18th day of May, 1887, at the City of Council Grove, in Morris County, Kansas, upon the hearing of the matter contained in said petition, did find as follows, to wit: (1) That it will be to the interest of the City of Junction City to extend the corporate limits thereof so as to include therein the body of land adjoining said City, more particularly described as follows, to wit: Lot two (2), section one (1), town twelve (12) south, range five (5) east of the sixth (6th) principal meridian in Kansas, and generally known as 'Callen's

Field.' (2) That it will be no to the owners of the aforesaid have the same included within limits of said City of Junction City, whereas, upon appeal taken from the Supreme Court of the State by the owners of said described supreme court duly found and judged that it had no power to set aside or modify said finding be it ordained by the mayor and the City of Junction City: Section 1. The corporate limits of the City of Junction City hereby extended so as to include the body of land adjacent to said City, particularly described as follows, to wit: (1), section one (1), town twelve (12) south, range five (5) east of the sixth (6th) principal meridian in Kansas, and generally known as 'Callen's Field.' Sec. 2. This ordinance shall take effect and be in force from the date of its publication once in the Junction City.

"Chas. P. Fogelstr."

"Approved July 9, 1889. (L. S.)"

"Attest: J. B. Callen, City Clerk."

This ordinance is pleaded by the plaintiff in error as justification of their reply of the plaintiff in error to the allegations that the Statutes and ordinances and by virtue of which all proceedings and acts done are, and were unconstitutional and void, and all proceedings were had without authority and are null and void. The contentions of the plaintiff in error is this: That section 69 of the Laws of 1886 *is unconstitutional for the following reasons: "First, no remedy is provided for the aggrieved party by appeal to any court or tribunal in conflict with section 1, amendment 10 of the Constitution of the United States. It deprives a person of property without process of law. Second, It is in conflict with article 7 of the Constitution of the United States, in this: that there is no pro-

*That section is as follows:

SECTION 1. That section 1 of an Act to Enable Cities of the Second Class to Extend Their Corporate Limits, and to Repeal Chapter 100 of the Laws of 1872, and Chapter 100 of the Laws of 1875, approved March 4, 1886, and is hereby amended so as to read: Section 1. That whenever the city council of the second class desire to enlarge their corporate limits from the territory adjacent to the city, the city council shall, in the name of said city, petition to the judge of the district court of the county in which said city is situated, and by metes and bounds the territory sought to be added, and asking said judge to make a finding as to the advisability of adding said territory to said city. Upon such petition being presented to the judge, with proof that notice of the time and place of such hearing has been published in said city, he shall proceed to make a finding as to the advisability of making such addition, and upon such hearing, if he shall find that the adding of such territory to the city is to its interests, and will cause no material injury to the persons owning real estate in the territory sought to be so added, he shall so find; and upon the city council of said city making such finding, the city council may, by ordinance, add such territory to said city by an ordinance providing for the same; provided, That no such proceeding shall be necessary where the territory sought to be added is subdivided into lots and blocks, in such cases the city council of said city may, by ordinance, add such adjacent territory to said city. [Rep.]

7 L. R. A.

For the reason given, it is unconstitutional, being in violation of section 5 of the Bill of Rights of the State of Kansas, by violating the right of trial by jury. *Fourth.* That the compensation provided for by law for property taken for public use, as followed in this case, is inadequate, unjust and an unconstitutional method, inasmuch as the appraisers provided for by law are authorized to take into consideration the benefits to be derived by, as well as the damages incurred to, the owner. *Fifth.* Said Law of 1886 is unconstitutional, and in violation of section 18 of the Bill of Rights of the State of Kansas, which provides that 'all persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law and justice administered without delay.' This proceeding takes private property for public use without just compensation. *Sixth.* It is in conflict with section 4 of article 12 of the Constitution of the State of Kansas, which provides that 'no right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or secured by a deposit of money to the owner, irrespective of any benefit from any improvement proposed by such corporation.' *Seventh.* Said Law of 1886 is unconstitutional, and in violation of section 1, art. 2, of the Constitution of the State of Kansas, in attempting to delegate a legislative power to the judiciary. *Eighth.* The law is a special one, conferring corporate power."

As to the first objection assigned, it is only necessary to say that the change of the status of a tract of land from a farm to city lots, by the exercise of a power granted cities to extend their limits, is not a deprivation of property without due process of law. As to the second and third objections, it may be remarked that, if the extension of the limits of a city is a purely legislative power, as the plaintiff in error claims, such a power is not exercised by means of a jury trial. To the fourth objection a sufficient answer is found in the statement that neither the Statute we are considering, nor the ordinance passed in pursuance of it, has anything to do with the question of compensation. He might raise the question embraced in the objection on an appeal from the award of the commissioners. The fifth objection mingles legislative and judicial considerations, but the pith of it is contained in the last sentence; but it must be obvious to all that a mere change in the use of land from agricultural to city purposes is not taking private property for public use. The case of *Pottawatomie Co. v. O'Sullivan*, 17 Kan. 58, holds that section 4, art. 12, of the Constitution of this State has application only to canals, railroads and other similar cases in which some corporation takes a use or benefit in the land other than that enjoyed by the public. It is claimed in the eighth objection that the law is a special one, but this is entirely unsupported. By the express terms of the Act, it applies to all cities of the second class.

This leaves the seventh objection to contain the spinal marrow of the contention of the attorneys of the plaintiff in error,—that by this Statute the Legislature attempted to delegate a

power to hear and determine whether a proposed ordinance of a city of the second class, extending its limits so as to embrace certain described tracts of land, will be to the interest of the City, and will cause no manifest injury to the persons owning the land. If the findings of the district judge are in favor of the extension, the city is then empowered to pass such an ordinance. If the findings are against the extension, the City has no power to enact that ordinance. While the mode of procedure prescribed by the Act conferring the power is different from that provided in the commencement and conduct of an ordinary action, yet all the essential features and requirements of that "due process of law" that is necessary to give vitality, force and effect to judicial proceedings everywhere are scrupulously observed. The ordinance must be published in the official paper of the City a certain length of time, so as to give notice to all persons whose property interests are in any manner changed or affected by its operation. All such persons are given the right and opportunity to be heard on the question, and to offer evidence to show the injurious operation of the ordinance. The judge has power, after such a hearing, to approve, disapprove or modify the proposed ordinance, and to make findings which, in effect, control the extension of the limits of the City. It would seem that by its terms the section in question does not require the judge to perform any other duty than one purely judicial in its character. The precise question, however, is that, while the exercise of the power conferred is through the instrumentalities of a court, with a close assimilation of the mode and manner of the ordinary exercise of judicial power, the power itself is legislative, and not judicial; that the manner of its exercise does not change the character of the power; that this is legislative power, although attempted to be exercised by the judge, and is violative of, and repugnant to, the distribution of power made by the Constitution among the co-ordinate branches of the state government. This question is one about which courts of last resort differ, their decisions being both contradictory and antagonistic. It being a question of doubt, therefore, it should be resolved against the plaintiff in error, as it is a well-settled rule that the action of the law-making power must in all cases be applied, unless it is manifestly in contravention of the Constitution. In favor of the jurisdiction under statutes similar in scope and expression to our own, see the following cases: *Kayser v. Bremen*, 16 Mo. 88; *Blanchard v. Bissell*, 11 Ohio St. 96; *Borough of Little Meadows*, 35 Pa. 335; *Wahoo v. Dickinson*, 23 Neb. 426; *Burlington v. Leebick*, 43 Iowa, 252.

Against the jurisdiction, see the cases of *Galesburg v. Hawkinson*, 75 Ill. 152; *People v. Bennett*, 29 Mich. 453; *State v. Simons*, 33 Minn. 540; *People v. Carpenter*, 24 N. Y. 86.

There may be other cases, but these are sufficient to indicate the conflict on the question. Our own view can be expressed in a few sentences.

The power to create and regulate municipal corporations, define, extend or limit their boundaries, and commit to them certain subjects for local regulation, is the exercise of a purely legislative authority. An organic command requires this legislation to be applicable to classes, and not special as to each municipality. A general law is passed authorizing cities of the second class to extend their boundaries so as to include adjacent territory, on certain conditions, or depending on certain facts. The existence of these conditions or of these facts is made the subject of judicial inquiry and determination; and this is done to protect the property interests of the land owners, and not to commit the whole control to a city council whose interests in the City might induce arbitrary action against the land owners. In other words, the judge says in each case whether or not the conditions authorizing the absorption by the City exists as to this particular piece of land. The Legislature can confer on the city council power to make a local regulation, and this necessarily involves discretion as to what it shall be; but the question as to whether that discretion has been exercised within the limitations of the power delegated is a judicial question, pure and simple, and nothing else. This section of the Statute does not confer upon the judge the power to extend the limits of the City in the first instance, but only to approve or disapprove the ordinance of the City making the extension. If that part of the section requiring the district judge to make and certify the findings had been omitted, and the city council had then passed an ordinance to extend the limits of the City so as to include this land in controversy, could it be doubted but that the owner, in a proper action instituted for that purpose in the District Court of Geary County, could contest with the City its power, under the delegated authority, to include these tracts of land? We think not. To avoid separate suits of this character by individual land owners and before property interests are affected and perplexing complications arise, this section provides for a determination of the rights of all the parties in one action. The practical effect of this Statute is to submit to the district judge, in advance of its enactment, the question of the legality of the city ordinance. The Legislature of this State can only create and regulate municipal and other corporations by general laws. It cannot either enlarge or reduce the corporate limits of the city of the second class (*Gray v. Crockett*, 30 Kan 138; *Wyandotte v. Wood*, 5 Kan. 603) by special enactment.

It is manifestly absurd to contend that, when any one of the cities of the second class wants to extend its limits so as to include adjacent territory, the only manner in which it can be done is by a legislative enactment extending the limits of all the cities of the second class in the State. The particular necessities of each city of the second class are such that, coupled with our constitutional provisions, the only manner in which their corporate limits can be extended is by a

general law authorizing the extension of their terms and conditions as will not injure the owners of adjacent property. To empower a city government to include agricultural land within its limits, without these very things being considered, attempts to do, by the force of equitable conditions and findings of a judicial officer, and the power of the city council to maintain by such findings. Such a way is open to judicial inquiry. It is not to state circumstances under which courts would not be open for a review by an adjacent land owner, to contest any action of the city government which would injure his property, whether within or without the corporate limits. The extension, and the terms and conditions under which the extension can be made, are determined by the Legislature; but the manner has been observed, the terms, with, or the conditions exist, in fact and essence of things, are judicial questions. The effect of this Statute is to authorize the district judge to determine, and to decide in advance, after a proper hearing, the validity of the extension of the limits of the city of the second class to include adjacent land owners, who consider themselves aggrieved, might otherwise seek redress by various forms of action. The Statute, like almost every other Act, may by its practical operation require a judicial inquiry as to its meaning, or effect, or as to the power of the district judge to pass it. Similar statutes have been enacted in this State for years, and cities of the second class have been organized by judicial action. Certain powers have been conferred upon the probate judge with reference to these matters. *Mendenhall v. Kan.* 570.

We had occasion in the case of *Smith*, 42 Kan. 433, to say that "no good reason can be given, why the question now discussed was not decided in that case, but we did consider it in that case that the Legislature could extend the limits of the second class cities of the second class to include adjacent land owners, who consider themselves aggrieved, might otherwise seek redress by various forms of action. The Statute, like almost every other Act, may by its practical operation require a judicial inquiry as to its meaning, or effect, or as to the power of the district judge to pass it. Similar statutes have been enacted in this State for years, and cities of the second class have been organized by judicial action. Certain powers have been conferred upon the probate judge with reference to these matters. *Mendenhall v. Kan.* 570.

All these considerations are in our mind controlling our opinion in favor of the power conferred by the Statute upon the district judges of the State. The homestead does not arise. There is no homestead in the petition that the land was a homestead.

It is recommended that the judgment be affirmed.

Per Curiam:

It is so ordered, all the Justices con-

David PETTED *et al.*, Impleaded, etc.,
Appls.

(.....Mich.....)

1. A statutory liquor bond which must be approved by the town board, and then filed with the county treasurer, who has no discretion as to the filing, becomes operative on its approval and before filing, so as to make the sureties liable for the acts of the principal between the date of the approval and filing.
2. A liquor bond dated back several days before the time of signing, and reciting that the principal then professes to carry on the business of liquor dealer, relates back to, and covers the period from, its date.
3. A recital in a liquor bond that the principal then professes to carry on the business of a liquor dealer estops the sureties from denying their liability on the bond on the ground that the business could not be legally carried on until the bond was filed.

(April 11, 1890.)

APPEAL by defendants from a judgment of the Circuit Court for Kent County in favor of plaintiff in an action to recover upon a liquor dealer's bond the amount of a judgment recovered against him under the Civil Damage Act for injury to plaintiff's means of support by reason of the death of her husband from injuries received at the hands of an intoxicated person. *Affirmed.*

The facts sufficiently appear in the opinion. *Meares, William F. McKnight and Turner & Carroll*, for defendants, appellants:

No deed, bond or other written instrument is of any validity until it has been duly delivered; the execution of the instrument is not complete until delivery to the grantee or to some person

properly designated to receive the instrument for him.

Com. v. Kendig, 2 Pa. 449; *Bruce v. State*, 11 Gill & J. 883; *McMicken v. Webb*, 47 U. S. 6 How. 298 (13 L. ed. 443).

The sureties were not liable for the misconduct of their principal during the interim between the date and delivery of the bond.

Hyatt v. Grover & B. Sewing Mach. Co. 41 Mich. 225; *Burson v. Huntington*, 21 Mich. 480.

A surety's promise cannot be enlarged in the slightest particular without his consent.

Bullock v. Taylor, 89 Mich. 137.

Mr. Myron H. Walker for plaintiff, appellee.

Grant, J., delivered the opinion of the court:

Plaintiff sued defendant Robert Patterson for injury sustained by her in consequence of his having sold liquor to her husband. She obtained judgment [see 1 L. R. A. 708] and thereupon brought this suit upon the liquor bond signed by defendant Patterson as principal and the other defendants as sureties. She recovered judgment in the court below. The bond was dated May 5, 1886, and was the bond required by How. Stat., § 2278. The bond was accepted and approved by the town board May 12, 1886, and their approval indorsed thereon May 15. It was filed with the county treasurer May 27. The act of Patterson for which plaintiff recovered her judgment occurred between the date of the approval of the bond and its filing with the county treasurer. Defendants insist that no liability could be incurred under this bond until it had been filed or delivered to the county treasurer. This is the principal question in the case.

1. This is a statutory bond, and must be interpreted according to the intent and meaning of the legislative enactment. It runs to the

NOTE.—*Liquor bond under Michigan statutes.*

Mich. Pub. Acts 1887, No. 313, § 1, requiring all persons engaged in the business of manufacturing, selling or keeping for sale intoxicating liquors, to pay a tax, § 8 of which provides that all such persons shall give a bond before commencing such business, is inapplicable to a levy upon and sale by a sheriff under attachment and execution. *Wildermuth v. Cole* (Mich.) 43 N. W. Rep. 889.

The statute preserving all rights of action accrued, a right of action under a bond for the year 1886 is saved. *Anthony v. Krey*, 14 West. Rep. 917, 70 Mich. 320.

The county treasurer cannot be invested with power to determine in what contingency he will require a liquor dealer to give a new bond or stop his business until it is done. *People v. Miner*, 13 West. Rep. 471, 68 Mich. 549.

Mandamus, to compel approval and acceptance.

Where a liquor bond is rejected because the affidavit required by § 8 omits to state that each surety is not engaged in the sale of liquors, its acceptance will be compelled by mandamus. *Kuhn v. Detroit*, 14 West. Rep. 478, 70 Mich. 584.

Where the sureties justified on oath as to their

sufficiency, and there was a conflict of testimony as to the value of the property owned by one of them, and there was nothing in the testimony to make it inadmissible, and the witnesses were legally qualified to express an opinion,—the determination of the board in rejecting one of the proffered sureties will not be disturbed. *Wolfson v. Rubicon*, 5 West. Rep. 601, 63 Mich. 49.

Where the answer, which is not put in issue and must be accepted as true, denies that the board's action was based on any deduction of personality, but that the board was unable to find the sureties responsible in a sufficient amount, the writ cannot be granted, unless it clearly appears that there has been a violation of a legal right. *Post v. Sparta*, 6 West. Rep. 112, 63 Mich. 323.

Where it does not appear that the board had acted arbitrarily or capriciously, the writ must be refused. *Post v. Sparta*, 7 West. Rep. 844, 64 Mich. 597.

In an application for mandamus to compel the township board to approve a druggist's liquor bond, where nothing is disclosed in the return showing that its discretionary power was not exercised reasonably and in good faith, the writ must be denied. *McHenry v. Chippewa*, 8 West. Rep. 108, 65 Mich. 9.

7 L. R. A.

people of the State of Michigan. Under the Statute, the sureties must sign and justify. It must be approved by the town board, and their approval indorsed. It must then be filed with, or delivered to, the county treasurer. No discretion in regard to the receipt and filing is lodged with the county treasurer. When presented, with the approval of the town board indorsed thereon, he is bound to receive it and file it. The filing is clearly for the benefit of the public, and those who may be entitled to remedies under it.

The word "delivered," used in this Statute, was clearly not intended to be used in the legal sense of a delivery necessary to the execution of a contract. The fact that, in the Statute, the word "filed" is used interchangeably with "delivered," appears to me conclusive on this point. The duty of the treasurer is merely clerical, not intended as an act to give effect to the bond, but to make and perpetuate a record of it. "Delivery," in the sense that it is necessary to the complete execution of a contract, implies a discretion both as to tender and acceptance. A deed may be properly signed, witnessed and acknowledged, but it is not executed until delivery. The grantor may or may not deliver it as he chooses. When the Statute provides that a bond shall be deposited, filed with or delivered to some public officer, to whom it gives no discretion in the matter, it makes his duty purely clerical. We must therefore look to the Statute for some other time fixed by it when this bond can be regarded as executed, and given legal effect. That time, in my judgment, is fixed upon the approval of the bond. This court has said that such a bond is valid when accepted and approved by the common council. *People v. Lansing* (Mich.) 41 N. W. Rep. 424.

The defense is based upon the theory that there can be no liability as against the sureties until the principal had complied with all the provisions of the law prerequisite to his commencing the business. If defendant Patterson had filed his bond the day after its approval, but failed to pay the tax, the defendants might with equal propriety claim this as a defense, and say, as they now say, that they had a right to believe that their principal would comply with the law before entering upon the business. If Patterson had left this bond with the town board, to be filed by them with the treasurer, and the board had failed to do so, would this defense then be urged? What difference can it make whether Patterson gave the bond to someone else to file with the treasurer, or took it himself for that purpose? He was then carrying on the business. His bond said so. He intended to file it, and did file it afterwards.

The case of *Hyatt v. Grover & B. Sewing Mach. Co.*, 41 Mich. 225, decides, simply, that a surety is not presumed to have meant to become answerable for acts committed before he signed the obligation. The language of the bond is not given, but the court says "the terms are all future."

The principle is recognized in *Bruce v. State*, 11 Gill & J. 382. That was a suit upon a sheriff's bond. The Constitution of Maryland provided that no sheriff should be qualified to act until he had given the bond, and the Stat-

ute provided before whom, a bond should be taken. The co-bond is made. It is the obligation of the signers when being signed. It is the court or judge, etc., and is adjudged sufficient. . . . I ment it is the operative act of parties, and not before."

The case of *McMicken v. W. How*, 293 [12 L. ed. 448], involves the signers to a promissory note also the cases of *Burson v. J. Mich.* 480, and *Bullock v. Taylor*. They have no application to the

In *Com. v. Kendig*, 2 Pa. 448 upon the bond of a justice of was signed upon Sunday and Monday to the prothonotary. "Granting that the bond was signed on Sunday, yet I am by no means of the opinion that it is void as against those who by the official misconduct of the are innocent parties, and ought not to be affected by the folly or turpitude of the prothonotary and obligors. Such a construction of the Act would enable the obligors to escape the consequences of their own wrong as against the obligee, and cannot be in any possibility protected."

Does not the same reasoning apply to this case? The above authorities cited by the defendant of their contention. One of the reasons for the rule contended for by none of the others are in conflict with the Statute.

The case of *State v. Toomer* was a bond of a master in equity. It prescribed several prerequisites to the master to enter upon his duties, and he should not enter upon them until he had recorded in the clerk's office a certificate of the commissioners that he had taken his bond, and that if he failed to comply with these requisites the office was vacant. This was held to be no defense against the sureties. 7 Rich.

His official acts as to third persons are valid, and for official defaults his sureties are liable. A bond is clearly complete when all the conditions necessary to give it validity have been performed. When these have been performed, and the principal commences the business mentioned in the bond for the purpose of which the sureties have been obligated, the bond is then in full force, and the liability of the sureties attaches. If the bond was executed, the principal entered upon the business, and it is fair to say that his sureties knew it. I find no moral or legal, upon which they can be excused. If defendant's contention be correct, Patterson had paid the tax, and had issued to him the receipt with the approval of the bond, the sureties would be released from liability. To all such claims the proper answer is that it is against the acts of Patterson that these bonds are obligating themselves. The Statute was to secure the payment of the tax, and that may be adjudged to any person injured by the sale of property or means of support, by the [the liquor dealer's] selling, furn-

ing or delivering any such liquors." The right to recover such damages is not made dependent upon the fact that the liquor dealer is legally engaged in the business. As well might it be claimed that the bondsmen have the right to presume that liquor dealers will not sell on the Fourth of July, or any other day upon which sale is prohibited, and therefore that they are not liable when injury results.

2. Upon the filing of the bond, it related back to its date, and covered the time prior to its filing. The rule is well settled that contracts of suretyship affecting ordinary business transactions take effect only from the date of their execution, which includes delivery, and that they will not be given retroactive effect unless so expressly provided. But it by no means follows that this rule extends to statutory bonds, given for the protection of third parties, covering a period of time fixed by the Statute. The Statute requires that every liquor dealer shall yearly execute such bond. It continues in force for one year from the first of May. It was the evident intent of these parties to comply with this provision. They signed the bond on the 12th of May, and deliberately dated it back to the 5th of May. It recited that Patterson then professed to carry on the business. They are presumed to know the law and to have contracted with reference to it. They deliberately made their bond to speak from the 5th. As a matter of fact he was carrying on the business. The only fair conclusion to be drawn is that they intended the bond to relate back to and cover the period from its date.

In *State v. Finn*, 28 Mo. App. 290, the sheriff was elected in November. On November 21 he gave the bond required by the Statute. November 29 the court, for some reason which does not appear, ordered a new bond to be given in lieu of the first. Suit was brought for money received by the sheriff between the 21st and the 29th. The sureties were held responsible for the sheriff's conduct during his entire official term.

In *Aetna L. Ins. Co. v. American Surety Co.*, 34 Fed. Rep. 291, the bond sued upon was dated June 15, and was to run for the term of twelve months ending June 15, the following year. It was not delivered or accepted until July 29. The court held that the liability of the surety accrued by relation as of its date, and that the sureties were liable for all defalcations prior to July 29. In that case the parties in the bond fixed the term. In this case the Statute fixes it.

8. It is the established rule that sureties are estopped to deny the facts recited in their obligations, whether true or false. *Brandt*, Sur. §§ 29, 30.

Where the bond recited that A was appointed paymaster, it was held that he and his sure-

ties were estopped to deny that fact. *United States v. Bradley*, 85 U. S. 10 Pet. 305 [9 L. ed. 448].

Where the bond recited that B was appointed a wharfinger, it was held that his sureties were estopped to deny it. *People v. Hason*, 78 Cal. 154.

It is also held immaterial whether there be any such office as is set up in the bond. *Hogers v. United States*, 32 Fed. Rep. 890.

Where a replevin bond recited that it was signed by S, the principal, who was in fact dead at the time, the sureties were held estopped to deny that S had signed it. *Collins v. Mitchell*, 5 Fla. 364.

Neither Patterson nor his securities can take advantage of his neglect to file the bond. His failure to do so was his own wrongful act. *Stevens ads. Treasurers*, 2 McCord, L. 107.

In that case the sheriff could not by law enter on the duties of his office until he had filed a certificate from commissioners that he had executed and filed a bond with the treasurer. The court says: "Neither he nor the sureties can take advantage of his wrongful neglect. . . . The approval by the commissioners, the certificate . . . are no more than the mere modes of giving, examining and perpetuating the bond. These are not of the essence, and constitute no part of the obligation, of the contract."

In the case at bar the defendant's sureties had done all that the law required, and all that they could do, to complete the bond. They had signed and justified to it. It had been approved. They left it with their principal, Patterson, to file. It recited that he was then professing to carry on the business. They are therefore estopped, both by law and reason, to make this defense. It is notorious that liquor dealers, by the implied, if not the express, assent of the officers charged by the law with the duty of enforcing it, are often permitted to carry on the business until they can raise the money to pay the tax. It would in my judgment, be a direct violation of the spirit and intent of this law to relieve them and their sureties from liability upon their bonds under such circumstances. To hold them liable gives the protection which the law intended to innocent parties, who are not, and cannot well be, charged with any duty in regard to the execution or filing of the bond. To relieve them would result in opening the door to intentional as well as careless evasions of the law.

4. The court correctly rejected the offer of defendants to show that after they heard of the injury to plaintiff's husband they demanded the surrender of the bonds, and that Patterson promised to surrender them.

Judgment affirmed, with costs.

The other Justices concurred.

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SOUTH CAROLINA SUPREME COURT.

C. P. SANDERS, Exr., etc., of Alie Lipscomb,
Deceased, *Rept.*,

S. M. BAGWELL, Admr., etc., of W. H.
Bagwell, Deceased, *Appt.*

(....S. C....)

1. An alteration may be made in an instrument by words added thereto which are not literally incorporated in the body thereof.
2. An addendum written below the signatures on a sealed note bearing interest at 7 per cent, saying, "The above note is to be accounted for, with interest at 8 per cent per annum," and signed by the principal obligor on the note, constitutes a material alteration which will avoid the note as against a surety thereon who did not consent to the alteration.
3. No consideration is imported by an unsealed addendum to a sealed note saying, "The above note is to be accounted for, with interest at 8 per cent per annum."
4. Any valid contract between the payee and the principal, by which the terms of the original note are altered in any material particular, whether prejudicial to the sure-

ty or not, will vitiate the note as to him, if made without his consent.

(March 6, 1890.)

A PPEAL by defendant from a judgment of the Common Pleas Circuit Court for Spartanburg County in favor of plaintiff in an action to enforce the liability of a surety upon a sealed note. *Reversed.*

The facts are fully stated in the opinion.

Messrs. Bomar & Simpson and W. S. Thomason, for appellant:

A new contract entered into between the creditor and the principal debtor need not be prejudicial to the interests of the surety, to release him. It is enough if the creditor agrees to a change of any kind in the terms of the contract by which the surety agreed to be bound.

Gardner v. Gardner, 23 S. C. 590.

It was error to charge that the agreement signed by the principal Pool was a *nudum pactum* and did not change the original contract.

The mere production and proof of execution of a sealed note, a bill of exchange or a prom-

NOTE.—Written instruments, effect of alteration.

It is the policy of the law to allow no tampering with written instruments. *Davis v. Eppler*, 88 Kan. 629.

If a note or bill is altered designedly by the owner, it will be void, even though without fraud on his part. *Ibid.*

The verbal alteration of a sealed instrument makes it parol. *Hamilton v. Hart*, 1 Cent. Rep. 117, 100 Pa. 629.

Any material alteration made in a note after its execution or indorsement without authority or direction of the holder discharges all parties thereto not giving their consent. See note to *Ruby v. Talbott* (N. M.) 8 L. R. A. 724.

If made without the indorser's knowledge it invalidates the indorsement. *Davis v. Eppler, supra.*

The indorser is discharged by the writing, over a blank indorsement, of a waiver of demand and notice. *Ibid.*

A material alteration of a note by one maker, after the other has signed it, if made without the consent of the latter, will render the instrument void as to him. *Flanigan v. Phelps* (Minn.) 43 N. W. Rep. 1113.

Such alteration will prevent a recovery on the note against him, whether he was a joint maker or indorser, and whether the alteration was made with or without fraud. *Owen v. Hall*, 70 Md. 97.

The insertion, over the signatures of the makers of a promissory note, of the memorandum, "Privilege of extension for thirty days given," is a material alteration. *Flanigan v. Phelps, supra.*

Inserting the figure "8" before the words "per cent interest," in a promissory note, is a material alteration. *Palmer v. Poor*, 6 L. R. A. 469, 121 Ind. 136; *Ruby v. Talbott, supra.*

Where an instrument was altered by the addition of the words making it bear interest, and no explanation is offered, it will not sustain an action. *Boustead v. Cuyler*, 8 Cent. Rep. 128, 116 Pa. 561.

Whether an alteration has been made is a question for the jury; its materiality is a question for the court. *Steele v. Spencer*, 26 U. S. 1 Pet. 552 (7 L. ed. 259).

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Immaterial alterations.

If a stranger, without the obligee's privity, alters an agreement in a point not material, it does not avoid the agreement. *Yeager v. Musgrave*, 28 W. Va. 90.

Where the payee of a note payable on or before a certain day extended the time of payment to a certain later day, by a writing on the face of it, before maturity and without the maker's consent, the note was not thereby avoided, as it did not prejudice his rights as to the time of payment. *Drexler v. Smith*, 30 Fed. Rep. 754.

An alteration of the serial number of a negotiable bond is not a material one which will defeat its obligation in the hands of a bona fide purchaser, although it was made after the bond was stolen, and presumably for a criminal purpose. *Wylie v. Missouri P. R. Co.* (N. Y.) 7 R. R. & Corp. L. J. 250, 41 Fed. Rep. 623.

A writing on the back of a note, by the payee and holder, who is administrator of the deceased maker, of words denoting where it is payable, no place being mentioned in the note, is not a material alteration. *Horton v. Horton's Estate*, 71 Iowa, 445.

Effect on surety.

It is not sufficient that a surety may sustain no injury by a change in the contract, or that it may be for his benefit. He has a right to stand upon the very terms of his contract and an alteration without his assent is fatal. *Martin v. Thomas*, 65 U. S. 24 How. 815 16 L. ed. 689; *Reese v. United States*, 78 U. S. 9 Wall. 13 (19 L. ed. 541).

A bond of sureties in replevin is void because, after the same was executed by defendants as sureties, their principal, without their knowledge or consent, and with the consent of the marshal, erased his name from the bond. *Martin v. Thomas, supra.*

The surety on a note will not be released by the agreement of the maker to pay 10 per cent interest indorsed thereon without his knowledge. *Moore v. Macon Sav. Bank*, 4 West. Rep. 888, 22 Mo. App. 684.

Fogartie, 8 Rich. 1 417; Story, Prom. Notes, § 7, 51. See *Bales, Bills*, 8; *Pepon v. Stagg*, 1 Nott & McC. 102; *Parsons, Bills and Notes*, p. 24.

Messrs. Carlisle & Hydrick for respondent.

Simpson, Ch. J., delivered the opinion of the court:

One Wash Pool, in October, 1873, executed a seal note, with W. H. Bagwell as surety, to Alie Lipscomb, for \$440, payable one day after date. The rate of interest was not mentioned, but, of course, it bore from its date the usual interest of 7 per cent. Some time after this both Pool and Bagwell died, and the action below was brought by Alie Lipscomb on this note against the defendant as administrator of Bagwell, deceased. During the progress of this action Alie Lipscomb died, and her executor, Sanders, was substituted as plaintiff. At the trial plaintiff introduced the note, stating that there was an *addendum* thereto, which he did not introduce in evidence, and to which he would object, if the defendant attempted to introduce it. Upon the close of plaintiff's testimony, the defense introduced this *addendum*, which, it seems, was "on the lower end of the note." The *addendum* was in the following words, to wit: "The above note is to be accounted for, with interest at 8 per cent per annum. [Signed] Wash Pool."

His honor Judge Hudson, presiding, "charged that the note was a good and valid obligation of Bagwell, and that there was nothing in the case going to discharge him from liability," holding that the *addendum* relied on as a defense should be determined under the law applicable to contracts, under which he held that said *addendum* was without consideration, and was a *nudum pactum* as to Pool, no consideration appearing on its face, and none proved. He further held that, even if there had been a consideration, it was not such an alteration of the contract as would prejudice the surety, and therefore, if the jury believed the evidence, they should render a verdict for the plaintiff for the amount of the note, which was accordingly rendered.

The defendant appealed upon exceptions, as follows: "(1) Because it is respectfully submitted the circuit judge erred in holding the agreement signed by the principal, Pool, changing the rate of interest on the note in suit to 8 per cent, was a *nudum pactum*, and not binding on said principal, and in so charging the jury. (2) In holding that, even if the agreement was a valid contract binding on the principal, it did not change the terms of the original contract to the prejudice of the surety, and hence the estate of the surety was not discharged, and in so charging the jury. (3) In not charging the jury that this agreement was binding on Pool, unless he could show want of consideration, and, being so binding on said principal, it released the surety. (4) In not charging the jury that this agreement showed on its face a consideration: that it was binding on the principal, Pool. (5) In not, at least, leaving it to the jury to say whether, from the

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passing upon questions of fact which belonged exclusively to the jury. (7) In instructing a verdict for the plaintiff for the amount claimed."

It is proper to state here, briefly, our understanding of the law applicable to questions as to the effect of alterations in notes, after execution, upon the rights of the parties thereto, and also of subsequent agreements or contracts in reference to such notes. Any material alteration of a note after execution and delivery will destroy it as to all the parties not consenting to such alteration, and this, too, whether there is a single maker, or one or more makers, whether they are joint and several, and whether they are all principals or some are sureties. This is upon the ground that every contracting party has the right to stand upon the contract which he makes, and no one is authorized to change such contract without his consent, and therefore any alteration in the body of the note making such change renders it void; upon the same principle, any independent valid contract, made by the principal as to such note, will release the surety, in the absence of his consent, whether said contract is prejudicial to the surety or not; provided, however, the contract is one which affects the note in some material point of view, such as obtaining time, increasing the amount of either principal or interest, etc.

Now, the question arises. Did his honor charge in conflict with these principles? First, Was there a material alteration of this note by the *addendum*, or was the *addendum* to be considered and adjudged under the law of contracts? and, if so, Was his honor's ruling in that aspect of the question correct? There is no doubt that had this *addendum* been incorporated directly in the body of the note, by interlineation or otherwise, that the note would have been destroyed utterly as to Bagwell at least. It was, however, not thus incorporated, but was written below, as it is said in the testimony, on the "lower end of the note."

In a case in New York (the case of *Woodworth v. America Bank*, 19 Johns. 391), referred to and discussed by Mr. Daniel in his work on Negotiable Notes, etc., a memorandum in the margin of the note, simply changing the place of the payment, was held as fatal as if incorporated in the body. 2 Daniel, Neg. Inst. § 1883.

And he further states that where the words "with lawful interest" were written on the corner of the note, it was held to be material, and to avoid the note as against nonconsenting parties. Id. § 1885, referring in the notes to *Warrington v. Early*, 2 El. & Bl. 763, and *Sutton v. Tuomer*, 7 Barn. & C. 416. See 2 Daniel, Neg. Inst. §§ 1883, 1885, and the notes.

In addition, we think that in the case below the evident intent of the *addendum* was to alter the note in the material matter of the rate of interest, and not to make a new contract, binding upon Pool alone, in reference thereto. What is its language? Not that Wash Pool promises and agrees to pay interest at said rate, but that the above note is to be accounted for at said rate. By whom? Why, by the

makers. That seems to us to be the fair and reasonable explanation of the matter, and of the intent of the *addendum*; and inasmuch as, doubtless, there could be no difference of opinion as to its effect had it been interlined in the note, we think upon the authorities above, and on account of its purpose, there should be no difference, because of the fact that it was written on the lower end of said note. It was still on the note, and, as far as Pool could make it so, was a part thereof. See also 1 Daniel, Neg. Inst. §§ 149, 150, as to memorandums on notes, where numerous examples are given of matters incorporated in the note by indorsement on the same paper on which the note is written, whether in the "four corners," at the bottom, on the margin, or on the back.

It is true the most of these examples refer to memorandums made at the time of the execution of the note, but they determine the question that an alteration may be made thereby, although not literally incorporated in the body; and, if so when thus made contemporaneously with the note, why not the same effect when made afterwards?

But, supposing the *addendum* is to be looked at in the light of a contract, was his honor correct in the charge thereon? The *addendum*, if examined under the law of contract, upon its face, and in the absence of evidence, we think, with his honor, was *nudum pactum*. Sealed instruments, notes, etc., it is true, import a consideration, and also bills of exchange and negotiable notes; not so, however, with other contracts and notes. On the contrary, in these latter cases a consideration must be both alleged and proved; we do not regard the *addendum* as either a seal note or a negotiable form note.

But we think his honor was in error in holding that even if the contract was based upon a sufficient consideration, and therefore binding on Pool, yet that the surety was not discharged, because, as his honor held, the surety not being bound, he was not prejudiced; in other words, that, to release the surety by a new contract made by the principal with the payee, the contract must be prejudicial to the surety. We do not so understand the law upon this subject. On the contrary, any valid contract between the payee and the principal, by which the terms of the original note are altered in any material particular, whether prejudicial to the surety or not, will vitiate the note as to him, if made without his consent. *Gardner v. Gardner*, 28 S. C. 588, and the cases there cited.

It is hardly necessary to say that an alteration as to the time of payment, the amount to be paid, or the rate of interest, and, as held in many cases, the place of payment, would be material, and would release the surety although the change might in some cases be beneficial to the surety.

It is the judgment of this court that the judgment of the Circuit Court be reversed.

William FOWLER *et al.*, *Repts.*,

v.

Harriet ALLEN, *Appt.*

(....S. C.....)

1. One who signs a negotiable note, perfect on its face, as surety for another, upon the condition, known only to the principal, that it is not to be delivered to the payee until something else is done, will be liable on the note, even in the hands of the payee, if the latter has no notice of such condition, although the condition be not complied with.
2. Where one of two innocent persons must suffer, the loss must fall upon him who put it in the power of a third person to cause the loss.
3. Indulgence to a debtor by extending the time for payment for a certain period is a valuable consideration for a note for the same debt, as against a surety on the note.

(March 6, 1890.)

APPEAL by defendant from a judgment of the Common Pleas Circuit Court, for Spartanburg County, in favor of plaintiffs in an action to recover upon certain promissory notes which appellant had signed as surety, as she alleged, upon a condition which had not been complied with. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. Nicholls & Moore, for appellant:

If Mrs. Allen signed the notes with the understanding that certain conditions were to be performed before they were delivered, she is not liable on the same if those conditions were not performed, as long as the note is held by the original payees, no matter whether they knew under what conditions she signed or not; and especially is this so unless they show that they were prejudiced in some way by her signature.

NOTE.—Suretyship; loss to be borne by party who causes it.

Where one of two innocent parties must suffer, he through whose agency the loss occurred must bear it. *Le Neve v. Le Neve*, 3 Atk. 648; *Lickbarrow v. Mason*, 2 T. R. 70; *Ayres v. Probasco*, 14 Kan. 190; *Wichita Sav. Bank v. Atchison*, T. & S. F. R. Co. 20 Kan. 520; *McNeil v. Jordan*, 28 Kan. 7; *Northrup v. Hottenstein*, 38 Kan. 270; *Heriell v. Bogert*, 9 Paige, 52, 4 N. Y. Ch. L. ed. 605; *Quick v. Milligan*, 6 West. Rep. 8-3, 108 Ind. 419; *Hunter v. Fitzmaurice*, 102 Ind. 449; *Young v. Bradley*, 63 Ill. 553; *Preston v. Witherspoon*, 7 West. Rep. 71, 109 Ind. 457.

He shall suffer whose negligence was the cause of the loss. *Grossman's App.* (Pa.) 10 Cent. Rep. 339; a case in point, *Garrard v. Haddan*, 87 Pa. 83.

Where somebody must be a loser by reason of a deceit practiced, he who employs and puts trust and confidence in the deceiver should be the loser rather than a stranger. *Hern v. Nichols*, 1 Salk. 239.

Where loss is caused by the fraud of a third person such loss should fall on the one whose act enabled such fraud to be committed. *Deobold v. Oppermann*, 111 N. Y. 531; *Sprights v. Hawley*, 30 N. Y. 441; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 441; *Griewold v. Haven*, 25 N. Y. 595; *Exchange Bank v. Monteath*, 28 N. Y. 505; *Sandford v. Handy*, 23 Wend. 268; *Root v. French*, 13 Wend. 572; *Voorhis v. Olmstead*, 65 N. Y. 116.

those condition were performed would be void, unless the notes were negotiated and came into hands of a bona fide purchaser for value.

Mills v. Williams 16 S. C. 593; *Gourdin v. Rend*, 8 Rich. L. 230; *Pawling v. United States*, 8 U. S. 4 Cranch, 219 (2 L. ed. 601); *Permiter v. McDaniel*, 1 Hill, L. 267; *Boyd v. Boyd*, 2 Nott & McC. 125; *Stringer v. Adams*, 98 Ind. 539; 2 Am. & Eng. Encyclop. Law, 843, note; 6 Am. & Eng. Encyclop. Law, 863, note, quoting from *People v. Bostwick*, 32 N. Y. 445.

Messrs. Carlisle & Hydrick for respondents.

McIver, J., delivered the opinion of the court:

The action in this case was upon two negotiable notes dated 80th of December, 1884, and payable 1st of December, 1885, signed by one Eber C. Allen as principal, and defendant as surety, and made payable to the plaintiffs. It seems that the plaintiffs had recovered two judgments, before a trial justice, against said Eber C. Allen, and also held an open account against him. One of the notes in suit was given for the amount of the two judgments, and contained an indorsement thereon to that effect, and that when the note was paid the judgments were to be canceled. The other note was for the amount of the store account. The defense was that defendant signed the notes as surety upon the condition that they were not to be delivered to the payees until the two judgments were marked "Satisfied."

Testimony was introduced tending to show that, the plaintiffs being about to press the two judgments, it was agreed that if Eber C. Allen would secure the amount thereof, as well as the amount of the account, by his own note, with his mother, the defendant, as his surety, indulgence would be extended to him for the time specified in the notes. Accordingly, Eber C. Allen signed the two notes, and took them off to procure his mother's signature, and in a few days thereafter delivered them to the plaintiffs properly signed by her. There was also evidence tending to show that defendant signed the notes upon the condition that they were not to be delivered to the plaintiffs until the two judgments above mentioned were canceled. Whether this condition was communicated to the plaintiffs when the notes were delivered was the subject of some conflict of testimony, Eber C. Allen testifying that it was, while the plaintiffs and their attorney, Mr. McCravy, who conducted the negotiations on behalf of the plaintiffs, testified to the contrary.

The jury having found a verdict for the plaintiffs, and judgment having been entered thereon, defendant appealed upon the several grounds set out in the record, which, however, make substantially but two questions, viz.: (1) whether the circuit judge erred in charging upon the facts; (2) whether there was error in instructing the jury that, even if the defendant did sign the notes upon the condition stated, which it is conceded is not complied with, she would nevertheless be liable thereon, unless the plaintiff had notice that she signed upon such conditions.

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fails to disclose any violation of the Constitution in charging upon the facts. On the contrary, it seems to us that every material question of fact was fairly left to the jury, without any expression or even intimation of opinion on the part of the circuit judge.

As to the second question, while it is not to be denied that there is some conflict in the cases elsewhere, we think the decided weight of authority, as well as argument, is in favor of the proposition that where one signs a negotiable note perfect on its face, as surety for another, upon the condition, known only to the principal, that it is not to be delivered to the payee until something else is done, the surety will be liable, even if such condition be not complied with, unless notice is brought home to the payee of such condition. This proposition does not rest alone upon the peculiar character of negotiable paper, but upon the well-settled principle that where one of two innocent persons must suffer the loss should fall upon him who put it in the power of a third person to cause such loss, as well as upon the principle that where an agent is clothed with apparent authority to do an act he may bind his principal, within the limits of that authority, whatever may have been his private instructions.

Here the principal debtor, after signing the notes, takes them to the defendant for the purpose of procuring her signature as his surety, in accordance with the agreement made by him with the plaintiffs; and, when he delivers them properly signed, surely the payees cannot be affected by any private instructions which the surety may have given to her principal, unless the same were communicated to the payees. The surety, by signing the notes complete in form, and placing them in the hands of her principal to be delivered to the payees, even though upon a condition, has placed it in the power of her principal to deceive the payees; and, if loss ensued, it must fall upon the one who contributed to that loss, rather than upon the innocent payees, who were left in ignorance of the conditions upon which the notes were signed. The principal debtor was the agent of the surety, and not of the creditor; and, if he has done an act for the doing of which he was clothed with apparent authority, even though it may have been done in violation of his private instructions, the person who invested him with such apparent authority must take the consequences. Any other view would, it seems to us, greatly impair, if it did not absolutely destroy, that confidence so necessary to the business interests of the community in negotiable paper; for it would render it necessary, before a negotiable note could be discounted by a bank, or by a private individual, that inquiry should be made of the indorser or surety as to whether they had signed their names upon conditions, and this, surely, could not be tolerated. That these views are well supported by authority may be seen by reference to the case of *Jordan v. Jordan*, 10 Lea, 124, where the subject is fully discussed, and the authorities cited; also *Marks v. First Nat. Bank*, 79 Ala. 550, as well as the cases

cited in 6 Am. & Eng. Cyclop. Law, 860, note 2.

It is urged, however, that the notes in this case, though negotiable in form, being still in the hands of the original payees, are not entitled to the protection which paper of that class would receive in the hands of a bona fide holder for value, to whom they had been transferred before maturity. But we do not think that this can affect the question. Of course, if these notes had been transferred before maturity to an innocent holder for value, no such question could arise; and therefore the question in the cases we have cited arose in cases where the original payees were still the holders. The plaintiffs here agreed to extend indulgence for a stipulated time if the debts were secured by the notes in question, and that was a valuable consideration, outside of the original debt, and the indulgence was extended for the time stipulated—in fact for a much longer time—upon the faith of defendant's suretyship; and now to deprive them of the consideration upon which such indulgence was extended on the ground that the principal debtor has violated his private instructions from his surety, of which the plaintiffs had no notice, would, it seems to us, operate as a fraud upon the plaintiffs.

Some of the cases, notably *Dair v. United States*, 88 U. S. 16 Wall. 1 [21 L. ed. 491], followed by *Butler v. United States*, 88 U. S. 21 Wall. 272 [22 L. ed. 614], have extended the principle above laid down to unnegotiable as well as negotiable instruments. While there is much force in the reasoning employed in those cases, we do not deem it necessary at this time to consider that question.

The cases of *Gourdin v. Read*, 8 Rich. 41, 230, and *Mills v. Williams*, 16 S. C. 593, relied on by appellant, we do not think in point, not simply because in those cases the instruments involved were unnegotiable, but because in neither case were they complete in form. Indeed, in the latter case the instrument, on its face, showed that the instrument was intended to be delivered to a person other than the plaintiff, and for a purpose different from that for which it was used; and in the former case, the bond being in blank, it was incumbent on the plaintiff to inquire into the authority of the surety to fill the blanks. The practical result of these two cases is simply this: that where the instrument in question is in such form as would naturally excite inquiry, then the person who takes it must be deemed to have notice of such facts as such inquiry, properly prosecuted, would disclose. In this case, however, it does not appear that there was anything in the form of the notes calculated to excite inquiry, and therefore we think there was no error on the part of the circuit judge in instructing the jury that, unless they found that the plaintiffs had notice of the private instructions which the defendant may have given to her agent, the principal debtor, as to the condition upon which the notes were to be delivered, the plaintiffs could not be affected thereby.

The judgment of this court is that *the judgment of the Circuit Court be affirmed.*

Simpson, Ch. J., and McGowan, J., concur.

7 L. R. A.

J. MOYER, *Resp't.*,

v.

J. N. DRUMMOND, *Appt.*

(.....S. C.....)

1. The relation of husband and wife or that of parent and child is not necessary in order to constitute a family.
2. A brother who lives with his sister in a house belonging to her, where they live together as one family, she being dependent upon him for means of living, is the head of a family, within the meaning of the Homestead Laws.
3. A homestead exemption is allowable in partnership property under the Constitution, as amended in 1880.

(McGowan, J., *dissent.*)

(February 23, 1890.)

A PPEAL by defendant from a judgment of the Common Pleas Circuit Court denying his claim to a homestead exemption of his interest in certain partnership property which plaintiff sought to reach by proceedings supplementary to an execution for the satisfaction of a judgment. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. Bomar & Simpson and S. M. Pilgram*, for appellant:

Defendant and his invalid sister, who lives with him and is supported by him, constitute a family.

Bradley v. Rodelsperger, 8 S. C. 227; *Rollings v. Evans*, 23 S. C. 827; *Thompson, Homesteads and Exemptions*, § 44; *Moore v. Parker*, 18 S. C. 488.

A father and an adult son (who is a married man separated from his wife) living together constitute a family.

Rollings v. Evans, supra.

So with an unmarried man supporting his mother and dependent brothers and sisters.

Marsh v. Lazenby, 41 Ga. 153; *Connaughton v. Sands*, 32 Wis. 887.

So with unmarried man supporting minor sisters.

Greenwood v. Maddox, 27 Ark. 638.

So an unmarried man supporting a widowed sister and her four small children, all of them living together, in a rented house, the sister keeping house for him.

Wade v. Jones, 20 Mo. 75. See also *Thompson, Homesteads and Exemptions*, § 59; *Bailey v. Comings*, 16 Nat. Bankr. Reg. 383; *Parsons v. Livingston*, 11 Iowa, 104; *Whalen v. Cadman*, 11 Iowa, 326.

It was error to hold that the defendant was not entitled to his exemption in this property because it was partnership property.

Nance v. Hill, 26 S. C. 227; *Mellichamp v. Mellichamp*, 28 S. C. 126.

NOTE.—Family defined.

The primary meaning of the word "family" is "children." It must be so construed unless the context shows that it was used in a different sense. *Phillips v. Ferguson* (Va.) 1 I. R. 87.

In the popular acceptance of the word, it includes parents, children and servants, domiciled in the same house and under one head. *Cheshire v. Burlington*, 31 Conn. 329.

As to the head of the family, see *note* to *Miller v. Finegan* (Fla.) 6 L. R. A. 813.

in a household and kept by the sister, do not constitute a family.

Whalen v. Cailman, 11 Iowa, 226; *Dendy v. Gamble*, 64 Ga. 528; *Moore v. Parker*, 18 S. C. 486; *Garaty v. Du Rose*, 5 S. C. 493.

Appellant's sister could not, as his family, claim the exempt property in case of his death. Gen. Stat. § 1996.

The object of the protection afforded by the homestead clause of the Constitution was the family, the head of the family standing as its representative.

Dorton v. Bradham, 21 S. C. 381.

McIver, J., delivered the opinion of the court:

This was a proceeding to subject the interest of defendant in a certain partnership, of which he was a member, to the payment of a debt due by him to the plaintiff, under proceedings supplementary to an execution. Defendant claimed that his interest in said partnership did not amount to the sum of \$500, and was therefore exempt under the Homestead Laws of the State. The circuit judge held that the defendant was not entitled to the exemption claimed for two reasons: (1) because he was not the head of a family; (2) because the homestead exemption "is not allowable in partnership property." From this judgment defendant appeals, imputing error to the circuit judge in both of said rulings.

The question whether one is the "head of a family," in the sense of that phrase as used in the Homestead Law, is a question of law, to be determined from a consideration of the facts in a given case. The question is, What is the legal conclusion to be drawn from the facts presented? To determine this question it is necessary to consider, first, What is meant by the phrase "head of a family," as used in the Homestead Law? and then to inquire whether the facts in a given case bring the applicant within the true meaning of that phrase. The accepted definition of the word "family," as given by lexicographers, and approved in many cases, seems to be: "The collective body of persons who live in one house, under one head or manager." The number of persons thus living together is not at all important, except that there must be more than one; as it is quite certain that two persons may constitute a family, *e. g.*, husband and wife, father and child. It is also well settled that it is not necessary that the relation of husband and wife nor that of parent and child should exist in order to constitute a family. *Brasley v. Rodelsperger*, 3 S. C. 226; *Garaty v. Du Rose*, 5 S. C. 493; *Moore v. Parker*, 18 S. C. 486; *Rollings v. Evans*, 28 S. C. 316.

But, where these relations are absent, we have no case in this State, so far as we are informed, which decides distinctly what other relations existing between persons living together will be sufficient to constitute a family; but, as was said by Simpson, *Ch. J.*, in *Rollings v. Evans*, *supra*, the term "family" is not to be taken in a restricted sense, but "in its ordinary sense, which includes persons living in one house, and under one head or manager;" and, as was said by Moses, *Ch. J.*, in *Garaty v. Du*

out to those whose relations to the head demand, on the one hand, support and protection, and, on the other, require a contribution, by the aid of their labor, to the maintenance and conduct of the general establishment to which they belong. . . . It would not follow that, although the head of a family might not be a parent, the one substituted as the head would lose the favor of the provision; for it would extend to one having under his roof those so connected with him by ties of residence and association as to become part and parcel of his household, changing their domicile with him, and having no residence but that which they enjoy under his favor." We do not think that the former chief justice in using the words "his roof" meant to imply, as is urged by counsel for respondent, that one of the conditions necessary was that the person claiming to be the head of a family should be the owner of the house in which the collective body of persons alleged to constitute the family resided; for, as matter of fact, it is well known that many persons who are undisputed heads of families reside in houses which they do not own, but which are owned by their wives. Nor do we think that it is necessary that there should be any legal obligation on the part of the one claiming to be the head of a family to support the members thereof, but a moral duty, arising from ties of blood, or, possibly, other similar relations, will be sufficient. As is said in 7 Am. & Eug. Cyclop. Law, 804, note 2: "The test of a legal duty has been rarely applied, and unquestionably a moral duty to support the members of a family is sufficient to constitute one its head,"—citing Thompson, Homesteads and Exemptions, § 45.

Accordingly we find that it has been held in *Arnold v. Waltz*, 58 Iowa, 706, that an unmarried woman keeping house, and there bringing up two children of her deceased sister, is the head of a family, though she has taken no steps to adopt said children; under the Statute of that State; in *Wade v. Jones*, 20 Mo. 75, that a brother living with his widowed sister and her four small children, and providing for them, is the head of a family; in *Bailey v. Comings*, 16 Nat. Bankr. Reg. 382, that a bachelor who supports a widowed sister, who keeps house for him, may be the head of a family.

We are inclined to agree with what is said by Anderson, *J.*, in *Calhoun v. Williams*, 83 Gratt. 18: "The whole theory and policy of the Homestead (Law) is founded upon the principle that there is a natural and moral obligation on the head of a family to provide for the support of his wife and children, and other persons dependent on him, towards whom he stands almost *in loco parentis*, which is, if not paramount, equal to his obligation to pay his debts. . . . The family may consist of a wife and children, or of other persons, who may stand in a state of dependence in the family relation; or it may consist of persons standing in either of these relations to the head of the family, whether the father or mother, or a brother or a sister, or other relation, is the head; but they must be persons who are dependent in some measure on the head for support, and who have an interest in his holding

his property, and would be prejudiced by its seizure and sale under execution, or other process, and who would be benefited by its exemption."

Testing this case by these principles, we think it clear that the defendant must be regarded as the head of a family, and as such entitled to the exemption claimed. The undisputed testimony of the defendant is: "My sister and myself live together as one family. Have so lived for eight years. She is sickly. She has nothing now but the house and lot. She has no other close relatives except myself. I support my sister, and run the establishment. Have one servant hired. My sister is dependent upon me for support, and I support her as a part of my family." Another witness says: "Drummond and his sister live together. He supports her."

It seems to us clear that this testimony is quite sufficient to show that these two persons, bearing the close relation of brother and sister, live together as one family; that she is dependent upon him for a support, which he provides for; and that he, as the head of the household, manages and controls, hires the necessary servants, and provides for the table, etc.,—she, doubtless, keeping house for him, though that fact is not explicitly stated. It is true that the sister owns the house in which they live, but this manifestly would not afford

that invalid female the barest support, for the testimony is that it would not rent for more than \$25 a year, and she is therefore clearly dependent upon her brother for the means of living.

The only other inquiry is whether there was error in holding that a homestead exemption is not allowable in partnership property. We see nothing in the Constitution or statutes which limits this exemption to personal property held in any particular manner. On the contrary the language of the Constitution since the Amendment of 1890 is very general in its character, and must be regarded as embracing any species of personal property, whether held in severalty or in common, or in any other manner. This is in accordance with the principles decided in *Nanes v. Hill*, 26 S. C. 227, and *Mellichamp v. Mellichamp*, 28 S. C. 125, where the right to a homestead in property held in common was recognized. It is true that there may be, as in the cases cited, a practical difficulty in assessing or setting apart to a claimant of such an exemption in partnership property the particular property exempt; but that difficulty does not present itself in this case.

The judgment of this court is that the judgment of the Circuit Court be reversed.

Simpson, Ch. J., concurs; McGowan, J., dissents.

PENNSYLVANIA SUPREME COURT.

James WHITAKER *et al.*

Alexander T. RICHARDS *et al.*, Appts.

(....Pa....)

The fact that a surety on a bond signed it in the expectation that his partner would also sign it as surety, which, for some reason, he failed to do, will not relieve the one who signed from liability.

(April 7, 1890.)

A PPEAL by defendants from a judgment of the Court of Common Pleas, No. 4, of Philadelphia County in favor of plaintiffs in an action to enforce an alleged obligation upon a contractor's bond. *Affirmed.*

Richards had entered into a contract with plaintiffs to erect for them a certain manufactory, and they required of him a bond to insure the faithful performance of the contract and the delivery of the building free from liens.

The bond began as follows:

"Know all men by these presents, That Alexander T. Richards, contractor, as principal, and R. J. Watson and F. C. Gillingham, trading as Watson & Gillingham, lumber merchants, as sureties, all of the City of Philadelphia, State of Pennsylvania, are held and firmly bound unto James Whitaker and Theodore Whitaker, trading as James Whitaker & Bro.,"

etc.
It was signed as follows:

"Alexander T. Richards [Seal].
"R. J. Watson [Seal].
[Seal]."

7 L. R. A.

After the building was delivered some mechanic's liens were enforced against it, and this action was brought upon the bond to recover the amount paid to discharge them.

At the trial the bond was offered in evidence by plaintiffs. It was objected to on the ground that defendants had denied its execution and also that the bond seeks to bind the defendant Watson. It was admitted and exception taken.

Watson defended on the ground that there was an agreement that if he would go on the bond one Michael Magee would also go on it, and that he executed the bond on the faith of this agreement, and as it was never fulfilled he was discharged.

He also defended upon the ground that the bond in the body thereof purported to be executed by Gillingham as well as by himself, and that until Gillingham signed it Watson's signature was not binding.

The court below rejected these defenses and directed the jury to return a verdict for plaintiffs, and defendants took this appeal.

Further facts appear in the opinion.

Messrs. G. Harry Davis and John G. Johnson for appellants.

Mr. Josiah R. Adams for appellees.

Paxson, Ch. J., delivered the opinion of the court:

The weak spot set up in the defense below is to be found in the fact that there was no evidence to show that when Watson signed the bond in controversy, he did so upon the condition that he was not to be bound unless his partner, Gillingham, also signed it. The de-

defendants contended that the bond was intended to bind not only the firm of Watson & Gillingham, of which firm Watson was a member, but that it was contemplated that Mr. Magee should sign as a co-surety. The bond sets forth the name of Alexander T. Richards, as principal, and of "R. J. Watson and F. C. Gillingham, trading as Watson & Gillingham," as sureties; but there is no mention of Magee's name, and so far as his alleged omission to sign is concerned, the defense, under all the authorities, is without merit.

We have no occasion to go outside of our own State for authority upon this question.

Sharp v. United States, 4 Watts, 21, was the case of a bond given in pursuance of an Act of Congress which required that it should be executed by two or more sureties. It was signed by one surety only. He had a right to suppose the bond would be executed in accordance with the Act of Congress, and it was held that there could be no recovery against him alone.

In *Fertig v. Bucher*, 8 Pa. 808, the party who executed the bond expressly stipulated that it should not be delivered until twelve names had been obtained to it, and the agent of the obligee so promised; it was held that the bond remained in the hands of the agent as an escrow, and until the condition was performed there could not be a valid delivery of it.

In *Keyser v. Keen*, 17 Pa. 827, the bond was prepared for six persons to sign, but was executed by five only. It was found in the possession of the obligee, and it was held that it was not to be implied that it was incomplete and not binding on those who executed it.

Grim v. Jackson Twp. School Directors, 51 Pa. 219, was the case of a joint and several bond prepared for signatures by four persons named, but signed by three only. The absence of the signature of the fourth was held not to be a defense against payment by the three.

To the same point is *Simpson v. Bovard*, 74 Pa. 351.

Warfel v. Frantz, 76 Pa. 88, and *Keener v. Crapo*, 81* Pa. 166, are upon all fours with *Fertig v. Bucher*, *supra*. There was an express stipulation that the bond was not to be delivered until all had signed.

The evidence shows that it was the intention of Watson to bind his firm as sureties when he went to execute the bond. He expected to sign the firm name for that purpose, but was told that the members of the firm must sign their individual names. As the bond was under seal his signature would have bound himself, but not his firm. He signed his own name with the expectation that his partner would also sign. For some reason he omitted to do so. Does the fact that Watson expected his partner to execute the bond, and that the firm should thus be held, relieve him from liability? We think not. He made no such stipulation or condition at the time. He might have done so, and thus have protected himself under the authority of *Fertig v. Bucher* and the other cases cited.

When a man signs the firm name to an instrument under seal he always expects to bind his firm. But he does not do so. He binds only himself. The fact that he intended and expected that his partners should be bound

equally with himself has never been held to relieve him of individual liability. In what respect does this case differ in principle? And is not Watson in the precise condition as if he had signed the firm name to this bond, intending to bind his firm, yet only binding himself? The argument of the learned counsel for the plaintiffs in error while ingenious and plausible, has failed to satisfy us that the court below committed error either in admitting the bond in evidence or in answer to points.

Judgment affirmed.

Sally N. PEPPER, Surviving Trustee, etc., of
Henry Pepper, Deceased,

v.
John CAIRNS, *Plff. in Err.*

(.....Pa.....)

1. On the embezzlement of the money received on a mortgage which was left after paying off prior incumbrances, by a person employed by the mortgagor to procure the money and pay off such incumbrances, and who was also the agent of the lender for the purpose of examining the property, title, etc., although the latter retained his own judgment as to the investment, the mortgagor, who has left the business to the agent without even an inquiry for months, must bear the loss.

2. Agency cannot be proved by the declarations of the alleged agent.

(March 10, 1890.)

ERROR to the Court of Common Pleas, No. 1, for Philadelphia County to review a judgment in favor of plaintiff in an action of *scire facias* sur mortgage. *Affirmed.*

Defendant defended upon the ground that he had never received the money alleged to have been advanced upon the mortgage. He claimed that he applied to plaintiff's agent, John Ruhl, for a loan which he was to secure by a mortgage; that he signed but did not acknowledge the mortgage and gave it to Ruhl for the procurement of the money; that Ruhl added an acknowledgment, procured the money, placed the mortgage on record, and failed to account for the proceeds. Plaintiff denied that Ruhl was her agent, and alleged that in procuring the loan Ruhl acted solely as the agent of defendant.

The court below directed a verdict for plaintiff, and defendant took this writ.

Further facts appear in the opinion.

Mr. M. J. O'Callaghan, for plaintiff in error:

Some competent evidence tending to prove the fact of agency having been presented, it became a question of fact for the jury, and it was error to withdraw the case from them.

Sidney School Furniture Co. v. Warsaw School Dist. 122 Pa. 494; *Howard Exp. Co. v. Wile*, 64 Pa. 201; *Jordan v. Stewart*, 23 Pa. 247.

Where an agent's acts are admissible his accompanying declarations explanatory of the acts are also admissible in evidence, and it is not necessary that the agent himself be called to prove such declarations.

Sidney School Furniture Co. v. Warsaw School Dist. *supra*; *Central Pa. Teleph. & S. Co. v. Thompson*, 2 Cent. Rep. 544, 112 Pa. 118.

It was competent for the defendant to prove conversations with Ruhl, showing the fraud that was practiced upon him, because the evidence tended to prove that Ruhl was the agent of the plaintiff.

Cover v. Manaway, 6 Cent. Rep. 711, 115 Pa. 888; *Lewars v. Weaver*, 121 Pa. 268; *Central Pa. Teleph. & S. Co. v. Thompson*, *supra*.

There was no evidence that Ruhl, to whose individual order the plaintiff drew his check for \$6,500, was the agent of the defendant. Even if he was his agent to draw papers or to ask if the plaintiff would loan the money on the property, this fact would not authorize the plaintiff to pay the principal to him.

See 2 Parsons, Cont. § 615; 2 Addison, Cont. § 542; *Taylor v. Vingert*, 33 Leg. Int. 238; *Seiple v. Irwin*, 30 Pa. 513.

A scrivener who lends another's money on a mortgage, and who holds the mortgage deeds, has no implied authority to receive the principal.

Addison, Cont. § 342; *Wilkinson v. Candlish*, 5 Exch. 91; *Kent v. Thomas*, 1 Hurlst. & N. 473.

Where a person acts as the agent of two parties, money paid by one will not be presumed to be paid on account of the other unless a transfer is made to that account by the agent, or he so informs the party to whose account the payment is to be credited.

Cavanaugh v. Buehler, 12 Cent. Rep. 733, 120 Pa. 441.

Where one of two equally innocent persons must suffer by the default of some third person, that one should bear the loss who put it in the power of the defaulter to inflict the injury.

Green v. Rick, 2 L. R. A. 48, 121 Pa. 130.

Messrs. S. E. Megargee and J. M. Pile, for defendant in error:

An agent's declarations *in pais* are not proof of his own authority.

Jordan v. Stewart, 23 Pa. 244.

To the same effect are—

Grim v. Bonnell, 78 Pa. 152; *Whiting v. Lake*, 91 Pa. 349.

That a notary public prepared a mortgage and took the acknowledgment and afterward delivered it to the mortgagee does not constitute the notary the agent of the mortgagee.

Lewars v. Weaver, 121 Pa. 268; *West v. Jones*, 1 Sim. N. S. 208; *Adsett v. Hives*, 33 Beav. 52.

Mitchell, J., delivered the opinion of the court:

This case belongs to the unfortunate class in which one of two innocent parties must suffer from the fraud of a third, and it is also an illustration of the evils of the practice, so constantly reprobated by courts, but apparently so inveterate in business, of the same person being employed as agent by separate parties whose interests are, or at any moment may become, adverse. The legal principles by which such controversies are to be settled are perfectly clear, but require much care in their application.

The essential facts in this case are not really in dispute. The appellant Cairns desiring to borrow money upon mortgage of his houses, went to Ruhl for the purpose of getting it. Ruhl, who was a conveyancer and real estate

agent, wrote to Sergeant, the trustee of several estates, from whom Ruhl had got money on previous occasions, naming the amount wanted, describing the property, its improvements, assessed value, etc., and asking "Shall I take it, and for whose account?" Just what answer was made to this letter does not appear, except briefly in the testimony of Sergeant that he "took the mortgage for the Pepper estate," and by the fact that Sergeant drew his check as trustee of the Pepper estate to the order of Ruhl for the amount required, \$6,500, and received from Ruhl the mortgage in suit. Ruhl used \$3,500 of the money properly in the extinguishment of a prior mortgage on the property, but embezzled the rest, and the question now to be decided is upon which party shall the loss fall. Ruhl unquestionably was to some extent the agent of both parties, and we are required to look closely into the facts to discover in which capacity he did the fraudulent act. Clearly at the inception of the transaction he was the agent of Cairns. It was an application for money, and made on behalf of Cairns. But more than this, what was to be done with the money when obtained, and by whom? Cairns himself says the prior incumbrances were to be paid off and satisfied, and clearly again this was to be done by Ruhl, for that was in the line of his business as a conveyancer, and Cairns so left it to him, without even an inquiry for a period at least of months.

On the other hand for what purpose was Ruhl the agent of Sergeant? Certainly for the examination of the property, the title, etc. If the property should prove an inadequate security, or if prior judgments or other incumbrances should cut out this mortgage, then the estate would have to bear the loss, for they took the risk of Ruhl's attention to this part of the transaction. But is there any evidence of Ruhl's further agency for the plaintiff? This was the pinch of the case, and on this the learned judge below ruled it. The evidence is very briefly reported in the bill of exceptions, but the most careful examination of it fails to show that Ruhl's agency for the plaintiff extended beyond his duties as a conveyancer in the examination of the titles, etc. The defendant endeavored strenuously to show that Ruhl was the general agent of Sergeant and had handled the money of several estates as such, but the only competent evidence on the subject was the testimony of Sergeant, and that flatly denied the agency. "Ruhl," he says, "never represented me, or the estate, in investing money. . . . If Ruhl had a mortgage which he thought was a desirable investment he would submit to me a memorandum, . . . and I would examine and approve or disapprove of it." It is clear that Sergeant transacted the business of the estate himself, retained his own judgment as to each investment, and left only the details of conveying to Ruhl. His testimony shows no agency beyond this point, and there is no other evidence in the case. Nothing is better settled than that agency cannot be proved by the declarations of the alleged agent, and the offers in the first and second assignments of error amount to no more than such declarations.

It is urged that Sergeant's act in drawing his check to the order of Ruhl, and not to Cairns,

of perpetuating the fraud should bear the loss. Sergeant or his principal should be responsible for Ruhl's act. But this is a misapplication of the principle. The means of committing the fraud may as well be said to be the mortgage, executed by Cairns and left with Ruhl, and by him delivered in exchange for the check. As already seen Ruhl was Cairns' agent in the application for the money, and was to continue his agent in the use to be made of it. When he brought the mortgage fully executed to Sergeant, the latter was justified in paying for it on delivery. He might have paid for it in cash, and his payment by check to Ruhl's order was not different in effect.

The case turned upon the question of agency, which the double capacity of Ruhl required to be defined with extreme care. The whole evidence not only fails to show that Ruhl was Sergeant's agent in handling the money, but on the contrary shows clearly that he received it as agent for Cairns, and in that capacity embezzled it. The learned judge was therefore right in directing a verdict for the plaintiff.

Judgment affirmed.

Sophronia A. PIERCE *et al.*, Admsrs., etc.,
of Horatio S. Pierce, Deceased,

v.

John CLELAND *et al.*, *Appts.*

(.....Pa.....)

1. The use of stairways in a building erected by several owners of land as a single structure, upon a single plan and under a single contract, no matter whether the land was then partitioned or not, cannot be denied by the owners of that part which includes the stairways to the owner of another part, the upper floors of which can be reached in no other way.
2. A permission or license, express or implied, to use the property of another in a particular manner, or for a particular purpose, on the faith of which one has expended money, is an executed or irrevocable license which cannot be revoked, where he cannot be restored to his original position.
3. Purchasers of real estate are chargeable with notice of an evident servitude existing thereon.

(March 10, 1890.)

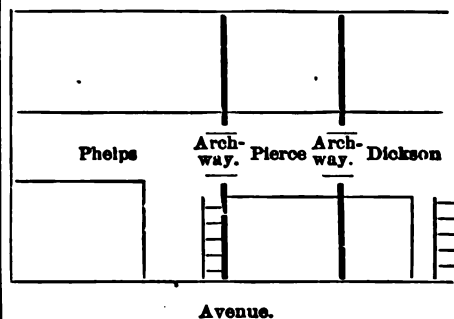
APPEAL by defendants from a decree of the Court of Common Pleas for Lackawanna County in favor of plaintiffs in a suit to perpetually enjoin defendants from interfering with plaintiffs' use of the entrance, stairs and corridor of the "Library Building," so called, in the City of Scranton. *Affirmed.*

In 1878, H. B. Phelps, H. S. Pierce and Thomas Dickson were tenants in common of certain land in the City of Scranton, Phelps owning an undivided one half and Pierce and Dickson each an undivided one quarter of the undivided property.

NOTE.—License distinguished from easement. See *notes to Nowlin v. Whipple* (Ind.) 6 L. R. A. 159; *Kyle v. Texas & N. O. R. Co.* (Tex.) 4 L. R. A. 276. 7 L. R. A.

many selected plans which would satisfactorily accomplish the object, and the block was erected in accordance therewith.

Before work was fairly begun on the building the parties, by deed of partition, conveyed to each other in severalty a portion of the property and a party-wall was placed upon the lines which divided the property of the respective owners, as follows:



A corridor extended through the entire width of the building, on its second floor, and archways were placed in the party walls, and the stairways leading to such floor were placed entirely upon the portions of the land which had been allotted to Phelps and Dickson respectively.

Defendants acquired Phelps' title and proceeded to close the archway leading from Pierce's property to the stairway on their premises, whereupon this suit was brought to enjoin them from doing so.

The case was referred to a master who found that the facts established an irrevocable license by Phelps to Pierce to use the stairways and corridors, and recommended that the preliminary injunction be made perpetual. Upon hearing of exceptions to this report, it was confirmed and a decree entered in accordance with its recommendations.

The opinion of the court below was as follows, and was delivered by ARCHBALD, P. J.:

"To the judges who heard this case it seems to be a very plain one. The clear and undisputed evidence is that the building in question, covering the two lots of land originally in the joint ownership of Mr. Phelps, Mr. Pierce and Mr. Dickson, was built by these three gentlemen upon a common and single plan, and as a single structure. It matters not, so far as we view the case, whether this plan was adopted before or after the deed of partition, or whether or not there was any express agreement with regard to the common use of the stairways. The building was erected by the owners of the land as a whole, each being liable for a proportionate part according to the extent of his ownership. There was but one plan, one set of specifications, one builder and one contract to build; and these were all treated as concerning one single structure, considered, for the time being, as a whole. By the common design of this building, the only access provided for the second and third stories of the Pierce part was

by means of the stairways upon the Phelps and Dickson parts, and through the common corridors upon the upper floors. Originally, one of these stairways was to have been half upon the Phelps, and half upon the Pierce, part; but this was changed, at the instance of Mr. Phelps, for the purpose of saving some of the common expense of building, and was concurred in by the others. Mr. Pierce joined in the execution of this common plan, and bore his share of the expense of constructing the building in this way, upon the faith of it. After this the owners of the adjoining parts of the building could not cut off the access provided by the stairways to this part of the building. The master has found that there was an express agreement between Mr. Phelps and Mr. Pierce with regard to the use of the stairways now in question. There is sufficient evidence to sustain this in the testimony of the architect, Mr. Perry. If this be so, Mr. Phelps could not subsequently repudiate or revoke it, after Mr. Pierce, in reliance upon it, had consented to the erection of the building in its present form. So far as it is necessary to the plaintiff's case, we affirm this finding of the master. But, as said at the outset, we do not consider the existence of an express contract essential. The circumstances to which we have referred of themselves clearly raise an equitable estoppel in favor of the one party and against the other. There is no doubt but that the present arrangement of the building was recognized at the time to be for the mutual advantage of all parties concerned; and, so far as it is of such mutual advantage, this advantage cannot be denied by either party to the other. Mr. Pierce, for instance, could not cut off access through the corridors on the second and third floors from the Phelps to the Dickson part, nor *vice versa*. For the same reason the owners of the Phelps part cannot interfere with the free and common use by the owners and tenants of the Pierce part of the corridors and stairways which happen to be upon their side of the property. The building being cast by common consent in its present permanent form, neither party can revoke the arrangement, upon the faith of which the money of the other has been expended. Each and every part is affected with what, in its nature, is a permanent servitude, so long as the building itself stands. It cannot be changed from its present form, nor the right of common access now provided for be interfered with, at the will of either party, but only by the common consent of all.

"A right of this character, while not strictly an easement, is in the nature of one. It is really a permission or license, express or implied, to use the property of another in a particular manner, or for a particular purpose. Where this permission has led the party to whom it has been given to treat his own property in a way in which he would not otherwise have treated it, as by the erection or construction of permanent improvements thereon, it cannot be recalled to his detriment. Having expended his money upon the faith of it, and not being able to be restored to his original position, equity will not allow the permission to be revoked, in breach of such faith. This has given rise to the doctrine of executed or irrevocable licenses.

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This doctrine obtained an early foothold in Pennsylvania, and has been consistently adhered to ever since. It first appears in *Le Fevre v. Le Fevre*, 4 Serg. & R. 241, and was followed in *Rerick v. Kern*, 14 Serg. & R. 267; *McKellip v. McIlhenny*, 4 Watts, 317 and *Swartz v. Swartz*, 4 Pa. 858,—being possibly carried to its extreme in the latter case.

"The force of these decisions, and their effect upon the present case, have not been met by the learned counsel for the defendants. It may, indeed, be as he suggests, that the doctrine of irrevocable license is principally illustrated in this State by cases which concern water-rights; yet it by no means follows that it is limited to these, or that there can be no case of irrevocable license except where it concerns such a right. There is nothing peculiar to water-rights which confines the doctrine to them. If it were necessary to prove this, an examination of two or three of the later cases would conclusively establish it.

"Thus, in *Ebner v. Stichter*, 19 Pa. 19, a right of way over an alley was sustained as an irrevocable license, where one party had made alterations and improvements on his adjoining property upon the faith of a mutual understanding as to the use of such alley with the adjoining owner.

"In *Cumberland Valley R. Co. v. McLanahan*, 59 Pa. 23, part of a warehouse had been built by the railroad company upon a corner of land which subsequently vested in the plaintiff. In consideration of this circumstance, the company had conceded a right of way over its own land to the owner of the property. The deed which conveyed to the plaintiff the land in dispute, upon which the corner of the warehouse stood, recited the grant of this right of way as the consideration for having built over upon the adjoining land. The plaintiff, after the conveyance to him, made use of this right of way. It was said, with respect to this, by Sharswood, J.: 'If the plaintiff below, with full knowledge of such grant having been made, whether by George Chambers alone, or in conjunction with the executors of McCulloch, availed himself of and enjoyed the right of way which was the consideration of the grant, it was evidence which ought to have been submitted to the jury of a ratification by him of the license, on the faith of which valuable improvements had been made by the grantees, and therefore not within the Statute of Frauds and Irrevocable; and subsequent ratification by parol must be held to be equivalent to a precedent authority.'

"In *Thompson v. McElarnay*, 82 Pa. 174, the license claimed was the right to cast sawdust into a stream upon which the plaintiff was a lower riparian owner. It was shown that the defendant, Thompson, had been induced to put his mill where it was, and in a different place from what he had intended, at the suggestion of one Beckwith, under whom plaintiff claimed, upon the express agreement that he was to have the privilege of casting his sawdust into the stream. There were other considerations which entered into the agreement, which had been fully complied with on the part of the defendant. In discussing the application of the doctrine of irrevocable license to the case in hand, it is said by Woodward, J.: 'The ground was

cases quoted could therefore have no application. It was said that "Thompson proposed to build the mill at all events, and did build on his own land. The mill could be enjoyed as well, and be of as much use to him, at one place as at the other." That is hardly so, for the change caused the very embarrassment in disposing of the mill-waste against which it was the object of the agreement to provide. Suppose a man, having selected a site for a building, changes it, and builds his house adjoining that of a neighbor, at the latter's invitation. In doing this he closes up the windows on one side of the neighbor's house. Is it possible that at the neighbor's death his heirs or alienee may enforce the destruction of the builder's house by setting up the doctrine of ancient lights? Or suppose the offered use of a right of way were the motive of the change. Could the neighbor's heirs or alienee oust the builder from the enjoyment of the right because he possessed, by the agreement, only an easement resting in parol grant?

"We have here a supposititious case, assumed by the court as clearly illustrating the doctrine of irrevocable license, which is on all fours with the case now in hand,—a right of way granted by parol over one man's land to an adjoining owner, who builds on his own land in a different way, that is to say, in a different place, from what he would have built, except for the promise relied upon. The unquestionable right of the latter to the enjoyment of the privilege so acquired is thus advanced to sustain the claim of the defendant to an irrevocable license in that case. The positions are here exactly reversed from that suggested by defendant's counsel. Instead of the doctrine of irrevocable license not being extended to other than cases of water-rights, we have it illustrated by the supposed case of a right of way, and from that carried over and applied to a privilege concerning water. These three cases, therefore, which I have discussed, confirm to its full extent the principle upon which the present case must be decided. There is no way of escaping their effect, or of denying their applicability. They entirely sustain the conclusions of the master, and rule the case in the plaintiff's favor. The defendants are furthermore affected with both actual and constructive notice of the right to which the plaintiff lays claim. Not only were they directly notified of its existence, but they could not use their eyes without having it plainly called to their attention. It was an evident servitude existing over the one building, in favor of the other, and arising out of the permanent form in which the building had been constructed. They were thus put upon such inquiry as would have elucidated the facts upon which the plaintiff now justly relies, and are bound thereby."

From that judgment defendants took this appeal.

**Messrs. James H. Torrey, W. H. Jes-
sup and C. Smith,** for appellants:

The fact that the agreement as to the use of the stairways was one of the considerations
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Johnson v. Skillman, 29 Minn. 95.

To give rise to an estoppel, it is essential that a person is misled to his injury, and even this is not sufficient to support an equitable estoppel. To do this the injury must be of such a character that it cannot be compensated in damages.

Luft v. McCauley, 53 Pa. 206.

A person who has merely omitted to do a thing can be placed *in statu quo*. In this case all that is needed is to supply the omission, put the stairway in. And while the Phelps estate may have to answer in damages for the cost of so doing, neither Phelps nor his grantees are estopped.

See *Jackson & S. Co. v. Philadelphia, W. & B. R. Co.* 11 Am. L. Reg. N. S. 380; *Wolfe v. Frost*, 4 Sandf. Ch. 72.

In the case in hand the contract is not clearly proved, either as regards its existence, its terms, its subject matter, its consideration or its duration. The evidence nowhere shows the expenditure of a single dollar on the faith of the contract. In case the contract was not enforced the plaintiff would not be injured, or if injured such injury could be adequately compensated in damages. These facts take the case out of *Le Fevre v. Le Fevre*, 4 Serg. & R. 241, and that class of cases.

See *Heyl v. Philadelphia, W. & B. R. Co.* 51 Pa. 470; *Jackson & S. Co. v. Philadelphia, W. & B. R. Co. supra*; *Mott v. Clark*, 9 Pa. 404.

There was no possession by Pierce amounting to constructive notice, and nothing which made inquiry a duty.

Boggs v. Varner, 6 Watts & S. 474; *Meehan v. Williams*, 48 Pa. 238; *Wade, Notice*, § 288, 290; *Scott v. Gallagher*, 14 Serg. & R. 833.

Messrs. Edward N. Willard and Everett Warren, for appellees:

The facts in this case show an irrevocable license granted to H. S. Pierce, his heirs and assigns, in and to the use of the stairways and corridors in question.

Washb. Easem. 4th ed. p. 29; *Goddard*, Easem. p. 90; *Herman*, Estoppel, § 1140. See note on License, 2 Am. Lead. Cas. 5th ed. p. 569; *Le Fevre v. Le Fevre*, 4 Serg. & R. 241; *Berick v. Kern*, 14 Serg. & R. 287; *Swartz v. Swartz*, 4 Pa. 353; *Campbell v. McCoy*, 21 Pa. 263; *McKelip v. McIlhenny*, 4 Watts, 317; *Lacy v. Arnett*, 33 Pa. 169; *Cumberland Valley R. Co. v. Mo-Lanahan*, 59 Pa. 24; *Thompson v. McElarney*, 83 Pa. 174; 1 Story, Eq. p. 329; *Lewis v. Carstairs*, 6 Whart. 193; *House v. Montgomery*, 1 West. Rep. 709, 19 Mo. App. 170; *Snowden v. Wilas*, 19 Ind. 14; *Lane v. Miller*, 27 Ind. 534; *Rogers v. Coz*, 96 Ind. 157; *Buchanan v. Longansport*, C. & S. W. R. Co. 71 Ind. 285; *East Jersey Iron Co. v. Wright*, 83 N. J. Eq. 248; *Meek v. Breckenridge*, 29 Ohio St. 648; *Miller v. Brown*, 83 Ohio St. 547; *Russell v. Hubbard*, 59 Ill. 335.

When a license is so far executed that the revocation of it would be a fraud, an equitable right will arise in the nature of an easement which may be transferred to third persons, and will be binding on everyone claiming through or under the licensor with notice.

Cook v. Pridgen, 45 Ga. 381; *Foster v. Brown-*

ing, 4 R. I. 47; *Dempsey v. Kipp*, 61 N. Y. 462; *Huttemeier v. Albro*, 18 N. Y. 48; *Harwood v. Benton*, 82 Vt. 724.

Per Curiam:

This case has been so well discussed by the

learned judge of the court below that we affirm the decree for the reasons given by him.

Decree affirmed, and the appeal dismissed at the costs of the appellants.

Mitchell, Ch. J., and Williams, J., absent.

NEW YORK COURT OF APPEALS (2d Div.).

Trustees, etc., of the TOWN OF BROOKHAVEN, *Appls.*,

v.

Egbert T. SMITH *et al.*, *Respts.*

(118 N. Y. 634.)

1. Where the inhabitants of a town voted and agreed that a person might purchase from the Indians, and peaceably enjoy, certain tracts of land, on his acquainting them of an intent to purchase them, and requiring to know whether the town laid any claim thereto or not, and in the following year, when a patent obtained by him was publicly read, voted and agreed to acquiesce in the limits and bounds of his patent, and the privileges therein contained, the town is estopped from claiming many years afterward that it had title to the lands purchased by him when he obtained this patent.

2. A false representation or concealment of material facts, or a design to mislead, is not necessary to constitute an equitable estoppel by an act which was voluntary and calculated to mislead, and actually has misled another acting in good faith.

3. If one is induced to purchase land by the acts or representations of another designed to influence his conduct, and creating a reasonable belief on his part, under which he acts, that he is thereby acquiring a valid title to the same, the party who thus has influenced him is estopped from setting up his own title, existing at the time of the purchase, against that of the purchaser.

(March 11, 1890.)

APPEAL by plaintiffs from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of the Suffolk Circuit entered upon a verdict directed for defendants in an action to recover possession of certain land covered by water. *Affirmed.*

Statement by *Brown, J.*:

This action is in the nature of ejectment to recover land under water of a part of Great South Bay of Long Island.

The plaintiffs' title rests upon two colonial charters granted to the inhabitants and freeholders of the Town of Brookhaven.

NORM.—Equitable estoppel.

Equitable estoppel consists in holding for truth a representation acted upon, when the person making it seeks to deny its truth and to deprive the other party of the benefit obtained. *Crans' App.* 8 Cent. Rep. 178, 177, 116 Pa. 232.

It is founded on deceit, and has its justification in the duty of courts to prevent the accomplishment of fraud. The same rule applies whether the application of the doctrine be sought in a court of chancery or of law. *Laub v. Trowbridge*, 71 Iowa, 206; *Milliken v. Dockray*, 5 New Eng. Rep. 861, 80 Me. 82.

Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct induced the other party to change his position, so that he will be peculiarly prejudiced. *Swain v. Seamans*, 76 U. S. 9 Wall. 254 (19 L. ed. 554).

So when a person encourages or induces another to buy an estate, he is estopped from thereafter setting up any prior claim he may have had. *Batcliff v. Bellfonte Iron Works Co.* 10 Ky. L. Rep. 643.

An estoppel *in pais* arises where one is prejudiced by the wilful act or declaration of another upon whose conduct the former has rightfully acted. *Ensel v. Levy*, 46 Ohio St. 255.

The acts and admissions of a party operate against him where, in good conscience and honest dealing, he ought not to be permitted to gainsay them. *Laub v. Trowbridge*, *supra*.

When an act is done or a statement made by a party, which cannot be contradicted without fraud on his part and injury to others, whose conduct has been influenced by the act or omission, the character of estoppel will attach to what would otherwise be a mere matter of evidence. *Union Mut. L. Ins. Co. v. Slee*, 10 West. Rep. 156, 123 Ill. 57.

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It is of the essence of an estoppel *in pais* that the party having authority to act in the matter has knowingly done an act to influence the conduct of the other, and that the other has acted on the faith of that act. *St. Louis, A. & T. H. R. Co. v. Belleville*, 10 West. Rep. 608, 122 Ill. 376; *Columbus v. Columbus Street R. Co.* 10 West. Rep. 440, 45 Ohio St. 98; *Lux v. Haggin*, 69 Cal. 255.

Declarations or admissions, express or implied, made for the purpose of influencing the conduct of another, if the designed effect ensues, are conclusive upon the party making them; but an estoppel, being in its nature defensive, will not be used to effectuate a gain, and will not be enforced further than is requisite to protection from injury. *Adler v. Pin*, 80 Ala. 351.

Inducing another to occupy a disadvantageous position.

The doctrine of estoppel *in pais* is applicable to one who has induced another to occupy a position which he otherwise would not. *Burke v. Grant*, 3 West. Rep. 884, 116 Ill. 124; *Brooke v. New York, L. E. & W. R. Co.* 1 Cent. Rep. 125, 106 Pa. 529; *Hedgworth v. Rose*, 95 N. C. 41; *Phoenix Mut. L. Ins. Co. v. Doster*, 105 U. S. 30 (27 L. ed. 65).

An estoppel results from conduct which was intended to induce, and has induced, another to act to his disadvantage. *Tyler v. Odd Fellows Mut. Relief Assn.* 5 New Eng. Rep. 196, 145 Mass. 134; *Adams v. Rockwell*, 16 Wend. 318; *Christianson v. Linford*, 3 Robt. 225.

The act or statement relied upon as an estoppel must have induced action, and the acting party must be injured by repudiation. *Union Mut. L. Ins. Co. v. Slee*, 10 West. Rep. 154, 123 Ill. 57; *Wells v. Austin*, 4 New Eng. Rep. 799, 59 Vt. 157; *Seckel v. Norman*, 71 Iowa, 264.

The first was granted March 7, 1666, by Governor Nicolls, and conveyed "all that tract of land which already hath been, or that hereafter shall be purchased for and on behalf of the said Town, whether from the native Indian proprietors or others within the bounds and limits hereafter set forth and expressed."

The said tract extended "north to the Sound, and south to the sea or main ocean," and included the greater part of the large body of water lying on the south side of Long Island and known as the Great South Bay.

The second charter was granted by Governor Dongan, December 27, 1686, and was confirmatory of the Nicolls charter. It granted the same tract of land, together with "the marshes, swamps, rivers, waters, lakes, ponds, creeks and harbors," etc. "Saving to his most sacred majesty aforesaid, his heirs and successors, all the tracts and necks of land that lieth to the south within the limits and bounds aforesaid

that remain unpurchased of the native Indians."

The defendant Smith made his title through two Indian deeds dated respectively April 8, 1692, and April 9, 1693, made to William Smith, defendant's ancestor, the first of which covered the premises in dispute; and a deed or patent from Benjamin Fletcher, captain-general and governor-in-chief of the Province of New York, to William Smith, dated October 9, 1693.

He further introduced in evidence, in support of his title, the following extracts from the public records of the town:

"TOWN AND WILLIAM SMITH.

"At a town meeting, upon the 28th day of March, 1693, Col. William Smith, of Brookhaven, did then and there acquaint the Town, as he did before, that with the governor's license he had purchased, and intended to pur-

Silent acquiescence.

If a person owns or has a claim to property, and he stands by and permits it to be sold without giving notice or asserting his rights, he is estopped from setting up his claim or title against the purchaser. *Trapnall v. Burton*, 24 Ark. 399; *Danley v. Rector*, 10 Ark. 211; *Markham v. O'Connor*, 52 Ga. 198; *Shall v. Bischoe*, 18 Ark. 142; *Corbett v. Norcross*, 35 N. H. 99; *Wendell v. Vankenselaer*, 1 Johns. Ch. 344; *McPherson v. Walters*, 16 Ala. 714.

It is the duty of a party to disclose his claim to property, and where he knowingly suffers third persons to purchase property without disclosing his claim, he cannot afterwards be permitted to assert his legal title against an innocent purchaser. *Trapnall v. Burton* and *Markham v. O'Connor*, *supra*; *Anderson v. Hubble*, 93 Ind. 578; *Brown v. Bowen*, 30 N. Y. 541; *Corkhill v. Landers*, 44 Barb. 223; *Boston & P. H. Corp. v. New York & N. E. R. Co.* 13 R. L. 265; *Sturm v. Parish*, 1 W. Va. 126; *First Nat. Bank v. Hammond*, 51 Vt. 215; *Smith v. Ford*, 48 Wis. 145; *Shall v. Bischoe*, 18 Ark. 142; *Corbett v. Norcross*, *supra*; *Breeding v. Stamper*, 18 B. Mon. 175; *Guthrie v. Quinn*, 43 Ala. 568; *Thompson v. Blanchard*, 4 N. Y. 303; *Baldwin v. Brown*, 16 N. Y. 359; *Buckingham v. Smith*, 10 Ohio, 288; *Hill v. Epley*, 31 Pa. 334; *Morgan v. Chicago & A. R. Co.* 96 U. S. 718 (24 L. ed. 743); *Babcock v. Utter*, 1 Keyes, 407, 1 Abb. App. Dec. 37.

The legal owner concealing his title, and suffering others to expend money, will not be permitted to assert his title and thereby defeat the just expectation upon which such expenditure was made. *Storrs v. Barker*, 6 Johns. Ch. 163; *Carlisle v. Cooper*, 21 N. J. Eq. 591; *American Exch. Bank v. Webb*, 15 How. Pr. 198; *Ross v. Elizabethtown & S. R. Co.* 3 N. J. Eq. 422; *Hume v. Shreve*, 4 N. J. Eq. 116; *Morris & E. R. Co. v. Prudden*, 20 N. J. Eq. 531.

The equitable principle of estoppel, that, where one has neglected to speak when it was his duty to speak, he will be estopped, may be enforced in an action at law when it goes to the whole action. *Fowler v. Parsons*, 3 New Eng. Rep. 449, 143 Mass. 401; *Michigan P. M. & Mfg. Co. v. Parcell*, 33 Mich. 480; *Hall v. Fisher*, 9 Barb. 31; *Beeson v. Eveland*, 28 N. J. Eq. 472.

Such a party shall not afterwards be permitted to enforce his legal rights to the prejudice of an innocent third party. *Town v. Needham*, 3 Paige, 553; *Pell v. Tredwell*, 5 Wend. 698; *Finnegan v. Carahar*, 61 Barb. 259; *Babcock v. Utter*, 32 How. Pr. 453; *Voorhees v. Presbyterian Church*, 5 How. Pr. 63.

Where one by his words or wilful conduct or by negligence causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is estopped from denying the existence of that state of facts. *Tousley v. Board of Education*, 39 Minn. 419; *Humphreys v. Finch*, 97 N. C. 806.

What I induce my neighbor to regard as true is the truth, as between us, if he has been misled by my asseveration. *Kirk v. Hamilton*, 102 U. S. 76 (23 L. ed. 82).

So one who induces another to purchase land by telling him that the vendor can make a good title is bound by those representations, and cannot thereafter claim that he himself had a right to the land as against the vendor. *Shuford v. Shingler*, 30 S. C. 612; *Greer v. Greer*, 11 Ky. L. Rep. 380.

One inducing another to purchase land of which he is the true owner, although ignorant thereof, is estopped from setting up his title. *Putnam v. Tyler*, 10 Cent. Rep. 752, 117 Pa. 570.

Actual fraud not an essential element.

Although fraud may be, and often is, an ingredient in the conduct of the party estopped, it is, nevertheless, not an essential element. See note to *Galbraith v. Lunsford* (Tenn.) 1 L. R. A. 522; *Waring v. Somborn*, 38 N. Y. 804.

It is sufficient if the conduct of the party induced another to act upon it, and that the other did act upon it. See 2 Pom. Eq. Jur. §§ 804-807, criticizing the case of *Brant v. Virginia Coal & Iron Co.* 96 U. S. 326 (23 L. ed. 927).

It is not necessary that there should be a prior positive fraud, to create an equitable estoppel. *Kelley v. Fisk*, 9 West. Rep. 189, 110 Ind. 552.

The doctrine of equitable estoppel does not depend upon any fraudulent design, but it is applied to avert injurious consequences from having been misled by the conduct of another. *Hill v. Blackwelder*, 113 Ill. 233; *Chapman v. Chapman*, 59 Pa. 214; *Miller v. Miller*, 60 Pa. 16; *Favill v. Roberts*, 50 N. Y. 222; *Tilton v. Nelson*, 27 Barb. 595; *Wells v. Pierce*, 27 N. H. 503; *Wilcox v. Iowa Wesleyan University*, 32 Iowa, 387; 1 Story, Eq. Jur. §§ 193, 387.

He who advises and encourages another to buy of a third person a right to which he has himself a title is postponed in equity to such purchaser. *Hart v. Giles*, 67 Mo. 150.

He will be bound by the sale, and neither he nor his privies will be at liberty to dispute the validity of vendee's title. *Barham v. Turbeville*, 1 Swan (Tenn.) 439, 37 Am. Dec. 784.

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chase, divers tracts of land unpurchased of the Indian natives by the Town, and within the limits of their patent and reserved to their majesties by their patent, and did require to know whether the Town laid any claim to the same or not and whether they were content that he, the said Smith, should purchase and peaceably enjoy the same. Voted and agreed that the above said Col. Smith may purchase and peaceably enjoy as aforesaid.

"At a meeting of the trustees of the freeholders and commonalty of the Town of Brookhaven, upon the 27th day of November, 1693, at the same time Col. William Smith did cause his patent to be read before the trustees above said, and each and every of them did declare that they had nothing to object against the limits, bounds, powers, privileges within the said patent contained.

"Upon the 1st day of May, 1694, being election day, Col. William Smith caused his patent to be publicly read before the freeholders of the Town. It is voted and agreed by the trustees and freeholders above said that they do, on the Town's behalf, agree and forever acquiesce in the limits and bounds of the said patent, and do assent and consent to the powers, privileges and immunities and exemptions therein contained, so far as the same may anyways concern the Township, saving to the several particular inhabitants such shares of meadow at South Bay by them unsold, as the same was laid out to them within the limits and bounds aforesaid."

On September 21, 1693, the said William Smith and the trustees of the Town entered into an agreement in writing which recited the purchase by Smith, with the consent of the Town, of certain tracts of land within the limits of the Town's patent, and which had never been purchased by the Town from the Indians, and then fixed and defined the north boundary line between Smith's lands and the lands of the Town.

The defendant, Egbert F. Smith, succeeded to Col. William Smith's title. The other defendants are lessees of Egbert Smith.

The trial court directed a verdict in favor of the defendant, to which the plaintiff excepted.

The other facts are stated in the opinion.

Mr. Nicoll Floyd, for appellants:

In order to an equitable estoppel or estoppel by conduct the following elements should concur:

1. There must have been a false representation or concealment of material facts.
2. The representation must have been made with the knowledge of the facts.
3. The party to whom it was made must have been ignorant of the truth of the matter.
4. It must have been made with the intention that it should be acted upon.
5. It must have been acted upon.

Bigelow, Estop. 484.

Fraud must be present or what in an honest man's mind is equivalent to it.

Malone, Real Prop. Trials; *Waring v. Somborn*, 82 N. Y. 604.

Mr. James C. Carter, also for appellants:

A grant of lands thereafter to be purchased of the Indians conveyed the fee with a future right of enjoyment, to take effect upon the purchase or extinction of the Indian title.

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Johnson v. McIntosh, 21 U. S. 8 Wheat. 543 (5 L. ed. 681); *Angell, Tide Waters*, p. 47; *People v. Dibble*, 16 N. Y. 208, 212; *Martin v. Waddell*, 41 U. S. 16 Pet. 367 (10 L. ed. 997).

Mr. Wilmot M. Smith for respondents.

Brown, J., delivered the opinion of the court:

This court decided in *Brookhaven v. Strong*, 60 N. Y. 56, and again in *Hand v. Newton*, 92 N. Y. 89, that under the Town's charters it had title to the land under the waters of the navigable bays and harbors within the limits defined in those instruments. These cases, however, afford no aid to the solution of the question now presented, for the reason that in the first action the patent under which defendant claims was a part of the Town's title to the land then in dispute, and the second involved the title to land under water on the north side of the island entirely outside of the limits of defendant's grant.

The learned counsel for the appellants claims that the patent to William Smith did not in terms convey any part of the bay. This proposition cannot be sustained.

The grant recites the issuing of a warrant to the surveyor-general of the province to survey and lay out several necks and tracts of land, beach, bay, etc., situated on the south side of the island, formerly called Long Island, etc. That said surveyor-general had surveyed and laid out "said necks and tracts of land, . . . bay and island within said bay bounded westward from the main sea or ocean," etc. It then grants to Col. William Smith and his heirs the "afore-recited necks and tracts of land within the respective bounds before mentioned, together with the waters, rivers, lakes, creeks, harbors, bays, islands, fishing, fouling, etc., and all rights . . . privileges . . . and appurtenances whatsoever to the aforesaid necks and tracts of land, bay, beach and islands within said bay," etc.

It will thus be seen that the bay is granted by express terms. The bay is not described as appurtenant to the neck and tracts of land, but the bay is conveyed with all the benefits and privileges appertaining thereto.

Almost identical language is used in the Dongan Charter to the Town, and this court held it sufficient to convey the title to land under water (*Brookhaven v. Strong, supra*), and that decision must control the construction of the grant to Smith.

The land in dispute being therefore within the grant to William Smith, I think the case presents all the elements of an equitable estoppel against the Town. It is not necessary, as is claimed in one of the briefs submitted to us by the appellant, to constitute an equitable estoppel that there should be a false representation or concealment of material facts. Nor is it essential that the party sought to be estopped should design to mislead. If his act was voluntary and calculated to mislead and actually has misled another acting in good faith, that is enough. *Manufacturers & T. Bank v. Hazard*, 30 N. Y. 226; *Continental Nat. Bank v. National Bank of Commonwealth*, 50 N. Y. 575.

Nor is it essential that the declaration of the Town as to its title to the land described in Smith's patent should have preceded the date

Bank v. Com. Nat. Bank, 60 N. Y. 588-589; *Casco Bank v. Keene*, 53 Me. 108.

If those declarations affected the conduct of Smith with reference to the land purchased, so that it would be unjust or injurious now to those who have succeeded him to permit the plaintiff to set up its title contrary to the truth of its declaration, it is sufficient. That which might not amount to an estoppel at the time the declaration is made may become such by ratification or acquiescence. *Bigelow, Estop.* 5th ed. 650; *Faxon v. Faxon*, 28 Mich. 159.

The authorities in this State are all harmonious on the subject of estoppel *in pais*.

When a party, either by his declarations or conduct, has induced a third person to act in a particular manner, he will not afterwards be permitted to deny the truth of the admission, if the consequence would be to work an injury to such third person or to someone claiming under him. *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344, 354; *Storrs v. Barker*, 6 Johns. Ch. 166; *Town v. Needham*, 3 Paige, Ch. 545; *Dezell v. Odell*, 8 Hill, 215; also see dissenting opinion of Judge Bronson, approved in *Pinnegan v. Carraher*, 47 N. Y. 500; *Brown v. Sprague*, 5 Denio, 545; *Plumb v. Cattaraugus Ins. Co.* 18 N. Y. 393; *Welland Canal Co. v. Hathaway*, 8 Wend. 483; *Thompson v. Blanchard*, 4 N. Y. 303; *Continental Nat. Bank v. Com. Nat. Bank*, 50 N. Y. 575; *Armour v. Mich. Cent. R. Co.* 65 N. Y. 111-122; *New York Rubber Co. v. Rothery*, 107 N. Y. 310-316, 9 Cent. Rep. 827.

Numerous cases where this principle has been applied to real estate are collected in Washburn on Real Property, vol. 3, chap. 11, § 6, to which reference is made. When so applied it is as effectual as a deed would be from the party estopped.

The general rule deduced from all the authorities is that if one is induced to purchase land by the acts or representations of another, designed to influence his conduct, and creating a reasonable belief on his part under which he acts that he is thereby acquiring a valid title to the same, the party who thus has influenced him is estopped from setting up his own title existing at the time of the purchase against that of the purchaser.

The various declarations of the Town through the trustees and the town meetings must be construed as a single representation. They were all *in pari materia*, and had one purpose, viz., to inform Smith that the Town made no claim to the land he desired to purchase.

The "necks and tracts" of land reserved to the Crown by the Dongan Charter could not be identified except by a declaration by the Town, or through the medium of some legal proceedings against the Town. We have the fact that when the survey had been completed, and embodied in the patent, it was read to the town meeting and approved, and the Town voted "to agree and acquiesce in the bounds of the patent."

It described particularly "the bay," and the patent obligated Smith to pay an annual quit-rent to the Crown.

There can be no reasonable doubt that Smith sought and obtained the resolutions of the town meetings as muniments of his title, and that they were intended by the Town to be

7 L. R. A.

edily did, influence the purchase; else why was the inquiry made and answered?

In the most deliberate manner possible the Town not only disclaimed ownership, but agreed and acquiesced in the purchase, and in the boundaries of the land conveyed.

I am unable to see any distinction to be made between the upland and the bay. Both were conveyed by the same instrument, and the resolution of the town meetings applied as much to one as to the other.

In reliance upon the declaration of the Town, and on the supposition that he had title, Smith entered into possession, and he and his descendants on the faith of these declarations have had undisputed possession of the land for nearly 200 years. The Town cannot now be permitted to deny the truth of its declarations, and assert its title to the premises in dispute.

To repel, however, the presumption arising from the transactions I have alluded to, so far as it is made applicable to the waters of the bay, the appellant appeals to the acts of the parties under their respective patents, and it is claimed that the evidence shows such user by the Town of the bay as indicates that title thereto was in the Town by the acquiescence of all parties, and that, if the evidence on this branch of the case was not conclusive, it was at least of such a character as to require the submission of the question to the jury.

The application of the rule which denies the right of the appellant to assert at the present time its title to the bay, depends very largely upon its acquiescence in the ownership of Smith and his descendants.

I have assumed such acquiescence in the view I have thus far taken of the case, but if the fact be as claimed by the appellant, the conclusion I have reached probably could not be sustained in the absence of a finding on that question by the jury.

The evidence of the question of user is of two kinds: first, certain resolutions of the trustees of the Town in reference to the control and regulation of fishing in the bay; and, second, acts of the inhabitants of the Town in taking fish and oysters from the bay.

The first covers a period of about ten years only, beginning in 1759 and ending in 1768.

There is no evidence that anyone ever acted under the resolutions of the trustees, and none that they were ever brought to the knowledge of the defendant's ancestors or that he ever heard of them. The evidence that the inhabitants of the Town took fish from the bay is confined mainly to the period between 1862 and 1879, when the Town, under an agreement with the defendant, Egbert F. Smith, controlled the bay.

There are a few instances earlier than 1862, but it was not shown that the persons acted under authority from the Town. I can find no evidence in the case that the defendant Smith, or any of his ancestors, ever, by word or act, admitted the right of the Town to control the fishing in the bay, and in the absence of evidence tending to show that fact, no resolutions passed by the trustees of the Town and no acts of the inhabitants in taking fish from the bay can be regarded as indicative of title in the Town.

Smith becoming dissatisfied with the agreement and threatening litigation, the agreement was annulled and the property reverted to him. This agreement established a dividing line between the land in dispute and the East Bay.

We think all these transactions from the date of the patent to Col. William Smith to the annulling of the last agreement between the parties, speak one language on the question of title and show acquiescence on the part of the Town in the grant to Smith.

The greater part of the bay was during the last century conveyed to the Town by the grandson of the original patentee, and the Town now holds such rights as it has there under those conveyances. In 1862 the Town took from the defendant Egbert F. Smith a deed for the property now in dispute, agreeing in consideration of that conveyance to lease out the privileges in the bay and pay one half the net proceeds to said defendant.

The town records inform us with reference to that conveyance that "Hon. Egbert F. Smith offered to release to the Town all that part of the bay, etc., on the same terms as his ancestor released to the Town the East Bay in 1790, so that hereafter the Town should have control of all the bays on the south side of the island." It was thereupon resolved "to accept

Smith becoming dissatisfied with the agreement and threatening litigation, the agreement was annulled and the property reverted to him. This agreement established a dividing line between the land in dispute and the East Bay.

We think all these transactions from the date of the patent to Col. William Smith to the annulling of the last agreement between the parties, speak one language on the question of title and show acquiescence on the part of the Town in the grant to Smith.

The few resolutions of the board of trustees passed one hundred and fifty years ago, and the few instances of the Town's people asserting a right to fish in the bay, establish only that there was occasional dissatisfaction and a show of resistance to Smith's title. But the right under that title was always maintained and exercised by exacting small payments for individual privileges and by occasional leasing of the bay.

There was on the evidence no question for the jury, and the court rightly disposed of the case on the legal questions alone.

The judgment should be affirmed, with costs.
All concur; **Bradley and Haight, JJ.**, in result.

NEW YORK COURT OF APPEALS.

J. Emmett WELLS, Exr., etc., of Samuel H. Hinsdale, Deceased, Resp't.,

TOWN OF SALINA, Appt.

(....N. Y.....)

1. Municipalities are not empowered to borrow money for municipal purposes unless expressly authorized to do so by statute, or, in the absence of a statute, unless the power is necessarily implied from some special duty imposed for the discharge of which the power to borrow is not only convenient but necessary.

2. A town in the State of New York has no power to borrow money.

3. The power to "raise" money for municipal purposes does not include the power to borrow.

4. An action cannot be maintained against a town on notes given for money loaned to the town to carry on ordinary litigation, nor does any action lie to recover the money loaned.

(February 25, 1890.)

APPPEAL by defendant from a judgment of the General Term of the Supreme Court, Fourth Department, affirming a judgment of the Onondaga Circuit in favor of plaintiff in an action to recover the amount alleged to be due upon certain promissory notes given for borrowed money. *Reversed.*

Statement by **Earl, J.:**

In the year 1870 the Town of Salina, under chap. 570 of the Laws of 1868, issued its bonds

NOTE.—Municipal corporations, power to borrow money.

By the Constitutions of several of the States the Legislature is required to restrict municipal corporations in their power to borrow money, contract debts or loan their credit.

In carrying out its express powers, or in effecting its legitimate object, a municipal corporation possesses the incidental or implied power to borrow money and issue its bonds therefor. *Bank of Chillicothe v. Chillicothe*, 7 Ohio (pt. II.) 31; *Mills v. Gleason*, 11 Wis. 470; *Clark v. Janesville*, 10 Wis. 136; *State v. Madison*, 7 Wis. 688.

Where express power to borrow money is given to a municipal corporation it includes the power to issue its negotiable bonds or other securities to the lender. *Seybert v. Pittsburg*, 68 U. S. 1 Wall. 272 (17 L. ed. 553); *Galena v. Corwith*, 48 Ill. 423; *Evansville, I. & C. S. L. R. Co. v. Evansville*, 15 Ind. 7 L. R. A.

See also 9 L. R. A. 497.

895; *Rogers v. Burlington*, 70 U. S. 8 Wall. 654 (18 L. ed. 79); *Com. v. Pittsburg*, 34 Pa. 493; *Com. v. Allegheny Co.* 37 Pa. 241; *DeVoss v. Richmond*, 18 Gratt. 338.

But constitutional limitations on state indebtedness apply to the State alone and not to her political or municipal subdivisions. *Pattison v. Yuba Co.* 13 Cal. 175; *Prettyman v. Tazewell Co.* 19 Ill. 406; *Slack v. Maysville & L. R. Co.* 13 B. Mon. 16; *Clark v. Janesville*, 10 Wis. 136; *Cass v. Dillon*, 2 Ohio, 607.

Municipal corporations have only such powers of government as are expressly granted them, or such as are necessary to carry into effect those that are granted. No powers can be implied except such as are essential to the objects and purposes of the corporations as created and established. They can bind the people and property only to the extent of their powers. *Ottawa v. Carey*, 108 U. S. 110 (27 L. ed. 609); *Brockman v. Creston (Iowa)* 44 N. W. Rep. 822; *Portland v. Schmidt*, 13 Or. 17.

to the amount of \$120,000, payable twenty years thereafter, with interest at 7 per cent, payable on the first days of August and February of each year. By the terms of § 4 of the Act of 1868, the railroad commissioner of the Town, an officer created under § 1 of the Act, was required "to report to the board of supervisors of the county wherein said town or village is situated, within three days after the commencement of their regular session in each year, the amount of money required to pay the principal and interest on the bonds thus issued, due or to become due and payable during the next ensuing year, after deducting any sums received as dividends on the stock of said company, held by said town or village, which must be first applied to the payment of such principal and interest; and the said board of supervisors shall thereupon cause to be assessed, levied and collected upon the real and personal property of the said town or village, at the same time and in the same manner as other taxes, such amount of money as shall be thus reported as necessary to pay such principal and interest, and such amount when collected shall be paid to and applied by the commissioners to the payment of the said principal and interest of the bonds aforesaid."

In pursuance of this provision the railroad commissioner of the Town of Salina, with moneys raised for that purpose, paid the interest upon the bonds as it became due to and including August 1, 1880. On December 1, 1880, he presented to the clerk of the board of supervisors a report directed to the board in which, in conformity with the provisions of the Act, he stated the amount required to pay the principal and interest to become due during the next ensuing year. That report was taken by the supervisor of Salina and no action was taken thereon by the board of supervisors. On the 27th of January, 1881, Francis Alvord, who was then supervisor of the Town, and Leman B. Pitcher commenced an action as individuals and taxpayers in behalf of themselves, and all other taxpayers of this Town who might come in and contribute to the expense of the action, against various of the bondholders and the railroad commissioner of the Town to restrain the latter from performing the acts required of him by the Statute, and the former from enforcing their securities. At the same time an injunction was served upon the defendants restraining the railroad commissioner from pay-

ing any of the bonds or coupons and from taking any measures for raising money for the payment of such interest. Judgment was demanded in that action, among other things, that the bonds mentioned in the complaint be declared void and surrendered up to be canceled; that all the proceedings for issuing the bonds be adjudged invalid and void; that the Statute under which they were issued be declared unconstitutional and void; that the defendants be enjoined from selling, transferring or disposing of any of said bonds in their possession, custody or control during the pendency of the action and until the further order of the court, without giving to the purchaser or purchasers thereof notice of the pendency of the action.

The next annual meeting of the Town of Salina after the commencement of that action was held on February 15, 1881, and a resolution was there duly adopted which after reciting the commencement of the action by Alvord and Pitcher as taxpayers of the Town of Salina on behalf of themselves and all other taxpayers of the Town who would contribute to the expense of the action, requested, authorized and required the supervisor of the Town, and his successor or successors in office, "to assume the direction and conduct of such action and the prosecution of the same, if permitted by said plaintiffs, and to prosecute the same to a final judgment, and to pay all the expenses of such prosecution, and to employ counsel and to borrow upon the credit of the Town all such sums of money from time to time as may be necessary for the prosecution of said action."

At a town meeting held in February, 1882, another resolution was adopted, "authorizing and requiring the supervisor to borrow on the credit of the Town not to exceed \$3,400, the amount so raised by him to be used in his discretion for the payment of the expense already incurred, by the litigation then pending, for the purpose of setting aside and canceling the bonds issued by the Town in aid of the Syracuse Northern Railroad Company, and for the purpose of defending the same against any suit or proceeding which might be brought against the Town; and the town board was authorized and required to put that amount into the abstract of town accounts, to be presented to the board of supervisors at its next annual session, to be levied on the Town with other taxes."

In pursuance of the first resolution, for the

And reasonable doubts as to the existence of authority in such corporations are to be resolved against them. *Ibid*.

They have no power to make commercial paper of any kind, unless such power is expressly conferred by law or clearly implied from some power expressly given which cannot fairly be exercised without it. *Concord v. Robinson*, 121 U. S. 165 (30 L. ed. 886).

No implication of such power arises from authority to appropriate and raise by taxation money to aid in the construction of a railroad. *Ibid*.

On the question whether municipal corporations have power, without legislative authority, to borrow money or to issue notes, bills or other securities of a commercial character, free from equitable defenses in the hands of bona fide holders, the court was equally divided. *Nashville v. Bay*, 86 U. S. 19 Wall. 468 (22 L. ed. 164); *Nashville v. Lindsey* ("Mayor v. Lindsey") 86 U. S. 19 Wall. 485 (22 L. ed. 7 L. R. A.

180; *Police Jury v. Britton*, 88 U. S. 15 Wall. 566 (21 L. ed. 251).

Legislative authority to a city to borrow money on the credit of the city, and to issue bonds therefor, does not authorize the issue of its bonds as a donation to a company or individual, to be used in the improvement of the water power within and near the city. *Ottawa v. Carey*, *supra*.

The power given to a city council to borrow money on the credit of the city, and issue their bonds under the seal of the city therefor, does not alone confer authority to subscribe to the stock of a railroad company and issue bonds in payment thereof. *Jonesboro v. Cairo & St. L. R. Co.* 110 U. S. 192 (28 L. ed. 116).

See note to *Schneider v. Detroit* (Mich.) 2 L. R. A. 54; and see *Rainsburg v. Fyan* (Pa.) 4 L. R. A. 336.

A city can bind itself by such contracts only as it is authorized by its charter to make. *Syracuse Water Co. v. Syracuse*, 5 L. R. A. 546, 116 N. Y. 167.

purpose of raising money to defray the expenses of that action, the supervisor, on behalf of the Town, made three promissory notes, one dated March 9, 1881, for \$1,500, one dated December 21, 1881, for \$500, and one dated December 31, 1881, for \$1,500; and in pursuance of both resolutions he made another note for \$500, dated April 29, 1882. Upon these notes \$4,000 was borrowed of the plaintiff's testator, Samuel H. Hinsdale, and the money so borrowed was used to defray the expenses of the action named. That action was brought to trial and the complaint was dismissed. An appeal was then taken on behalf of the plaintiff to the general term of the supreme court where the judgment was affirmed, and a further appeal was then taken to this court where the judgment was finally affirmed. *Alford v. Syracuse Sav. Bank*, 98 N. Y. 599.

Thereafter this action was commenced against the Town to recover on the four notes made on behalf of the Town by its supervisor as above stated, and to recover the money loaned to the Town thereon. The action was put at issue and brought to trial before a judge without a jury who ordered judgment in favor of the plaintiff. The defendant appealed to the general term and from affirmance there to this court.

Mr. Louis Marshall, for appellant:

There can be no recovery in this action upon the promissory notes executed by Alvord, as supervisor, or even for money had and received, since the resolutions under which they purport to have been executed, provided that the Town should borrow money upon its credit, for the prosecution of the action, and no statutory authority exists which empowers the Town to pledge its credit by means of a promissory note. A municipality, and *a fortiori* a town, has no implied power to borrow money, or to issue negotiable paper.

Ketchum v. Buffalo, 14 N. Y. 356; *Burroughs*, Pub. Securities, p. 177; *Dillon*, Mun. Bonds, pp. 12-14; 2 *Dan. Neg. Inst.* § 1528; *Jones*, Railroad Securities, § 288; *Hackettstown* ads. *Swackhamer*, 87 N. J. L. 192; *Knapp v. Hoboken*, 39 N. J. L. 894; *Nashville v. Roy*, 86 U. S. 19 Wall. 475, 481 (22 L. ed. 168, 170); *Atty-Gen. v. Litchfield*, 18 Sim. 547.

Messrs. Tracy, McLennan & Ayling, for respondent:

The moneys represented by the notes in question are town charges because authorized to be raised by the vote of the town meeting for a town purpose.

Rev. Stat. 7th ed. title 6, § 2, subd. 3, p. 842. *Horn v. New Lots*, 83 N. Y. 100, was an action brought to recover for money had and received and the court says, at p. 106: "The averment of fact now before us is, that the town had and received the money and applied it to its own use, and that averment is aided by the other that the money was applied to the payment of those bonds of the town;" and it was held that the allegations were sufficient and that the action could be maintained.

See also *Lyons v. Cole*, 3 Thomp. & C. 431; *People v. Hempstead Board of Audis*, 4 Hun. 94.

Frances Alvord was duly appointed the agent of defendant, and not having exceeded his authority the defendant is bound by his acts. 7 L. R. A.

Cushing v. Stoughton, 6 Cush. 329.

This action can be sustained upon the notes or the original consideration of the notes.

The transfer of the notes was a transfer of the original consideration for which they were given. The right to recover upon the original consideration passes to the assignee by a transfer of the security.

Gerwig v. Sitterly, 56 N. Y. 214; *Pitcher v. Brayton*, 17 Hun. 429; *Bolen v. Crosby*, 49 N. Y. 183; *Oneida Bank v. Ontario Bank*, 21 N. Y. 490.

Earl, J., delivered the opinion of the court:

The action commenced by Alvord and Pitcher, if successful, would necessarily have inured to the benefit of the Town and all its taxpayers, and we will therefore assume that the electors of the Town at the town meetings in 1881 and 1882 had the power to direct the supervisor, with the consent of the plaintiffs in that action, to assume the control, direction and prosecution thereof on behalf of the Town, and that that action may therefore be treated as if it had been actually commenced in the name of the Town or its supervisor. We will also assume that the electors at the town meetings had the power to direct money to be raised for prosecuting that action, and furthermore that the \$4,000 was borrowed to defray the expenses of that action and was actually used for that purpose, and yet we are constrained to hold that this action cannot be maintained.

Business corporations, unless restrained by their charters, possess the power to borrow money and issue securities therefor. Generally they could not carry on their authorized and legitimate business without such a power, and hence it must be presumed that the Legislature intended that they should possess it. But towns and other municipal corporations are organized for governmental purposes, and their powers are limited and defined by the statutes under which they are constituted. They possess only such powers as are expressly conferred or necessarily implied. They are clothed with the power of taxation, and can thus raise all the money needed for ordinary municipal purposes, and until the money can thus be raised, as it can be at brief intervals, experience has demonstrated their ability to obtain upon credit all the materials and services needed without a resort to loans of money upon credit. It is the general, if not the universal, law of this country, and of England, that municipalities are not empowered to borrow money for municipal purposes, unless expressly authorized to do so by statute, or in the absence of a statute, unless the power is necessarily implied from some special duty imposed, for the discharge of which the power to borrow is not only convenient but necessary.

We do not find in the statutes of this State that the power to borrow money has been expressly conferred upon towns, or is necessarily implied. This, we think, will clearly appear from a brief examination of the statutes. It is provided in part 1, chap. 11, title 1, art. 1, of the Revised Statutes, that "no town shall possess or exercise any corporate powers, except such as are enumerated in this chapter, or shall be especially given by law, or shall be

enumerated are the following: "To make such contracts, and to purchase and hold such personal property, as may be necessary to the exercise of its corporate or administrative powers." This provision clearly does not authorize the borrowing of money upon the credit of the Town, unless it can be shown that such borrowing was necessary "to the exercise of its corporate or administrative powers." In title 2, art. 1, of the same chapter, it is provided that the electors of a town at the annual town meeting shall have power "to direct the institution or defense of suits at law or in equity, in all controversies between such town and corporations, individuals or other towns;" and "to direct such sum to be raised in such town for prosecuting or defending such suits, as they may deem necessary." What is here meant by the word "raised?" It certainly does not mean "borrowed," and evidently means raised by taxation. In the same article it is provided that electors, at a town meeting, shall have power "to direct such sum to be raised in such town for the support of common schools for the then ensuing year, as they may deem necessary;" "to make such provisions and allow such rewards for the destruction of noxious weeds as they may deem necessary, and to raise money therefor;" "to direct such sum to be raised in such town for the support of the poor for the ensuing year, as they may deem necessary. And every town may raise any money that may be necessary to defray any charges that may exist against the overseers of the poor of such town;" and special town meetings may be "called for the purpose of raising money for the support of common schools, or of the poor," "to vote on the question of raising money for the construction and maintenance of any bridge or bridges," and "for the purpose of deliberating in regard to the institution or defense of suits, or the raising of moneys therefor."

In pt. 1, chap. 16, title 1, art. 1, of the Revised Statutes, it is provided that, "the commissioners of highways of each town shall deliver to the supervisor of such town a statement of the improvements necessary to be made on the roads and bridges, together with the probable expense thereof, which supervisor shall lay the same before the board of supervisors at their next meeting. The board of supervisors shall cause the amount so estimated to be assessed, levied and collected in such town in the same manner as other town charges; but the moneys to be raised in any such town shall not exceed in any year the sum of \$250;" and in chapter 274 of the Laws of 1832, § 1, it is provided that "whenever the commissioners of highways of any town in this State shall be of opinion that the sum of \$250 as now allowed by law will be insufficient to pay the expenses actually necessary for the improvement of roads and bridges, it shall be lawful for such commissioners to apply in open town meeting for a vote authorizing such additional sum to be raised as they may deem necessary for the purpose aforesaid, not exceeding \$250 in addition to the sum now allowed by law;" and § 5 provides that, "if any town shall at an annual meeting have already voted to raise a sum ex-
7 L. R. A.

the county in which such town is situated to assess, levy and collect the sum so voted to be raised upon said town."

In chapter 805 of the Laws of 1840 the boards of supervisors are authorized and directed to cause "to be levied and raised" the amounts audited and allowed by boards of town auditors.

In chapter 197 of the Laws of 1847 it is provided that "the board of supervisors in any county may, in their discretion, cause any money, or any portion thereof voted by towns, before the passage of this Act, for building town houses, to be raised in said town for such purpose."

In chapter 518 of the Laws of 1872, chapter 410 of the Laws of 1874, chapter 554 of the Laws of 1880, and in numerous other Statutes, the word "raise" or "raised" is used in the same sense; and so far as we can discover it is never used in the sense of "borrow" or "borrowed." The power to raise money for municipal purposes, it is believed, never means a power to borrow unless there is other language qualifying or extending its meaning. *Sletson v. Kempton*, 13 Mass. 272; *Frost v. Belmont*, 6 Allen, 152; *Claffin v. Hopkinton*, 4 Gray, 502; *Minot v. West Roxbury*, 112 Mass. 1; *Mead v. Acron*, 139 Mass. 841.

There was not only no express authority conferred upon the Town to borrow this money, but it did not possess the power by necessary implication. The credit of the Town would have been sufficient for the prosecution of the taxpayer's action, until money could have been raised to meet the expenses by the ordinary mode of taxation.

We have assumed that the maintenance of that action was a town purpose, and that the expense thereof was a town charge; but the expense was to be met like all other town charges. Towns have no power to borrow money simply because it is useful and intended to pay a town charge. The expenses of the town poor and of town bridges and of town officers, are all town charges, and yet no one would contend that the Town could borrow money to meet these charges instead of meeting them in the mode prescribed by statute by taxation.

In pt. 1, chap. 11, title 6, of the Revised Statutes, it is provided that "the moneys necessary to defray the town charges of each town shall be levied on the taxable property in the town in the manner prescribed in this Act."

It is the policy of the laws that town charges shall be met by annual recurring taxation, and thus extravagance and improvidence are in some degree checked, as those who create town charges, or are the taxpayers when they arise, must bear the burden of taxation to meet them. It is quite easy for the taxpayers of to-day to create a debt which they are not to feel, and which the taxpayers of the future are to discharge. The system of laws relating to towns requires that all bills for moneys expended, or materials furnished, or services rendered to the town, shall be verified and presented to the board of town auditors and audited by them, and then enforced by warrants of the board of

supervisors, against the taxpayers of the town. This whole system would be subverted if towns could borrow money upon credit to meet town charges. Then the money would have to be repaid, whether the town had had the benefit thereof or not, and the wise provisions of the statutes to secure economy and safety by the audit of accounts would be entirely frustrated.

The danger of allowing money to be borrowed on the credit of the town for such a town purpose, as we have here is quite clearly illustrated in this case. Here the sum of \$8,400 was authorized to be borrowed to carry on an ordinary litigation, and \$500 was paid to the attorney long before the trial of the action, and thereafter \$8,000 more was paid to him for his services and expenses, and there remains still a balance due. The bills for services and expenses have never been audited or allowed in the mode prescribed by the statutes. There was no proof upon the trial that the money borrowed was actually needed for the prosecution of that action, or that it was prudently, honestly or wisely used. But even if we should assume that it had been sufficiently established that the Town had the full benefit of the money thus borrowed, that would not authorize the maintenance of this action.

If a town could be made liable for money borrowed simply because it had been applied for town purposes, then the entire system for the audit and allowance of town charges would be overturned. Even if the plaintiff's testator by the payment of the expenses of that litigation became the equitable assignee of the bills representing such expenses, and might have taken and presented those bills for audit to the board of town auditors, yet he never did so. He did not bring his action upon the theory that he was an equitable assignee of those bills, and he gave no proof which entitled him to recover as an equitable assignee, and the case was not tried upon that theory.

Our conclusion therefore is that upon the facts as they appear in this record the complaint should have been dismissed; and for this conclusion there is abundance of authority.

In *Hanger v. Des Moines*, 52 Iowa, 193, it was said: "It is well settled that a municipal corporation can exercise only such powers as are expressly granted by statute, and such as are necessarily and fairly implied in, or incident to, those conferred by express grant and 'those essential to the declared object and purpose of the corporation.'" And to the same effect are the following authorities: *Minot v. West Roxbury*, *supra*; *Anthony v. Adams*, 1 Met. 284; *Parsons v. Goehen*, 11 Pick. 396; *Lemon v. Newton*, 134 Mass. 476; *Cornell v. Guilford*, 1 Denio, 510; *Richmond Co. v. Ellis*, 59 N. Y. 620.

In *Hackettstown ads. Swackhamer*, 87 N. J. L. 191, it was held that municipal corporations, in the absence of a specific grant of power, do not in general possess the capacity to borrow money, and that a note given for an unauthorized loan cannot be enforced, although the money borrowed has been expended for municipal purposes. *Beasley, Ch. J.*, writing the opinion, said: "I am at a loss to perceive how it can be inferred that a power to borrow money is an appendage to the usual franchises given to municipal corporations. Such a right

cannot, in any reasonable sense, be said to be necessary within the meaning of that term as already defined. Under ordinary circumstances, it is not certainly indispensable, as common experience demonstrates. In the great majority of instances the municipal affairs are, with ease and completeness, transacted without it. . . . My remarks are to be restricted to that class of cases where charters are granted containing nothing more than the usual franchises incident to municipal corporations, and under such conditions it seems clear to me that the power to borrow money is not to be deduced. I have already said that it does not appear to be a necessary incident to the powers granted, for such powers can be readily and efficiently executed in its absence. It would be to fly in the face of all experience to claim that the ordinary municipal operations cannot be efficiently carried on except with the assistance of borrowed capital. Without any help of this kind it is well known that our towns and cities have long been, and are now being, improved and governed. For the attainment of these ends it has not generally been found necessary to resort to loans of money. The supplies derived annually from taxation have been found amply sufficient for these purposes. Consequently I am unable to perceive any necessity to borrow money, under these conditions, from which the gift of such power to borrow is to be implied. It undoubtedly is clear that if, as has been asserted, the ends of the municipal charter can be conveniently reached without a resort to the device of raising moneys by loan, there is not the least legal basis for a claim of the power to obtain funds in that way. Granted the fact that the charter can be executed with reasonable ease and with completeness, the conclusion is inevitable that the power in question cannot be called into existence by intendment, and as I claim the fact to exist, I must of necessity reject the right of implication in question."

In *Ketchum v. Buffalo*, 14 N. Y. 856, *Selden, J.*, writing the opinion of the court, said: "It is true the power to contract to pay A \$10,000 at the end of the year for doing certain work, and the power to borrow \$10,000 of B upon a credit of a year, for the purpose of paying A for doing the work, might seem at first view to be substantially identical. The amount is the same and the time of payment the same; the credit only is different. A little examination, however, will show that there is a very material difference between the two. If the power of the corporation to use its credit is limited to contracting directly for the accomplishment of the object authorized by law, then the avails or consideration of the debt created cannot be diverted to any illegitimate purpose. The contract not only creates the fund, but secures its just appropriation. On the contrary, if the money may be borrowed the corporation will be liable to repay it, although not a cent may ever be applied to the object for which it was avowedly obtained. It may be borrowed to build a market and appropriated to build a theatre, and yet the corporation would be responsible for the debt. The lender is in no way accountable for the use made of the money. It is plain, therefore, that if the policy of limiting the powers and

expenditures of corporations to the objects contemplated by their charters is to be carried out, their right to incur debts for those objects must be strictly confined to contracts which tend to their direct accomplishment. . . . No one can fail to see that to concede to corporations the power to borrow money for any purpose would be entirely subversive of the principle which would limit their operations to legitimate objects."

In *Starin v. Genoa*, 28 N. Y. 489, Lott, J., writing the opinion, said: "The towns of this State have not the general power to borrow money, nor are their officers, in the exercise of their ordinary duties, authorized to issue bonds or any other evidence of indebtedness in the name of the towns represented by them for loans or other debts contracted or incurred on their behalf."

In *Parker v. Saratoga Co.*, 106 N. Y. 392, 9 Cent. Rep. 263, Andrews, J., said: "The contention that boards of supervisors have no inherent power to borrow money or to issue negotiable paper, accords with the general understanding and with the tenor of the adjudged cases and the course of legislation, which presupposes the necessity of express legislative sanction in order to justify the exercise of this authority. In this State the powers of boards of supervisors are not only the subject of express affirmative definition, but for the purpose of confining the action of these bodies to the exercise of enumerated powers, it is declared that 'no county shall possess or exercise any corporate powers, except such as are enumerated or shall be specially given by law, or shall be necessary to the exercise of the powers so enumerated or given.' The power of borrowing money is incident to the powers of a business corporation, unless excluded by its charter. Boards of supervisors have the recourse of taxation for the raising of money for county purposes. The power to borrow money is not necessary to the execution of powers expressly given. But the denial of this power to these quasi public corporations also stands strongly upon considerations of public policy, and the doctrine that they have no implied power to borrow money is an important safeguard to the protection of political communities against the creation of ruinous liabilities through the action of incapable, negligent or unfaithful public agents. We concur, therefore, with the proposition that the power of the board of supervisors to extend the original debt by means of new loans, or by renewals of prior obligations, if it existed, must be found in the statute, given either expressly or by implication."

In *Nashville v. Ray*, 86 U. S. 19 Wall. 468 [22 L. ed. 164], Mr. Justice Bradley wrote an opinion in which Justices Miller, Davis and Field concurred, in which he said: "A municipal corporation is a subordinate branch of the domestic government of a State. It is instituted for public purposes only, and has none of the peculiar qualities and characteristics of a trading corporation instituted for purposes of private gain, except that of acting in a corporate capacity. Its object, its responsibilities and its powers are different. As a local governmental institution it exists for the benefit of the people within its corporate limits. The Legislature invests it with such powers as it

deems adequate to the ends to be accomplished. The power of taxation is usually conferred for the purpose of enabling it to raise the necessary funds to carry on the city government, and to make such public improvements as it is authorized to make. As this is a power which immediately affects the entire constituency of the municipal body which exercises it, no evil consequences are likely to ensue from its being conferred, although it is not unusual to affix limits to its exercise for any single year. The power to borrow money is different. When this is exercised the citizens are immediately affected only by the benefit arising from the loan; its burden is not felt until afterwards. Such a power does not belong to a municipal corporation as an incident to its creation. To be possessed it must be conferred by legislation, either express or implied. It does not belong, as a mere matter of course, to local governments to raise loans. Such governments are not created for any such purpose. Their powers are prescribed by their charters, and those charters provide the means for exercising the powers; and the creation of specific means excludes others. Indebtedness may be incurred to a limited extent in carrying out the objects of the corporation. Evidence of such indebtedness may be given to the public creditors. But they must look to and rely on the legitimate mode of raising the funds for its payment. That mode is taxation. Our system of local and municipal government is copied, in its general features, from that of England. No evidence is adduced to show that the practice of borrowing money has been used by the cities and towns of that country without an Act of Parliament authorizing it. We believe no such practice has ever obtained. . . . If in the exercise of their important trusts the power to borrow money and to issue bonds or other commercial securities is needed, the Legislature can easily confer it under the proper limitations and restraints and with proper provisions for future payment. Without such authority it cannot be legally exercised."

In *Atty-Gen. v. Lichfield*, 13 Sim. 547, the case was one where £200 were borrowed of one Mallett and used for the ordinary expenses of the corporation; and it was held that the corporation had no authority to borrow money, and its treasurer was restrained from paying out of the funds of the corporation the money thus borrowed.

To the same effect are the following textbooks: Dillon, *Mun. Bonds*, 13, 14; Burroughs, *Pub. Securities*, § 177; Jones, *Railroad Securities*, §§ 222, 233; Daniel, *Neg. Inst.* § 1580.

In the latter authority the learned author says: "But there is a fundamental difference between contracting a debt to one person and borrowing money from another to pay it. It may be convenient to do so, but it cannot be necessary, and the power to contract a debt to A cannot, by any reasonable intentment, be construed into a power to borrow money from B. In the one case the application of the credit is secured to the advancement of the authorized object, while money borrowed is liable to be lost, to be squandered or to be diverted to illegitimate purposes."

In *McDonald v. New York*, 68 N. Y. 23, it

was held that where a municipal charter prohibits its officers from contracting on its behalf for the purchase of materials, save in cases and in a manner specified, the municipality is neither liable upon a contract made by an official in violation of, or without a compliance with the requirements of the charter, nor can the value of materials furnished under the contract be recovered upon any implied liability. In that case *Judge Folger* said: "It may be that where a municipality has come into the possession of the money or the property of a person without his voluntary, intentional action concurring therein, the law will fix a liability and imply a promise to repay or return it."

In *Dickinson v. Poughkeepsie*, 75 N. Y. 65, it was held that a contract for the supply of water in the City of Poughkeepsie was unauthorized and void, and that being void when executed its execution did not confer upon the contractor any right of action thereunder, and that no recovery thereon could be had upon a *quantum meruit*. *Judge Hand* there said: "If the execution of a contract, the making of which is prohibited as against public policy, absolutely cures its invalidity, a mere continuance in violation of law would have certainly a strange result. It is difficult to see what use or force there could be in such prohibitions, so general as to municipalities, and so much a

part of our policy in this State, if the consummation of their violation brings with it the protection of the law and a right of action for payment upon the void contract."

The money for which the plaintiff here seeks to recover was not taken from his testator against his will. On the contrary his testator delivered it to Alvord knowing, as we must assume, that he had no right to borrow it on behalf of the Town, and that he had no agency on its behalf in reference thereto. This is not, therefore, like a case where the money or property of one is taken against his will without authority of law or in violation of law, and applied to the use or benefit of a municipality.

We have regarded this as a case of great public importance, and we have therefore given it very careful consideration. The extended citations from authorities of acknowledged weight, and from the opinions of judges of great repute, furnish ample reasons for the conclusion we have reached. There is no possible ground which we can perceive for the maintenance of this action, and it is better that the litigation should end here.

The judgment of the General Term, and that entered at the Trial Term should therefore be reversed, and the complaint dismissed, with costs.

All concur, except *Ruger, Ch. J.*, and *Andrews, J.*, who take no part.

MASSACHUSETTS SUPREME JUDICIAL COURT.

CARY LIBRARY, *Petitioner,*
v.

Edward P. BLISS *et al.*

(.....Mass.....)

1. The gift of a fund to a town for the establishment of a public library, the fund to be held by trustees who are to invest it and expend the income therefrom for books in their best dis-

cretion, as well as control and manage the library, vests the legal title to the fund in the trustees, and the town has but the beneficial interest.

2. The prohibition against impairing the obligation of contracts, contained in art. 1, § 10, U. S. Const., applies to contracts establishing charitable trusts.
3. The acceptance by a town of a proposition for the donation of a fund for the establishment of a public library which contains

NOTE.—Municipal corporations may administer public charity.

The City of Cincinnati is capable of taking in trust devises and bequests for charitable uses,—such as for the establishment of a college for boys and girls. *Perin v. Carey*, 65 U. S. 24 How. 465 (16 L. ed. 701).

A devise to the Cities of New Orleans and Baltimore in trust for the establishment of public schools for the free education of poor children is not invalid for any incapacity of those cities to take the trusts. *McDonogh v. Murdoch*, 56 U. S. 15 How. 267 (14 L. ed. 732).

A devise to the mayor of New York City and the presidents of several colleges, to establish and maintain a library for the use of the public in general of the City of New York, is valid. Chap. 318, Laws 1840; chap. 231, Laws 1841; *Cottman v. Grace*, 41 Hun. 345.

The corporation of Philadelphia has power under its charter to take real and personal estate by deed and also by devise. *Vidal v. Girard*, 43 U. S. 2 How. 127 (11 L. ed. 205).

Dr. Franklin left legacies to the Cities of Philadelphia and Boston, to be lent to young married artificers, with sureties, to be paid by yearly instalments of one tenth, with interest, and directed that

this should go on for one century, and with a part of the fund for another century, at the expiration of which he gave the principal to the City and Commonwealth. In 1827 *Chief Justice Gibson* spoke approvingly of this disposition of property. *Witman v. Lex*, 17 Serg. & R. 91.

The change in the name of the City of Philadelphia, the enlargement of its area, the increase in the number of its corporators, or the amendment of its charter, cannot affect its title or right to hold the property devised by the will of Stephen Girard, or its authority to execute the trusts of the will. *Girard v. Philadelphia*, 74 U. S. 7 Wall. 1 (19 L. ed. 53).

A bequest of personal property to a town for the support of the poor is valid, but a devise of realty for the same purpose is void. *Fosdick v. Hemstead*, 29 N. Y. S. R. 545.

A bequest or devise to a township in Indiana, although primarily to the civil township, will be held to be for the school township when the intention appears to create a fund for the support of common schools. *Skinner v. Harrison Twp.* 116 Ind. 139.

A bequest to a school township for the support of common schools is a public and charitable use. *Ibid.*

A school district in Indiana is capable of taking a

a scheme for the management of the fund and library, and the payment of the money in accordance therewith, constitutes a contract between the parties, and the scheme cannot afterwards be changed by the Legislature without the consent of all the parties to the contract,—at least not until the conditions existing at the time the contract was made become so changed as to make it impracticable or inconvenient to further carry out the original scheme.

4. **Persons who make gifts to a fund** already established for the maintenance of a public charity are presumed to know on what terms the charity was established and the scheme for the management thereof, and it will also be presumed that they intended their gifts to be held upon the same trusts, and the acceptance of the gift will constitute a contract on the part of the donee that it shall be so held.
5. **The signatures of a majority of the members** of a board of directors, separately obtained to a paper when the board is not in session, will not constitute a valid act by the board.
6. **The taking of money** by a private corporation created to administer a public charity is not a taking of property for a public use which may be authorized under the power of eminent domain.
7. **The taking of property which is held by one person for a public use** by another person to be held in the same manner for precisely the same public use is not a matter of such public necessity that it can be authorized by the Legislature under the power of eminent domain.

(May 1, 1890.)

REPORT from the Supreme Judicial Court for Middlesex County (Knowlton, J.) for the opinion of the full court of a petition for a writ of mandamus to compel the delivery to plaintiff of all the funds, books, etc., in possession of defendants as trustees of the Cary Library. *Dismissed.*

In 1867 Maria Cary addressed to the selectmen of Lexington the following letter:

Brooklyn, N. Y., December 10, 1867.
To the Selectmen of the Town of Lexington.
Gentlemen:
Having a regard for my native place and wishing to promote its welfare by diffusing

knowledge among its inhabitants, I desire to make through you the following proposition to the Town of Lexington:

If the inhabitants of the Town of Lexington, in a town meeting duly called for that purpose, will vote to establish a free public library open under suitable regulations to all the inhabitants of the town, and will appropriate or otherwise procure the sum of \$1,000 in books suitable for a town library or in cash for the purchase of books, and will vote that they will after the opening of said library for use appropriate the sum of \$40 a year for the purchase or repair of books for said library for the space of six years, I will give them \$1,000 the interest of which shall be expended from year to year for the purchase of books to increase the said library.

The said sum of \$1,000 thus given shall be held by the selectmen and the school committee of the town for the time being and the settled ministers of the place as trustees who shall invest the same and expend the interest accruing therefrom in their best discretion for such books as they shall deem suitable for the library, and the said trustees shall have the general supervision of said library and shall make such rules and regulations for the management thereof as they may consider most conducive to the public interest, the said rules and regulations to be submitted to the town for their approval. And the said trustees shall report to the town annually stating the manner in which the fund held by them is invested, the number of volumes in the library, and the general condition of the same, with such suggestions and recommendations as they may deem useful to the parties concerned.

This offer is made upon the conditions, that if said library shall be abandoned, or shall at any time cease to be kept open to the inhabitants of the town, as above provided, the said town shall forfeit and the trustees shall make over said sum of \$1,000 (to be given by me) together with the accrued interest which shall remain by them unexpended to me and my heirs, executors and administrators.

Maria Cary.

Witness: I. H. Frothingham.

devise in trust for support of common schools therein. *Ibid.*

Gifts, devises and bequests for the advancement of education, learning and knowledge generally are valid. See *notes to Penny v. Croul* (Mich.) 5 L. R. A. 858; *Bullard v. Chandler* (Mass.) 5 L. R. A. 107.

That municipal corporations may be trustees, see *note to Cottman v. Grace* (N. Y.) 3 L. R. A. 147.

Vested rights, subordinate to the power of eminent domain.

All private rights vested under the government, including those held by charter or other contracts, are subordinate to the power of "eminent domain." *West River Bridge Co. v. Dix*, 47 U. S. 6 How. 507 (12 L. ed. 535); *Richmond F. & P. R. Co. v. Louisa R. Co.* 54 U. S. 13 How. 71 (14 L. ed. 55).

The Legislature may regulate the use of property dedicated to a public use, but cannot divert it to a use inconsistent with the contract of dedication. *Portland & W. V. R. Co. v. Portland*, 14 Or. 188.

There must be a special reference to an existing necessity for the subsequent use, where it appears that both uses cannot stand together and the latter, if exercised, must greatly endanger, if it does not

destroy, the exercise of the former use. *Mills, Em. Dom.* § 345; *Hickok v. Hine*, 23 Ohio St. 523; *Crosley v. O'Brien*, 24 Ind. 325; *Pierce, R. R.* 153; *Bloodgood v. Mohawk & H. R. Co.* 18 Wend. 2, 1 Redf. R. Cas. 224.

The Legislature may interfere with corporate property held for one purpose and apply it to another; but the intention to do so must be stated in clear and express terms. *Baltimore & O. & C. R. Co. v. North*, 1 West. Rep. 474, 108 Ind. 488; *Re Buffalo*, 88 N. Y. 167; *Re Boston & A. R. Co.* 58 N. Y. 574; *Prospect Park & C. I. R. Co. v. Williamson*, 91 N. Y. 552.

The intent to subject lands already devoted to public use will not be implied, but must be shown by express terms. *Indianapolis & C. Gr. Road Co. v. State*, 2 West. Rep. 631, 105 Ind. 37; *Houstanian R. Co. v. Lee & H. R. Co.* 118 Mass. 391.

A general authority to take property for a public use does not authorize the taking of property already devoted to the same use. *Contra Costa C. M. R. Co. v. Moss*, 23 Cal. 323; *California Pac. R. Co. v. Central Pac. R. Co.* 47 Cal. 649; *Worcester & N. R. Co. v. Railroad Comrs.* 118 Mass. 561; *Boston & M. R. Co. v. Lowell & L. R. Co.* 124 Mass. 368; *Oregon*

At a meeting held on April 20, 1868, the Town of Lexington voted to establish a public library, to be called the Cary Library, and to accept the offer of Maria Cary and to comply with all the conditions annexed to the gift.

The Library was duly established and other funds were subsequently donated towards the library fund.

The petitioner was incorporated under chap. 843 of the Acts of 1888 for the purpose of taking possession of the funds, books and other property then in the hands of the trustees of the Cary Library. Upon the refusal by the trustees to deliver the same this action was brought.

The other facts sufficiently appear in the opinion.

Messrs. Robinson & Blaney, for petitioner:

Petitioner has a legal right to the property of which possession is sought to be obtained, because all of it was at the time of the passage of the Act of Incorporation vested in the inhabitants of the Town of Lexington as absolute owners, or in trust for sundry public purposes. By vote of the inhabitants the title of the town was transferred to the petitioner.

Rumford School Dist. v. Wood, 13 Mass. 199; *Adams v. Frothingham*, 3 Mass. 352; *Drury v. Natick*, 10 Allen, 169.

It was within the constitutional authority of the Legislature to create the petitioner corporation and delegate to it the power to exercise the right of eminent domain for the purposes set forth in the Act of Incorporation.

Dorgan v. Boston, 12 Allen, 223, 229, 230; *Cooley, Const. Lim.* *536, 537.

The power to take all private property for a public use is an attribute of sovereignty. It can only be limited by the Constitution. But the Constitution contains no restriction except as to compensation.

Mississippi & R. R. Boom Co. v. Patterson, 98 U. S. 403, 406 (25 L. ed. 206); *United States v. Jones*, 109 U. S. 513, 518 (27 L. ed. 1015,

1017); *Beekman v. Saratoga & S. R. Co.* 3 Paige, 45.

The use set forth in the Act of Incorporation is clearly a public one.

Drury v. Natick, 10 Allen, 169, 182.

If it be said that these funds and property were already appropriated to one public use, yet it was competent for the Legislature to authorize the same to be taken and appropriated to another similar use.

Eastern R. Co. v. Boston & M. R. Corp. 111 Mass. 130, 181.

All property, both real and personal, can be so taken.

Declaration of Rights, art. 10; *Eastern R. Co. v. Boston & M. R. Corp. supra*; *Cooley, Const. Lim.* 4th ed. chap. 15, pp. 526, 527, 651, 652, 654-656.

The term "property" must be taken to comprehend money as well as everything of which man may legally have the absolute and exclusive dominion.

People v. Brooklyn, 9 Barb. 535, 546.

It is constitutional to appropriate to public uses property previously granted to individuals or corporations, compensation being made, although such appropriation impairs the obligation of contracts.

West River Bridge Co. v. Dix, 47 U. S. 6 How. 507 (13 L. ed. 535); *Boston Water Power Co. v. Boston & W. R. Co.* 23 Pick. 860, 894.

Messrs. Gaston & Whitney, for respondents:

The attempt to substitute a close corporation for the trustees named by Mrs. Cary is directly contrary to the terms of the contract between the town and Mrs. Cary, and also to the trusts upon which the defendants hold the property.

Fellows v. Miner, 419 Mass. 541; *Harvard College v. Society for Promoting Theological Education*, 3 Gray, 280; *Winthrop v. Atty. Gen.* 128 Mass. 258; *Morville v. Fowls*, 4 New Eng. Rep. 39, 144 Mass. 109.

This being so, the Statute is unconstitutional.

Cascade R. Co. v. Baily, 3 Or. 164; *Alexandria & F. R. Co. v. Alexandria & W. R. Co.* 75 Va. 730.

The exceptions to this rule are cases where the property of a railroad company, not in use for railroad purposes and not necessary to the proper exercise of its franchise, was authorized to be taken by another company. *Peoria P. & J. R. Co. v. Peoria & S. R. Co.* 66 Ill. 174; *Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co.* 17 W. Va. 812.

But the authorization must be by express words (*Eastern R. Co. v. Boston & M. R. Co.* 111 Mass. 125; *Lewis v. Germantown, N. & P. R. Co.* 16 Phila. 621); or must arise by necessary implication. *Providence & W. R. Co. v. Norwich & W. R. Co.* 138 Mass. 277. See note to *Barre R. Co. v. Montpelier & White Riv. R. Co.* and *Granite R. Co. v. Barre R. Co.* on cross petition (Vt.) 4 L. R. A. 785.

An implication arises that the Legislature intended that such appropriation may be made, when it appears that the contemplated road could not reasonably be built without such appropriation. *Fall River Iron Works v. Old Colony & F. R. R. Co.* 5 Allen, 221; *Springfield v. Connecticut River R. Co.* 4 Cush. 63.

Another exception to the general rule is that when necessary for the right of way of one railroad company a small and immaterial portion of the appurtenances of another company may be 7 L. R. A.

taken. *New York, H. & N. R. Co. v. Boston, H. & E. R. Co.* 36 Conn. 190; *Chicago & N. W. R. Co. v. Chicago & E. R. Co.* 112 Ill. 589; *Northern R. Co. v. Concord & C. R. Co.* 27 N. H. 183; *North Carolina & R. R. Co. v. Carolina Cent. R. Co.* 33 N. C. 489; *Philadelphia, G. & N. R. Co. v. Pennsylvania S. V. R. Co.* 16 Phila. 696.

So a railroad may cross the right of way of another railroad under a general authority to build its road, and this whether the respective roads be steam railroads or horse railroads. *Northern Pac. R. Co. v. St. Paul, M. & M. R. Co.* 1 McCrary, 302; *Union Pac. R. Co. v. Burlington & M. R. R. Co.* Id. 452; *Union Pac. R. Co. v. Leavenworth, N. & S. R. Co.* 29 Fed. Rep. 728; *Market Street R. Co. v. Central R. Co.* 51 Cal. 568; *St. Louis, J. & C. R. Co. v. Springfield & N. W. R. Co.* 96 Ill. 274; *Lake Shore & M. S. R. Co. v. Chicago & W. L. R. Co.* 97 Ill. 506; *East St. Louis C. R. Co. v. East St. Louis Union R. Co.* 108 Ill. 265; *Newcastle & R. R. Co. v. Peru & I. R. Co.* 3 Ind. 464; *Lynn & B. R. Co. v. Boston & L. R. Corp.* 114 Mass. 38; *Grand Rapids, N. & L. S. R. Co. v. Grand Rapids & I. R. Co.* 35 Mich. 235; *Morris & E. R. Co. v. Central R. Co.* 31 N. J. L. 205; *Brooklyn Cent. & J. R. Co. v. Brooklyn City R. Co.* 83 Barb. 420; *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.* 30 Ohio St. 604; *South Carolina R. Co. v. Columbia & A. R. Co.* 13 Rich. Eq. 339.

Louisville v. University of Louisville, 15 B. Mon. 642; *Allen v. McKean*, 1 Sumn. 277; *New Gloucester School Fund v. Bradbury*, 11 Me. 118; *Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 518 (4 L. ed. 629); *University of Maryland v. Williams*, 9 Gill & J. 365; *Norris v. Abingdon Academy*, 7 Gill & J. 7; *Brown v. Hummel*, 6 Pa. 86; *Edwards v. Jagers*, 19 Ind. 407.

The fact that one of the parties to a contract is willing or desirous to break that contract, or to alter the terms of it, does not give any additional authority to the Legislature.

Louisville v. University of Louisville, 15 B. Mon. 642, 687.

The Legislature cannot, except in case of some overruling necessity, as in time of war, authorize the taking of money under the power of eminent domain.

Cooley, Const. Lim. 4th ed. p. 656; *People v. Brooklyn*, 4 N. Y. 419, 424; Lewis, Em. Dom. § 268.

Where property is already being used for public use, it cannot be taken for the same public use.

West River Bridge Co. v. Diz, 47 U. S. 6 How. 507, 537 (12 L. ed. 535, 547); *Lake Shore & M. S. R. Co. v. Chicago & W. L. R. Co.* 97 Ill. 506; *Chicago & N. W. R. Co. v. Chicago & E. R. Co.* 112 Ill. 589; Lewis, Em. Dom. § 276.

Knowlton, J., delivered the opinion of the court:

The foundation of the Cary Library in Lexington was a gift of \$1,000, made by Maria Cary in accordance with the terms of her letter of December 10, 1867. Upon compliance by the town with the condition named in the letter, her gift was to go to the inhabitants of the town to be held by a board of trustees consisting of the selectmen and school committee of the town for the time being and the settled ministers of the place, who were to invest it, and expend the accruing interest in their best discretion for such books as they should deem suitable for the Library, and were to have the general supervision of the Library and to make such rules and regulations for the management of it as they should consider most conducive to the public interest, such rules and regulations to be submitted to the town for approval. Her scheme contemplated the establishment of a public library for the benefit of all the inhabitants of Lexington, supported in part by the income of a fund furnished by her, and in part by moneys supplied by the town. It is perhaps not of much consequence in the consideration of this case, or in the practical management of the trust, whether the legal title to the fund, or to the Library itself, was in the trustees or in the town. In either case the trustees had the management and control of the fund and of the Library. They had not a mere naked power, but a power coupled with a trust. *Drury v. Natick*, 10 Allen, 169.

We are of the opinion that they had the legal title to the fund contributed by Mrs. Cary, and that the interest of the inhabitants was merely beneficiary. The considerations which induced the court to make a similar decision as to the legacy referred to in *Atty-Gen. v. Parker*, 126 Mass. 216, apply equally to this case. There the legacy was to the town "for the

benefit of all the youth of the town." It was said in the opinion that the powers given to the trustees were inconsistent with the idea that the town was to be the owner of the legal title to the money. It is true in this case also that the rights and duties of the trustees in the management and disposition of the fund show that they have the legal title. The principal reason for holding in *Drury v. Natick*, *supra*, that the town took the fee in the property devised, is wanting in the case at bar. See also *Hadley v. Hopkins Academy*, 14 Pick. 262.

It seems to have been intended that the legal title to the library itself should be in the town. The letter required the town, as a condition precedent to receiving the gift, to "vote to establish a free public library," and to provide a sum of money towards the establishment and support of it. It was nowhere said that the title to the money supplied by the town, or to the books procured with it, should pass to the trustees, but it was rather implied that the library should be the property of the inhabitants, although under a trust that it should be supervised and managed by the trustees.

By another communication, on April 6, 1870, Mrs. Cary made another gift of \$3,000, on precisely the same terms as the first, except that the trustees were directed to expend \$1,000 of it in appropriately fitting up and furnishing the library rooms. On her death \$5,000 more passed by her will to the Cary Library without a particular designation of the trust. It may be doubtful, and it is immaterial, whether that sum went to the trustees as holders of the legal estate, or to the town. At all events it was to be held solely for the support and maintenance of the Library, and the proceeds of it were to be used and expended under the supervision of the same trustees.

That part of the donor's scheme which relates to the management and control of the fund and of the Library cannot be disregarded as unimportant. It prescribed the method of administering the charity which she thought best adapted to the accomplishment of her purpose. She chose to give her money to be used in that way. She did not authorize the use of it in any other way, unless for some reason it should become impracticable to pursue the course which she prescribed. It is fair to presume that before founding this charity, she carefully considered the subject of its administration, and thought it wise to select for her board of trustees those public officers who have in their special charge the business interests of the town, and those whose duty it is to superintend the education of children, together with such reverend gentlemen as regularly minister in the churches, and are expected earnestly to desire the moral and religious welfare of all the people. This part of Mrs. Cary's proposal was carefully regarded by the town in all its proceedings, and was treated as an important element in the agreement which resulted from the acceptance of her offer.

The Statute of 1868, chap. 842, by which the plaintiff was incorporated and under which it claims title, purports to authorize the town to vote to transfer to the plaintiff all the funds and property held by the town for the purposes

of a public library, or for the Cary Library then existing, and also the books, pamphlets and other property constituting the Cary Library, and to vote to assent to a taking by the plaintiff of all the funds and property held by the trustees of the Cary Library under the terms of the gifts and bequests of Maria Cary. The town voted to make the transfer and to assent to the taking, and the plaintiff filed a statement of a taking in accordance with the provisions of the Statute. The principal question now before us is whether by these proceedings the plaintiff acquired a valid title.

The Statute to which we have referred undertakes to materially change the execution of the trust. It allows the town by a single act to divest itself of all property in the Library, and of all connection with it, and of all right to have reports as to its condition or the investment of its funds. A transfer and taking under the Statute place the Library and the funds given by Maria Cary, and acquired from other sources, in the hands of a corporation, which, besides the school committee and the selectmen of the town for the time being, is to consist of not less than thirty nor more than fifty members, of whom nine are named in the Act and the others are to be chosen by these. It vests the management and control of the property, subject to the by-laws of the corporation, in a board of nine trustees to be elected by the corporation from its members. The settled ministers of the town are not made corporators. While the selectmen and school committee are *ex officio* members of the corporation, they cannot be upon the board of trustees unless they chance to be elected to that place by their associates. No one of the board of trustees created by the acceptance of Mrs. Cary's gift is left upon the managing board under this Statute.

Without the consent of the donor such a change in the execution of a charitable trust has never been authorized by the courts in England, when it was practicable to execute the trust according to the original intention.

In *Atty-Gen. v. Boulton*, 2 Ves. Jr. 380, 237, it is said by the Master of the Rolls that "the court will not decree execution of a trust in a manner different from that intended, except so far as they see that the intention cannot be executed literally." It is only when it becomes impracticable to administer a charitable trust according to its terms that a court of chancery will apply the doctrine of *cy pres*. *Atty-Gen. v. Hurdley*, 2 Jac. & W. 382; *Atty-Gen. v. Earl of Mansfield*, 2 Russ. 520; *Atty-Gen. v. Whitechurch*, 3 Ves. Jr. 141; *Atty-Gen. v. Whiteley*, 11 Ves. Jr. 241; *Atty-Gen. v. Deilham F. G. School*, 23 Beav. 350, 357.

This subject has repeatedly been considered by this court.

In *Winthrop v. Atty-Gen.*, 128 Mass. 258, the trustees under a deed of trust, who held a large sum to be used in founding and maintaining a museum of American Archeology and Ethnology in connection with Harvard University, sought to make an agreement whereby the fund would be placed under the control and management of the president and fellows of Harvard College to be held as a part of their general funds, and a part of the income bearing the proportion to the whole which this part

of the fund bore to the whole fund to be paid over to the trustees. The court said that such a departure from the directions of the donor could be justified, if at all, only upon proof of the most pressing exigency; and that the court cannot alter the scheme of a donor, "either as to the objects of the charity or the agents by which it is to be administered, unless it appears to be impossible to carry out the scheme according to its terms."

A similar decision was made in *Harvard College v. Society for Promoting Theological Education*, 8 Gray, 280.

In *Fellows v. Miner*, 119 Mass. 541, a bequest was made by a testator residing in this State to the Town of Kinderhook in New York, in trust for the charitable uses declared in the will. Under the laws of the State of New York, a town could not take such a charitable bequest without express authority from the Legislature, and, an Act having been passed giving the town authority to receive the bequest, it was held that the money could not be paid over because the Act authorized the appointment of the persons who were to collect and distribute the income of the fund to be made by the supervisors and justices of the peace of the town, while the will directed that they should be appointed by the town itself. See also *Baker v. Smith*, 13 Met. 34, 41; *Smith Charities v. Northampton*, 10 Allen, 498, 501, 502; *Jacobs v. Phillips*, 14 Allen, 529, 591, 592; *Merrill v. Fowler*, 144 Mass. 109, 4 New Eng. Rep. 39.

It is quite clear that, upon grounds of mere expediency, and in the absence of an emergency requiring it, the court could not decree such a change in the administration of the trust as is contemplated by this Statute; and it becomes necessary to inquire whether the principles of law which limit the authority of the court in a case of this kind are equally applicable to the action of the Legislature under our Constitution.

The acceptance by the town of Maria Cary's proposition contained in her letter created a contract, which was executed on her part by the payment of the money, and which continued binding on the town and the trustees as to their conduct in reference to the charity.

Prior to the decision in *Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 518 [4 L. ed. 629], it was uncertain what construction would be given by the Supreme Court of the United States to the word "contracts" in section 10 of article 1 of the Constitution of the United States, which provides that no State shall pass any "law impairing the obligation of contracts." It was settled by that case that the word is to be interpreted broadly and liberally, so as to include all obligations which should be enforced and held sacred growing out of agreements, express or implied, for which there is a valuable consideration.

There can be no doubt that the money of Maria Cary was paid under a contract, within the meaning of that word in this clause of the Constitution. The principles by which the courts of England and of this country have been controlled, in the decisions to which we have referred, are those rules of common right which protect men in their transactions with one another.

Among them is that fundamental one which

is embodied in this provision of the Constitution. If it applies to a change in the administration of a charitable trust, such as has been attempted in the present case, it controls the action of the Legislature as effectually as that of the courts.

We think it does apply. The town impliedly agreed with Maria Cary to conform to the terms of her letter. The trustees also agreed that, so long as they continued to be members of the board, they would execute their trust according to her stipulations. She indicated a general purpose to devote her money to this charity, even if it should become impossible to administer it in the manner proposed, and she impliedly agreed that the court might make any reasonable modification of her scheme which might at any time become necessary. The town might become a city, and the board of selectmen or the school committee might be abolished by law, or many other things might occur which would render it impossible or impracticable literally to follow her directions. She impliedly agreed that in such a case the court or the Legislature might modify her method to adapt it to changed conditions. But she did not agree that any material change might be made unless there should be an exigency for it.

It does not appear to be necessary to depart from the plan of administration adopted by the original donor. There seems to be no practical difficulty in conforming literally to the scheme at first proposed. Under these circumstances none of the parties can be relieved from the obligations of their contract without the consent of all the others. The Statute makes no provision for obtaining the consent of any party except the town.

Besides Maria Cary, many others have made gifts for the Library, of which some were given in terms to the trustees of the Cary Library, some to Cary Library and some to the town. It is to be presumed that these persons knew on what trusts the Library was established and was to be managed, and that they made their gifts to be held under the same trusts. In connection with each of the gifts, the donor, the town and the trustees impliedly became parties to the same contract in regard to the management of the Library as that made with Mrs. Cary. *Hadley v. Hopkins Academy*, 14 Pick. 263; *Edwards v. Jayers*, 19 Ind. 407, 415.

So far as appears, George W. Robinson is the only donor who has consented to a change after contract. If it be assumed that Alice B. Cary, the residuary legatee of Maria Cary, has assented by petitioning for the passage of the Statute and becoming one of the corporators and a trustee, her assent is not equivalent to the assent of the original donor. Two of the gifts of Maria Cary were made in her lifetime, and the contract was fully executed on her part. Her residuary legatee does not legally represent her desire to secure a permanent benefit to the inhabitants of Lexington. Her representative succeeds only to her rights of property. Her right to have the trust executed in the interest of charity is a personal right, whose value was in her enjoyment of doing good, and it is not allied to the interest which an heir might have to avail himself of property which belonged to his ancestor. *Sanderson* 7 L. R. A.

v. White, 18 Pick. 328, 333; *American Academy of Arts and Sciences v. Harvard College*, 13 Gray, 542; *Atty-Gen. v. Margaret and Regius Professors*, 1 Vern. 55.

The possibility of a reversion under the last clause of the letter gives the residuary legatee no right to consent to a modification of the scheme. So far as there is a succession to a mere right of property in the contract, her executor and residuary legatee might represent her; although such a representation could not include a right to consent to the change proposed. But it is not necessary to decide that Alice B. Cary cannot give consent for Maria Cary. It is enough that there is no one who assumes to represent the other donors, and that their consent is not obtained.

If, in a case of this kind, either the original donor or those who subsequently contributed to the charity might be sufficiently represented by the trustees, the Statute in the present case makes no provision for obtaining the trustees' consent, and the paper signed by a majority of them separately, and without conference with their associates, is so inconsistent with the performance of the ordinary duties of their trust that it cannot be taken as representing a valid act of the board. *Morville v. Fivole*, 144 Mass. 100, 4 New Eng. Rep. 39.

We are of opinion that the Statute which we are considering impairs the obligation of the contract under which this charity is administered. The principles which lie at the foundation of the *Dartmouth College Case* and of other similar decisions are decisive of the question before us. *Louisville v. University of Louisville*, 15 B. Mon. 642; *Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 518 [4 L. ed. 629]; *Allen v. McKean*, 1 Sumn. 277; *New Worcester School Fund v. Bradbury*, 11 Me. 118; *University of Maryland v. Williams*, 9 Gill & J. 865, 408; *Norris v. Abingdon Academy*, 7 Gill & J. 7; *Brown v. Hummel*, 6 Pa. 80, 96.

The law laid down in these cases, that a charter establishing an eleemosynary corporation is a contract which cannot be changed by the Legislature without the consent of its parties to it, is a mere extension of the doctrine which gives a similar effect to the written statement of the scheme that is made the foundation of donations to unincorporated trustees of a public charity.

As if apprehensive that the Statute, in the parts already considered, was in conflict with the Constitution, the framers of the Act embodied in it a provision for taking the property under the right of eminent domain. Of this property \$1,500 was money deposited in a savings bank; and there were two promissory notes of the Town of Lexington, amounting to \$11,000, bearing interest, and payable to the treasurer of the board of trustees.

Property can be taken in this way only in the exercise of the paramount right of the government founded on a public necessity. The question has been somewhat considered whether that necessity can ever extend to the taking of money.

In *Burnett v. Sacramento*, 12 Cal. 76, Mr. Justice Field, now of the Supreme Court of the United States, says: "Money is not that species of property which the sovereign authority can authorize to be taken in the exercise of its right

of eminent domain. That right can be exercised only with reference to other property than money; for the property taken is to be the subject of compensation in money itself, and the general doctrine of the authorities of the present day is that payment must be either made, or a fund provided for it in advance."

In *Cooley on Constitutional Limitations*, 4th ed. 656, a similar opinion is expressed, and language to the same effect is found in *People v. Brooklyn*, 4 N. Y. 419, 424.

There may be a great public exigency, as in time of war, which will authorize the governments to take money in the exercise of this right. *Mitchell v. Harmony*, 54 U. S. 18 How. 128 [14 L. ed. 81]; *Wellman v. Wickerman*, 44 Mo. 434; *East v. Stout*, 4 Coldw. 205.

But it cannot truly be said that the taking of money by a private corporation created to administer a public charity is a taking of property for public use. The money taken must be paid for in money. It cannot be taken unless it is paid for in advance or sufficient provision is made for immediate payment, which provision must be in money or in that which is deemed its equivalent. There can be no necessity for such a taking. In its nature it is not a taking for a public use. There can be a taking for a public use under this power only when in the nature of the case there is or may be a public necessity for the taking. There cannot be such a necessity in favor of a private corporation which must provide money to pay for money. For this reason we are of opinion that the Legislature could not authorize the taking of this property by the petitioner.

The only statement of the use to which the property is to be put is found in the provision that it is "to be held and applied in the same manner as if held by said trustees." The question arises whether taking property from one party who holds it for a public use by another to hold it in the same manner for precisely the same public use can be authorized under the Constitution. Can such a taking be founded on a public necessity? It is unlike taking property for a public use which is already devoted to a different public use. There may be a necessity for that. In the first case the property is already appropriated to a public use as completely in every particular as it is to be. Can the taking be found to be for the purpose which must exist to give it validity? In every case it is a judicial question whether the taking is of such a nature that it is or may be founded on a public necessity. If it is of that nature, it is for the Legislature to say whether in a particular case the necessity exists. We are of opinion that the proceeding authorized by the Statute was, in its nature, merely a transfer of property from one party to another, and not an appropriation of property to public use nor a taking which was, or which could be found by the Legislature, to be a matter of public necessity. *West River Bridge Co. v. Dix*, 47 U. S. 6 How. 507 [12 L. ed. 535]; *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.* 97 Ill. 506; *Chicago & N. W. R. Co. v. Chicago & E. R. Co.* 112 Ill. 569.

For these reasons the majority of the court are of opinion that the Statute of 1888, chap. 842, is not in conformity with the Constitution of the United States. It follows that the peti-

tioner has no title to the property in the hands of the trustees of the Cary Library, and that the petition must be dismissed.

Petition dismissed.

John W. MASON *et al.*

v.

Silas H. POMEROY *et al.*

(.....Mam.....)

1. Where trustees are authorized to carry on a business and contract debts therein, and are given a right of indemnity from the trust estate for the personal liability incurred thereby, when the time arrives for terminating the trust a creditor of such trustees may bring suit in equity on behalf of himself and of other similar creditors to reach the trust fund for the satisfaction of his debt without first recovering a judgment at law.
2. A bill filed for such purpose will not be subject to demurrer for failure to contain an offer to make good to the trust estate the losses incurred by defaults for which the estate would have a claim on the trustee, even on the theory that the creditor can only reach the equity of the trustee to indemnity, since the creditor would succeed only to such rights as the trustee might be found to have.
3. If a trust to carry on a business with power to contract debts is given to three trustees who carry on the business for a time and in so doing contract debts, and then two of the trustees retire from the trust and the other trustee continues the business and contracts more debts in good faith and for the benefit of the business, upon the termination of the trust and the winding up of the business the creditors whose claims accrued during the management of the three trustees have no equity to priority in payment over the other creditors in the absence of provisions to that effect in the statutes or in the instrument constituting the trust.
4. Where a decree of court directs the taking of an account of the amount due to certain creditors of a business conducted by a trustee and the giving of a mortgage upon the business to secure the same, the right to the mortgage will be lost if no steps are taken to secure it until long afterward, when proceedings have been begun for the winding up of the trust and bills have been filed by other creditors to reach the trust property.

(February 27, 1890.)

ON reservation from the Supreme Judicial Court for Berkshire County (C. Allen, J.) upon bill, answer, demurrer, replication and master's report, of a suit by a creditor to obtain from a trust estate payment for goods furnished to the trustee for the benefit of the estate. *Decree for complainants.*

The case sufficiently appears in the opinion.

Mr. M. Wilcox, for plaintiffs:

These trustees stand (at the termination of the trust), in relation to the trust estate (still in their hands) in no better condition than sureties holding securities from a principal debtor for payment or for indemnity against payment of debts due from the principal debtor to the creditor. And such a relation gives a direct equitable right to the creditor to look to the trust property for payment.

Reid v. Reid, 8 Conn. 525; *Seibert v. True*, 8 Kan. 62, 65; *Vail v. Foster*, 4 N. Y. 812, and the authorities cited; 1 Story, Eq. §§ 683, 689; *Eastman v. Foster*, 8 Met. 19; *New Bedford Sav. Inst. v. Fairhaven Bank*, 9 Allen, 175, and cases cited; *Moses v. Murgatroyd*, 1 Johns. Ch. 119; *Phillips v. Thompson*, 2 Johns. Ch. 418; *Ten Eyck v. Holmes*, 8 Sandf. Ch. 428; *Curtis v. Tyler*, 9 Paige, 432.

The court then goes on to say that the right of the creditor does not depend on insolvency of the surety, and the creditor is not bound to wait until the fund goes into the hands of an assignee and assert his right there.

The equity of the creditor does not depend upon the fact whether or not the trustee be in advance or in default to the trust estate.

Wyllie v. Collins, 9 Ga. 235; *Lelm v. Young*, 9 B. Mon. 894.

The equitable right of the creditor is not derivative from the surety or trustee holding the trust property, but is an independent right superior to the control of the trustee, and equity will cause the trust to be executed.

See *Cater v. Edeleigh*, 4 Desaus. Eq. 19, 6 Am. Dec. 591; *James v. Mayrant*, 4 Desaus. Eq. 591, 6 Am. Dec. 630; *Montgomery v. Edeleigh*, 1 McCord, Ch. 267; 1 Lead. Cas. in Eq. (3d Am. ed.) 530; *Storv. Eq.* § 1250.

These creditors dealt with persons intrusted with the control and management of the trust business, and furnished things necessary therefor in good faith, relying on the trust estate as well as on the personal liability of the person or persons conducting the business. They have a right to look to the trust property embarked in the trade.

Ex parte Garland, 10 Ves. Jr. 110, 120; *Pitkin v. Pitkin*, 7 Conn. 307-318.

Messrs. F. P. Goulding and T. P. Pingree, for defendants Turnbull and Atwater, trustees:

The bill simply shows a contract debt of personality sold to one of the three trustees, and if the plaintiff has any claim, an action at law will be the simple, plain, adequate remedy for the recovery of his debts.

Jones v. Newhall, 115 Mass. 244.

And in this Commonwealth a bill is demurrable, not only if it shows that the plaintiff has a remedy at law equally sufficient and available, but if also it fails to show that he is without such remedy.

Jones v. Newhall, 115 Mass. 252, 258, and cases cited.

The plaintiff cannot maintain a creditor's bill because he does not show that he has recovered judgment on his debt.

2 Story, Eq. Jur. § 1216 b; *Smith v. Hurst*, 10 Hare, 80; *McDermott v. Strong*, 4 Johns. Ch. 687; *Reubens v. Joel*, 13 N. Y. 488, 490, 492; *Wiggin v. Heywood*, 118 Mass. 514; *Carver v. Peck*, 141 Mass. 298; 3 Pom. Eq. § 1415, and cases cited in notes 3, 4.

Courts of equity are not tribunals for the collection of debts, though they enable creditors to obtain payment, when their legal remedies have been exhausted. And it is only by the exhibition of such facts as show that these have

been exhausted, that the bill should state that judgment has been obtained and the execution returned unsatisfied.

Baxter v. Moses and Webster v. Clark, supra; *Hartshorn v. Eames*, 81 Me. 93; *Dana v. Haskell*, 41 Me. 25; *Dockray v. Mason*, 48 Me. 178; *Howe v. Whitney*, 66 Me. 17; *Taylor v. Bowker*, 111 U. S. 110 (28 L. ed. 868); *Ades v. Bigler*, 81 N. Y. 849; *Adsit v. Butler*, 87 N. Y. 585.

The bill cannot be maintained because of a lack of proper parties plaintiff. The plaintiff and other claims are separate and distinct in diverse parties, having no connection with each other, and no one plaintiff interested in the claim of the other, and arise by divers distinct contracts for personality with each claimant, without any privity between them, and where knowledge and notice to one would not bind another.

Lapeer Co. v. Hart, Harr. Ch. (Mich.) 157; *Marcellis v. Morris Canal & Bkg. Co.* 1 N. J. Eq. 31, 35-39; *Bouverie v. Prentice*, 1 Bro. Ch. 200; *Ward v. Duke of Northumberland*, 2 Anstr. 469; *Saxton v. Davis*, 18 Ves. Jr. 72; *Hester v. Weston*, 1 Vern. 468; *York v. Pitkington*, 1 Atk. 282; *Cooper*, Eq. Pl. p. 182; *Whaley v. Dawson*, 2 Sch. & Lef. 367; *Jones v. Garcia Del Rio*, 1 Turn. & R. 299; *Birkley v. Presgrave*, 1 East, 227; *Ballard Paving Co. v. Mulford*, 100 U. S. 143 (25 L. ed. 591).

The bill is not that of one or more creditors suing in behalf of all, for the enforcement of a trust *inter vivos*, where any decree is for the benefit of all. There is no trust here to be enforced. The trustees conducting the trust are individually liable at law for the debts each has contracted, and he is responsible only for his own act, unless he has aided or concurred in the wrong-doing or mal-appropriation of assets by his associate trustee; and no such act or doings are alleged in this bill.

Ex parte Garland, 10 Ves. Jr. 110; *Ex parte Richardson*, 8 Madd. 138-157; *Pitkin v. Pitkin*, 7 Conn. 307; *Burwell v. Cawood*, 43 U. S. 9 How. 560 (11 L. ed. 378); *Stanwood v. Owen*, 14 Grav. 195, 198; *Owen v. Delamere*, L. R. 15 Eq. 124; *Ormiston v. Olcott*, 81 N. Y. 339, 346; *Craft v. Williams*, 88 N. Y. 284; *Adair v. Brimmer*, 74 N. Y. 506; *McKim v. Aulbach*, 130 Mass. 481.

After he took charge of the trust Silas H. Pomeroy alone is responsible for debts then arising, whilst he is also responsible to the defendants Turnbull and Atwater, his co-trustees, for the avails of the trust fund and its property for the benefit of creditors whose debts had accrued prior thereto.

Hall's App. 40 Pa. 409; *Prepost v. Gratz*, 1 Pet. C. C. 378; *Fisk v. Sorber*, 6 Watts & S. 18; *Cadbury v. Dugal*, 10 Pa. 265.

The business or trade that was carried on by the trustees was for the trust estate, not for themselves personally. In conducting it to-

gether, as trustees under the will, they were not partners; nor is their liability, one for the other, that of partners; there was no community of interest in property or profits in them, in the conduct of this business as trustees, and the attributes of partnership are entirely wanting.

Denny v. Cabot, 6 Met. 82; *Sikes v. Work*, 6 Gray, 438; *Fitch v. Harrington*, 13 Gray, 464; *Pratt v. Langdon*, 12 Allen, 544; *Howe v. Howe*, 99 Mass. 71; *Meserve v. Andrews*, 104 Mass. 860; *Beckford v. Mill*, 124 Mass. 588; *LaMont v. Fullam*, 138 Mass. 533; *Legett v. Hyde*, 58 N. Y. 272; *Manhattan Brass Co. v. Sears*, 45 N. Y. 797.

Upon the bankruptcy of an executor and trustee, directed by the will to carry on a trade, with a limited sum to be paid him by the trustees for that purpose, the general assets beyond that fund are not liable; and the rights of new creditors are confined to the funds in trade, and the credit of the executors or trustees carrying it on.

Ex parte Garland; *Ex parte Richardson*; *Pitkin v. Pitkin*; *Burwell v. Cawood*; *Stanwood v. Owen* and *Owen v. Delamere*, *supra*.

Silas H. Pomeroy contracted these debts in disobedience of the decree, and in violation of its every sense and spirit, and is not entitled, himself, to any indemnity for or on account of those debts so contracted, unless he first makes good to the trust all he has cost and lost it; and his creditors are in no better position, and not entitled to have their debts paid out of the specific assets, unless they reimburse the trust all he has cost and lost it.

Re Johnson, L. R. 15 Ch. Div. 548.

For the fraudulent acts of Pomeroy in conducting the business intrusted to him under the decree by which he created these debts of the second class, the defendants Turnbull and Atwater are not answerable.

Barnard v. Bagshaw, 3 De G. J. & S. 855, 858.

C. Allen, J., delivered the opinion of the court:

The late Theodore Pomeroy devised his mills and manufacturing property to three trustees, in trust, to continue and carry on his manufacturing business until his son Theodore L. Pomeroy should arrive at the age of twenty-one years. They were to provide for the outstanding and current liabilities and to incur, on account of said trust estate, during the continuance of the trust, such further liabilities as a wise and prudent management might require, and, when his said son should become twenty-one years of age, to convey the property to testator's two sons Silas H. and Theodore L., or in case either one of them should decline to continue in business with the other, then to convey the same to the other, upon his paying certain sums to the son who should withdraw, with certain other provisions relating to the termination of the trust, not necessary to be recited here. The will further provides that the trustees should be entitled to fair and reasonable compensation, and that they should not be liable for any loss to the trust estate which did not involve bad faith on their part, and that at the termination of the trust and before any transfer or convey-

ance they should be fully indemnified against any then existing personal liability incurred in the proper execution of the trust.

The three trustees accepted the trust and carried on the business together until May, 1885, when, in consequence of disagreements which had arisen among them, it was arranged that thenceforth the business should be carried on by Silas H. Pomeroy, one of the trustees, and this was done, under the circumstances which are detailed in the master's report. The son Theodore L. became twenty-one years of age on November 13, 1887, and the time had thus come for the termination of the trust. A large amount of indebtedness was then existing, some of which was incurred by the three trustees while carrying on the business together, and some by Silas H. Pomeroy while carrying on the business alone. A partnership firm belonging to the latter class of creditors brought the present suit in behalf of themselves and of other similar creditors, averring that the trustees refused to pay their said debts, and that neither of them had property open to attachment or execution, and seeking to establish and enforce an equitable right to have their claims paid out of the trust property, and especially to have enforced in their favor the right of the trustees for reimbursement and indemnity out of the trust fund, before its distribution.

The principal questions in the case are raised by the two trustees who withdrew from the active management of the business in 1885, and they contend that the creditors whose debts accrued under the joint management are entitled to a priority over the later creditors, and indeed that the present bill cannot be maintained at all by the latter. In support of their demurrer, they rely upon the following propositions: (1) that the plaintiffs have no equity because they do not offer in the bill to make good to the trust fund the losses and defaults occasioned by the acts of the trustee, Silas H. Pomeroy, with whom they contracted, and that their right to the trust fund must be limited by his right to indemnify from that fund; (2) that the plaintiffs' sole remedy is at law; (3) that there has been no previous recovery of judgment by the plaintiffs; and (4) that there is no community of interest between the plaintiffs, and that one creditor cannot sue in behalf of all.

The most of these objections are answered by a brief consideration of the nature of the bill. It is in its essential character a bill seeking to enforce the proper execution of a trust, which is ready to be terminated, and in which nothing remains to be done but to transfer the trust property in accordance with the equitable rights of the various parties who assert conflicting claims thereto. It is indeed difficult to see how this object can be accomplished in any other way than by a suit in equity. The plaintiffs claim equitable rights in the premises. Their position as creditors entitles them to assert such rights and to seek the determination of the court whether on the particular facts of the case their rights should be sustained, that is to say, where trustees are authorized to carry on a business and contract debts, they are not only liable personally for the payment of them, but the creditors may also resort to

trustees which may exist in any particular case. *Ex parte Garland*, 10 Ves. Jr. 110; *Ex parte Richardson*, 8 Madd. 188; *Owen v. Delamere*, L. R. 15 Eq. 184; *Cutbush v. Cutbush*, 1 Beav. 184; *Thompson v. Andrews*, 1 Myl. & K. 116; *Burwell v. Mandeville*, 43 U. S. 2 How. 560 [11 L. ed. 878]; *Smith v. Ayer*, 101 U. S. 320, 330 [25 L. ed. 955]; *Jones v. Walker*, 103 U. S. 444 [26 L. ed. 404]; *Pittin v. Pittin*, 7 Conn. 307; 2 Story, Eq. § 1400; Lewin, Tr. 7th ed. 217.

It is indeed contended on the part of the plaintiffs that their right to resort to the trust property is a primary and original right, which exists independently of any right on the part of the trustees to be indemnified. *Wylly v. Collins*, 9 Ga. 223.

The view, however, which has prevailed in England, so far as the question has been discussed, is that the creditors may reach the trust property when the trustees are entitled to be indemnified therefrom, and that the creditors reach it by being substituted for the trustees and standing in their place. *Re Johnson*, L. R. 15 Ch. Div. 548; *Dowse v. Gorton*, L. R. 40 Ch. Div. 536; *Lindley*, Partn. 4th ed. 607, 608.

It is with reference to this doctrine that the defendants contend that the plaintiffs ought to offer in their bill to make good to the trust fund the losses and defaults occasioned by the acts of Silas H. Pomeroy. But this ground is untenable on the demurrer, because, assuming for the present this doctrine to be correct and taking the plaintiffs' case upon the lowest ground, the bill sets out the right of the trustees to be indemnified against personal liability incurred in the proper execution of the trust, the existence of such liability to the plaintiffs and others and the equitable right of the plaintiffs and others to have enforced in their favor for the payment of their claims the rights of the trustees for reimbursement and indemnity; and it asserts a right to have their claims paid out of the trust property and estate in full, or if such property and estate are insufficient, then to have their claims paid in *pro rata* proportions; and prays that the trustees be held and ordered to account for the trust property, and that an account of the creditors may also be taken and the equitable interest of Silas H. Pomeroy in the trust estate may be sold and disposed of, and the proceeds applied in payment of the plaintiffs and others. There is no occasion for any distinct offer on the part of the plaintiffs to make good any possible losses to the trust estate, arising from his misconduct, if any such there were, since they would only succeed to such rights as he might be found to have. There is no suggestion in the bill of any misconduct or default on his part, but if there were, and if the plaintiffs have no higher right than simply to stand in his place, the bill need not contain any such offer to make good losses in order to entitle the plaintiffs to reach whatever upon account may be found to remain as a fund from which he would be entitled to be indemnified. The result of such an accounting cannot be anticipated on a demurrer. If it should prove finally that there was nothing to which he was entitled, then the plaintiffs would fail on the merits, unless they

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to the equity of the trustee who contracted the debt to them.

It is not necessary that the plaintiffs who institute such a suit should first have recovered judgment on their claim, or even that their claim should be yet due. *Whitmore v. Orborow*, 2 Younge & C. Ch. 18; Story, Eq. 35, 47.

And the usual way is for one creditor to sue in behalf of all. Story, Eq. Pl. § 99; *Eoberts v. Wood*, 3 Paige, 520; *Hallett v. Hallett*, 2 Paige, 15; *Chapman v. Bankers & T. Pub. Co.* 123 Mass. 478; *Thompson v. Dunn*, L. R. 5 Ch. 573. We can have no doubt, therefore, that the demurrer to the bill should be overruled. The demurrer was contained in the answer, and there appears to have been no formal order by a single justice overruling it, but the case was referred to a master, who has made a report which was apparently designed to present all the material facts involved in the issues raised by the pleadings. No objections or exceptions were taken to the report, and when the case came on to be heard before a single justice, it was, upon the request of both parties, reserved for the determination of the full court, upon the pleadings and the master's report. The more important questions which have been argued upon the merits are two: (1) whether the rights of the plaintiffs are qualified by any equity which exists in favor of the trust estate against Silas H. Pomeroy; (2) whether the earlier creditors are entitled to have a priority over the later ones.

In reference to the first of these questions, there is nothing in the facts stated in the master's report which shows that there is any equity existing in favor of the trust estate against Silas H. Pomeroy, so that we have no occasion to consider the question whether, as a general rule of equity, the rights of the plaintiffs would be qualified thereby in case it should be found that he was himself subject to any such equity.

Mention has already been made of the provision in the will, that the trustees shall be entitled to a fair and reasonable compensation for their services in administering the trust, and shall not be liable to any loss to the trust estate which does not involve bad faith on their part. Assuming that the doctrine of the recent English cases above cited [*Re Johnson* and *Dowse v. Gorton*] is applicable to the present case, we find nothing to show that Silas H. Pomeroy is indebted to the trust estate, or that he has caused any loss to the same for which he is responsible, under the terms of the will. There has been no formal accounting, and the material facts, briefly stated, upon which this question depends are as follows: Until May, 1885, the trustees carried on the business together. While so carrying it on, disagreements arose, and the other two trustees brought a bill in equity in the court, on the 11th of April, 1885, against Silas H. Pomeroy and the other parties in interest, under the Statute giving jurisdiction in equity to regulate the execution of trusts.

On the 18th of May, 1885, an agreement was made whereby Silas H. Pomeroy was to take charge of the mills and property and carry on the business, and pay over to Turnbull, who was one of the other trustees, and whose firm

was also a large creditor of the trustees, the net avails over and above the cost of manufacture of the goods manufactured and sold by him, and he was also to give to the two other trustees an agreement with acceptable surety indemnifying them against any liability, debt or obligation created by his acts, and also securing the payment above provided for to Turnbull. No restriction was put upon his power to contract debts in carrying on the business. Such agreement with surety was given, and Pomerooy took possession of the mills and property and proceeded with the manufacturing business under the same name as before.

On the 1st of June, 1886, a decree was made in the suit in equity denying a motion for a receiver, and prescribing the manner in which Pomerooy should thereafter conduct the business. He was to proceed with the manufacture of the wool and raw material then on hand and turn over the net avails of the goods to Turnbull & Co.; his right to purchase new material was limited; after all the stock should be manufactured he was to be at liberty to continue the business as trustee under the will; as soon as he had manufactured the material on hand and the goods had been sold and the proceeds applied as above provided, then the balance, if any, due to Turnbull & Co., was to be determined by reference to a master, if the parties did not agree, and a mortgage upon the trust property was to be given to secure such balance, and thereupon the two other trustees were to be discharged as trustees; the business was to be so conducted as to create no liability upon the two other trustees; and there were certain other subordinate provisions. Pomerooy failed in certain particulars to conform to the above decree, and on the 4th of June, 1887, a new decree was entered, reciting that he had disobeyed the order of the court in that he had failed to turn over to Turnbull & Co. the net proceeds of the goods, and had intermingled the material and goods, until their identity had been lost, and had used the proceeds for carrying on the general business of manufacturing, and that he had thus failed to apply \$40,000; and it was thereupon ordered that all the wool and raw material then on hand should be devoted and set apart to raise \$40,000 to be applied as directed in the former decree.

The decree further provided that the business of manufacturing should be continued, and that additional necessary material might be purchased from time to time not exceeding \$100,000, and added to and mixed with the stock on hand. From the proceeds of such manufacture after deducting the cost of such additional property, and expense, the sum of \$40,000 and interest was to be paid to Turnbull & Co., or to creditors of the three trustees. There were other provisions not necessary to be stated here. The master finds that it was admitted that the provisions above mentioned have been substantially fulfilled. The new decree in the particulars above mentioned was a substitute for the former decree. If while the first decree was in force he exceeded what was therein prescribed in respect to the purchase of goods, that transgression was cured by the appropriation of the property so purchased under the new decree. The goods so purchased went into the trust property and thus went for the

benefit of the other trustees in raising the \$40,000. The master expressly finds that the goods became a part of the trust property, and that they were suitable and necessary therefor. Whether the purchase was or was not in accordance with the first decree, the second decree dealt with the question of any failure in that respect, and it has been complied with; so that it is not now to be alleged against Pomerooy that he failed to comply with the terms of the first decree, in respect to the purchase of goods.

There were certain other particulars in the decree of June 1, 1886, respecting which nothing has yet been done, namely, the indebtedness of the trust estate to Turnbull & Co. has not been determined, and no mortgage to secure the same has been given. With reference to these the first step to be taken was to determine the amount of indebtedness by reference to a master, if the parties did not agree, and if this has not been done there is nothing to show that the omission has been through any fault of Pomerooy. It was a matter between the three trustees on the one side, and Turnbull & Co. on the other, Mr. Turnbull himself being on both sides.

There has been no accounting, in which Pomerooy has been found to be in default, as in the case of *Re Johnson*, before cited; and there is nowhere in the master's report any finding that there has been any loss to the trust estate through any fault of his; much less, that there has been any loss which involved bad faith on his part. We are therefore unable to see that he is in any manner indebted to the trust estate, or that there is any equity existing against him to prevent him from being indemnified out of the trust estate for personal liabilities assumed by him in the conduct of the business.

Nor do we see any good reason for giving to the first class of creditors, whose debts accrued while the three trustees were carrying on the business, a priority over the latter creditors whose debts accrued during the management of Pomerooy. The business during the whole time was the business contemplated in the will. There was no change of trustees. By an arrangement among themselves, which was sanctioned by the court, one of the trustees assumed the direct management of the business, but there was no separation of the property, no inventory, no accounting and no withdrawal or discharge of any of the trustees. The trustees who retired from the active management made an arrangement with their associate which was then deemed sufficient for their protection. Pomerooy's failure in the first instance to conform to the directions of the first decree of the court was made good by what he did under the second decree. The master finds that he incurred debts and liabilities for and on account of the business for goods and materials used in and made a part and parcel of the trust property, and such goods and materials were suitable and necessary for the manufacturing business as conducted by him, and for payment of them the creditors relied on the credit of the trust property, as well as on his personal credit; and these are the debts due to the plaintiffs and those in whose behalf this suit is prosecuted. The trust is now ready to be closed. It is found that these two classes of creditors exist; the first class to the amount of about \$91,000, and the

second class to the amount of about \$51,000, besides a few others which are to be dealt with specially. They have all furnished materials and supplies to the trust property, and it may prove that the trust property now remaining is insufficient to pay them all in full. Why should one class of creditors be preferred to another? There is nothing in the statutes and nothing in the provisions of the will directly applicable to such a case. It is suggested that under the decree made in June, 1886, it was contemplated that a mortgage upon the trust property should be given which would inure to the benefit of the first class of creditors. But such mortgage was to be given while the concern was a going concern; it has never been given, and the time has never come for it to be given. There was first to be a determination of the amount due, by a reference to a master, and this has never been done. The business is now no longer to be carried on under the trust but the trust is to be wound up, and in view of the question in controversy it is to be treated as if the trust property were insufficient to pay the debts in full. Ordinarily, under the insolvent laws, an agreement by a debtor to give to his creditor a mortgage in the future will not protect the mortgage when given from being set aside as a preference. *Copeland v. Barnes*, 147 Mass. 288, 890, 7 New Eng. Rep. 61, and cases there cited.

The steps were not seasonably taken to procure the mortgage, and it is now too late. New equities have arisen. If the mortgage had actually been given, creditors would have been bound to take notice of it. Under the decree, it was not certain whether there would be any balance of indebtedness to be secured by the

mortgage or whether any mortgage would be given. The decree contemplated a security to be given in the future in case it should be determined that there remained any indebtedness to secure. But now the whole business is stopped and creditors must accept the situation as it is. The later creditors have contributed to increase the trust property and it would not be equitable or just to appropriate the whole trust property to the payment of the earlier creditors in full, leaving the later creditors to the chance of what might remain.

The provision in the decree of June 1, 1886, that the business be so conducted in the future as to create no liability upon the two plaintiffs as trustees, and that they should not be liable for any debt incurred by S. H. Pomeroy in doing the business, referred only to a direct liability on their part. It did not mean that creditors in the future should be postponed to themselves in case of a possible necessity for resorting to the trust property. It is not contended that the creditors whose debts accrued under the management of Pomeroy have any direct claim upon the two other trustees. The several claims specially reported upon by the master may be allowed to be paid out of the trust fund, either as expenses of the administration of the trust, or as the costs of parties properly brought before the court in a suit to determine the duties of the trustees, no objection being made by any party. Under the above decision, there is no need to classify them further. *Abbott v. Bradstreet*, 8 Allen, 587; 2 Perry, Tr. § 910; 2 Dan. Ch. Pr. 4th Am. ed. 1412.

Decree accordingly.

CONNECTICUT SUPREME COURT OF ERRORS.

Franklin FARREL *et al.*
v.
TOWN OF DERBY *et al.*

(68 Conn. 234.)

1. A town has power to employ counsel to oppose before the General Assembly a petition for the division of its territory.
2. The vote of the town is not necessary to authorize selectmen to employ counsel and incur expense to oppose a division of the town by the General Assembly.

(Andrew, Ch. J., dissents.)

(December 30, 1889.)

RESERVATION from the Superior Court for New Haven County, upon bill, answer and demurrer thereto, of a suit to enjoin the payment by defendants of certain expenses incurred in opposing a petition to the General Assembly for a division of the Town of Derby. *Judgment for defendants advised.*

The plaintiff with others presented a petition to the General Assembly asking for a division of the Town of Derby and the incorporation of a new town to be called the Town of Ansonia. The town agent and selectmen of Derby re-

tained counsel to oppose this petition and this suit was brought to enjoin the payment for such services from the funds of the Town.

The case sufficiently appears in the opinion. *Messrs. V. Munger and John P. Kellogg*, for plaintiffs, in support of the demurrer:

A town has no such implied right to its existing boundaries that it may defend them against that legislative body which has given the town all the powers it possesses and even its existence itself.

See *Stetson v. Kempton*, 13 Mass. 272; *Minot v. West Roxbury*, 112 Mass. 6; *Coolidge v. Brookline*, 114 Mass. 593; *Westbrook v. Deering*, 68 Me. 231; *Opinion of the Justices*, 59 Me. 598; *Frankfort v. Winterport*, 54 Me. 250.

The fact that notice must be given under our statutes that such a petition will be presented to the Legislature, and the fact that notice was served upon the Town of Derby in this case, gives this Town no new rights, duties or powers.

First Society of Waterbury v. Platt, 13 Conn. 181; *Hartford Bridge Co. v. East Hartford*, 16 Conn. 149; *Granby v. Thurston*, 23 Conn. 416.

Mr. C. E. Ingersoll, with *Messrs. Wooster, Williams & Gager*, for defendants, *contra*:

By law and immemorial usage, towns in Con-

In 1695 patents were issued by the general court for the "grants" of their territory. Stat. ed. 1808, p. 438; *Symsbury Case*, Kirby, 447.

The powers of Connecticut towns are of the nature of chartered powers derived by "grant" from the sovereign.

Webster v. Harwinton, 82 Conn. 189.

Notice in cases for the division of towns was regarded as essential to the jurisdiction by lawyers who were familiar with legal practice before the Constitution.

Berlin v. New Britain, 9 Conn. 175; *Symsbury Case*, *supra*; *Granby v. Thurston*, 28 Conn. 416.

The proceeding is judicial in its character, and the party in interest is entitled to have an impartial tribunal and the usual rights and privileges which attend judicial investigations.

Cooley, Const. Lim. 562. See also *Enfield Toll Bridge Co. v. Connecticut River Co.* 7 Conn. 49.

Carpenter, J., delivered the opinion of the court:

This is a complaint by certain residents and taxpayers of the Town of Derby, praying for an injunction restraining the defendants from paying the charges of counsel, and other expenses, incurred in defending against the petition for the incorporation of the Town of Ansonia.

The controversy arises mainly under the fifth paragraph of the complaint and the fourth paragraph of the answer. The former is as follows:

"The defendants have already wrongfully and illegally paid money from the treasury of said Town, and threaten and intend to wrongfully and illegally pay additional sums of money from said treasury, to counsel and others to oppose before said General Assembly the proposed division of said Town, as hereinbefore stated, using in so doing money paid into said treasury by the plaintiffs in common with others."

The paragraph of the answer referred to is as follows:

"The said Wheeler, as the agent of said Derby, and the said Wheeler, Gesner and Webster, as selectmen of said Derby, acting for and in the name and behalf of said Town of Derby, did retain and employ counsel to attend to several matters and measures brought to and pending before said General Assembly, affecting and concerning the interests of said Town, and to do what could properly and legally be done by them to protect and advance the interests of said Town, as the same should be affected as aforesaid, including within such retainers and employment the opposition by such counsel in the name and behalf of said Town to the granting of said petition and the passage of said resolution; and that they have made a payment from the treasury of such Town on account of such employment, and intend to pay for all legitimate retainers, services and expenses of such counsel rendered or incurred under said employment."

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several matters and measures were that pending before said General Assembly." There are seven other causes of demurrer assigned, which may be summed up and expressed in the language of the plaintiffs' brief, — that the Town has "no power to employ counsel to oppose before the General Assembly the granting of a petition, or the passage of a resolution, dividing its territorial limits."

It will be noticed that the answer expressly admits the precise thing and all that the complaint alleges. The fact that it is included in "several matters and measures" not named, can neither enlarge the scope of the complaint nor destroy the effect of the admission.

But if necessary to specify the other "matters and measures," we think they are sufficiently specified for all the purposes of the answer. The complaint, in terms, only refers to the matter of dividing the Town. While that may fairly include a division of the property, debts, burdens, etc., yet they are not named. The answer brings upon the record the petition and resolution, so that the court can see just what the Legislature was asked to do. In looking at the resolution we find that it embraces several distinct "matters and measures." If they were what the answer referred to, and they probably were, the first cause of demurrer has no foundation in fact.

We come then to the other causes of demurrer, which raise the main question: Has the Town as such the right and power to employ counsel and expend money in proper ways, in opposing the granting of the petition and the passage of the resolution? It will be observed that the question we are considering is not whether the Town has a right to resist the sovereignty of the State in an attempt to change the territorial limits of the Town. Had the State of its own motion, for reasons of public policy, taken steps to change the boundaries of the Town, or abolish it altogether, the case presented would have been a very different one. But the attack was not made by the State from motives of policy and in the interest of good government, but was made by certain parties who sought thereby to promote their own interests. The attack was not directed alone against other individuals who differed from them, but against the Town as well. The end sought involved not only a dismemberment of the Town in respect to territory and population, but also a division of its corporate property, a reduction of its grand list, an apportionment of its debts, liabilities and burdens as to highways, bridges, paupers and the like. In respect to these matters the Town and every taxpayer in the Town had an interest; and they and everyone were duly cited to appear before the Legislature that they might be heard. The proceeding was of an adversary nature, and the opposing parties were brought before the supreme tribunal of the State, that the matter might be adjusted. Here, then, were all the elements of ordinary litigation—a court having competent jurisdiction, parties in interest and matters in controversy. The Town then was not antagonizing the State, but was defending a cause against

those cases in which towns have exercised powers which more properly pertain to the functions of the State or the general government: such as *Stetson v. Kempton*, 18 Mass. 272, in which it was held that the town had no power to appropriate money to defend the inhabitants and property of the town against a foreign enemy, the bounty cases in this State, and the like.

Neither is this case to be controlled by those cases in this State and elsewhere which hold that towns have no inherent or reserved powers of legislation, of which many of the cases cited by the plaintiffs are examples.

On the other hand we do not deem it necessary to decide whether towns in this State are essentially different in respect to their origin, powers and duties from towns in other States. We assume that towns have only such powers as are conferred by statute, expressly or by reasonable implication.

Powers and duties carry with them corresponding obligations and rights. Public duties imposed upon towns and the right to have and hold property are inseparable; and the right to hold property begets the power to protect and defend it. These simple and obviously correct propositions will not be controverted. Let us make the application.

Has the Town power to pay its counsel?

That question will be substantially answered by the answer to another—Had the Town a right to appear? In the somewhat exhaustive brief of the plaintiffs we nowhere find the bald proposition in so many words, that the Town had no right to defend. The right of the selectmen to defend without a vote of the Town is denied on the ground, as it is claimed, that the matter does not concern the Town, and therefore that the selectmen, under section 64 of the General Statutes, which provides that they shall superintend the concerns of the Town, had no power to act. Granting the premises, the conclusion follows. Another conclusion, that the Town itself had no power, would seem to be equally logical. But the argument impliedly admits that the Town might act. That admission destroys the premises; for if the Town may act, it is because the Town is interested; if interested, it is one of the concerns of the Town. If the Town fails to take action, it is the duty of the selectmen to take such action as they may deem advisable.

The right of self-defense is well nigh universal. Towns are not exceptions to the rule. They have a right to defend their existence, and to ask for its continuance, even when it is proposed to deprive them of it by law. So long as they exist, and must exist, with certain burdens imposed upon them, certain duties from which they cannot escape, they have a clear right to defend their integrity. When it is proposed to change those burdens, by increasing or lessening them, with a corresponding change in their means and facilities, their right to be heard must be unquestionable.

That a town is interested in questions necessarily arising on the division of the town is hardly a debatable question. What is a town? A corporation. Who are the parties in inter-

est in the property and when being of the corporation with which they are connected. Their interest pertains, not to their own private affairs, but to the affairs of the corporation. It is not several, but an interest in common. Now the argument is that the organized community may not appear to protect the community interest, but each individual in the community may appear and defend such interest as he may have, infinitesimal though it may be, in common with all the others. We confess our inability to appreciate the force of this logic. If either is to be excluded it would seem more natural to exclude the individual and admit the corporation. It seems to us much more reasonable that the organization, representing the whole, should act for the benefit of all and at the expense of all.

But, as already remarked, the claim is not made in terms that the Town had no right to appear and defend. It did in fact appear, and, so far as we know, without objection. The matter had been pending before the Legislature two months when this suit was brought. During that time the matter had been heard or partially heard, counsel for the Town appearing and taking part, and presumptively with the knowledge of some of these plaintiffs, for they were petitioners. In bringing the suit no suggestion was made that the Town wrongfully appeared; the sole ground of complaint is that the expenses have been, and are to be, wrongfully paid. What reasons are there for this complaint?

We start now with the proposition conceded, or established, that the Town had a right to appear. Engrafted on that proposition is the claim that the Town has no right to pay the expense. That is the precise question. Of what avail is the right to defend, if the Town is deprived of the power to exercise the right? Towns can only appear by agent or attorney. Agents and attorneys do not ordinarily appear in such cases at their own expense. How are they to be obtained without compensation? It may be said that individuals interested may employ counsel. True, but what sense is there in imposing upon individuals burdens which properly belong to the Town? Why cripple a town in maintaining its rights, by compelling it to depend upon voluntary contributions?

Let us examine this matter a little more in detail. The first proposition is to make two towns of one. That involves a division of the grand list. The Town is reduced, it may be, from a first class town in point of wealth and population, to one of the third or fourth class. It may be that every resident of the remaining town would prefer that the former state of things should continue. But his preferences are rendered practically unavailing by the inability of the Town to bring the matter to the attention of the Legislature. Is this right? True, each person may appear for himself. But an organized defense for and in behalf of the whole would be more effective and less expensive.

Again; the division of a town makes necessary the maintenance of two town organizations, with public buildings, instead of one

not the Town employ and pay counsel to prevent such injury? The question answers itself. Moreover, this resolution apportioned the town deposit fund, the property of the old Town, its debts and liabilities, and also its duties and burdens. These are matters which do directly concern the Town obviously and necessarily. It is well nigh absurd to say that the Town has a right to appear and be heard, and yet has no power to pay the expense of such hearing. It seriously impairs, if it does not practically destroy, the right.

We have not overlooked the fact, suggested in the complaint, that the plaintiffs and others, residents in the new town, are taxed to pay the expenses of resisting the petition. There may be an apparent injustice in this; but we doubt if it is real. That was a matter for the Legislature rather than the court. The Legislature might have provided, as it did in the case of Beacon Falls (see 8 Spec. Laws, 52), that the Town of Derby as it now is should pay all such expenses. But it did not; on the contrary, the second section provides that "said new town shall pay its proportion of the present debts, liabilities, charges and expenses, suits, petitions and claims, already due and accrued, commenced and existing, against said Town of Derby," etc. That clearly includes all legitimate expense incurred in defending the petition for a new town. So that by its express language, as well as by its silence, the Legislature has recognized the duty of paying them by the Town of Derby as it was; and we cannot say that it is unjust. The Legislature may have had the best of reasons for its action.

Incidentally we remark that the Legislature, in the case of Beacon Falls, expressly recognized not only the right of the towns to defend such petitions, but also the power to pay the bills.

Prior to 1852 all petitions to the General Assembly of an adversary nature were required to be served on adverse parties in the ordinary way of serving civil process. Under that Statute the practice is believed to have been universal to serve the petition on the town or towns to be affected. The substitution of an order of notice by a judge of the superior court in 1852 made no change except in the mode of service. This is another recognition of the right of the town to be heard, and, by strong implication, of its power to pay the expenses.

Applications for the incorporation of new towns have been numerous and frequent in this State. We apprehend that few cases can be found in which the towns to be affected did not take action either for or against the application. The custom has been general, if not universal, for the towns to pay the expenses of such action. The fact that this question has not been raised heretofore, either in this court or in the superior court, affords some presumption against the plaintiffs' contention. A practice acquiesced in by the bar and the public for so long a time, is pretty good evidence of what the law is, and of what it ought to be.

We are not unmindful of the cases cited in behalf of the plaintiffs from Massachusetts and Maine, and that they are inconsistent with the 7 L. R. A.

See also 11 L. R. A. 550.

strained to say that neither the reasons nor the conclusions are satisfactory to us. In the more prominent case, *Coolidge v. Brookline*, 114 Mass. 592, one argument is that the town has no vested right to its territorial limits and therefore has no corporate duty to defend those limits against the State. That does not quite reach the question before us, which is not a question of duty, but of right and power. The Town may violate no duty to the State or to others if it makes no defense; but when its pecuniary interests are to be affected has it not a right to be heard? True, the Town has no vested right to its territorial limits in the sense that the Legislature may not at its pleasure change those limits; but will the Legislature for that reason deny it a hearing? The right of petition includes the right of remonstrance, and when the Legislature proposes to do an act detrimental to the Town, we have no doubt that in Massachusetts, as well as in Connecticut, a respectful remonstrance will be graciously received and fairly considered.

The opinion in that case concedes that the Town may defend its limits before all tribunals except the Legislature itself. This seems to imply that if others apply to the Legislature to enlarge or restrict the limits, the Town may not resist the change. If that is its meaning we cannot assent to it. We do not understand that the character of the tribunal before which a claim is made will at all affect the rights or the standing of the parties. We cannot believe that the Legislature is less willing to grant a full hearing to all parties in interest than are other tribunals. In that case the change in the boundary lines of Brookline is treated simply as a change in the public duties required of the Town. Here, as we have seen, the case goes much further and materially affects rights of property as well.

For these reasons the superior court is advised to render judgment for the defendants.

In this opinion the other Judges concurred, except *Andrews, Ch. J.*, who dissented.

WILLIAM ROGERS MANUFACTURING CO. *et al.*, *Appts.*,

v.

Frank W. ROGERS.

(58 Conn. 356.)

1. **Contracts for personal services** will not be specifically enforced in equity.
2. **The negative enforcement of a contract** for personal services by an injunction will not be made where the services are not purely intellectual, peculiar or individual in their character.
3. **A contract for the employment of a person** in such services as shall be devolved

NOTE.—*Contracts not enforceable.*

Contracts for services involving special merit and skill will not be enforced in equity except under special circumstances. See note to *Cort v. Lassard* (Or.) 6 L. R. A. 653.

See also the late case of *Metropolitan Exhibition*

upon him by the general manager of the business, including such duties as travelling or acting as secretary or other officer of the company, if required of him, does not show that his services are so peculiar or individual that they cannot be performed by any person of ordinary intelligence and fair learning, so as to authorize an injunction in aid of the specific performance of the contract.

4. An agreement by an employee not to allow his name to be used in any business similar to that of his employer, will not, if the latter does not own the name as a trade-mark, authorize an injunction against his engaging with his employer's competitors, and allowing them the use of his name, at least if it is not shown that the employer uses, or is entitled to use, such name, or that the use of it by rivals would do him some special injury.

(February 17, 1890.)

APPEAL by plaintiffs from a judgment of the Superior Court for Hartford County in favor of defendant in a suit brought to enjoin defendant from leaving plaintiffs' employment or engaging in other business, in violation of a contract. *Affirmed.*

The action was brought by the William Rogers Manufacturing Company and the Rogers Cutlery Company, both joint-stock corporations located in Hartford, and carrying on business under one management, the manager being William H. Watrous.

On March 17, 1879, the following contract was entered into between Watrous, acting as agent of the plaintiff Companies, and the defendant.

"1. That said Companies will employ said Rogers in the business to be done by said Companies, according to the stipulations of said agreement, for the period of twenty-five years therein named, if said Rogers shall so long live and discharge the duties devolved upon him by said Watrous, as general agent and manager of the business to be done in common by said Companies, under the directions and to the satisfaction of such general agent and manager, it being understood that such duties may include traveling for said Companies, whenever in the judgment of said general agent the interests of the business will be thereby promoted.

"2. The said Companies agree to pay said Rogers for such services so to be rendered, at the rate of \$1,000 per year for the first five years of such services, and thereafter the same or such larger salary as may be agreed upon by said Rogers and the directors of said Companies, said salary to be in full during said term of all services to be rendered by said Rogers, whether as an employe or an officer of said Companies, unless otherwise agreed.

"3. The said Rogers, in consideration of the foregoing, agrees that he will remain with and

serve said Companies under the direction of said Watrous, as general agent and manager, including such duties as traveling for said Companies, as said general agent may devolve upon him, including also any duties as secretary or other officer of either or both of said Companies, as said Companies may desire to have him perform at the salary hereinbefore named, for the first five years, and at such other or further or different compensation thereafter, during the remainder of the twenty-five years, as he, the said Rogers, and the said Companies may agree upon.

"4. The said Rogers during said term stipulates and agrees that he will not be engaged, or allow his name to be employed, in any manner, in any other hardware, cutlery, flatware or hollow-ware business, either as manufacturer or seller, but will give, while he shall be so employed by said Companies, his entire time and services to the interests of said common business, diminished only by sickness and such reasonable absence for vacations or otherwise as may be agreed upon between him and said general agent."

The complaint set out the foregoing contract, and a contract of March 14, 1879, between the plaintiff Companies, by which they agreed for twenty-five years to do certain business on their joint account and under one management, the defendant then being secretary of the Rogers Cutlery Company, one of the plaintiffs. The complaint then proceeded as follows:

"After the execution of said last-named contract, in order to make it desirable to the defendant to become and continue permanently interested in and connected with the new business thereafter to be severally done by said corporations under the control of said Watrous as general manager thereof as provided in said contract, and to prevent him from allowing his name to be used in conflict therewith, and as a consideration for the performance of his own contract additional to those named therein, the said Watrous, in and by another contract with the defendant dated March 17, 1879, conveyed to the defendant the equitable interest and ownership in one hundred and sixty shares of the capital stock of the Rogers Cutlery Company aforesaid, upon the terms and conditions named in the agreement; and the defendant has since, and prior to the date of this complaint, received upon said shares of stock \$2,995.99 in dividends, and still remains entitled to the receipt of continued dividends thereon and to full conveyance of said shares according to the terms of said contract.

"In accordance with said agreement the defendant entered the service of the plaintiffs, and therein has continued until the present time as the secretary of each of said Companies and in the discharge of the duties therein so as

Co. v. Ewing (N. Y.), ante, 881, where it is held that, "although equity will not ordinarily attempt to enforce contracts which cannot be carried out by the machinery of a court, it may nevertheless practically accomplish the same end by enjoining the breach of a negative promise." This was in relation to the contract of a base ball player, which gives the employer the right to "reserve" such player for the season next ensuing, and which

simply gives clubs the right as against other clubs, to secure the services, if the parties can agree, but places no obligations on the player to enter into such contract. Hence players cannot be compelled to enter into such future contracts by a decree of specific performance, and consequently they cannot be enjoined from entering into them with other clubs.

after stated) have been executed both by the plaintiffs and the defendant; the salary of the defendant has by mutual agreement been raised to \$2,000 per annum, and the services of the defendant, by reason of his familiarity with the plaintiffs' business and knowledge of their customers, acquired by his said employment since said 14th day of March, 1879, have become and now are of special value to the plaintiffs; and the plaintiffs desire that the defendant should continue in their employ and faithfully keep and perform all the obligations of said agreement.

"The plaintiffs are informed and believe, and therefore aver, that the defendant secretly and with intent that the fact should not be known to the plaintiffs, now is and for some time past has been conspiring and negotiating with sundry persons and corporations to the plaintiffs unknown, but all of whom, as the plaintiffs believe, are their competitors in business, with the purpose and intent of engaging, in connection with such persons and corporations, in the manufacture and sale of cutlery and silver-plated flat and hollow ware, and with the intent and purpose of allowing his name to be used and employed in connection with such business as a stamp on such silver-plated ware, and with the further intent of using in the interest of and for the advantage of such persons all his knowledge and information of the plaintiffs' business and of their customers which he has obtained by virtue of his employment as aforesaid. And the plaintiffs further say that the defendant threatens to leave their employ and to engage with such other parties in the business of manufacturing and selling cutlery and silver-plated flat and hollow ware, and to allow his name to be used and employed in connection with such business as a stamp upon such silver-plated goods and otherwise; all of which would be in violation of the defendant's agreement with the plaintiffs, and would deprive the plaintiffs of all the benefits and advantages secured to them by said agreement and to which they are justly entitled. And the plaintiffs aver that such conduct and doings of the defendant would occasion great and irreparable loss and damage to the business of the plaintiffs, and the use of defendant's name as a stamp or trade mark on said cutlery, silver-plated flat and hollow ware as aforesaid, would cause the same to so resemble the similar goods made and sold by the plaintiffs and stamped with the plaintiffs' stamps and trade-marks, of which the most prominent part is the word 'Rogers,' as that the same would be liable to be mistaken for those of the plaintiffs, and would be liable to be sold and would be sold as and for goods made and sold by the plaintiffs, and thereby great and special loss and damage would be done to the plaintiffs in their business, for which there would be no adequate remedy at law. And they aver that the defendant has little, if any, property, and substantial damages, if recovered, could not be enforced at law."

The defendant demurred to the complaint, and the court sustained the demurrer, whereupon plaintiffs took this appeal.

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certain acts, and also to abstain from doing certain other acts, the court has jurisdiction to restrain the breach of the negative covenants, though there may be no jurisdiction to compel specific performance of the affirmative covenants.

2 Story, Eq. Jur. § 723 a. See also 8 Wait, Act. and Def. 693; *Lumley v. Wagner*, 1 DeG. M. & G. 604; *Stiff v. Cassell*, 2 Jur. N. S. 848; *Kemble v. Kean*, 6 Sim. 333.

When one partner contracts that he will exert himself for the benefit of the partnership, a court of equity cannot compel the specific performance of that part of the agreement; yet if he has also contracted that he will not carry on the same trade with other persons, the court will restrain him from breaking that part of his agreement.

2 Story, Eq. Jur. § 723. See also *Printing & N. Registering Co. v. Sampson*, L. R. 19 Eq. 402; *Diamond Match Co. v. Roeder*, 106 N. Y. 473, 482, 483, 9 Cent. Rep. 181; *Hodge v. Sloan*, 107 N. Y. 244, 9 Cent. Rep. 870.

Messrs. C. R. Ingersoll and F. L. Hungerford for appellee.

Andrews, Ch. J., delivered the opinion of the court:

Contracts for personal service are matters for courts of law, and equity will not undertake a specific performance. 2 Kent, Com. 258, note b; *Hamblin v. Dinneford*, 2 E. & W. Ch. 529; *Sanguirico v. Benedetti*, 1 Barb. 815; *Haight v. Badgley*, 15 Barb. 499; *DeRicafnoli v. Corsetti*, 4 Paige, 214.

A specific performance in such cases is said to be impossible because obedience to the decree cannot be compelled by the ordinary processes of the court. Contracts for personal acts have been regarded as the most familiar illustrations of this doctrine, since the court cannot in any direct manner compel the party to render the service.

The courts in this country and in England formerly held that they could not negatively enforce the specific performance of such contracts by means of an injunction restraining their violation. 8 Wait, Act. and Def. 754; *Rutland Marble Co. v. Ripley*, 77 U. S. 10 Wall. 840 [19 L. ed. 955]; *Burton v. Marshall*, 4 Gill (Md.) 487; *De Pol v. Schike*, 7 Robt. (N. Y.) 230; *Kemble v. Kean*, 6 Sim. 333; *Baldwin v. Society for Diffusion of Useful Knowledge*, 9 Sim. 393; *Fothergill v. Rowland*, L. R. 17 Eq. 132.

The courts in both countries have, however, receded somewhat from the latter conclusion, and it is now held that where a contract stipulates for special, unique or extraordinary personal services or acts, or where the services to be rendered are purely intellectual, or are peculiar and individual in their character, the court will grant an injunction in aid of a specific performance. But where the services are material or mechanical, or are not peculiar or individual, the party will be left to his action for damages. The reason seems to be that services of the former class are of such a nature as to preclude the possibility of giving the injured party adequate compensation in dam-

Wait, Act. and Def. 754; Pom. Eq. Jur. § 1813; *Bank of California v. Fresno Canal & L. Co.* 53 Cal. 201; *Singer Sewing-Mach. Co. v. Union button hole & R. Co.* 1 Holmes, 253; *Lumley v. Wagner*, 1 De G. M. & G. 604; *South Wales R. Co. v. Wythes*, 5 DeG. M. & G. 880; *Montague v. Flockton*, L. R. 16 Eq. 189.

The contract between the defendant and the plaintiffs is made a part of the complaint. The services which the defendant was to perform for the plaintiffs are not specified therein, otherwise than that they were to be such as should be devolved upon him by the general manager; "it being understood that such duties may include traveling for said Companies whenever in the judgment of said general agent the interests of the business will be thereby promoted;" and also "including such duties as traveling for said Companies as said general agent may devolve upon him, including also any duties as secretary or other officer of either or both of said Companies as said Companies may desire to have him perform." These services, while they may not be material and mechanical, are certainly not purely intellectual, nor are they special, or unique, or extraordinary; nor are they so peculiar or individual that they could not be performed by any person of ordinary intelligence and fair learning. If this was all there was in the contract it would be almost too plain for argument that the plaintiffs should not have an injunction.

The plaintiffs however insist that the negative part of the contract, by which the defendant stipulated and agreed that he would not be engaged in or allow his name to be employed in any manner in any other hardware, cutlery, flat-ware or hollow-ware business, either as a manufacturer or seller, fully entitles them to an injunction against its violation. They aver in the complaint, on information and belief, that the defendant is planning with certain of their competitors to engage with them in business, with the intent and purpose of allowing his name to be used or employed

if the plaintiffs owned the name of the defendant as a trade-mark they could have no difficulty in protecting their ownership. But they make no such claim; and all arguments or analogies drawn from the law of trade marks may be laid wholly out of the case.

There is no averment in the complaint that the plaintiffs are entitled to use, or that in fact they do use, the name of the defendant as a stamp on the goods of their own manufacture; nor any averment that such use, if it exists, is of any value to them. So far as the court is informed the defendant's name on such goods as the plaintiffs manufacture is of no more value than the names of Smith or Stiles or John Doe. There is nothing from which the court can see that the use of the defendant's name by the plaintiffs is of any value to them, or that its use as a stamp by their competitors would do them any injury other than such as might grow out of a lawful business rivalry. If by reason of extraneous facts the name of the defendant does have some special and peculiar value as a stamp on their goods, or its use as a stamp on goods manufactured by their rivals would do them some special injury, such facts ought to have been set out, so that the court might pass upon them. In the absence of any allegation of such facts we must assume that none exist.

The plaintiffs also aver that the defendant intends to make known to their rivals the knowledge of their business, of their customers, etc., which he has obtained while in their employ. But here they have not shown facts which bring the case within any rule that would require an employé to be enjoined from disclosing business secrets which he has learned in the course of his employment and which he has contracted not to divulge. *Peabody v. Norfolk*, 98 Mass. 452.

There is no error in the judgment of the Superior Court.

In this opinion the other Judges concurred.

INDIANA SUPREME COURT.

KE-TUC-E-MUN-GUAH, *Appt.*,

v.

Samuel McCLURE

(.....Ind.....)

1. An Indian is not incapable of giving a valid promissory note by reason of the fact that he belongs to a band which is governed by ancient Indian customs and retains a tribal organization, unless it grows out of some contract prohibited by law.
2. The fact that the lands of a defendant, who is an Indian, are not liable to levy and sale under a judgment, is no ground for refusing a judgment against him.
3. Rendering judgment for a sum in excess of that covered by the prayer of the complaint is not ground for reversal, where it does not exceed the amount due, as the complaint is.

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plaint might have been amended if the objection had been made in the lower court.

(March 15, 1800.)

APPEAL by defendant from a judgment of the Circuit Court for Grant County in favor of plaintiff in an action to recover the amount alleged to be due on a promissory note. *Affirmed.*

The facts are fully stated in the opinion.
Mr. George W. Harvey for appellant.
Mr. Alvah Taylor for appellee.

Coffey, J., delivered the opinion of the court:

This was a suit by the appellee against the appellant based upon a promissory note dated March 7, 1872, and due one day after date. The appellant answered, first admitting the execu-

tion of the note in suit, but averring that the appellee ought not to recover on the same because he is a member of the Miami tribe of Indians; that he was at the date of said note and at the time the debt for which it was given accrued, to wit, in 1870 and 1871, and has at all times since continued to be, up to the present time, a member of the band of Me-ching-gomesia, and has at all times been, remained and resided upon a reservation containing 6,400 acres of land, situate in the Counties of Grant and Wabash, in the State of Indiana, reserved by the Miami Indians in their Treaty of 1838 with the United States to the band of Me-tosmia, which reserve is again referred to in the Treaty of 1840 between the same parties, by which, as amended by the Senate, the United States agreed to convey said land by patent to Me-ching-gomesia, in trust for his band, who have ever since remained upon said lands; that said Me-ching-gomesia remained the chief of said band until his death, which occurred in the year 1877; that immediately upon his death the said band, in accordance with their ancient customs, proceeded to and did select William Pe-conga, one of said band, as their chief, who is still acting as such; that up to the 1st day of January, 1881, they lived upon their said lands, practicing and adhering to their ancient manners and customs, holding but little intercourse with the whites from choice; that they settled their troubles and disputes among themselves, without resorting to the courts of the State; that in their intercourse with each other they speak their own language; that the greater part of said tribe cannot speak the English language intelligently; that their tribal organization still remains unaltered; that they hold their councils for the same purposes as in former times, and are governed by their ancient customs; that said band did not go into the courts of the State for any redress until the year 1881; that they are a distinct people; that they did not, until the 1st day of January, 1881, participate in our civil or political privileges, nor were they in any way regarded as members of our body politic, having no right to vote or participate in our elections, or to serve in any official capacity; that they were, in every particular, wards of the United States, and not bound by, or amenable to, the laws of the State of Indiana; that the defendant has at all times since his birth remained with, and participated in the ancient manners, customs and rights of, said band, as one of its members, and fully acted with said band, taking upon himself and exercising no other or different rights or privileges than the band, as a whole, used or exercised, as heretofore stated; that he has never at any time since the 1st day of January, 1881, or since the execution of said note, agreed or contracted or consented to pay said debt, or in any manner acknowledged the same, but has at all times repudiated and refused to pay the same, or any part thereof.

The second paragraph of the answer avers, substantially, the same facts as those set out in the first paragraph, with the additional averments that the land reserved to the band of Miami Indians, of which the appellant is a member, has been partitioned among the members of said band under an Act of Congress, by means of which certain of said lands have been

set off to the appellant in severalty; that the debt for which the note in suit was executed accrued in 1870; and that his lands so set off to him under the Act of Congress are not liable to levy and sale for the payment of said debt. Prayer that the appellant be enjoined from levying any execution that may issue on a judgment rendered upon the note in suit upon said land, or from interfering with the same in any manner. To these answers the court sustained a demurrer, and the appellant excepted. A trial by the court resulted in a finding and judgment for appellee, from which this appeal is prosecuted.

The assignment of errors calls in question the correctness of the ruling of the circuit court in sustaining the demurrer to these answers, as well as the propriety of the ruling in overruling a motion for a new trial. It is earnestly contended by the appellant that the band of Indians of which he is a member are wards of the United States government, and that by reason thereof each member of said band is under legal disability, and is incapable of making a binding contract. It is admitted by the appellee, as we understand his brief, that the band to which the appellant belongs is, in a sense, the ward of the government of the United States; but it is denied that any law exists creating a general legal disability, and that the individual members of said band are not prohibited from contracting debts, and making such contracts as the one now in suit. As all persons not under legal disabilities are capable of making and entering into binding contracts, it follows that the note in suit is a binding obligation, unless it can be shown that the appellant, at the time of its execution, was under duress or some legal disability, or unless it can be shown that the making of such note was prohibited by some law, or contrary to the public policy. In support of his contention, the appellant cites the cases of *Cherokee Nation v. Georgia*, 30 U. S. 5 Pet. 1 [8 L. ed. 25]; *Worcester v. Georgia*, 31 U. S. 6 Pet. 515 [8 L. ed. 483], and *Goodell v. Jackson*, 20 Johns. 693.

While it was held in the case of *Cherokee Nation v. Georgia*, *supra*, that the Cherokee Nation was a separate State, a distinct political society, separated from others, capable of managing its own affairs and governing itself, it was held, also, that it was not a foreign State, in the sense of the Constitution of the United States, and could not maintain an action as such in the courts of the United States.

The case of *Worcester v. Georgia*, *supra*, was a prosecution against Worcester, a white missionary, who resided within the territory reserved by treaty with the government of the United States to the Cherokee Nation. The prosecution was instituted under a law of the State of Georgia making it a penal offense to reside in that territory without a license from the governor of the State. It was held that the Cherokee Nation was a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of the State of Georgia could have no force, and which the citizens of Georgia had no right to enter, except with the assent of the Cherokees themselves, or in conformity with the treaties, and with the Acts of Congress, as the whole inter-

course with that nation was, by the Constitution and laws, vested in the United States.

While the learned chancellor in the case of *Goodell v. Jackson*, 20 Johns. *supra*, gives a comprehensive review of the Acts of Congress relating to the various tribes of Indians, and the treaties made with them, and reaches the conclusion that they are to be regarded as separate and distinct nations, subject, however, to the protection of the general government, the case depended wholly upon the statutes of the State of New York; and the questions there adjudicated can have no bearing upon the question now here for determination. Indeed, there would seem to be no doubt that the different Indian tribes residing within the territory of the United States, while they keep up their tribal relations, are to be regarded, in the absence of some Act of Congress upon the subject, as separate and distinct nations. The government has always treated with them as such; and, when engaged in war against the whites, they have never been treated as rebels, subject to the law of treason, but, on the contrary, have always been regarded and treated as separate and independent nations, entitled to the rights of ordinary belligerents, and subject to no other penalties. Acting upon the theory that the Indians, maintaining their tribal relations, residing on reservations secured to them by treaties with the United States government, constitute separate and distinct nations, and following the law as announced in the case of *Worcester v. Georgia*, it was held by this court, in the case of *Me-shing-go-me-sia v. State*, 36 Ind. 310, that this State had no power to tax the lands reserved to the tribe to which the appellant belongs. But none of these cases decide that an Indian belonging to a tribe or nation has not the power to make a contract of the kind now before us, and our attention has not been called to any law which prohibits him from making such contract. Very many of the Acts of Congress, as well as the adjudicated cases, proceed upon the theory that an Indian may bind himself by an ordinary executory contract, and may contract debts. Most, if not all, of the Acts of Congress granting annuities to the Indians provide that such Indians shall not be bound by any contract whereby such annuity is disposed of or pledged before the same is actually paid by the government.

By Rev. Stat. U. S. 1878, p. 307, it is provided that no agreement shall be made by any person with any individual Indian, not a citizen of the United States, for the payment or delivery of any money, or other thing of value, in present or prospective, or for the granting or procuring any privilege to him or any other person, in consideration of services for said Indians relative to their lands, or to any claim growing out of, or in reference to, annuities, installments or other moneys, claims, demands or things, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as therein provided. It does not appear that the contract in suit falls within the class of contracts prohibited by this Act of Congress. Unless it appears that such contract falls within the provisions of this Statute, or some other statute, 7 L. R. A.

rendering it illegal, it must be held to be valid and binding. *Godfrey v. Scott*, 70 Ind. 259.

In our opinion, the court did not err in sustaining the demurrer to the first paragraph of the answer.

The second paragraph of the answer does not state a defense to any part of the plaintiff's cause of action. The fact that the lands set off to the appellant may not be liable to levy and sale for the payment of the appellee's judgment furnishes no sufficient reason why judgment should not be rendered. The appellee may be able to collect his debt without resort to the land. As there is no pretense that the appellee is threatening to levy upon the land described in the answer, there is no ground for an injunction. Furthermore, the pleading is not a cross-bill seeking affirmative relief, but is an answer. The court did not err in sustaining the demurrer to this answer.

The only matter urged under the assignment of error calling in question the action of the court in overruling the motion for a new trial is that the judgment exceeds the amount claimed in the complaint. It is not claimed that the judgment exceeds the amount due on the note, but it is contended that the court erred in rendering judgment for a sum in excess of that covered by the prayer of the complaint. This contention cannot be maintained. The appellee could have amended the prayer of his complaint at any time, and this court will regard the amendment as having been made in the circuit court. *Carpenter v. She'don*, 23 Ind. 259; *Webb v. Thompson*, 23 Ind. 423.

There is no error in the record.

Judgment affirmed.

James A. LOWMAN, *Appt.*,
v.

Frederick SHEETS.

(....Ind.....)

1. The court may require the jury to return a special verdict at the request of one of the parties to the action, although he has previously requested the court to instruct the jury in writing and has entered upon a discussion of the questions of law to be embraced in such instruction.
2. The Statute prohibiting the making of contracts by parol which are not to be performed within one year has no application to a contract which has been fully performed by one of the parties.

NOTE.—Statute of Frauds: contracts not to be performed within one year.

A parol contract not relating to land, and not to be performed within the year, is not enforceable. It is not taken out of the Statute by a part performance, as that equitable doctrine applies only to contracts in relation to land. *Osborne v. Kimball* (Kan.) 21 Pac. Rep. 103; *Wolke v. Fleming*, 1 West. Rep. 103, 103 Ind. 105.

Oral contracts not to be performed within a year are not enforceable; yet a contract to sell stock at the end of three years at a certain price, and also that it may be called at any time before the expiration of three years, is valid although not in writing, because its performance within one year is

transaction, some of which are within the Statute of Frauds; and the others not, and they are of such a nature that they can reasonably be considered as separate, the former will be enforced although the latter are avoided.

5. A person's title under a valid contract for the purchase of an interest in brood mares, which is coupled with a voidable contract as to their keeping, will not be affected by the avoidance of the latter contract.

6. Where partnership property is to be kept for the purpose of carrying on a particular business and not for sale, neither partner has power to make a sale of the entire property.

7. Declarations as to the ownership of property, made by a person in possession thereof, are admissible in evidence upon an issue as to such ownership as part of the *res gestae*.

(March 22, 1830.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Benton County in favor of defendant in an action of replevin to recover possession of certain brood mares. *Affirmed*.

The facts are fully stated in the opinion.

Messrs. Wallace, Baird & Chase, for appellant:

Contracts prohibited by subd. 5 of § 1 of the Statute of Frauds are not, by part performance, taken out of the Statute.

Wolke v. Fleming, 1 West. Rep. 166, 103 Ind. 105; *Houghton v. Houghton*, 14 Ind. 507; *Wallace v. Long*, 8 West. Rep. 870, 105 Ind. 522; *Groves v. Cook*, 88 Ind. 169; *Wood*, Stat. Fr. 492; 1 Addison, Cont. § 212.

The Statute applies to cases "where the contract is not to be performed by either party to it within a year."

Haugh v. Rhythe, 20 Ind. 24; *Houghton v. Houghton*, *Wolke v. Fleming* and *Groves v. Cook*, *supra*.

This provision of the Statute of Frauds applies to contracts of partnership as well as to other contracts.

Wilson v. Ray, 18 Ind. 1.

If any portion of a contract be within the Statute of Frauds, no portion of it can be enforced "where the several stipulations are so interdependent that the parties cannot reasonably be considered to have contracted but with a view to the performance of the whole."

Caylor v. Roe, 99 Ind. 1.

Under no fair and reasonable interpretation

possible. See *note* to *Seddon v. Rosenbaum* (Va.) 3 L. R. A. 839.

If a contract can be fully performed within one year, on one side, it is not within the Statute of Frauds. *Thomas v. Armstrong* (Va.) 5 L. R. A. 529; *Wolke v. Fleming*, 1 West. Rep. 166, 103 Ind. 105; *Washburn v. Dorch*, 68 Wis. 478.

The statute does not apply to actions for payment for property delivered and accepted under a promise to pay, upon contracts wholly executed on one side within a year. *Durfee v. O'Brien* (B. L.) 6 New Eng. Rep. 432.

When one party to a verbal contract has fully performed his part of it, the statute affords no defense to the other party. *Simmons v. Headlee*, 13 West. Rep. 223, 94 Mo. 482.

Although a verbal contract to do work, which
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mond, 11 East, 142; *Herrin v. Butters*, 20 Me. 119.

Under the circumstances of this case Templeton had the power to sell the partnership property, and the appellant, Lowman, acquired a good title by the purchase.

8 Kent Com. 44; Story, Partn. § 94; *Lock v. Lewis*, 124 Mass. 1; *Wells v. Mitchell*, 1 Ired. L. 484; *Nicholas v. Sober*, 88 Mich. 678; *Chipley v. Keaton*, 65 N. C. 584; *Stokes v. Stevens*, 40 Cal. 891.

Messrs. Edwin P. Hammond, Matthew H. Walker, Daniel Fraser, Isaac H. Phares and William B. Austin, for appellee:

When a contract within the Statute of Frauds is partly executed, neither party while the other is not in default, can, except by consent of both, rescind and recover what has been paid or delivered upon it.

Suarez v. Moore, 23 Ill. 63, 74 Am. Dec. 134; *Day v. Wilson*, 83 Ind. 463; *Groves v. Cook*, 88 Ind. 169.

The sale and delivery of the property by Templeton to Sheets vested good title in the latter.

Wood, Stat. Fr. § 235, pp. 431-435; *Abbott v. Draper*, 4 Denio, 51; *Coughlin v. Knowles*, 7 Met. 57; *Sims v. Hutchins*, 8 Smedes & M. 328; *Crabtree v. Wells*, 19 Ill. 55.

A partner in selling the entirety of the partnership property must act within the scope of the partnership.

Story, Partn. § 94.

Coffey, J., delivered the opinion of the court:

This was an action by the appellant against the appellee to recover the possession of forty brood mares described in the complaint. The complaint alleges that he is the owner and entitled to the possession of the property, and that the appellee unlawfully detains the possession thereof from him.

The cause was admitted to a jury, who returned the following special verdict:

State of Indiana, }
Benton County, } ss.
Benton Circuit Court, September Term, 1887.

James A. Lowman }
v. } No. 1032.
Frederick Sheets. }

We, the jury, having been instructed to re-

by its terms is not to be performed within one year, is void, yet if the parties treat it as valid until after a part of the work is done, it cannot then be avoided so as to avoid payment of the reasonable value of the work that has been performed. *Keller v. Bley*, 15 Or. 429; *Baker v. Lauterbach*, 10 Cent. Rep. 103, 68 Md. 64; *Freeman v. Foss*, 5 New Eng. Rep. 302, 145 Mass. 361.

A parol contract to serve a company as treasurer for the term of five years for a percentage of the profits, although not enforceable by action, is not void, and in so far as voluntarily executed by entering upon and continuing in the service, its terms may be referred to and considered in determining the measure of compensation for the service. *La Du-King Mfg. Co. v. La Du*, 30 Minn. 473.

Templeton was the absolute owner of the forty mares in controversy in this case, and on that day bargained to the defendant, Sheets, a one-half interest in said mares, at and for the price of \$45 for each of said mares, said mares in said bargain being valued at \$90 each.

By the terms of said sale said defendant was to have possession and care and control of said mares, and was to keep the same until March 1, 1891.

Said Templeton was to furnish pasture for the same until October 1, 1887, after which the feed for said animals was to be furnished at the equal expense of said Templeton and said defendant.

Said defendant, from the time of making said bargain, was to look after and have the control and possession of said mares in the pasture furnished by said Templeton, up to October 1, 1887, and was thereafter to continue to feed and take care of said animals and to have the possession of the same. Said Sheets was to pay said Templeton interest at 7 per cent on the purchase price of said mares from October 1, 1887, and was to have the option to pay said purchase money when he saw proper on or before March 1, 1891. On March 1, 1891, the interest of said parties in said mares, and the proceeds thereof, was to be equal, after accounting to each party for his portion of the expense, and also after payment to Templeton by the defendant of the purchase price for the one-half interest thereof, with interest, if the same had not been previously paid.

By the terms of said bargain, said mares were to be kept exclusively for breeding purposes, and were not to be worked or sold, broke or traded by either party prior to March 1, 1891, except by consent.

Said bargain was not in writing.

Pursuant to said contract, said Templeton, on the same day that it was made, to wit, about April 8, 1887, delivered possession of said mares to said Sheets, who remained in the possession and care of the same, having the same in a pasture furnished by said Templeton, in said county, until the 16th day of June, 1887, when said Templeton and said plaintiff, without the knowledge or consent of said Sheets, took said mares from said pasture, and placed them in a pasture of the plaintiff, about half a mile distant from where they were taken.

The possession of said property was taken by said Lowman, under a sale made to him by said Templeton, on the 16th day of June, 1887, on which day said Templeton sold said property to said Lowman for the sum of \$3,400 to be paid by said Lowman in six months after said date, which was evidenced by a promissory note, executed by plaintiff to Templeton, payable in a bank in this State, which said note is still held by said Templeton, and is still wholly unpaid.

Said Sheets had no notice, knowledge or information of said sale by Templeton to the plaintiff until after the same was made, and the possession of said property taken by the plaintiff as aforesaid; nor did he ever afterwards consent to the same.

On the 22d day of June, 1887, said defendant

his, said defendant's, own pasture, on Fowler and Van Natta's farm in said county, the same being about four miles from the pasture where said animals were when taken by the plaintiff as aforesaid, and about the same distance from the plaintiff's said pasture, from which they were taken by the defendant as aforesaid.

While said animals were in the possession of the defendant as aforesaid, said plaintiff, on the 22d day of June, 1887, before the commencement of this action, demanded said property of said defendant, but said defendant refused to deliver him the possession thereof.

Said plaintiff on the same day commenced this action, and upon a writ of replevin herein issued and upon the plaintiff's undertaking, approved by the sheriff, said sheriff, on said writ, delivered said property to the plaintiff, who, by virtue of said delivery of possession, has since retained and is now in the possession of said property.

Said property is now of the aggregate value of \$3,400. At the same time of making the sale of a half interest in said mares to said Sheets, said defendant and said Templeton entered into a bargain whereby said Templeton was to lease to said Sheets 800 acres of real estate, owned by said Templeton, in said county, for the term of three years, to commence on the 1st day of March, 1888.

Said lands were the north half of each of two adjoining sections owned by said Templeton, one lying immediately east of the other, and the south-west quarter of said east section—the precise location of said lands so leased was well understood and agreed to by the parties at the time of making said bargain.

By the terms of said bargain said land was to be cultivated in corn, oats, pasture and meadow, as said Sheets might determine, and as rent for the same said Sheets was to deliver to said Templeton, on said premises, one third of the corn raised thereon in the crib, one third of the oats in the bin and three fifths of the hay in the stack, and to pay \$2.50 per acre for all the pasture except thirty acres, for which no charge was to be made.

Said Templeton was, before March 1, 1888, to move a house from a designated part of said premises to another designated part thereof, and to put the same in a tenable condition, at an expense of not exceeding \$300.

At the same time that Templeton sold a half interest in said mares as aforesaid, and at the same time that he leased said defendant said real estate as aforesaid, said Templeton and defendant entered into a bargain whereby it was agreed by and between them that such portions of the hay and grain as should be raised upon said leased premises by said defendant, as the parties should determine, should be fed to stock, which stock was to be purchased from year to year by said parties, with money to be borrowed by them jointly, and to be taken care of by said defendant on said premises, the expense of feeding the same to be borne by Templeton and the defendant equally, and the net profits thereof to be divided between them equally.

Said mares were also to be kept on said leased premises after March 1, 1888.

None of said bargains were in writing.

Said sale of a half interest in said mares, by said Templeton to said defendant, would not have been made if said Templeton had not at the same time leased said defendant said real estate as aforesaid; but said sale of said half interest in said mares to said defendant, and said lease of said real estate, were in no wise dependent upon said other contract, and would have been made though said other contract had not been made.

If, upon the foregoing facts, the law is with the defendant, then we find for the defendant — that the property in controversy should be returned to him, or, if return thereof cannot be had, that he should have judgment for one half the value of the mares described in the complaint. Thos. S. Lamb, Foreman.

But if, upon the foregoing facts, the law is with the plaintiff, then we find for the plaintiff, that he keep and retain possession of the property in controversy, and that he recover from the defendant one cent for his damages herein.

Thos. S. Lamb, Foreman.

The appellant moved the court for judgment in his favor on the special verdict, which was overruled. The court sustained a motion by the appellee for judgment in his favor on this verdict, and rendered judgment for a return of the property.

The errors assigned are:

1. That the court erred in overruling appellant's motion for judgment in his favor on the special verdict of the jury.

2. That the court erred in overruling the appellant's motion for a *venue de novo*.

3. That the court erred in overruling the appellant's motion for a new trial.

4. That the court erred in overruling the appellant's motion to arrest the judgment.

5. That the court erred in sustaining the appellee's motion for judgment in his favor on the special verdict of the jury.

The first objection with which we are met is that the court erred in directing the jury to return a special verdict.

It appears by the record that after the close of the evidence in the cause each of the parties requested the court to instruct the jury in writing, and to indicate before the argument what instructions would be given. After the close of the argument, in the effort to settle on the instruction, but before the court had announced its conclusion, the appellee requested that the jury be required to return a special verdict, which request was granted.

It is claimed by the appellant that, by requesting the court to instruct the jury in writing, and by entering upon the discussion of the questions of law to be embraced in such instructions, that the appellee waived his right to a special verdict, and that the court for that reason erred in granting his request.

It is unnecessary to decide whether it would have been error in the court to refuse the request of the appellee for a special verdict, coming at the time it did, but it was certainly not error to grant it. Indeed, the court had

the right to require the jury to return a special verdict without any request from either party. *Weatherly v. Higgins*, 6 Ind. 73.

It is earnestly contended by the appellant, in an able brief, that the contract found by the jury is within the Statute of Frauds, and that it is therefore void.

It is found by the jury, as we understand their verdict, that the contract to purchase stock to be fed on the farm has no connection with the other agreements between the parties, and hence that agreement does not call for any consideration at our hands.

The contracts under which the question for decision arises are: (1) the contract by which the appellant sold to the appellee a one-half interest in the property in controversy for an agreed price, and delivered to him the possession; (2) the contract by which the appellant leased to the appellee the land described in the verdict for the term of three years; and (3) the contract, by the terms of which the appellee was to keep the mares in controversy and breed them for a period of more than one year.

The sale and delivery of a one-half interest in the mares in controversy is not within the Statute of Frauds, because it was fully executed by Templeton.

The Statute prohibiting the making of contracts not to be performed within one year has no application to contracts which have been fully performed by one of the parties. *Brown*, Stat. Fr. § 287; *Donellan v. Read*, 3 Barn. & Ad. 809; *Smith v. Neale*, 2 C. B. N. S. 67; *Holbrook v. Armstrong*, 10 Me. 81; *Eell v. Hewitt*, 24 Ind. 280; *Wolke v. Fleming*, 103 Ind. 105, 1 West. Rep. 166.

Nor is the lease of the land within the Statute of Frauds, as the Statute expressly exempts leases for a period not exceeding three years. Rev. Stat. 1881, § 4904.

This is not an action by either party to enforce the contract. A contract within the Statute of Frauds is not void, but merely voidable. *Schierman v. Beckett*, 88 Ind. 52; *Day v. Wilson*, 83 Ind. 463.

In the latter case cited it was held that where a party had paid money on a parol contract for the purchase of land, the money could not be recovered back unless the vendor refused to convey.

It being settled that the contract for the sale of the property in controversy was not within the Statute of Frauds, and that it vested the title to the undivided one half of the property in the appellee, the question arises as to what is the effect of the repudiation of the agreement to keep the property for a period of more than one year for breeding purposes, by the appellant, when the appellee is ready and willing to carry out the contract on his part.

We think, for the purposes of this case at least, that it must be held that the agreement to keep the mares for breeding purposes until 1891, each party furnishing a part of the feed, with postponement of a settlement to that date, is within the Statute of Frauds, unless it be held that such contract creates a partnership. *Stephenson v. Arnold*, 89 Ind. 426; *Wolke v. Fleming*, *supra*.

If the contract between the parties created a partnership, then, according to some of the

But conceding that the Statute applies to this contract, did the repudiation of it by Templeton divest the title of the appellee to the property in controversy? We are of the opinion that the contract to keep the mares involved in this suit until 1891 is so far separated from, and independent of, the other contracts found by the jury, that the repudiation of it by the appellant cannot deprive the appellee of the benefits he has acquired under the other contracts, which are not within the Statute of Frauds, without his consent. Where there are a number of contracts made at the same time, and as parts of the same transaction, some of which are within the Statute of Frauds and the others not, and they are of such a nature that they can reasonably be considered as separate, those which are not within the Statute will be enforced though the others may fall within the Statute. Brown, Stat. Fr. § 148 *et seq.*

In such cases it is not so important to ascertain whether the one contract would not have been entered into without the other, as to ascertain whether they are in their nature separate and distinct. In this case, if the contract had been for the leasing of the land described in the verdict for the period of three years, coupled with the agreement on the part of Templeton to build a house on the premises during the second year, it could not be reasonably contended that Templeton could defeat the appellee's tenancy by a refusal to erect the house, though it should plainly appear that the one contract would not have been made without the other. So we think Templeton could not divest the title of the appellee in the mares in controversy by a refusal to carry out the agreement in relation to keeping them until 1891. It is probably true that the appellee could not maintain an action against him for such refusal, but we do not think this fact affects the title which the appellee acquired by a contract which is not affected by the Statute of Frauds.

Having reached the conclusion that the appellee is the owner of an undivided interest in the property in controversy, it follows that appellant cannot maintain this action unless he acquired the whole title to the same by his purchase from Templeton. *Mills v. Malott*, 43 Ind. 248; *Lucen v. Weaver*, 49 Ind. 873; *Branch v. Wiseman*, 51 Ind. 1; *Schenck v. Long*, 67 Ind. 579.

It is contended by the appellant that Templeton and appellee were partners, and that, as such, either partner had the right to sell the property owned by the firm and confer a good title, and that by his purchase from Templeton he acquired the title to the whole of the property in controversy, and has a right to its possession.

We do not deem it necessary to decide whether the contract between the parties was one of partnership or not, as the appellant had no power to sell the entire property, whether it was held as partnership property or otherwise. The partnership, if one existed, was not one in which the parties contemplated a sale of the property here involved, but it was one in which this property was to be kept for the purpose of carrying on a particular business. In

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See also 34 L. R. A. 265.

v. Sturdevant, 4 B. Mon. 453; *Cayton v. Hardy*, 27 Mo. 586; *Mussey v. Holt*, 24 N. H. 248; *Hudson v. McKenzie*, 1 E. D. Smith, 858.

Mr. Bates, in his valuable work on Partnerships, in treating the subject in the section above cited, says: "But I have no doubt but that the power of sale must be confined to those things held for sale, and that the scope of the business does not include the sale of the property held for the purposes of business and to make a profit out of it, and that this only is the true rule."

It follows from what we have said that the court did not err in overruling the motion of the appellant for judgment in his favor on the special verdict of the jury, nor did the court err in sustaining the motion of the appellee for judgment in his favor on said verdict.

It is contended that the special verdict before us does not find on all the issues in the case, and for that reason the court erred in overruling the motion for a *venire de novo*; but we think the verdict covers all the issues presented by the pleadings in the cause, and that it is not subject to the objection urged against it.

The court, over the objection of the appellant, permitted the appellee to prove certain declarations, made by himself, in relation to the ownership of the property in controversy. But these declarations were made while in possession of the property, and under the rule as settled in the cases of *Bunnell v. Studebaker*, 88 Ind. 338; *Kuhns v. Gates*, 92 Ind. 66; *McConnell v. Hannah*, 96 Ind. 102, and *Creighton v. Hoppis*, 99 Ind. 309, it was admissible as part of the *res gestae*. *Durham v. Shannon*, 116 Ind. 408.

Finally it is contended by the appellant that the verdict of the jury is not supported by the evidence. We have read the evidence carefully, and while it is conflicting, there is evidence in the record fairly tending to support the verdict. Its weight was for the jury. We cannot disturb the verdict on the weight of the evidence. We find no error in the record for which the judgment should be reversed.

Judgment affirmed.

Petition for rehearing overruled June 20, 1890.

Emily E. VALENTINE *et al.*, Appts.,

v.

Jacob H. WYSOR.

(.....Ind.....)

1. Although heirs of a deceased partner cannot maintain an action to compel the surviving partner to account in the absence

NOTE.—*Dissolution of partnership by death.*

As a general rule the death of a partner dissolves the firm. First Nat. Bank v. Farmers Deposit Nat. Bank (Pa.) 5 Cent. Rep. 505; *Scudder v. Ames*, 4 West. Rep. 846, 89 Mo. 496; *Weise v. Moore*, 3 West. Rep. 58, 22 Mo. App. 550.

The death of a partner dissolves the partnership, unless in the life of the deceased provision was made for its continuance. *Saunders' App.* 5 Cent. Rep. 149, 114 Pa. 205.

of special circumstances, yet such circumstances may exist as to make it proper for equity to entertain such action on their behalf.

2. Heirs of a deceased partner cannot call the surviving partner to account, although they have shown that he has paid all the partnership debts, where it also appears that the estate of the decedent was indebted to him, unless they further make it appear that he has in his hands partnership property in excess of the amount required to reimburse himself.

3. A sale of land by executors under a will giving them power to sell and convey it, either at public or private sale, with or without appraisement, on such terms as to them shall seem best, is not affected by a statute regulating the conduct of sales of land directed by will to be sold, and prescribing the manner of giving notice, conveying, etc., "unless by the terms of the will different directions are given."

4. The sale of a deceased partner's interest in partnership real estate is authorized by a will giving power to settle, adjust and compromise all debts owing by the testator, to make settlements with his former partners and to sell and convey any or all of his real estate in order to pay and satisfy debts against his estate.

5. A surviving partner may purchase the interest of his deceased partner in the partnership business, including partnership real estate, from his properly authorized legal representative, where the transaction is fairly entered into.

6. An executor may convey his testator's interest in partnership real estate to his surviving partner in consideration of an agree-

ment by the latter to pay the partnership debts, where the will authorized him to make settlements with testator's partners of all matters pertaining to the partnership business, to adjust, settle and compromise all debts, claims and demands against the estate and in his discretion to sell and convey so much of testator's real estate as should be deemed necessary to satisfy his debts.

7. A court of equity will not disturb a settlement and final accounting of partnership matters, actually consummated between a surviving partner and the executor of the deceased partner duly empowered to that end, until it is impeached as fraudulent or unfair or unless collusion between the executor and surviving partner is shown, although the latter thereby became the purchaser of the deceased partner's share.

8. After the unexplained lapse of fourteen years a settlement and accounting in regard to partnership matters between the surviving partner and the deceased partner's executor will not be opened up, although the settlement was irregularly made.

(March 22, 1890.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for Delaware County in favor of defendant in a suit to compel an accounting by defendant for certain property which had belonged to a partnership existing between defendant and plaintiffs' ancestor.

Affirmed.

The facts sufficiently appear in the opinion. *Messrs. O. T. Boas, W. W. Herod and F. Winter, for appellants;*

Provision for continuance in copartnership articles.

A provision that, in the event of the death of either partner, it is to be optional with the survivor whether the copartnership shall continue, is not an agreement binding on both parties, and cannot be enforced against the heirs of one. *Hart v. Anger, 38 La. Ann. 341.*

Where articles of partnership provide that, on the death of a partner during the partnership term, his executor shall be entitled to the place of the deceased partner in the firm, with the capital of the deceased partner in the firm business, if he elects to come in, he comes in with all the rights and liabilities of a partner, and is personally liable as a partner for debts contracted in the business. *Wild v. Davenport, 5 Cent. Rep. 76, 48 N. J. L. 129.*

Articles which simply provide that his capital shall be left in the business until the end of the partnership term do not require the admission of the executor of a deceased partner in the management or control of the business; and if he does not personally engage in the business he will not be personally liable for debts, though he leaves the testator's capital in the business. *Ibid.*

A stipulation that if either of the partners should die before the expiration of the stipulated period, "the surviving partner shall continue the business for the unexpired term," gives the survivor the power to employ all the partnership effects without material change in the business for the residue of the term, but confers on him no authority to fasten any new debt or liability on the estate of the deceased partner. *Vincent v. Martin, 79 Ala. 540.*

Agreement that survivor shall take decedent's interest.

Under an agreement between partners that the survivor should have the right to take the other's interest at his option, the interest of the deceased

partner ends on notice of an election to take it. *Harbster's App. 125 P. 1.*

A bill for an account against a surviving member of the firm, to ascertain the value of the testator's interest, may be maintained in the name of the executor as plaintiff; and this valuation will include profits on the share until its purchase, although the share was taken at an appraisement previously made. *DeHaven v. Anjer (Pa.) 5 Cent. Rep. 530.*

Agreement that survivor shall continue the business.

Under a partnership agreement that upon the death of either partner the business shall be conducted by the survivor, the estate of a deceased partner is not liable for the debts thereafter contracted. *Butcher v. Hepworth, 115 N. Y. 330.*

In such case the executors of a deceased partner do not become partners in their representative capacity. *Ibid.*

Continuance of business under provisions of the will.

A partner may, by his will, provide that the partnership shall continue notwithstanding his death; and if it is consented to by the surviving partner, it becomes obligatory. *Burwell v. Cawood, 43 U. S. 2 How. 560 (11 L. ed. 378).*

The testator may bind his general assets for all the debts of the partnership contracted after his death, or he may limit the liability to funds already embarked, or to any specific investments, and release his general assets from liability to creditors. *Ibid.*

Nothing but the most clear and unambiguous language, that the testator intended that his general assets be liable for all debt contracted in the continued trade after his death, will justify the court in arriving at such conclusion. *Ibid.*

in controversy as heirs-at-law of John Jack, deceased, and they have the right to maintain an action for the protection of such interest.

As between the personal representatives and the heirs of a deceased partner, his share of the surplus of the real estate of the partnership, after all its debts are paid, and the equitable claims of the members are adjusted, will be considered and treated as real estate.

1 Parsons, Cont. 5th ed. p. 150 and note; *Hale v. Plummer*, 6 Ind. 121.

Where the object sought to be recovered is the deceased partner's interest in the partnership real estate, then the heirs-at-law, to whom alone that interest belongs, must sue for the accounting which is necessary to the ascertainment and recovery of such interest.

Rev. Stat. § 1070.

The power given in the will to sell the testator's real estate cannot be extended to embrace partnership real estate in which his interest was unascertained and indefinite and contingent.

Anderson v. Anderson, 81 N. J. Eq. 560; *Kistner v. Sindlinger*, 83 Ind. 114.

The transaction between the executors and the surviving partner, by which it was attempted to transfer to the latter the entire interest of the decedent in all the real estate of Wysor & Jack, was not a sale.

Bouvier, L. Dict. *Sale*; *Russell v. Russell*, 36 N. Y. 581; *Allen v. De Witt*, 3 N. Y. 276; *Briggs v. Davis*, 20 N. Y. 15; *Roome v. Philips*, 27 N. Y. 357.

A power to sell will not authorize an exchange for other property.

Where he declares that his capital shall be chargeable, but not his other property, such other property will not be chargeable with the partnership debts. *Jones v. Walker*, 103 U. S. 444 (26 L. ed. 404).

Dividends and profits fairly made cannot be called on to pay firm debts. *Ibid.*

The authority of an executor to continue a specifically designated existing interest in a firm does not extend to the use in its business of any other funds of the estate, or to the use of any property which he received in his official character, to raise funds for that purpose. *Smith v. Ayer*, 101 U. S. 320 (25 L. ed. 965).

Under a will by which the testator provides that his executors shall manage and carry on his business for a certain time for the benefit of his wife and children, and the only executor who qualifies is a son, who, after the execution of the will, had become a partner of the testator, interested simply in a share of the profits, he is entitled to an interest in the profits, as well as to the salary provided by the will, for the time during which he continues the business as the will requires. *Allen's App.* 125 Pa. 544.

Continuance of business by consent of beneficiaries.

Where the legal representatives and all the beneficiaries consent to a continuance of the business by the surviving partners, they cease to have a lien upon the property as against the subsequent creditors of the concern. *Hoyt v. Sprague*, 103 U. S. 613 (26 L. ed. 585).

Surviving partner; duties of.

In equity the surviving partner is considered a trustee to pay the partnership debts, and to dispose
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Ringgold, T. Hart, & Co., 11; *Atty. v. Whitson*, 10 Wis. 684; *Cleveland v. State Bank*, 16 Ohio St. 236.

That notice of the sale has been given as required by law is a jurisdictional matter.

Rev. Stat. 1876, § 538.

The absence of notice will invalidate the proceedings.

McKeever v. Ball, 71 Ind. 398.

The sale to the appellee is voidable by appellants, for the reason that the appellee could not become the purchaser of the property.

Parsons, Partn. *442; *Osce v. Abeel*, 1 Paige, 393; *Sigourney v. Munn*, 7 Conn. 11; *Jones v. Dexter*, 180 Mass. 380, 39 Am. Rep. 459, and notes; *Martin v. Wyncoop*, 12 Ind. 266; *Hunsucker v. Smith*, 49 Ind. 118; *Murphy v. Teter*, 56 Ind. 545.

Mr. C. E. Shipley, for appellee:

Heirs and devisees of a deceased partner have no interest in the partnership estate until the partnership liabilities have all been paid, and then only in such surplus as shall remain.

See *Deeter v. Sellers*, 102 Ind. 458; *Thompson v. Love*, 9 West. Rep. 671, 111 Ind. 773; *Lewis v. Harrison*, 81 Ind. 278; *Jewett v. Meech*, 101 Ind. 289; *Henry v. Anderson*, 77 Ind. 361.

Separate creditors, legatees or next of kin of a deceased partner have no *locus standi* against his surviving partners. There are some exceptions to this rule. But no circumstances have been stated bringing this case within any of the exceptions.

See *Rossum v. Sinker*, 12 Cent. L. J. 202, Editor's note; *Id.* 241; 2 Lindley, Partn. 4th ed. pp. 1067-1009; *Harrison v. Richter*, 11 N.

of the effects of the concern for the benefit of himself and the estate of his deceased partner. Clothed with the legal authority to dispose of the partnership effects, it follows that the exercise of that authority will be sustained in equity, if the disposition be for the common benefit of himself and the estate of his deceased partner. *Beate v. Burger*, 17 Abb. N. C. 169; *White v. Union Ins. Co.* 1 Nott & McC. 556.

On general principles a surviving partner is the owner of the partnership assets; he has the legal title, and it is only in a court of equity that he is treated as trustee. *Re Sauls*, 5 Fed. Rep. 717; *Stanford v. Lockwood*, 95 N. Y. 588; *Nehrboss v. Bliss*, 88 N. Y. 600; *Hoyt v. Sprague*, 103 U. S. 613 (26 L. ed. 585); *Palmer v. Myers*, 43 Barb. 513.

He holds the assets as quasi trustee, first for the partnership creditors, and afterwards for the personal representatives of the deceased partner, and a court of equity may intervene to afford relief against waste, negligence, misconduct or other violation of duty on his part. *Farley v. Moog*, 79 Ala. 148.

On the dissolution of a partnership by the death of one of its members, the surviving partner is alone suable at law for partnership debts, and is entitled to the possession and control of the firm assets to enable him to discharge the debts and to settle the affairs of the partnership. *Kirkpatrick v. McElroy*, 5 Cent. Rep. 68, 41 N. J. Eq. 539; 3 Kent, Com. 64; 2 Lund. Partn. 605; *Murray v. Mumford*, 6 Cow. 44.

It is the right of the representatives of a deceased or bankrupt partner to share in the profits of all business unfinished at the dissolution but completed afterwards, and a valuation of such business as of the time of the dissolution will not be re-

don. ed. p. 1000; *mites v. whatever*, 43 Ill. 120; *Davies v. Daries*, 2 Keen, 584; 1 Collyer, Partn. 444, § 288; *Ludlow v. Cooper*, 4 Ohio St. 1; *Roy v. Vilas*, 18 Wis. 169; *Willson v. Nicholson*, 61 Ind. 241; *Brown v. Slee*, 103 U. S. 828 (26 L. ed. 618); *Pfeffer v. Steiner*, 27 Mich. 537; *Kimball v. Lincoln*, 99 Ill. 578; *Chambers v. Howell*, 12 Jur. 905, 11 Beav. 6; *Nelson v. Hayner*, 66 Ill. 487; *Merritt v. Dickey*, 88 Mich. 41; *Baird v. Baird*, 1 Dev. & B. Eq. 524, 31 Am. Dec. 399; *Shanks v. Klein*, 104 U. S. 18 (26 L. ed. 635), 13 Cent. L. J. 869; *Barry v. Briggs*, 22 Mich. 201; *Skillen v. Jones*, 44 Ind. 136; *Rusk v. Gray*, 83 Ind. 589; *Illick v. Reid*, 43 Ind. 390; *Cobble v. Tomlinson*, 50 Ind. 550; 2 Wms. Exrs. 6th Am. ed. 814.

An account and settlement by the executor of a deceased partner with the surviving partner of the partnership affairs are binding as between the surviving partner and the persons interested in the estate of the deceased partner, and cannot be impeached save on the ground of fraud.

2 Lindley, Partn. 1070, 1409, 2d London ed. 1060; 1 Collyer, Partn. 389, § 249; *Barry v. Briggs*, 22 Mich. 201; *Davies v. Davies*, 2 Keen, 584; *Smith v. Everett*, 27 Beav. 446; *Yeatman v. Yeatman*, L. R. 7 Ch. Div. 210; *Ludlow v. Cooper*, 4 Ohio St. 1.

The executors could sell to the surviving partner, and the surviving partner could buy from the executors.

Chambers v. Howell, 12 Jur. 905; 1 Lewin, Tr.

quired unless peculiar circumstances, exempting the particular case in equity from the operation of the general rules, exist. *King v. Leighton*, 1 Cent. Rep. 761, 100 N. Y. 382; *Wedderburn v. Wedderburn*, 22 Beav. 84; *Simpson v. Chapman*, 4 DeG. M. & G. 154; *Murray v. Mumford*, *supra*.

The remaining members become trustees of the assets for the purpose of winding up its affairs and distributing its effects, and they will not be allowed to reap a profit made by the use of the partnership assets after dissolution. *King v. Leighton*, *supra*; *Williams v. Whedon*, 39 Hun. 101; *Egberts v. Wood*, 3 Paige, 517; *Skidmore v. Collier*, 8 Hun. 50; *Hooley v. Gieve*, 7 Abb. N. C. 271.

As a general rule surviving or solvent partners cannot take the assets of the firm at a valuation as of the time of the dissolution. They have a right to the possession and control of the assets, but it is for the purpose only of satisfying the liabilities of the firm and turning the effects into money in the manner most advantageous to the interests of all concerned. *King v. Leighton*, *supra*; *McClean v. Kennard*, L. R. 9 Ch. App. 342.

Where the surviving partner of a firm becomes insolvent and his individual creditors levy attachments on the partnership property, the partnership creditors may come into equity to enforce their right to priority of payment out of the partnership assets. *Farley v. Moog*, 79 Ala. 143, 58 Am. Rep. 568.

The trust relation in fact which imposes the duty of payment of the partnership debts is between the survivor and the representatives of the deceased partner. *Williams v. Whedon*, *Skidmore v. Collier* and *Hooley v. Gieve*, *supra*; *Case v. Abeel*, 1 Paige, 383.

Surviving partners; duties of. See note to *Walling v. Burgess* (Ind.) 7 L. R. A. 481.
7 L. R. A.

See also 12 L. R. A. 254.

change the property for other property.
Rossum v. Sinker, *supra*; *Perry*, Tr. 4th ed. § 769.

There are none of the elements of the co-trusteeship between the surviving partner and the executor of the deceased partner.

Kimball v. Lincoln, 99 Ill. 578.

The conveyance to Wysor was valid.

Rossum v. Sinker, *supra*. See *Parsons*, Partn. 1st ed. p. 442, citing *Chambers v. Howell*, 11 Beav. 6, 12 Jur. 905; *Kimball v. Lincoln*, *supra*; *Boaz v. McChesney*, 53 Ind. 193; *Roy v. Vilas*, 18 Wis. 169; *Nelson v. Hayner*, 66 Ill. 487; *Brown v. Slee*, 103 U. S. 828 (26 L. ed. 618); *Baird v. Baird*, 1 Dev. & B. Eq. 524, 31 Am. Dec. 399; *Shanks v. Klein*, 104 U. S. 18 (26 L. ed. 635), 13 Cent. L. J. 869; *Ludlow v. Cooper*, 4 Ohio St. 1.

Mitchell, Ch. J., delivered the opinion of the court:

This suit was instituted by Emily E. Valentine, Martha M. Little, Parmelia R. Gilbert, Mary E. Wood and Florence T. Howe, the children and heirs at-law of John Jack, late of Delaware County, deceased, against Jacob H. Wysor.

The questions for decision arise upon the complaint, from which we summarize the following facts:

John Jack, father of the plaintiff below, died testate in the month of October, 1859. At and before that date he was in partnership with the

Rights and liabilities of. See note to *Patton v. Leftwich* (Va.) 6 L. R. A. 569.

Application of property to payment of partnership debts. See notes to *Darby v. Gilligan* (W. Va.) 6 L. R. A. 740.

Accounting by. See note to *Walling v. Burgess*, *supra*.

Equitable rule as to partnership assets.

The partnership property of the firm shall be applied to the payment of the partnership debts, to the exclusion of creditors of the individual members of the firm. *Fassett v. Tallmadge*, 18 Abb. Pr. 53; *Bowen v. Billings*, 13 Neb. 444; *Hutchinson v. Smith*, 7 Paige, 26; *Story*, Eq. § 675.

And creditors of the latter are to be first paid out of the separate effects of their debtor, before the partnership creditors can claim anything therefrom. *Bowen v. Billings*, 13 Neb. 444; *Jackson v. Cornell*, 1 Sandf. Ch. 350, 3 N. Y. Legal Obs. 90; *Fassett v. Tallmadge*, 18 Abb. Pr. 53; *Wilder v. Keeler*, 3 Paige, 167; *Payne v. Matthews*, 6 Paige, 19; *North River Bank v. Stewart*, 4 Bradf. 257, 4 Abb. Pr. 409; *Butts v. Genung*, 5 Paige, 254.

Partnership property is a trust fund to the extent of partnership liabilities to be applied in satisfaction of the same. *Roop v. Herron*, 15 Neb. 80; *Innes v. Lansing*, 7 Paige, 533; *Whitewright v. Stimpson*, 2 Barb. 379.

But it has never been supposed that the creditors could resort to equity to reach the property, when there has been a wrongful disposition of the assets, until the remedy at law has been exhausted. *Walsor v. Soligman*, 21 Blatchf. 132, 13 Fed. Rep. 416; *Dunlevy v. Tallmadge*, 32 N. Y. 457.

The creditors of a partnership come in through the medium of the partner and his equities. *Robb v. Stevens*, *Clarke*, Ch. 197.

ing the firm of Wysor & Jack. The testator was also a member of the firm of Wysor, Jack & Kline, which was composed of the above-named Jacob H. Wysor, John Jack and William B. Kline.

This last named firm was engaged in the milling business and owned a flouring mill, together with sixty-five acres of land adjacent, each member being the owner of an undivided one third of the business and property. The business of the firm of Wysor, Jack & Kline was in no way connected with that of Wysor & Jack, the last-named firm being the owner of 880 acres of land which constituted part of the firm assets, in which each partner had an equal interest. The character of the business of Wysor & Jack does not distinctly appear, but the land owned by them is treated by both parties as partnership property.

By the first, second and third clauses of his will, the testator appointed executors to carry the will into execution, made provision for his wife by giving her a life estate in his real estate, and expressed a desire that she should be admitted into the firm and continue the business as a partner with Wysor and Kline, his former associates in the milling business.

The fourth and fifth clauses of his will read as follows:

"4th. I will and direct that my said executors, and, in case of the death or failure to serve of either, the survivor of them, shall adjust, settle and compromise any and all debts, claims or demands due to or from me, according to the best of their or his judgment, with-

jurisdiction whatever; and further, that they shall make settlement with my said partners, and each of them, of the partnership affairs, and of the profits heretofore arising therefrom, together with any matters of dealing between myself and them, or either of them, in manner according to his or their judgment, without any further authority from any court whatever.

"5th. I do further will and direct that my said executors, or in case of the failure from any cause of either to serve, then the remaining executor, shall sell and convey so much of my personal or real estate, at either public or private sale, with or without appraisement, on such terms, at such place and in such manner as to him or them shall seem best, as may be necessary to pay and satisfy all my just debts, reserving, however, to my said wife the title and possession of the house and grounds where I now live, otherwise selling such parcels, the sale of which will least injure the remainder."

As to the remainder of his property, after the termination of the life estate of the widow, the testator died intestate. After the testator died, Wysor, as surviving partner of the firm of Wysor & Jack, and Wysor & Kline, as surviving partners of Wysor, Jack & Kline, continued in possession of the property of their respective firms until June 25, 1866 when the executors of the last will of John Jack, assuming to act under the provisions of the fourth and fifth clauses of the will above set out, made a settlement and entered into an agreement with the defendant Wysor, whereby, in consideration that the latter agreed to pay the

In the distribution of the trust fund, partnership debts are to be ratably paid without regard to the form of the securities not constituting an actual lien held by the creditors, and this proportional equality among themselves is as necessary to be preserved as their priority over the separate creditors of the individual partners. *Nicholson v. Leavitt*, 4 Sandf. 300, 9 N. Y. Legal Obs. 127.

Administrator of decedent's estate.

An administrator of the estate of a decedent has nothing to do with the partnership interests, except to look after it so far as to see that no waste or fraud is committed in its management, until the surviving partner has settled up the partnership and paid all its debts, and then turned over to the administrator an equal half of what was left. *Re Armstrong*, 6 West. Rep. 124, 63 Mich. 356.

He cannot be made liable for negligent action of the surviving partner in closing up the business of the firm. *Ibid.*

He is not entitled to a participation in profits of, or to an accounting with, firms formed subsequently to his death to carry on the same business, where the new firms took the interest of deceased, believing it to have been purchased from the administrator by a third party. *Demarest v. Rutan*, 1 Cent. Rep. 697, 40 N. J. Eq. 356.

It is only the decedent's share of the balance to be distributed equally between the surviving partner and the representatives of the deceased partner which belongs to his representatives as part of his estate. *Thomson v. Thomson*, 1 Bradf. 34.

The administrator of a deceased partner has no authority to meddle with the firm assets, or to introduce into the inventory the value of his intestate's share of them; and the orphans' court should relieve him of a charge made therein of the value

of such share. *Shipe's App.* 5 Cent. Rep. 142, 114 Pa. 206.

Only where a surviving partner fails to give bond can the administrator of the deceased partner, on giving the bond required by law, meddle with the partnership assets. *Matney v. Gregg Bros. Grain Co.* 1 West. Rep. 437, 19 Mo. App. 107.

Rights and remedies of surviving partners.

On the death of a partner, a dissolution of the partnership occurs, and the surviving partner becomes agent of the defunct firm for the purpose of disposing of its assets, paying its debts and settling it up; and, for this purpose, the title to such assets vests in him. *First Nat. Bank v. Farmers Deposit Nat. Bank (Pa.)* 5 Cent. Rep. 505.

He must proceed to sell the personal property belonging to the firm, and account for the proceeds as trustee. He cannot himself be purchaser at his own sale, at a valuation. *Scudder v. Ames*, 4 West. Rep. 846, 89 Mo. 496.

He is entitled to the possession and control of the partnership assets for the purpose of winding up its affairs, with or without the statutory bond. *Weise v. Moore*, 5 West. Rep. 58, 22 Mo. App. 530; *Farley v. Moog*, 79 Ala. 148; *King v. Leighton*, 1 Cent. Rep. 758, 100 N. Y. 336.

A surviving partner in possession of partnership property, real or personal, has a right to hold it until firm debts to himself, as well as to others, are paid. *Clay v. Freeman*, 118 U. S. 97 (30 L. ed. 104).

The surviving member of an insolvent partnership may make an assignment for the equal benefit of all the creditors; but his power to mortgage the partnership effects, thereby giving the mortgagee a preference over other creditors, is a question which is worthy of consideration, and which is not decided. *Espy v. Comer*, 80 Ala. 353.

If he be sole surviving partner and himself in-

indebtedness of the firm of Wysor & Jack, and certain debts due from the testator to Wysor, and also to pay his share of all the unpaid indebtedness of Wysor, Jack & Kline, and all other indebtedness of the testator, including the cost of administration, and, in addition, convey certain property to the widow, and secure to her one third interest in the property of Wysor, Jack & Kline free from any debts, the executors and widow agreed to convey to the defendant Wysor all the interest of the testator, excepting certain designated parcels, in the real estate owned by the firm of Wysor & Jack. This agreement was consummated and conveyances were made accordingly by the widow and executors in June, 1866: and it is charged that the defendant claims, in virtue of these conveyances, to be the sole owner of the property, and denies the title of the plaintiffs.

These conveyances stood without question until in February, 1880, when this suit was instituted.

It does not appear from the complaint that there was any disparity between the value of the property conveyed and the amount of debts assumed, or that the debts have not been paid according to the agreement, or that there was any fraud or collusion between the surviving partner and the executors, or that the latter were in any way overreached.

It is claimed, however, that the power of sale contained in the will did not extend to the partnership real estate, except that specifically mentioned therein; that if it did, it only authorized the executors to sell the testator's interest in so much thereof as remained after full pay-

ment of the partnership debts. Moreover, it is claimed that even if the executors had authority to sell, the transaction as disclosed by the complaint was not a sale within the meaning of the language employed in the will, and that because the sale was made by the executors without having given notice of the time, place and terms of sale, and without having included the value of the real estate in the bond given by them when they qualified, the conveyance was invalid and void. It is claimed, too, that Wysor, being the surviving partner of the firm of Wysor & Jack, was a trustee of the partnership property, under a duty to the heirs and creditors, and that he was therefore incompetent to purchase and receive a conveyance from the executors.

For all these reasons, it is urged that the conveyance is illegal and ought to be set aside, and that an accounting of the affairs of the firm of Wysor & Jack should be had, the appellants alleging their readiness to pay whatever may be found due the defendant Wysor.

While it is undoubtedly true, as a general rule, that an action to compel a surviving partner to account can only be maintained by the personal representative of the deceased partner, yet circumstances may appear which create an exception to the general rule, and make it proper that a court of equity should entertain an action on behalf of the heirs.

Where it is shown that there is collusion between the surviving partner and the executor, the latter refusing to compel an accounting by the former, or where there have been such dealings between the two as render it probable

solvent, he may assign the partnership assets for the benefit of partnership creditors, with preferences to some of them, where the local law does not forbid. *Emerson v. Senter*, 118 U. S. 3 (30 L. ed. 49).

His fraudulent omission from the schedules of certain partnership property, for his own benefit, does not make the assignment void where the assignee and the beneficiaries of the trust are ignorant of the fraud. *Ibid.*

His neglect to wind up the concern will not relieve assets from the lien of partnership debts, or permit the Statute of Limitations to run in favor of the heirs of the decedent partner, so as to enable them to obtain an interest in the property without payment of debts. *Clay v. Freeman*, *supra*.

On the death of a partner, a cause of action in a suit by the firm on a contract survives to the surviving partner, who is the only necessary party thereto. *Matney v. Gregg Bros. Grain Co.* 1 West. Rep. 437, 19 Mo. App. 107.

Rights as to heirs of decedent.

He can dispose of the equitable interest, and the purchaser can compel the heirs-at-law of the deceased partner to protect the purchase by a legal right. *Sullivan v. Smith*, 15 Neb. 483; *Andrews v. Brown*, 21 Ala. 443.

As between himself and the heir of the deceased partner, he has an absolute right to dispose of the real estate purchased for and used in the partnership business and paid for out of funds of the firm, in the same manner as if it were personal estate. *Delmonico v. Guillaume*, 2 Sandf. Ch. 366, 7 N. Y. Ch. L. ed. 627; *Shanks v. Klein*, 104 U. S. 23 (26 L. ed. 636); *Fereday v. Wightwick*, 1 Russ. & M. 45; *Phillips v. Phillips*, 1 Mylne & K. 649; *Broom v. Broom*, 3 Mylne & K. 443; *Cookson v. Cookson*, 8 7 L. R. A.

Sim. 829; Townsend v. Devaynes, referred to in 11 Sim. 486.

Where articles of copartnership expressly declare that real estate purchased by the firm shall be considered as possessing all the incidents and liabilities of partnership funds and personal property, and are duly probated as part of the will of a deceased partner, the surviving partner may convey a perfect legal title to such property as against the heirs of the deceased, although he does not sell for the purpose of paying partnership debts. *Davis v. Smith*, 22 Ala. 196.

Surviving partner; executor of deceased partner

A surviving partner who is also the executor of his deceased partner must file in the probate court, not only a true and correct inventory of the individual property and assets of the estate, but also of the partnership property, showing who are partners, the place of business, its nature and character, the terms of the partnership, capital contributed by each and some statement of the assets and liabilities as far as known. *Perrin v. Lepper*, 72 Mich. —.

He must keep accurate, distinct accounts and exhibit them when called upon by the heir or his attorneys, and to all persons interested in the estate. In case of doubt as to the proper construction of the will in regard to final disposition of the estate, he must apply to the proper court, and have the matter settled, and take its direction in reference thereto. *Ibid.*

On his death his representative has no more right to the exclusive control of the copartnership books, papers and property of the partnership estate than has the representative of the deceased partner. *Ibid.*

If he makes a statement of receipts and disbursements as survivor in winding up the business,

effort to secure an accounting, or other like circumstances appear, it has been held that the heirs may maintain the action. In the absence of special circumstances, heirs have no *locus standi* against the surviving partner. 2 Lindley, Partn. 494; *Harrison v. Righter*, 11 N. J. Eq. 889; *Hyer v. Burdett*, 1 Edw. Ch. 825.

Assuming, without deciding, that the facts as pleaded in the present case make it apparent that the executors have placed themselves in such an attitude towards the surviving partner and the transaction sought to be set aside as to bring the case within the exception, it becomes pertinent to inquire whether or not the appellants, as heirs, show any interest in the property of the late firm of Wysor & Jack upon which to predicate an action.

If the executors had no power under the will to sell and convey, or the surviving partner was incompetent to purchase or receive a conveyance, or if, for any of the other reasons urged, the transaction between the executors and the surviving partner was illegal and the conveyance void, then the property remained in the possession and under the qualified ownership of the surviving partner, unaffected by what transpired.

It is familiar law that a surviving partner has the right to the control and possession of the property of the firm, and that he may dispose of it in order to adjust the partnership accounts, and is only liable to the representatives of the deceased partner for what remains in his hands after the partnership affairs are

settled in the law of partnership than that the rights of the heirs of a deceased partner are subject to the adjustment of all claims between the partners, and attach only to the surplus which remains when the partnership debts are all paid and the affairs of the firm wound up. Until all the debts are paid the rights of the heirs do not attach. *Grissom v. Moore*, 106 Ind. 298, and cases cited, 7 West. Rep. 657; *Walling v. Burgess* (Ind.), 7 L. R. A. 481; *Deeter v. Sellers*, 102 Ind. 458.

The heirs of a deceased partner have no interest, as such, in the property of the firm; their only remedy is to compel the surviving partner to account for the surplus after the settlement of all the partnership liabilities, and, ordinarily, a court of equity will not entertain jurisdiction of the affairs of a partnership until by its decree a final adjustment of the business can be effected. *Thompson v. Lowe*, 111 Ind. 272, and cases cited, 9 West. Rep. 671; *Scott v. Seares*, 5 Smedes & M. (Miss.) 25; *Rossum v. Sinker*, 12 Cent. L. J. 202, and *note*.

Now, while it appears that the deceased partner was indebted to the firm, and that the firm was indebted on partnership account, and that the surviving partner agreed, in consideration of the conveyance which is assailed, to pay these and other debts for which the testator's estate was liable; and while it may be inferred from the facts alleged in the complaint that the surviving partner has paid all the debts of the firm, except what remains due to himself on the partnership account,—it nowhere appears that the entire interest of the deceased

showing a balance in his favor to be divided, he is insolvent, so that such balance is not substantial assets, his sureties on the executorial bond are not liable for such balance. *Hooper v. Hooper*, 22 W. Va. 528.

Where he wastes the social assets at a time when the partnership affairs are, or under the law should be, regarded as closed, if the survivor is insolvent his sureties on the executorial bond are not liable. *Ibid*.

The fact that executors have left to one of their number, who is a surviving partner of the testator, the entire management of the estate, and that he retains in the firm (without authority) the capital of the testator, will not give him the right to pledge securities of the estate for a loan to the firm. In such case the pledgee may be subrogated to whatever rights the pledgor has as *cestui que trust* or legatee in the securities pledged. *First Nat. Bank v. Farmers Deposit Nat. Bank* (Pa.) 5 Cent. Rep. 505.

Bond required.

A bond furnished by a surviving partner is legal and is required by law. *Macready v. Schenck* (La.) Apr. 22, 1889 (not yet reported).

A recovery on such a bond is not limited to nominal damages, where he has failed to pay firm creditors, while having a balance of firm moneys in his hands, which he has been ordered by the court to pay them. *Miller v. Kingsbury*, 128 Ill. 45.

Continuance of business after death of partner.

Nothing but the clearest and most unambiguous language, demonstrating in the most positive manner, by contract or by will, the intention of the

decedent to make his general assets liable for debts contracted in continuing trade after his death, will render his estate a partner. *First Nat. Bank v. Farmers Deposit Nat. Bank* (Pa.) 5 Cent. Rep. 505.

Where, upon the death of a partner, the business is continued under the management of the survivor, with the joint funds, and such survivor purchases property and erects a factory thereon with the partnership funds, and takes the title in his own name, he and his heirs hold such legal title subject to the partnership trust. *A. & W. Sprague Mfg. Co. v. Hoyt*, 29 Fed. Rep. 421.

And where a corporation is formed from such partnership after the purchase of such real estate, such corporation also takes the partnership's equitable title to such property. *Ibid*.

A surviving partner in a cotton plantation, before the war, not authorized by partnership articles or the will of the deceased partner, could continue firm business only until he then growing crop was gathered and sold. *Clay v. Field*, 34 Fed. Rep. 375.

The facts that the surviving partners continued the business after the death of a partner, and the assets were conveyed to one of them, under an agreement between them, in consideration of his assuming the payment of certain mortgages upon the firm property, which was carried out; and the property turned over to such partner did not exceed in value 75 per cent of the indebtedness assumed, do not affect the rights of defendant claiming as heir-at-law of the deceased partner. *Jennens v. Smith*, 7 West. Rep. 323, 64 Mich. 91.

The survivor of two surgeons conducting business as copartners is not obliged to give up the business and sell the practice in the absence of any contract to that effect. *Mandeville v. Harman*, 5 Cent. Rep. 627, 42 N. J. Eq. 123.

partner would not be absorbed in the adjustment of the partnership account with the surviving partner. Having averred facts from which the inference arises that the surviving partner has paid all the partnership debts, and that the estate of the deceased partner is indebted to him, it is essential to the right of the heirs to call him to account that they make it appear that he has in his hands partnership property in excess of the amount required to reimburse himself. The averments in the complaint wholly fail to do this, and the conclusion is therefore unavoidable that the complainants fail to show such an interest in the property as entitles them to invoke the aid of a court of equity.

This conclusion necessarily follows from the application of the rule that a surviving partner is entitled to the custody and management of the assets, unless it be shown that he is committing waste or otherwise mismanaging the affairs of the firm, and is only liable to the heirs or representatives of the deceased partner for what remains after everything is settled up. *Boys v. Vilas*, 18 Wis. 169; *Shanks v. Klein*, 104 U. S. 18 (26 L. ed. 685), 18 Cent. L. J. 869; *Anderson v. Ackerman*, 88 Ind. 481; *Cobble v. Tomlinson*, 50 Ind. 550.

If, however, it were conceded that it appeared that the partnership assets exceeded in value the amount necessary to adjust the partnership account, it would by no means follow that the appellants could maintain this action.

It appears that more than fourteen years before the commencement of this action, the executors of the deceased partner on the one hand, acting under the authority conferred by the will, and the surviving partner on the other, consummated a final settlement and adjustment of the partnership account of Wysor & Jack.

The powers conferred by the will are broad and comprehensive, and include the power to settle, adjust and compromise all debts owing by the testator, and to make settlements with his former partners and each of them without any authority from any court, and to sell and convey, either at public or private sale, with or without appraisement, any or all of the testator's real estate, on such terms as to them should seem best, in order to pay and satisfy debts against his estate. It thus plainly appears that it was the purpose of the testator to invest his executors with power to make compromises and settlements at their discretion, and to sell and convey his real and personal estate according to their best judgment. The statute in force at the time the sale was made provided, in effect, that where lands were directed to be sold by a will, the sale, as to giving notice, conveying, taking notes and mortgages, return and confirmation, should be conducted as sales by an administrator for the payment of debts, "unless by the terms of the will different directions are given, but no petition or notice of the filing thereof shall be required." 2 Rev. Stat. 1876, p. 530.

As was in effect said in *Munson v. Cole*, 98 Ind. 502, the land was not directed to be sold by the will. That was left to the discretion of the executors. But if it had been, the executors were authorized to sell at their own dis-

cretion, upon such terms as they might think best; and the authority thus conferred necessarily operated as "different directions" from those prescribed by the Statute. The conveyance was not therefore invalid because the terms of the Statute were not observed or on account of any defect in the power of the executors.

This brings us to inquire whether the surviving partner occupied such a relation to the property and to those concerned as to disqualify him from purchasing the interest from the executors of the deceased partner.

It is not to be doubted that a surviving partner is regarded as a trustee primarily for the creditors of the firm, and secondarily for the heirs or personal representatives of the deceased partner in all that remains, or fairly ought to remain, after adjusting the partnership account. Accordingly, it has been correctly laid down that "the surviving partners are held strictly as trustees, and their conduct in discharging their trust is carefully looked after by the courts of equity. Thus, like other trustees, they cannot sell the property of the firm and buy it themselves; nor, as the converse of this, can they buy from themselves property for the firm. Their trust being to wind up the concern, their powers are commensurate with the trust. . . . Their trust is to wind up the concern in the best manner for all interested, and therefore without unnecessary delay." *Parsons*, Partn. p. 442; *Case v. Abel*, 1 Paige, 868; *Sigourney v. Munn*, 7 Conn. 11; *Jones v. Dexter*, 180 Mass. 880, 89 Am. Rep. 459.

Being in a sense a trustee, the surviving partner cannot, of course, speculate upon the property which the law commits to his custody, solely for his own advantage, in disregard of the interest of his *cestuis que trust*; and if he makes profits out of the trust property, in the course of the adjustment of the affairs of the partnership, he is held to account to those interested for their share. He cannot purchase the trust property from himself, no matter whether the attempt be made by means of a public or private sale. This is so, not only because his duty as seller and his interest as purchaser are in irreconcilable conflict, but for the more cogent reason that it is indispensable to every legal contract of sale and purchase that there be two contracting parties, competent to enter into a binding engagement with each other. Hence an attempt by a trustee who holds property in trust, whether he be surviving partner, administrator, or whatever his designation, to sell the trust estate to himself is everywhere held to be void. *Martin v. Wyncoop*, 12 Ind. 266; *Hunsucker v. Smith*, 49 Ind. 118; *Murphy v. Tetr*, 53 Ind. 545; *Rochester v. Leclerc*, 104 Ind. 502, 2 West. Rep. 880; *Nelson v. Hayner*, 66 Ill. 487.

In the case of a sale thus made or attempted, it can well be said, it is of no avail to show that the trustee acted in good faith. Such transactions are poisonous in their tendencies, and violative of the principles of public policy. They are declared void, not for the purpose of affording a remedy against actual mischief, but to prevent the possibility of wrong. *Potter v. Smith*, 86 Ind. 231; *Morgan v. Watiles*, 69 Ind. 261.

These principles do not apply or control in

partner. No good reason can be suggested why a surviving partner should be held legally incompetent and absolutely disqualified from becoming the purchaser of the interest of his deceased partner in the partnership business, from his properly authorized legal representative, while very many reasons occur why such transactions, fairly entered into, should not only be upheld, but encouraged. In addition, the adjudged cases firmly support the right to make such sales. *Brown v. Nee*, 103 U. S. 828 [26 L. ed. 618]; *Baird v. Baird*, 1 Dev. & B. Eq. 524, 31 Am. Dec. 899; *Chambers v. Howell*, 11 Beav. 6; *Roy v. Vilas*, *supra*.

In *Kimball v. Lincoln*, 99 Ill. 578, after reiterating the rule that a surviving partner could not become a purchaser of the firm property at his own sale, nor from a co-trustee, the court said: "But the reason that would forbid a transaction of this character has no application to a case where a surviving partner purchases property from the executor or administrator of the deceased partner, and hence the rule which would govern the one case cannot control the other." *Ludlow v. Cooper*, 4 Ohio St. 1.

It has thus been seen that the executors had plenary power to make settlement of the partnership account, and to sell and convey the real and personal estate of the testator at their discretion, and that the surviving partner was competent to negotiate a settlement of the affairs of the firm and to purchase the interest of his deceased partner.

It is contended, however, that the power which the will conferred upon the executors was a power to sell the real or personal estate of the testator, and that the power thus conferred was not well executed by the conveyance of the testator's interest in the real estate of the firm, in consideration of the agreement to pay debts, as already indicated. The argument is that the agreement between the executors and the surviving partner was the same in legal effect as an exchange of property, and that a power to sell does not authorize an exchange. *Russell v. Russell*, 36 N. Y. 581; *Taylor v. Galloway*, 1 Ohio, 232; *Ringgold v. Ringgold*, 1 Harr. & G. 11; *King v. Whiton*, 15 Wis. 684; *Cleveland v. State Bank*, 16 Ohio St. 236.

Conceding that the proposition above stated is correct as a general rule, it cannot be made available in the appellant's behalf for two reasons:

(1) The power conferred upon the executors comprehended much more than a mere naked authority to sell and convey the testator's real estate. They were especially invested with power to make settlement with the partners of the testator, and with each of them, of all matters pertaining to the partnership business, and to adjust, settle and compromise all debts, claims or demands against the estate of the testator, according to their best judgment; and, in addition to the foregoing power, they were authorized, at their discretion, to sell and

lands, as personality, and the power conferred by the fourth clause of the will to make a settlement of the partnership affairs invested the executors with ample authority, in case it became expedient or necessary in the course of the settlement to transfer property to the surviving partner, to make such transfer. *Ludlow v. Cooper*, *supra*.

Moreover, the power contained in the fifth clause must be construed in connection with the duties imposed upon the executors by the fourth clause of the will. It will be observed that the executors are directed to sell and convey so much of the testator's real estate as they shall deem necessary to pay and satisfy his debts. Construing both clauses of the will together, it becomes apparent that the executors had authority to make any proper settlement which, in their discretion, seemed fit and best.

(2) A settlement and final accounting with the surviving partner of the partnership matters having been actually consummated by the executors who were duly empowered to that end, a court of equity will not disturb the settlement so made until it is impeached as fraudulent or unfair, or unless collusion between the executors and surviving partner is shown. Nothing less than fraud or collusion will invalidate an arrangement between an executor and a surviving partner, whereby the latter became the purchaser of the deceased partner's share. *Travis v. Milne*, 9 Hare, 141; *Davies v. Davies*, 2 Keen, 634; *Chambers v. Howell*, *supra*; *Stanton v. Carron Co.* 18 Beav. 146; *Smith v. Everett*, 27 Beav. 446; 2 Lindley, Partn. Rapalje's ed. 487.

As has been seen, there is no pretense of any fraud or collusion in the present case.

Finally, after the settlement and accounting between the executors and the surviving partner has been had, and the account closed, as appears to have been the fact in the present case, a court of equity will not, after this long acquiescence, unexplained by circumstances, decree the opening up of the account, even though it appeared that the settlement had been irregularly made.

It is the settled doctrine of courts of equity that unexplained delay in the prosecution of a right until it becomes stale constitutes such laches as forbids the interference of the court. *Smith v. Thompson*, 7 Gratt. 112, 54 Am. Dec. 126, and note; *Hough v. Coughlan*, 41 Ill. 181; 2 Story, Eq. Jur. § 1520.

Here, as we have seen, there is an unexplained delay of fourteen years. The Statute of Limitations would have barred an action between the partners themselves in case the settlements had been made by them. After this lapse of time a presumption of innocence and fair dealing arises, and removes every inference or imputation of bad faith from the transaction, and the settlement must repose as the parties made it. *Prevost v. Gratz*, 19 U. S. 6 Wheat. 481 (5 L. ed. 211); *Rochester v. Leering*, 104 Ind. 562, 2 West. Rep. 330.

The judgment is affirmed, with costs.

A. S. NEWSON, *App't.*
v.
CITY OF GALVESTON *et al.*

(....Tex.....)

1. A city has power to forbid the selling of fresh meats elsewhere than at market houses established by it, where its charter empowers it to establish market houses, designate, control and regulate market places, and regulate the vending of fresh meats.
2. Licensing a person to keep a private meat market for several years does not compel the city to continue granting such a license, or to prohibit keeping a market within the district where it is situated.
3. A person is not deprived of his property without due process of law by an ordinance forbidding private markets within certain limits, in which he has established a market under license from the city and expended money thereon.
4. Denying the privilege to sell meats in a city except at certain places is not void as in restraint of trade.

(March 18, 1890.)

APPEAL by plaintiff from a judgment of the District Court for Galveston County dismissing his bill filed to enjoin interference by the city authorities with a private market owned and kept by him for the sale of fresh meats. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Quitman Finlay, John Lovejoy and A. Sampson, for appellant:

The ordinance fixing the boundaries within which no private market shall be established, and fixing the rental of stalls in the public market, and prescribing a penalty for its violation, is in restraint of trade, unreasonable, tyrannical, oppressive and void.

St. Paul v. Laidler, 2 Minn. 190, 72 Am. Dec. 99, and *note: Slaughter House Cases*, 83 U. S. 16 Wall. 86 (21 L. ed. 894), (*Judge Field's* dissenting opinion, divided court); *Bethune v. Hunke*, 28 Ga. 560, 73 Am. Dec. 7-9; *Caldwell v. Alton*, 83 Ill. 410, 75 Am. Dec. 282.

The ordinance amounts to the damaging and destroying of petitioner's property without compensation, and is void.

State Const. Bill of Rights, § 17; U. S. Const. 14th Amend.

It amounts to the depriving of petitioner of property without due process of law, and is void.

U. S. Const. 14th Amend.

Mr. Sam. W. Jones, for appellees:

The State of Texas, under its police power, has the authority to establish and erect markets, and to authorize the establishment of markets, to forbid the sale or purchase of marketable articles except at designated places, and to confine the prosecution of certain trades to certain localities; and it may delegate this power to a municipal corporation.

1 Dillon, Mun. Corp. §§ 141, 380; *Tiedeman, Pol. Powers*, 434; *First Municipality v. Outting*, 4 La. Ann. 325

7 L. R. A.

Under its charter the City of Galveston had the power to fix the times and places at which fresh meats might be sold within its corporate limits, and to prohibit their sale at other times and places; and the ordinances prohibiting the establishment and conduct of private markets for such purposes within the limits therein prescribed were a proper exercise of that power.

Buffalo v. Webster, 10 Wend. 100; *Bush v. Seabury*, 8 Johns. 418; *New Orleans v. Stafford*, 27 La. Ann. 417; *Wartman v. Philadelphia*, 33 Pa. 202; *Ash v. Peoria*, 11 Mich. 347; 1 Dillon, Mun. Corp. §§ 880, 884; *Tiedeman, Pol. Powers*, 811-318; *St. Louis v. Weber*, 44 Mo. 547; *Winnboro v. Smart*, 11 Rich. L. 551.

The exercise of this power by the City is in the nature of a police regulation, and does not violate private rights or improperly restrain trade.

Re Nightingale, 11 Pick. 108; *New Orleans v. Stafford*, 27 La. Ann. 417; *Wartman v. Philadelphia*, 33 Pa. 202; 1 Dillon, Mun. Corp. § 326.

Green-grocers and vendors of fresh meats, fish, poultry, etc., have always been held to be proper subjects for the exercise of the police powers of a State or city.

1 Dillon, Mun. Corp. § 334; *Tiedeman, Pol. Powers*, 812-814.

Forbidding, by ordinance, the establishment or conduct of private markets for the sale of fresh meats, within certain limits, and punishing by fine any violation thereof, was not a taking by the City of the plaintiff's property, but was simply a legitimate regulation of the use and enjoyment of that property by him, under the police powers delegated to the City by the State.

1 Dillon, Mun. Corp. § 141; *New Orleans v. Stafford*, 27 La. Ann. 417; *Tiedeman, Pol. Powers*, 818; *Louisville C. R. Co. v. Louisville*; 8 Bush, 415.

Whatever right to establish and conduct or maintain a private market the plaintiff may have acquired from the City in 1884, that right was necessarily subordinate to the City's right at all times to the exercise of its police powers over such occupation.

Tiedeman, Pol. Powers, 287; 1 Dillon, Mun. Corp. § 384.

Stanton, Ch. J., delivered the opinion of the court:

This was a suit for injunction, instituted in the District Court of Galveston County, January 26, 1889, by A. S. Newson against the City of Galveston, in which it was sought to restrain the latter from interfering with the private market for the sale of fresh meats, conducted by the former in violation of an ordinance of the City prohibiting such markets in the territory bounded by certain streets within its corporate limits. *Judge N. G. Kittrell*, of the Twelfth Judicial District, granted a preliminary injunction in accordance with the prayer of the plaintiff's bill; and on February 23, 1889, this injunction was by the court, on motion of defendant, and after demurrer and sworn answer filed by it, dissolved, and the plaintiff de-

larly called for trial on its merits, the bill was dismissed; to which rulings the plaintiff excepted, and gave notice of appeal. The facts bearing on the controversy, necessary to be stated, are thus correctly given in condensed form by counsel for appellees, from the pleadings:

"By its charter, the City of Galveston is authorized and empowered to establish and erect markets and market houses; designate, control and regulate market-places and privileges; inspect and determine the mode of inspecting meat, fish, vegetables and all produce, and every article and thing brought therein for sale; to license, tax and regulate merchants and all other trades and professions, occupations and callings, the taxing of which is not prohibited by the Constitution of the State; to regulate the inspection and vending of fresh meats, poultry, fish, vegetables, fruits, butter, lard and other provisions, and the place and manner of selling fish and inspecting the same; to make such rules and regulations in relation to butchers as the city council may deem necessary and proper; and to pass all ordinances, rules and police regulations, not contrary to the Constitution of this State, for the good government, peace and order of the City, and the trade and commerce thereof, that may be necessary or proper to carry into effect the powers vested by its charter in the said corporation, the city government or any department thereof; and to enforce the observance of all such rules, ordinances or police regulations, and punish violations thereof by fines, penalties and imprisonment,—fines being limited to \$200, and imprisonment to three months. In pursuance of these powers, the city council, in 1880, passed an ordinance authorizing the establishment of private markets for the sale of fresh meats within the corporate limits, upon written application to the city council for that privilege, stating the length of time and the place where such market was to be established, the time for such privilege not to be less than three nor more than twelve months; and, if granted, in whole or in part, each and every person occupying such market to pay for the privilege quarterly, in advance, at the rate of \$50 per annum, and all private markets to be governed by and stand under the ordinances, rules and regulations of the said City, and imposing a fine or penalty of not less than \$10 nor more than \$50 for each day's violation of any of the provisions of said ordinance. In October, 1887, the city council amended this ordinance by providing that all market privileges theretofore granted should terminate on the 1st day of January, 1888, and all market privileges thereafter granted should terminate on the 1st day of the next succeeding January. June 18, 1888, the city council digested all ordinances of the City of a general nature, and continued in full force and effect the ordinance of 1880, as amended in October, 1887.

"On October 2, 1888, the city council adopted an ordinance amendatory of the Revised Ordinances of the City adopted June 18, 1888, providing that from and after January 1, 1889, no private market should be established in the

avenue K on the south, and the channel of Galveston Bay on the north; and by the ordinances of the City any person violating the provisions of this ordinance is subject to a fine of \$10.

"On February 18, 1889, the city council again amended the Revised Ordinances by the passage of the following: 'Hereafter it shall be unlawful for any person to establish, operate or maintain any private market for the sale of butchers' meats within the following boundaries in the City, to wit: between Thirteenth Street on the east and Twenty-Seventh Street on the west, and between Avenue K on the south and the channel of the bay on the north. Any person who shall violate the provisions of this article shall, on conviction, be fined \$10, and each and every day any such violation shall occur shall constitute a separate offense.'

"In October, 1884, the plaintiff, A. S. Newson, made application in writing to the city council for permission to establish, under the Ordinance of 1880, which was then in force, a private market, in the City of Galveston, for the sale of fresh meats. This application was granted by the council, and immediately there after the plaintiff established, on Twenty-First Street, between Market and Mechanic Streets, in said City, a private market for the sale of fresh meats, fitting up the same with refrigerator and other appliances at an expense to himself of several thousand dollars, and continued, unmolested, to conduct such market, at a profit, from that time until January 1, 1889, paying to the proper officer of the City, quarterly in advance, the tax imposed by that ordinance for the exercise of such privilege. This private market of the plaintiff is located within the limits in which such markets are inhibited by the provisions of the Ordinances of October 2, 1888, and February 18, 1889.

"Prior to January 1, 1889, the City had erected and completed, within the limits defined by the Ordinance of October 2, 1888, a large and commodious market-house, for the accommodation of the public and those engaged in vending fresh meats, etc., and containing stalls to let for such purposes at a reasonable rental fixed by the city council. No privilege to establish or conduct a private market in the city limits had been granted to the plaintiff since January 1, 1888, and the last granted to him expired December 31, 1886. In January, 1889, he tendered, for the quarter commencing the first of that month, to the city official whose duty it is to collect taxes and fees for licenses, the amount imposed, under the Ordinance of 1880, for the privilege of conducting a private market within the City, but the officer declined to receive the same, and refused to issue him further license in that behalf; and the plaintiff was then notified to desist, under penalty of the law, from further conducting his said market for the sale of fresh meats at the said locality on Twenty-First Street, within the said prescribed limits. Notwithstanding, however, the change in the law, and the refusal of the City to further grant him the privilege of conducting his said market, the plaintiff continued the same, and was in January, 1889, arrested under a warrant

violation of the ordinances prohibiting the establishment of private markets for the sale of fresh meats within the limits in said City prescribed by the aforementioned ordinances. The plaintiff was at the time a renter of stalls in the said market-house erected by the City, and vended meats therein, as well as at his private market. The prosecution in the recorder's court was pending at the time of the filing of the bill and the service of the writ of injunction in this case. The bill charges that the plaintiff's private market having been established at an expenditure of his moneys in October, 1884, under permission from the city council, his right to conduct the same, unmolested, had become vested, and the City was without authority to interfere with him in its exercise; and the ordinances passed subsequently in October, 1884, prohibiting the establishment or conduct of private markets within the limits therein defined, are null and void, in so far as they affect that right; that the said ordinances are in restraint of trade; that the enforcement of them would be to deprive the plaintiff of his property without due process of law; and also other matters,—all of which are specifically denied in the defendants' answer."

Under the provisions of the charter empowering the City to establish market-houses, designate, control and regulate market-places, and to regulate the vending of fresh meats, poultry, fish and other things, no doubt can exist of the power of the City to establish market-houses, and to require fresh meats to be sold there, and also to forbid their sale at other places. Such a power is most necessary for the protection of the health of a city, and has often been recognized under charters not so clearly conferring it as does the charter of the City of Galveston. *Buffalo v. Webster*, 10 Wend. 100; *Bush v. Sealbury*, 8 Johns. 418; *Winnaboro v. Smart*, 11 Rich. L. 552; *Bowling Green v. Carson*, 10 Bush. 65; *New Orleans v. Stafford*, 27 La. Ann. 417; *St. Louis v. Weber*, 44 Mo. 549; *Wartman v. Philadelphia*, 83 Pa. 209; *Ash v.*

The case of *Le Centre v. Davenport*, 13 Iowa, 210, goes much further, in that it protected a private individual in the exclusive privilege to furnish a market-place.

Palestine v. Barnes, 50 Tex. 538, seems to have recognized the power of a municipal corporation to confer like exclusive market privileges. We refer to the last two cases cited for illustrations of the rulings on the general question before us, but are not called upon, by the facts of this case, to adopt or reject them on the question of power to confer such exclusive privileges. The character of power the City exercised in authorizing meats to be sold in private markets was not such as the City could be prevented from exercising again by withdrawing the privilege whenever the public good required it. The police power possessed by such corporations cannot be fettered by contracts, but must be left free to be exercised at all times, whether in conferring or withdrawing privileges once conferred. If license tax had been paid for a year, this would not deprive the City of the power to withdraw the privilege before its expiration, if the public welfare demanded it. Much less would the fact that the City for a time had received the tax, and granted the privilege, make it incumbent on it to continue to do so. If appellant expended money in preparing his private market place for the conduct of his business, he did so with full knowledge that the City might at any time forbid the business to be there conducted. The City has neither divested him of a right nor deprived him of his property, nor are the ordinances complained of unlawful because in restraint of trade. He is not denied the right to sell meats, but is denied the right to sell at a particular place. This is but that regulation of his right which the charter of the City authorized it to make, and it must be presumed that the city council in its action was prompted solely by a desire to promote the public welfare.

There is no error in the judgment, and it will be affirmed.

CALIFORNIA SUPREME COURT.

Jane WHITE, *Resp't.*,
v.
Lorenzo E. WHITE, *App't.*

(32 Cal. 427.)

1. Marriage may be proved by the conduct of the parties, where the habit and re-

pute to show that the marriage status has been assumed is all uniform and undivided, although the connection of the parties was in its beginning illicit.

2. The presumption that when a connection between parties is illicit it continues as it began, whether it is presumption of fact or of law, is rebuttable.

NOTE.—Marriage; sufficient proof of.

Marriage may be shown by cohabitation and repute during the life of the persons whose marital relations are in dispute, or during the life of one of them. It may be proved in this manner in an action brought by husband and wife jointly. *Reading F. Ins. & T. Co.'s App.* 4 Cent. Rep. 678, 113 Pa. 204; *Crozier v. Gano*, 1 Bibb, 257; *Hammick v. Bronson*, 5 Day, 290; *Boatman v. Curry*, 25 Mo. 433.

So in actions against husband and wife. See *Pettingill v. McGregor*, 12 N. H. 179; *Newburyport v. Boothbay*, 9 Mass. 414; *Hicks v. Cochran*, 4 Edw. Ch. 110.

The declarations and acts of parties are sufficient to prove their marriage. *White v. Lowe*, 1 Redf. 377.

The facts that parties have publicly acknowledged each other as husband and wife (*Kansas Pac. R. Co. v. Miller*, 2 Colo. 442, 461; *Barnum v. Barnum*, 42 Md. 271, 296; *Chamberlain v. Chamberlain*, 71 N. Y. 423, 47; *Re Taylor*, 9 Paige, 611, 617; *Jones v. Reddick*, 79 N. C. 293, 292); have

See also 16 L. R. A. 699; 17 L. R. A. 847, 848; 35 L. R. A. 794.

4. Proof of marriage by cohabitation and repute may be made in a suit for divorce on the ground of adultery as well as in other cases.

5. No reversal will be granted for the allowance of leading questions unless there has been a manifest abuse of discretion.

6. A reversal for the admission of irrelevant evidence, where the court tried the case, will not be made unless it appears that the evidence was relied upon by the court in making its decision.

7. Want of a finding will not warrant a reversal where the evidence would not have justified a finding in favor of the complaining party.

8. A marriage between a man and his housekeeper was held to be established, although they never had any marriage ceremony performed, and illicit intercourse began between them within one week after she came into his house without any promise of marriage, and for several years thereafter and until their removal to another place she was not regarded in the community as his wife, where several children were born to them, and after their removal she was treated by him in all respects as his wife and so introduced by him to the people of the community, and so regarded and treated by all their acquaintances in the limited circle in which they moved.

(Works, J., dissents.)

(January 2, 1890.)

APPEAL by defendant from a judgment of the Superior Court for the City and County of San Francisco in favor of plaintiff, and from an order denying a motion for a new trial in an action for a divorce. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Jarboe, Harrison & Goodfellow, with *Mr. George E. Nourse*, for appellant:

assumed marriage rights, duties and obligations (Com. v. Hurley, 14 Gray, 411, 412; have been generally (Boone v. Purnell, 28 Md. 607, 627; Cunningham v. Cunningham, 2 Dow, P. C. 482, 511; Yardley's Estate, 75 Pa. 207, 212; Badger v. Badger 88 N. Y. 546) reputed in the place of their residence to be husband and wife (The Breadalbane Case, L. R. 1 H. L. Sc. 182, 183, 103; Holmes v. Holmes, 1 Abb. (U. S.) 525; Green v. State, 59 Ala. 68, 70; Budington v. Munson, 33 Conn. 481, 487; Bowers v. Van Winkle, 41 Ind. 432, 435; Miller v. White, 83 Ill. 580, 585; Proctor v. Hurelow, 88 Mich. 282, 283; Redgrave v. Redgrave, 28 Md. 98, 97; Henderson v. Cargill, 31 Miss. 367, 408, 109; Richard v. Brehm, 73 Pa. 140, 144). —are relevant to prove a contract of marriage between them (DeThoren v. Atty-Gen. L. R. 1 App. Cas. 686, 611; Campbell v. Campbell, L. R. 1 H. L. Sc. 182, 200; Langtry v. State, 30 Ala. 536, 537. See State v. Wilson, 22 Iowa, 364, 365; Richard v. Brehm, *supra*; and consequently, in cases where no celebration is necessary, are sufficient to prove a valid marriage. Langtry v. State and State v. Wilson, *supra*; Com. v. Jackson, 11 Bush, 679, 686; Blasini v. Blasini, 30 La. Ann. 1388, 1397; Cayford's Case, 7 Me. 57, 58; Henderson v. Cargill, 31 Miss. 367; Davis v. Davis, 1 Abb. N. C. 140, 148; Forney v. Hallacher, 8 Berk. & R. 159, 161; State v. Hilton, 3 Rich. L. 434, 435.

But in cases where a celebration is necessary, evidence of a contract only is not relevant to prove 7 L. R. A.

and Div. § 262; Brinkley v. Brinkley, 50 N. Y. 184, 193; Collins v. Collins, 80 N. Y. 1, 5; Emerson v. Shaw, 56 N. H. 420.

While cohabitation and matrimonial reputation are facts from which a prior marriage may sometimes be presumed, both must concur, to be even prima facie evidence of marriage. Neither is, alone, evidence of marriage.

1 Bishop, Mar. and Div. § 438; 1 Greenl. Ev. § 107, and cases cited; Cargile v. Wood, 63 Mo. 501; Foster v. Hawley, 8 Hun, 63; Smyth's Estate (Pa.) 1 Leg. Gaz. Rep. 210; Guardians of the Poor v. Nathans, 2 Brewst. 149, 8 Pa. L. J. Rep. (Clark) 139; Becking's App. 2 Brewst. 202, 1 Phill. Ev. 234, 225; Hervey v. Hervey, 3 W. Bl. 877; Birt v. Barlow, 1 Doug. 171, 174; Read v. Pisser, 1 Esp. 213; Leader v. Barry, 1 Esp. 853; Doe v. Fleming, 4 Bing. 266; Smith v. Huson, 1 Phillim. 294; Hammett v. Branson, 5 Day, 290, 293; Rose v. Clark, 8 Paige, 574; Ford v. Ford, 4 Ala. 142; Jenkins v. Sisbee, 1 Edw. Ch. 877; Whitehead v. Cinch, 2 Hayw. (N. C.) 8; Kuhl v. Knauer, 7 B. Mon. 130; Com. v. Stump, 53 Pa. 132.

To raise the presumption of marriage from cohabitation and reputation, the reputation must not be divided and the cohabitation must be matrimonial in its inception.

Clayton v. Wardell, 4 N. Y. 230, 235; Barnum v. Barnum, 42 Md. 251; Cunningham v. Cunningham, 2 Dow, P. C. 482; 1 Fraser, Dom. Rel. 207; Jones v. Hunter, 2 La. Ann. 254; Hamilton v. Hamilton, 1 Bell, App. Cas. 736, 9 Clark & F. 327.

Evidence of cohabitation and reputation should be resorted to, to prove a prior actual contract of marriage; only when, by lapse of time, or death of the parties, or other sufficient reason, it has become impossible to obtain direct proof of such actual marriage.

Clayton v. Wardell, 4 N. Y. 230, 240; Bishop,

the celebration; still, if the parties have cohabited, such evidence may be, in certain cases, deemed relevant (George v. Thomas, 10 U. C. Q. B. 604, 606; Chamberlain v. Chamberlain, *supra*), on the presumption that such cohabitation was lawful. Cargile v. Wood, 63 Mo. 501, 512; Case v. Case, 17 Cal. 598, 600.

Cohabitation and repute may thus be direct evidence of a valid marriage (Guardians of Poor v. Nathans, 2 Brewst. 149, 153; Donnelly v. Donnelly, 8 B. Mon. 113, 117), or indirect (The Breadalbane Case, L. R. 1 H. L. Sc. 182, 183, 193; Cunningham v. Cunningham, 2 Dow, P. C. 482, 511; Breakey v. Breakey, 2 U. C. Q. B. 849; Holmes v. Holmes, 1 Abb. (U. S.) 525; Jewell v. Jewell, 42 U. S. 1 How. 219 (11 L. ed. 103); Blodget v. Thornton, 3 Cranch, C. C. 176; Green v. State, 59 Ala. 68, 70; Arthur v. Broadnax, 3 Ala. 557, 559; Case v. Case, 17 Cal. 598, 600; Budington v. Munson, 33 Conn. 481, 487; Kansas Pac. R. Co. v. Miller, 2 Colo. 442, 461; Burns v. Burns, 18 Fla. 389, 390; Lowry v. Coster, 91 Ill. 182, 184; Miller v. White, 83 Ill. 580; Harman v. Harman, 16 Ill. 85; Bowers v. Van Winkle, 41 Ind. 432, 435; Noesaman v. Noesaman, 4 Ind. 648; Blanchard v. Lambert, 43 Iowa, 228, 230; State v. Wilson, 22 Iowa, 364, 365; Sneed v. Ewing, 5 J. J. Marsh. 460, 491; Donnelly v. Donnelly, *supra*; Holmes v. Holmes, 6 La. 463; Blasini v. Blasini, 30 La. Ann. 1388, 1397; Taylor v. Robinson, 29 Me. 323, 328; Damon's Case, 6 Me. 148; Barnum v. Barnum, 42 Md. 251, 256; Redgrave

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of the father, defendant had illicit intercourse with plaintiff; and thereafter, in the year 1851, a child was born, the fruit of such intercourse. About the year 1853 another child was born to the parties. Between the birth of the first child and the birth of the second, the plaintiff and defendant mutually agreed to marry, and did marry, each other, and did thereafter live and cohabit together as husband and wife, and continued to do so from that time continuously up to a short time before this action was begun. The marriage of the parties was not performed by any clergyman or minister of the law, but was assented to and agreed upon and entered into by and between the parties themselves, and from that time to the commencement of this action the parties have ever treated and held each other out to the community, their friends and acquaintances, as husband and wife, and they have always been accepted, received and treated as such by their friends and acquaintances and the community. Other children than those mentioned were born to the parties. At the time this suit was begun there were two children living, the fruits of the intercourse between the parties. One of these was a daughter, named Nellie, born in March, 1858, and the other a son, named William, born in January, 1859.

In regard to the issue of the marriage, it is clear that there was never any promise to marry made between the parties either by present words (*per verba de praesenti*) or by words in the future (*per verba de futuro*). But it is urged on behalf of plaintiff that the evidence shows cohabitation and repute sufficient to establish a marriage. Such seems to have been the view of the case taken by the court below. That a marriage may be inferred from cohabitation seems to be the settled law of most countries. The law of Scotland is set forth, and the cases on this subject are collected and commented on, by a learned and distinguished writer, Patrick Fraser, LL. D., in his able work on the Law of Scotland regarding the relation of husband and wife. See chapter 8 of Fraser's "Husband and Wife," the work above referred to.

The law is thus stated in the initial sentence of the chapter just referred to: "If a man and a woman cohabit together as husband and wife, and are held and reputed by their neighbors and friends as married persons, they are presumed to have entered into marriage." The learned author adds to the above, by way of explanation, that "cohabitation and repute do not make marriage. They are merely items of evidence from which it may be inferred that a marriage had been entered into."

The facts in evidence must be such as to justify the inference that matrimonial consent had been interchanged between the parties, for the matrimonial contract is formed by consent, and consent alone. See 1 Fraser, Husband and Wife, 899.

Lord Cranworth, in his judgment in the case of *Campbell v. Campbell* (a Scotch appeal case) L. R. 1 H. L. Sc. 200, 201, thus expresses himself on this subject: "Marriage can only exist as the result of mutual agreement. The conduct of the parties and of their friends and neighbors, in other words *habite* and *repute*, 7 L. R. A.

to the laws of marriage there existing, unanswered, evidence that at some unascertained time a mutual agreement to marry was entered into by the parties passing as man and wife. I cannot, however, think it correct to say that *habite* and *repute* in any case make the marriage; . . . but I prefer to say that *habite* and *repute* afford, by the law of Scotland, as, indeed, of all countries, evidence of marriage always strong, and in Scotland, unless met by counter evidence, generally conclusive." Lord Westbury observes, in the same case, as follows: "Exception may possibly be taken to some few words occurring in one of the judgments [referring to a judgment in the court below] which represents cohabitation with habit and repute as a mode of contracting marriage. Perhaps it may not be strictly correct to say that it is a mode of contracting marriage. It is rather a mode of making manifest to the world that tacit consent which the law will infer to have been already interchanged. If I were to express what I collect from the different opinions on the subject, I should rather be inclined to express the rule in the following language: That cohabitation as husband and wife is a manifestation of the parties having consented to contract that relation *inter se*. It is a holding forth to the world, by the manner of daily life, by conduct, demeanor and habit, that the man and woman who live together have agreed to take each other in marriage, and to stand in the mutual relation of husband and wife; and when credit is given by those among whom they live, by their relatives, neighbors, friends and acquaintances, to these representations and this continued conduct, then habit and repute arise, and attend upon the cohabitation. The parties are holden and reported to be husband and wife; and the law of Scotland accepts this combination of circumstances as evidence that consent to marry has been lawfully interchanged. Probably, therefore, in the correct expression of the law, it would be more proper to say that cohabitation, with habit and repute, is a mode of proving the fact of marriage, rather than a mode of contracting marriage." Id. 211. To the same effect is the opinion of Lord Moncreiff in *Lapsley v. Grierson*, 8 Ct. Sess. Cas. (2d Series) (Dunlop, B. & M.) 61, and in *Lowrie v. Mercer*, 8 Ct. Sess. Cas. (2d Series.) (Dunlop, B. & M.) 966.

The same rule is recognized by the law of England. See *Goodman v. Goodman*, 28 L. J. N. S. Ch. 745; *Plunkett v. Sharpe*, 1 Lee, Eccl. 441; *Bond v. Bond*, 2 Lee, Eccl. 45; *Diddear v. Faucit*, 3 Phillim. Eccl. 580; *Hervy v. Deroy*, 2 W. Bl. 877. See Starkie, Ev. 4th ed. 45, where the doctrine is explained.

The observations of Starkie are quoted in 1 Fraser, Husband and Wife, 897. See also remarks of Lord Cranworth in *Campbell v. Campbell*, L. R. 1 H. L. Sc. 199, 200. Fraser states that the rule is acknowledged to a limited extent in Code Civil of France, in relation to the legitimacy of children. Fraser, Husband and Wife, 897, 898.

The proof of marriage by cohabitation and repute has been recognized in many cases in the United States, as in *Penton v. Reed*, 4 Johns. 52; *Clyton v. Wardell*, 4 N. Y. 230; *Jones v. Hunter*, 2 La. Ann. 254; *Barnum v. Barnum*,

v. Hawley, 8 Hun, 68; *Bickley's App.* Brewst. 202; *Purcell v. Purcell*, 4 Hen. & M. 512; *Brinkley v. Brinkley*, 50 N. Y. 197, 198; *Hynes v. McDermott*, 10 Daly, 428, 82 N. Y. 46, 91 N. Y. 451; *Radger v. Radger*, 88 N. Y. 554; *Van Tuyl v. Van Tuyl*, 57 Barb. 237; *Rose v. Clark*, 8 Paige, 580-592.

That a marriage in this State may be established *per verba in presenti*, or by a contract *per verba de futuro, cum subsequente copula*, was recognized in *Estate of McAusland*, 52 Cal. 577. The contract characterized as entered into *per verba de futuro* is only evidence of marriage as proving the requisite matrimonial consent. Such consent is essential to every marriage (1 Fraser, 11ush, and W. 415); and, prior to the adoption of the Civil Code in this State, consent alone constituted marriage. The law at that time was correctly expressed by the Latin words, "*consensus non concubitus facit nuptias*." As cohabitation and repute are only a mode of proving the required consent, and thus establishing marriage, there is no reason why the rules above stated regarding cohabitation and repute did not obtain in this State during the greater part of the period of the cohabitation of the parties to this action.

The evidence in this case plainly shows, and it is so found, that the intercourse between the parties was in its beginning illicit and meretricious, and it is contended (1) that it is presumed to continue illicit and meretricious until such presumption is overcome by distinct proof of marriage; and (2) that mere continued cohabitation and reputation of marriage create no presumption of a subsequent marriage in such case. With regard to this contention, we think it may be considered as sound and settled law that as regards the cohabitation of a man and woman, not shown to have been in its origin illicit, the presumption is that it is lawful. *Per Lord Eldon in Cunningham v. Cunningham*, 2 Dow, P. C. 482; *per Lord Redesdale* in same case.

The law always presumes, in the absence of proof to the contrary, that the conduct of men is lawful, and in accordance with the rules of morality. *Lapsley v. Grierson*, 1 H. L. Cas. 498.

But when the intercourse was illicit from the beginning, in the absence of evidence from which a change to the matrimonial relation may be inferred, it is presumed to continue. The state of illicit intercourse is presumed to continue until the evidence shows that the intercourse of the parties has become matrimonial.

The above, we think, is the meaning and extent of the decision in the case of *Cunningham v. Cunningham* (known as the "*Balbougie Case*"), above cited. No greater change than that above indicated is required. There are some expressions in opinions in the cases of *Cunningham v. Cunningham* and *Lapsley v. Grierson*, which seem to go further. But on a particular examination of the above cases it is manifest that the learned court that decided those cases did not intend to hold that in the case where the intercourse in its inception was illicit, that that circumstance prevented the establishment of the marriage status by the subsequent conduct of the parties, showing a general, undivided and uniform habit and repute that they had in-
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lives and conduct of the parties to see if they did not prove a marriage by habit and repute, and it was held in the repute was not general and singular and divided.

The opinions in the cases above were examined in *Campbell v. Campbell*, as the "*Breadalbane Case*") L. R. 182, and the language of the opinions was explained; and the conclusion was that, though the connection between the parties might be such as to prove, by habit and repute, that a marriage status had been assumed. The lords discussed the question, and the conclusion above stated.

In the *Breadalbane Case* it arose as to the legitimacy of Campbell, who eloped with Ludlow in 1760 or 1781. Ludlow Up to that time no marriage was proved. The court held that the evidence after that time, and during the time of Campbell, the habit and repute of a marriage was uniform and undivided, and established a marriage between Campbell and the Ludlows.

The change must be such as to show that the marriage was in its origin illicit, and there is no presumption to the contrary. There was no such change in the *Balbougie Case*. In that case, as in the *Breadalbane Case*, the change from mere illicit cohabitation to a formal marriage cannot be said to be such as to change the status of the marriage. There must be a change of operation which the law regards as a change which may be operated by cohabitation and reputation.

In the case of *Lapsley v. Grierson*, the *Breadalbane Case*, where the marriage began, one of the parties, the husband, was living. In the *Breadalbane Case*, the marriage was not contended for until the time of Ludlow, the husband, died, and the parties continued to cohabit until the death of James Ludlow in 1806; and during this period from the time of Ludlow, to the death of Campbell in 1793, the husband, Marie Blanchard, was received as his wife by his family and friends as a formal marriage. There was evidence in the *Breadalbane Case* tending to show that there had been a formal marriage celebrated in 1782, and some evidence that Campbell was recognized by Campbell as his wife; and it was in regard to this that there was a change. It was argued that Campbell was deceiving his friends by passing the woman as his wife, and leading his relatives to believe that she was his wife. It was also argued that this system of deception continued the entire period of the cohabitation of Campbell with the woman; and on this point, that, as there was no change in this deception, there was no evidence which

as "Madam." Could not swear that he had heard White call her "wife" or "Mrs. White" in speaking to or of her.

The next witness was Mrs. Smith, the wife of the former witness. She met the plaintiff about twenty years ago (his testimony was given on the trial, in December, 1881), and Mr. White about twenty-two or twenty-three years ago. She met them at Albion, in Mendocino County. She lived near them. Knew the children Nellie and Willie. Sometimes she had seen plaintiff and defendant half a dozen times a day,—sometimes more; sometimes less. So far as she knew, they were known at Albion as Mr. and Mrs. White. She had heard the defendant call the plaintiff "the madam," "my wife" and "Jane." She was not very sure of any particular instance when she heard defendant call plaintiff his wife. She was very positive she had heard White call plaintiff his wife, and more than once, and this in addressing her.

The next witness is Mrs. Helen M. Kimball, who was the sister of defendant. Has known the plaintiff since 1866. Became acquainted with her at her brother's (White's) house, in Albion, when he was keeping the hotel there. She was introduced to her. Cannot tell how she was introduced to her. Was introduced by her brother. He usually addressed her as "Jane," and in speaking of her he called her "Madam;" and, in speaking to the children, "your mother." She does not remember that her brother introduced plaintiff to her as his wife. Does not remember that he told her she was his wife. Her understanding was that she supposed she (plaintiff) was his wife. They lived as husband and wife. She and her father and mother lived in the house with them eight months. She testifies further that plaintiff was received and treated by her father and mother (father and mother of defendant also) and their relatives as the wife of defendant. She does not remember hearing her brother speak of plaintiff as Mrs. White. She thought it a little peculiar that he addressed her as "Jane" or "Madam." She does not know that she spoke of it while living at the hotel. While they lived there they regarded her as White's wife.

Mrs. W. L. Jenny testified that she had known the parties nineteen or twenty years. She was introduced to plaintiff by a lady named Cunningham. Mr. White was not present. White never introduced plaintiff to her. He always called her "the madam." Knew the children. They went by the names of Nellie White and Willie White. She had not been to their house for twenty years. Before that, used to call there once in a while. Have taken dinner there a good many times. Mr. White was present. The witness was a married woman. She always thought the parties acted towards each other as husband and wife. She never heard him call her "wife." The children addressed Mr. White and the plaintiff as their father and mother.

George W. Le Mont had known the parties some ten or twelve or fourteen years. Had frequently taken lunch at White's house. He

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appeared like a family living in harmony.

Miss Annie Manning had known the parties about four years. She thinks they acted towards each other as husband and wife. They acted towards their children as a father and mother should.

Jerome B. Ford became acquainted with defendant at Albion some time between 1855 and 1865. Was at the hotel in Albion frequently. Had never been introduced to Mrs. White, and never spoke to her. They were said to be then Mr. and Mrs. White,—L. E. White and wife. Had known the parties four years next March. Mr. White used to speak to plaintiff as any man would to his wife. Could not say what name he called her.

B. H. Madison testified that he had known Mr. White ten or twelve years. Had visited the house several times on business, and thinks he once made a social call with his wife and eldest daughter. Both White and plaintiff were present. He called her Mrs. White in the presence of defendant, and of his wife and family.

James Brett had heard defendant speak of plaintiff as his wife. His (witness') wife addressed plaintiff in presence of defendant as his wife.

James Kenny had known the parties for twenty-five or twenty-six years. Had known them at Cuffey's Cove. He believed they had lived on a ranch there for five or six years as Mr. and Mrs. White. He was on friendly and social terms with them during their residence at Cuffey's Cove. The reputation of their relation while they resided there was that of man and wife, so far as he ever heard. He first called at defendant's house. Then Mr. White introduced her; "but not sure defendant was accustomed to speak to me and to others in my presence of plaintiff as Mrs. White. If I remember right, defendant introduced me to plaintiff as his wife;" but he has no distinct recollection of the introducing. While the parties lived at Cuffey's Cove, heard a rumor that they were not married.

Eugene Brown had known defendant a little over twenty years, the plaintiff a little less, while they resided in Mendocino County. He knew the reputation in the community in which the parties lived of the relation they bore to each other since he first knew them, and up to the time he gave his testimony. The reputation was that they lived together as married people in Mendocino County, and had never heard anything to the contrary until this divorce case came up. He did not think he had controverted his impression of the facts with public reputation thereof. Heard her called his wife once or twice in Mendocino County. Had heard her called Mrs. White frequently, but does not distinctly remember of hearing her called Mrs. White at The Albion. He could not remember who of the people at The Albion he had heard say that plaintiff and defendant were husband and wife.

Mark D. Gray testified that he saw plaintiff at The Albion once in 1877. Defendant introduced plaintiff as "the madam."

There is evidence here, at least since 1861,

making manifest to the world the tacit consent which the law will infer to have been already interchanged." L. R. 1 H. L. Sc. 211.

The repute, which was nearly all one way prior to 1858, afterwards underwent a change. We think the evidence tends to show that the parties had agreed to stand in the relation of husband and wife. The defendant treated the plaintiff as his wife. If he did not in so many words formally introduce the plaintiff to his father and mother and sister as his wife, his conduct convinced them that she was his wife; and, according to the testimony of the sister (Mrs. Kimball), she and the father and mother of defendant received plaintiff and treated her as defendant's wife. They did not go much into society, but in the contracted circle into which they went they were regarded and treated as husband and wife. This treatment was induced by the conduct of defendant and plaintiff. We do not think that the law requires the formal introduction by the husband of the woman as his wife to each member of the social circle into which they go, but that his conduct should justify her reception in such circle as his wife. The defendant's styling the plaintiff "the madam," might well induce persons to whom he so introduced her, or to whom he thus spoke of her, to believe that she was his wife. He admits that he did introduce her as his wife, and this is evidence that he sometimes spoke of her as his wife. He explains the introduction of her as his wife as a mode of shielding his children, but such mental reservation cannot be considered of much weight. The credit to be given to such reservation, and the weight and value of the testimony, are matters for the consideration and determination of the court below. That tribunal weighed the testimony, and found a marriage; and there is not such a lack of testimony here as will authorize this court to say that the evidence was insufficient to justify the conclusion of the trial court.

But it is urged that, inasmuch as the divorce is sought here on the ground of adultery, that a marriage cannot be proved by cohabitation and repute; and, to sustain this, two cases are referred to, decided in this court: *Case v. Case*, 17 Cal. 600, and *People v. Anderson*, 26 Cal. 183. In the latter case, which was an indictment for murder, a witness was called for the people, whose competency was challenged by the defendant on the ground that she was his wife, and an attempt was made to show that such was the relation of the witness to the defendant by cohabitation and repute. The court, *per* Sanderson, *Ch. J.*, said that the general rule is that such evidence was admissible (citing several authorities to sustain this proposition), and then adds: "Actions of crim. con., divorce, indictments for bigamy and like cases, where the marriage is the foundation of the claim to be enforced, or the crime to be punished, are exceptions to this rule." 26 Cal. 184. *Case v. Case* was an action for divorce on the ground of adultery. The only evidence of marriage between the parties to the action was that of cohabitation and reputation. It ap-

per Cope, *J.*, said: "We think that, under the circumstances, an actual marriage should have been proved. The general rule that in actions of this nature the marriage may be inferred from the cohabitation of the parties, we do not understand to be applicable. We cannot indulge this inference without presuming that the defendant has been guilty of the crime of bigamy; and the fact that it involves such a presumption is sufficient to repel it. In the absence of criminative proof, it is never to be supposed, as a matter of legal presumption, that a person has violated the criminal law; and the presumption in favor of innocence, says a learned writer, is not confined to proceedings instituted with a view of punishing the supposed offense, but holds in all civil suits where it comes collaterally in question." The learned justice then proceeds to quote two extracts from Bishop on Marriage and Divorce, and refers to *Rex v. Tynning*, 2 Barn. & Ald. 886, and *Clayton v. Wardell*, 4 N. Y. 230. The cases cited sustain the decision of the court in *Case v. Case*. But it will be observed that in both cases there had been an actual marriage, by which, if there was a prior actual marriage, the party would have been guilty of a violation of the criminal law from having committed the offense of bigamy. *Case v. Case* and the two cases go no further than what is just above pointed out, and they proceed on the ground that where a presumption of marriage is met by the presumption of innocence, which the defendant, on his trial for bigamy, has a right to make, the weaker presumption gives way to the stronger, which is the presumption of innocence. This question is considered and passed on in a criminal action in *People v. Feilen*, 58 Cal. 218, and is thoroughly discussed in *Jones v. Jones*, 45 Md. 157, 158, 48 Md. 397, 398 *et seq.* In every case above referred to, the strife was between two marriages; the antecedent marriage being one attempted to be made out by the presumption or inference from cohabitation and repute, and the other an actual marriage. See *Taylor v. Taylor*, 1 Lee, Eccl. 571, 5 Eng. Eccl. Rep. 454; *Rex v. Tynning*, 2 Barn. & Ald. 886; *Poultney v. Fairhaven*, Brayt. 185; *Senser v. Hower*, 1 Pen. & W. 450; *Myntt v. Myott*, 44 Ill. 473; *State v. Holyakins*, 19 Me. 158, 159.

The presumption of innocence will only arise when there is evidence brought to show that a party has been guilty of a penal offense; and this, we think, is the meaning of the portions of the text of Best on Presumptive Evidence (page 64), and Bishop on Marriage and Divorce (sections 824, 825, referred to in *Case v. Case*). The language in the work on Presumptive Evidence denotes that a violation of the criminal law is referred to. The author says that the presumption of innocence is not confined to proceedings for punishing the supposed offense, but holds in all civil suits where it comes collaterally in question. What can it refer to but to the offense which is punishable? It is evident that Bishop, in the extract made in the opinion (17 Cal. pp. 600, 601), refers to adultery as an offense against the public law. He

speaks of the benign influence of the presumption of innocence, "in order to prevent the suspicion that an offense has been committed." We cannot find this section (825) in the last edition of Bishop on Marriage and Divorce. In section 442 (vol. 1) Bishop states the rule thus: "The marriage has been required to be proved by evidence other than of cohabitation and repute in actions for criminal conversation, and indictments for polygamy, for adultery, for incest, and for loose and lascivious cohabitation,"—citing cases which sustain this as to adultery. It will be remarked that he confined this rule to indictments for adultery. This could only be so where adultery was an indictable offense. Now, we have no statute, and never have had one, in this State, making mere adultery a penal offense. It was not a penal offense at common law. 4 Bl. Com. 65. The statute in this State makes the living in open and notorious cohabitation and adultery an offense. See Stat. 1871-72, p. 830; *People v. Gates*, 46 Cal. 52.

Section 123 of the Act concerning crimes and punishments only refers to adultery between persons living within the degrees of consanguinity within which marriages are declared by law to be incestuous and void. We think that the weight of authority shows the rule to be that evidence of cohabitation and repute is admissible to show a marriage in all cases where there is no question of a public offense involved.

The statement of the rule in *People v. Anderson*, *supra*, as regards actions for divorce, is a mere dictum, outside of the case, and is not sustained by the decided cases or by the law. There are cases which tend to show that such evidence is admissible in a civil action when it proved the commission of a public offense. *Archer v. Haightcock*, 6 Jones, L. (N. C.) 421, 422, 423; *Sneed v. Ewing*, 5 J. J. Marsh. 464, 491.

In *Jewell v. Jewell*, 43 U. S. 1 How. 224 [11 L. ed. 110], the evidence seems to have been admitted by the lower court without objection, and the point was not distinctly made in the supreme court. In the North Carolina case it is said that the only exceptions to the rule are an indictment for bigamy and an action for criminal conversation. The court expressed the opinion that what is competent evidence in one case ought to be so in another. In this case the evidence was admitted in an action of ejectment to defeat rights under a second marriage, though the second marriage was formally solemnized and proved by direct evidence. Gardiner, J., in a dissenting opinion in *Clayton v. Wardell*, *supra*, expressed the opinion that such evidence should be held admissible in all cases. He said the distinction between civil actions and criminal or quasi criminal proceedings was established by Lord Mansfield, and has been adopted without question or investigation, apparently. We think such evidence was admissible here, and that nothing in *Case v. Case* is adverse to it. The point was not decided in *People v. Anderson*. It was not involved in the case, and we are convinced that the dictum there pronounced is not sustained by authority or law.

It appears that a deposition of the plaintiff had been taken herein previous to the trial and 7 L. R. A.

returned to the court below. During the cross-examination of the plaintiff, defendant's counsel, with a view of showing contradictory statements made by her, read to her from this deposition several questions and answers, and inquired of the witness "if that was correct," "Is that what you said then?" "Is that true?" An objection was made to this mode of cross-examination. The court sustained the objection, and the defendant excepted. The court, no doubt, would have allowed the defendant to put in such portions of the deposition as he might have selected to discredit the witness. The defendant certainly has a right to show the contradictory statements. To do this, as the witness was a party to the action, it was not necessary to call her attention to the statements formerly made, inconsistent with her statements made on her then examination. Her statements appearing in the deposition were admissions, and might have been offered as such. The mode of cross-examination was objectionable. It consumed time in doing what was utterly useless in asking the questions as above stated. The court has the power, and should have it, to control the mode of examination of a witness, provided it does not trench on the rights of a party. The defendant might have put in portions of the deposition to show the contradictory statements, and the court would have allowed the plaintiff to put in the remaining portions. The deposition was subsequently offered and admitted. The statements which the defendant desired to get before the court did thus get before it. In this state of the case, conceding that the court erred in its ruling, putting a stop to defendant's mode of cross-examination, the error was rendered harmless to the defendant by placing the deposition before the court as evidence; and, as no injury was done by defendant, there can be no reversal for such ruling.

It is objected that the plaintiff's counsel was permitted to ask of the plaintiff, on her re-examination, a question admitted by the court to be leading. The allowance of leading questions, it is a well-settled rule in this State, is in the discretion of the trial court, and there should be no reversal for such allowances, unless there is a manifest abuse of this discretion. As we find no such abuse here, there is no error.

The admission of the mortgage of plaintiff and defendant to W. B. Spears, over the objection of defendant that it was irrelevant, is not error. When the court tries the case, this court never reverses for the admission of irrelevant evidence, unless it appears that the court, in making its decision, relied on the irrelevant evidence. It does not appear herein that the court relied on such evidence. Conceding that the admission of the acknowledgment of the mortgage was erroneous, the court is of the opinion that the evidence is of so trifling a character that it could not have prejudiced plaintiff, and it declines to reverse for such ruling.

It is contended that there is no finding on the issue of extreme cruelty, which was pleaded by defendant in recrimination. The court is of opinion that the evidence on this issue was insufficient to have sustained or justified a finding by the court below of extreme cruelty by plaintiff to defendant. The only evidence worthy of consideration is that regarding the

firing of a pistol behind defendant by plaintiff many years before the former quit living with the latter. From this circumstance, it is evident that defendant did not regard himself in peril or danger of any kind from plaintiff. If he had regarded himself in danger, he would not have continued to live with her for five or six years after the firing of the pistol occurred. As the evidence would not have justified a finding of extreme cruelty on the part of plaintiff, and as this court would have reversed for such a finding, as not justified by the evidence, if it had been made, it will not reverse for want of such finding, and send the cause back for a finding on that issue.

Judgment and order affirmed.

We concur: **McFarland, J.; Sharpstein, J.; Paterson, J.**

Fox, J.:

I concur in the judgment. I think that the first part of the second finding negatives every allegation of extreme cruelty made by the defendant, and that a separate finding upon that subject was unnecessary. The other errors of law, if they were errors, are of so insignificant a nature as that they could not possibly have changed the result. It is true that consent lies at the foundation of every marriage, and without consent there can be no marriage; but as was said in *Campbell v. Campbell*, cited by *Mr. Justice Thornton*, there are cases in which a tacit consent will be inferred. Even under our Code it will be presumed "that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage." Code Civ. Proc. § 1963, subd. 80.

And after a quarter of a century of that kind of deportment towards each other, and towards the world, the parties ought to be estopped to deny such presumption. Then the conclusive presumption arising under subdivision 8, § 1963, *Id.*, ought to prevail: "Whenever a party has by his own declaration or act . . . intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration or act . . . be permitted to falsify it."

Works, J.:

I dissent. To my mind the evidence shows conclusively that these parties were never married. Cohabitation and repute may be sufficient to raise a presumption of marriage, and, if undisputed, authorize a judgment to that effect; but here the testimony of both of the parties shows beyond any question, not only that the intercourse of these parties was illicit in the beginning, but that it continued to be so up to the time of their separation. The positive and direct evidence of both of the parties is that there never was any promise or agreement to marry, or to live together as husband and wife. Therefore the evidence of cohabitation and repute, which in this case is extremely weak and unsatisfactory, cannot and should not prevail. A mere presumption of a marriage, arising from cohabitation, cannot stand as against positive evidence to the contrary by both of the parties interested.

Petition for rehearing denied.

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Charles ASHTON, *Appt.*,

v.

DASHAWAY ASSOCIATION *et al.*

(....Cal.....)

1. The donation by trustees of an incorporated benevolent association to each member in pursuance of an unanimous vote of the members present at a meeting when the vote was taken, of a certain sum for past services, when no services had been rendered other than such as the parties were bound to render as members, is a misappropriation of corporate funds, the restoration of which may be compelled by a member who was not a party to the transaction.
2. A demand on the trustees of a corporation to restore funds misapplied is not necessary before an action by a member to compel such restoration, where the trustees themselves were parties to the unlawful transaction, and defend the action on the ground that their acts were rightful.

(November 22, 1889.)

APPEAL by plaintiff from an order of the Superior Court for the City and County of San Francisco denying his motion for new trial after a judgment of nonsuit in an action brought to compel the restoration of certain corporate funds alleged to have been misappropriated.

Reversed.

The facts sufficiently appear in the opinion.

Messrs. S. Heydenfeldt, Jr., and Joseph P. Kelly for appellant.

Messrs. Tilden & Tilden and David McClure for respondents.

Sharpstein, J., delivered the opinion of the court:

This was a suit by Charles Ashton, a member of the Dashaway Association, against the corporation, its five trustees, and a majority of the other members, to compel the restoration of funds alleged to have been misappropriated. The trial court nonsuited the plaintiff, who appeals from an order denying his motion for a new trial. The original association was an unincorporated temperance society. It was formed in January, 1859, at the Howard Engine-House, by seventeen public-spirited men, who took a pledge to abstain from all intoxicating drinks, except for medical purposes, the necessity of which was to be certified by a physician, and adopted a constitution and by-laws. The initiation fee was fixed at twenty-five cents, and the dues at twelve and one half cents a week. The preamble was as follows: "We, the undersigned, anxious to advance our own interests, and to promote a spirit of good feeling, not only amongst ourselves, but our friends, and being impressed with the importance of concentrated effort to accomplish the object, and desirous of forming ourselves into an association in which we may labor together for the end proposed, have framed the annexed constitution," etc.

It was provided that "it shall be the duty of members to seek out their friends in the city and vicinity, and bring them to the meetings, and introduce to the members," and "to assist those members who are in need to obtain employment, and aid and encourage the poor

members and their friends to "dash away" the intoxicating cup from their lips. In May, 1859, a more extended constitution was adopted. After reciting that the original plans were "to bring under our banner all inebriates, not only here, but in other parts of the State," it provided for the establishment of branch associations, and that all persons admitted as members should take the pledge. The substance of the previous constitution was adopted.

The enterprise seems to have received the approbation and assistance of the public. The press gave it encouragement; the Reverend Thomas Starr King consented to deliver a lecture for its benefit; and donations of books, of building materials and of money were received. On one occasion the Association received a "donation in money" of \$ 87.50; on another, a subscription of \$1,200; on another, \$2,107.83; on another, \$134.50; on another, \$154.75,—and letters of sympathy were received from other States. In 1860 the Association purchased a lot on Post Street, near Dupont, for the sum of \$6,250, and a building was erected upon it for the use of the Association. This is the lot which was subsequently sold, as mentioned below. It was mortgaged for part of the purchase money, and subsequently other mortgages were placed upon it. In 1862 the Association was incorporated. The articles were evidently framed under the provisions of the incorporation of "religious, social, benevolent and learned associations." 1 Hittell, Gen. Laws, § 1024 *et seq.*

There was no capital stock. The articles state that the organization was "a benevolent Association, formed for the purpose of promoting the cause of temperance." A "home" for the care of inebriates was provided, under the auspices of the Association; but for this purpose a separate corporation was formed.

The Association had a numerous membership. "There were 3,163 names before the incorporation, and 4,904 since the incorporation." In 1892, however, from some cause which is not explained by the record, the membership had dwindled to 59; and in the following year notice was given of a meeting of members to consider the question of selling the property above mentioned, in order to pay the indebtedness, "and to reinvest in other property suitable for the Association." At this meeting a resolution was passed that the trustees be instructed to sell the property, pay the indebtedness "and purchase other cheaper property suitable for the uses and purposes of the Association." A petition for leave to sell the property was accordingly filed in the superior court, stating, among other things, that the Association was incorporated "purely and solely for the benevolent and laudable purpose of aiding and promoting the cause of temperance, and not pecuniary profit;" and the court granted leave to sell, reciting in its order the above mentioned resolution. The property was then sold for the sum of \$150,000. Of this sum \$45,000 was used in discharging indebtedness; \$31,543.54 was placed in savings banks, where it is to be presumed that it now is; and \$73,7 L. R. A.

or received any money "that was held by said corporation in trust," but do not deny the taking or receiving, and the evidence of the taking is uncontradicted.

At a meeting of the members held in December, 1883, the minute-book shows the following entry: "Brother Eagan then moved that the Association donate to each member in good standing the sum of \$1,500 for past services, on signing a receipt for the same. Carried unanimously." And this is followed by a receipt in the following form: "San Francisco, December 31, 1883. We, the undersigned, members of the Dashway Association, acknowledge the receipt of \$1,500, donated to us for past services by order of the Association." This receipt was signed by 49 members, including the trustees, the sum of \$1,500 being opposite each name.

It was admitted at the trial "that there were no services rendered by the defendant members other than in the line of being good and efficient members of the organization, in accordance with the constitution and by-laws and general objects of the Association, and that that is all any of the defendants rendered to the society." The by-laws provide that "no officer of this Association shall receive compensation for his services, except the secretary and collector, who shall receive such compensation as may from time to time be fixed by the Association."

It is admitted by the pleadings that the Association "still is" a corporation, and no proceedings for its voluntary dissolution are shown.

The argument for the respondents is that the organization was not a charity, in its legal sense, and that therefore it could do what it pleased with its property. "Take all the evidence," say the learned counsel, "search the record through and through, and not one word indicating a charity can be found." We do not find it necessary to decide this question, and, for the purposes of this opinion, shall assume that the Association stands upon the same footing as any other private corporation. So regarding it, we think it clear that any member has the right to the aid of the courts in setting aside such a plain misappropriation of the corporate funds as is above shown. That any stockholder or member has this right in equity is well established. The rule is thus stated in a recent work: "Even the majority have no right to direct the affairs of a corporation except in accordance with the provisions of its charter, for the powers of the majority are derived wholly from the agreement of the stockholders, as set out in the charter; and every individual stockholder has the right to stand upon his contract, and forbid any departure from its terms. It may accordingly be stated as a rule that any departure from the chartered purposes of a corporation is an injury to every individual stockholder, for which equity will, under proper circumstances, provide a remedy." *Morawetz, Priv. Corp.* § 408.

Another learned writer says: "It is *ultra vires* and illegal for the board of directors to donate the funds of the corporation to charitable or public purposes, or to aid corporations

poration to induce promoters to abandon a proposed rival company. A stockholder may enjoin the directors from making free of tolls a bridge from which a corporation derives its income. The directors may be held liable for allowing the president to use the corporate funds for lobbying purposes. An unreasonable use of the corporate profits of a leased railroad to build up and improve the lessor railroad, without reference to the rights of the former, has been held to be good cause of complaint on the part of a stockholder in the leased railroad company; and, in general, any misapplication or waste of the property of a corporation may be remedied by a member thereof." *Cook, Stock and Stockholders*, § 674.

The Supreme Court of Rhode Island, in reference to the misappropriation of corporate funds by a director, said: "The jurisdiction does not appear to be so firmly settled and defined in England as in this country; but we do not believe any English judge has ever decided that a president or director who fraudulently converts or embezzles corporate funds cannot be sued in equity by a stockholder, when the corporation willfully neglects or refuses to bring the suit. Indeed, to hold that a corporation could gratuitously condone or release such a fraud by anything short of unanimous consent would be monstrous; for it would be, in effect, to hold that a president or director who can control a majority vote in the corporation may rob or despoil it with impunity." *Hazard v. Durant*, 11 lt. I. 206, 207.

In accordance with those principles, it has been held that a stockholder may restrain the directors from paying an unfounded claim of the secretary for extra services (*Butts v. Wood*, 87 N. Y. 817), and may compel the repayment of funds misappropriated by the directors (*Sears v. Hotchkiss*, 25 Conn. 177), and may recover from a trustee property of the corporation which he has converted to his own use (*Carpenter v. Roberts*, 56 How. Pr. 210), and may prevent corporate securities from being misapplied to the benefit of other corporations (*Chicago v. Cameron*, 120 Ill. 447, 9 West. Rep. 507), and may have annulled a lease made in excess of corporate powers (*Mills v. Central R. Co.* 41 N. J. Eq. 1, 2 Cent. Rep. 239), and may prevent the collection of payment of a tax illegally levied (*Dodge v. Woolsey*, 59 U. S. 18 How. 231, 15 L. ed. 401), and may prevent the payment of dividends out of a fund which ought to have been appropriated to repairs of the company's works (*Dent v. London Tramways Co.* L. R. 10 Ch. Div. 844), and may prevent the conversion of the corporate assets by the officers (*Atlanta Real Estate Co. v. Atlanta Nat. Bank*, 75 Ga. 45), and may have restrained acts which amount to a violation of trust, or a breach of the charter (*March v. Eastern R. Co.* 40 N. H. 548; *Wilcox v. Nickel*, 11 Neb. 154; *Tencout v. Des Moines B. G. Street R. Co.* 75 Iowa, 527; *Manderson v. Commercial Bank*, 23 Pa. 379), or which amount to a fraud upon the company (*Ryan v. Leavenworth, A. & N. W. R. Co.* 21 Kan. 365), or to a breach of its charter. *Cook, Stock and Stockholders*, § 672.

In California the rule was laid down in 7 L. R. A.

the sum paid by him for the redemption of corporate property which the directors had allowed to be sold, and had wrongfully neglected to redeem, and Wallace, J., delivering the opinion, said: "It is settled that courts of equity in this country will, at the instance of a stockholder, control a corporation and its officers, and restrain them from doing acts even within the scope of corporate authority, if such acts, when done, would, under the particular circumstances, amount to a breach of the very trust upon which, as we have seen, the authority itself has been conferred." *Dodge v. Woolsey*, 59 U. S. 18 How. 341 [15 L. ed. 404].

"And upon the same principle the court will, even after such an act has been done, relieve an injured stockholder from loss, if, in the mean time, no superior equity has intervened, nor the rights of innocent third parties attached." See also *Neill v. Hill*, 16 Cal. 145; *Beuch v. Cooper*, 72 Cal. 99; *Chicago v. Cameron*, 120 Ill. 453, 9 West. Rep. 507.

And the relief does not depend upon the existence of a fraudulent intent, although such intent very frequently exists.

Now, in the present case there was a plain misappropriation of corporate funds. The corporation was not dissolved, or, so far as appears, to be dissolved. It was a simple case of trustees who were in possession and in control of corporate funds, acting in pursuance of a vote of the majority of the members, "donating" the corporate funds to themselves and other members upon the pretext of "past services," although the fact was, as admitted at the trial, that no services had been rendered other than such as the parties were bound to render as members of the Association. The answers deny that the Association was not a corporation for profit. But it is too plain for discussion that this denial was untrue. The corporation was not for profit. Its articles define it as "a benevolent Association, formed for the purpose of promoting the cause of temperance," and it is evident, as stated in the petition for leave to sell the property, that the Association "was incorporated purely and solely for the benevolent and laudable purpose of aiding and promoting the cause of temperance, and not pecuniary profit." This being so, the division of more than one half of the corporate property among 49 members was a diversion of the same from the cause of temperance, which was the "benevolent and laudable" purpose of the institution, into the private pockets of said members. It was an attempt to make a profit out of an undertaking which was not for profit. It is not inconsistent with the conclusion that the preamble of the constitution of the unincorporated association stated that the object of the members was "to advance our own interests." It is perfectly clear, from the circumstances, that this meant their interests with respect to temperance and sobriety. But, aside from this, the old constitution was superseded by the articles of incorporation, which explicitly define the object of the Association, as above stated.

If such a transaction as appears here would

divide up the funds whenever they felt in need of a little money. It does not appear that the plaintiff consented to the proceeding; he is not shown to have been present at the meeting at which the resolution above quoted was "unanimously carried;" his name does not appear on the receipt above set forth; the resolution offered by him at the meeting preliminary to the sale seems to us to have been perfectly proper; and his subsequent proceedings show, to his credit, that he was not a party to the transaction.

It is argued for the respondents, however, that a member or stockholder cannot have redress for any wrong or injury to the corporation "until after he has exhausted all the means within his reach to obtain redress of his grievances. He must make an earnest effort with the managing body of the corporation." This is undoubtedly the general rule. But the complaint alleges that the trustees of the corporation "control and manage its affairs, and were parties to the said unlawful and fraudulent acts, being aided and abetted by the said other defendants members; that it would be futile and useless to make a demand upon said corporation defendant, or upon its trustees or officers, to commence a suit to obtain the relief which the plaintiff seeks, or any relief whatever." The answers deny that the trustees "were ever parties to any unlawful or fraudulent transaction," but do not deny the remainder of the allegation; and from the whole case it is apparent that the defendants claimed the right to do what they did, and that the

take action. The law does not require a useless act to be performed; and when it is claimed, from the answer, that, if a demand had been made, it would have been refused, it does not lie in the mouth of the defendant to object that no demand was made." *Parrott v. Byers*, 40 Cal. 622, 623. See also *Heath v. Erie R. Co.* 8 Blatchf. 347; *Morawetz, Priv. Corp.* § 895; 8 Pom. Eq. Jur. 10.

We see no material error in the admission of evidence; but, if there had been, it would not affect the result here. *McCloud v. O'Neill*, 16 Cal. 397.

The order appealed from is reversed, and the cause is remanded for a new trial.

We concur: **McFarland, J.; Thornton, J.**

A petition for rehearing was subsequently granted, and on May 8, 1890, **Sharpstein, J.**, delivered the opinion of the court:

This appeal was heard in Department 2, which reversed the judgment and order of the court below. An opinion was filed November 22, 1889. Afterward a petition that the cause be heard in bank was filed and granted and the case has been argued in bank, but the argument has failed to convince us that the decision of the department was erroneous; and for the reasons stated in the opinion of the department the judgment and order appealed from are reversed.

We concur: **Works, J., Thornton, J., Paterson, J.**

OHIO SUPREME COURT.

Lewis BENTON et al., Plffs. in Err.,

v.

Mary J. SHAFER.

(.....Ohio St.....)

*1. A mortgagee of real property not part of an entire tract situate in more

*Head notes by the COURT.

NOTE.—Notice; *lis pendens*.

Two things seem indispensable to give effect to the doctrine of *lis pendens*: (1) that the litigation must be about some specific thing which must necessarily be affected by the termination of the suit; and (2) that the particular property involved in the suit must be so definite in the description that anyone reading it can learn thereby what property is intended to be made the subject of litigation. *Houston v. Timmerman*, 17 Or. 499.

Notice of *lis pendens* does not take effect until service of process, or its publication in case of an absent defendant. *Cassidy v. Kluge*, 73 Tex. 154; *Tharpe v. Dunlap*, 4 Heisk. 674; *Skeel v. Spraker*, 8 Paige, 189; *Murray v. Finster*, 2 Johns. Ch. 155; *Heatley v. Finster*, 2 Johns. Ch. 153.

The doctrine of *lis pendens* operates as notice only from the time the complaint is filed and summons is served, and of such facts as are alleged in the pleadings, which are pertinent to the issue, and 7 L. R. A.

than one county, will not be charged with constructive notice of an action for the recovery of such property, pending in a county other than that in which the property is situated.

2. The doctrine of *lis pendens* does not apply, unless the court has acquired, in some manner, jurisdiction of the subject matter involved in the suit. Where, therefore, in an action to recover real property which is not an entire tract situate in more than one county,

of the contents of exhibits. *Walker v. Goldsmith*, 14 Or. 149; *Center v. Planters & M. Bank*, 22 Ala. 743; *Hayden v. Bucklin*, 9 Paige, 511; *King v. Bill*, 28 Conn. 583; *Murray v. Ballou*, 1 Johns. Ch. 556; *Low v. Pratt*, 53 Ill. 438; *Miller v. Sherry*, 69 U. S. 2 Wall. 237 (17 L. ed. 827); *Jones v. Lusk*, 2 Met. (Ky.) 355; *Lewis v. Mew*, 1 Strobb. Eq. 180; *Griffith v. Griffith, Hoffm.* Ch. 153; *Stone v. Connelly*, 1 Met. (Ky.) 632.

While strangers to the record are not affected with constructive notice of the pendency of an action involving the title to land lying in another county, unless the notice required by N. C. Code, § 220, has been given, even purchasers for a valuable consideration are affected with notice of an action brought in the county where the land lies, if the pleadings describe it with reasonable certainty; and they take title subject to the final decree rendered in the action. *Spencer v. Credle*, 108 N. C. 66

the action is not brought in the county where the subject of the action is located, a bona fide purchaser of the property for a valuable consideration, without actual notice, and residing in the county where the property is situated, will not be charged with constructive notice of the pendency of such action at the time of his purchase, so as to prevent his acquiring a valid interest in the property.

3. The heirs of P. brought an action in the Court of Common Pleas of Union County to partition two tracts of land situated respectively in Union County and Delaware County, and also, to set aside a deed, duly recorded, from P. to D. and L., of the Delaware tract, and to recover the same. The land in Union County was not an entire tract with the land in Delaware County, but the two were separate tracts, one situated entirely in Union County, and one entirely in Delaware County. While the action was pending in the court of common pleas, and before the rendition of final judgment in the case, D., one of the defendants, mortgaged his interest in the Delaware tract to M., who was, at the date of the commencement of the action, and ever since has been, a resident of Delaware County. M. had no actual notice of the pendency of the action, at the time of taking the mortgage; was not a party to the action; and the final judgment rendered in the action was never recorded in Delaware County. *Held*, that under §§ 5055 and 5056 of the Revised Statutes, M. was not charged with constructive notice of the pendency of the action, so as to be prevented from acquiring an interest in the subject matter thereof covered by the mortgage, as against the title of the parties to the pending litigation.

(March 4, 1890.)

ERROR to the Circuit Court for Delaware County to review a judgment in favor of plaintiff, rendered upon appeal from the Court of Common Pleas, in an action brought to foreclose a mortgage. *Affirmed*.

Statement by **Dickman, J.**

The defendant in error, Mary J. Shafer, filed her petition in the Court of Common Pleas of Delaware County, against Daniel S. Benton and the plaintiffs in error, Lewis Benton, Aaron Clover and Nancy Clover, asking for the foreclosure of a mortgage made to her October 28, 1882, by Daniel S. Benton, on the one undivided fourth part of 122½ acres of land in Delaware County, Ohio, described in a deed dated August 9, 1878, from Phebe Benton to Lewis Benton and Daniel S. Benton, in which she conveyed to them the undivided half part thereof. The mortgage was given to secure the payment of Daniel S. Benton's note for \$571.23, dated October 17, 1882, payable one year after date, with interest at 8 per cent per annum, and was duly recorded in Delaware County, November 28, 1882, in vol. 28, p. 149, of the Records of Mortgages.

Daniel S. Benton was in default for answer and demurrer.

The defendant, Lewis Benton, set forth in his answer to the petition, that Daniel S. Benton was not the owner of the one-fourth part of the real estate described in the petition, but, as one of the heirs-at-law of Phebe Benton, was the owner of only one forty-eighth part thereof; that in January, 1880, the heirs-at-

the Court of Common Pleas of Union County, Ohio, for partition of the premises described in the petition; and that at a public auction in partition he, Lewis Benton, became the purchaser of the premises, and afterwards sold them to Aaron Clover, who entered into possession of the same.

Aaron Clover and Nancy Clover, by their joint answer to the petition, set up the purchase from Lewis Benton, and prayed that their title might be protected.

The court of common pleas found that the mortgage from Daniel S. Benton to Mary J. Shafer was the first and best lien on an undivided forty-eighth part of the 122½ acres of land; that Daniel S. Benton did not have any title to the premises in the petition described, by virtue of the deed from Phebe Benton to Daniel S. Benton and Lewis Benton, but owned in fee simple the undivided forty-eighth part of the premises, as heir-at-law of Phebe Benton, at the time he executed the mortgage to Mary J. Shafer; that the condition of defeasance in said mortgage had been broken, and that Mary J. Shafer was thereby entitled to have the defendants' equity of redemption foreclosed.

The plaintiff excepted to the judgment of the court of common pleas, and appealed to the circuit court. In the circuit court the cause was submitted on the pleadings, and the evidence embodied in an agreed statement of facts, which is as follows:

It is agreed by the parties in this action:

That a case was commenced and prosecuted in Union County, Ohio, in which Stephen Cranston and others, heirs-at-law of Phebe Benton, deceased, were plaintiffs, and Orson Benton, Daniel S. Benton, Lewis Benton and others were defendants, by petition filed January 17, 1880, in which the plaintiff sought to set aside the deed of conveyance made by Phebe Benton to said Daniel S. and Lewis Benton of the tract of land in Delaware County, Ohio, upon which Mary J. Shafer holds the mortgage which she seeks to foreclose in the action at bar, and also to recover the said real estate situate in Delaware County, Ohio, and the partition of the same among the heirs of said Phebe Benton, deceased. Also in the same action was sought the partition of another tract of land in Union County, Ohio, among said heirs. And that the land in Union County, Ohio, is not a continuous or entire tract with the said land in Delaware County, Ohio, but are separate and independent tracts several miles apart.

The land in Delaware County is in Virginia Military Surveys Nos. 2546 and 2897, and the land in Union County in Virginia Military Survey No. 4404.

That Mary J. Shafer was not a party to said action in Union County.

That the suit in Union County was pending when Daniel S. Benton executed and delivered the mortgage to Mary J. Shafer on the lands in Delaware County, but the final decree in said action was not rendered until March 10, 1883, in the District Court of Union County, on appeal from the decision of the court of common pleas where judgment had been rendered in favor of said Lewis and Daniel S. Benton, sus-

7 L. R. A.

Benton to said Daniel S. and Lewis Benton, of the said land in Delaware County. The decision of said common pleas court was rendered May 18, 1881, and on appeal from said common pleas court the district court rendered the following decision March 10, 1883 viz.:

"On consideration whereof the court do find that the equity of the case is with the plaintiff and cross-petitioners, and that the deeds of conveyance mentioned in the pleadings from Phebe Benton to Orson Benton, Lewis Benton and Daniel S. Benton, dated August 9, 1878, should be set aside and held for naught; and therefore it is ordered, adjudged and decreed by the court that said deeds of conveyance be and they are hereby set aside and held for naught, and said estate of Iliam and Phebe Benton is hereby ordered to be partitioned and settled the same as if said deed had never been made."

And finding and decreeing among other things that the interest of Daniel S. Benton, as one of the heirs of said Phebe Benton in the land in Delaware County, was one forty-eighth part, which amounted to \$84.78, net proceeds, and ordered the partition be made of said premises.

Which judgment was affirmed by the supreme court and certified to the Court of Union County, and the commissioners of partition in said case, appointed by said court, having reported the premises not susceptible of division, the court thereupon ordered said premises to be sold by the sheriff, which was accordingly done, and Lewis Benton became the purchaser at said sale of said tract of land in Delaware County, consisting of 122 1/2 acres, and received his deed for the same, and afterward conveyed the same to Aaron Clover, defendant, and the proceeds of the sale, by the sheriff aforesaid were distributed according to the order of the Union County Court to said heirs of Phebe Benton, deceased, and as one of said heirs, to Daniel S. Benton, one forty-eighth part.

The above record of facts is admitted so far as the record thereof may be competent evidence in the trial of this case.

And it is further admitted as a fact in this case that I Hebe Benton is the person who made the deed of conveyance of the undivided one half of said land in Delaware County, Ohio, of which she had the title in fee simple, and that she died August 20, 1879.

And it is admitted as a fact that the deed made by said Phebe Benton to Daniel S. Benton and Lewis Benton is a general warranty deed, purporting to convey the undivided one half of said land in Delaware County to said Daniel S. and Lewis Benton, their heirs and assigns in fee simple, and that the date of said deed is August 9, 1878, and the same was filed in the recorder's office of Delaware County, and recorded in volume 12, pages 33 and 34, August 27, 1878, Record of Deeds of Delaware County, and under which deed Lewis and Daniel S. Benton went into possession, and under which title Mary J. Shafer claims her rights in this action as well as to whatever title the said Daniel S. Benton had as one of the heirs of Phebe Benton, deceased.

It is further admitted as a fact that the record of the pendency of said suit in Union County, 7 L. R. A.

are not recorded in Delaware County, Ohio. Mary J. Shafer's mortgage, it is agreed, is dated October 28, 1882, filed for record November 11, 1882.

It is also agreed that it is a fact that the plaintiff, Mary J. Shafer, was, at the date of the commencement of the action in Union County, and ever since has been, a resident of Delaware County, and never a resident of Union County.

And that she had no actual notice in fact, other than the notice which is presumed in law, of the pendency of said suit in Union County, or of the proceedings therein, when Daniel S. Benton executed and delivered to her the note and mortgage in suit.

Upon the foregoing agreed statement of facts, the finding and judgment of the circuit court were as follows:

"The court find on the issue joined between the plaintiff and the defendants that the equity of the case is with the plaintiff. And the court find that the defendant, Daniel S. Benton, has been duly served with notice by publication, according to law, of the pending of this action, and is in default for answer and demurrer, and that the allegations of the petition as to him are thereby conceded by him to be true. And the court do further find all the other issues between the plaintiff and said defendants, Lewis Benton and Aaron and Nancy Clover, in favor of the plaintiff and against the said defendants. And that there is due the plaintiff from the defendant, Daniel S. Benton, on the promissory note set forth in the petition, with the interest thereon to the first day of this term, to wit, December 14, 1886, the sum of \$761.44, with interest at 8 per cent from that date.

"The court further find that in order to secure the payment of said note and interest, the said Daniel S. Benton executed and delivered to said Mary J. Shafer, plaintiff, his certain mortgage as in the petition described, and on the premises therein described. That said mortgage was duly recorded in volume 28, page 149, etc., November 23, 1882, in the Records of Mortgages of Delaware County, Ohio, and is a valid lien on the premises in the petition described, and that the conditions in said mortgage have been broken and said deed has become absolute.

"It is therefore adjudged and decreed by the court that unless the defendant, Daniel S. Benton, shall within five days from the entry of this decree pay or cause to be paid to the clerk of the court of common pleas, to which this case is remanded for further proceedings, the costs of this case, and to the plaintiff herein the sum of \$761.44, so found due as aforesaid, with interest at 8 per cent from the 14th day of December, 1886, the defendant's equity of redemption be foreclosed and said premises be sold, and that an order of sale issue therefor to the sheriff of Delaware County, Ohio, directing him to appraise, advertise and sell said premises as upon execution, and report his proceedings to the Court of Common Pleas of Delaware County, Ohio.

"It is further ordered that this cause be remanded to the Common Pleas Court of Delaware County, Ohio, to carry this decree into execution and for all further proceedings."

ment, the defendants did at the time, by their counsel, except, and thereupon the defendants filed a motion for a new trial, for reasons set forth in said motion, which motion was overruled by the court, to which the defendants did at the time except.

This proceeding in error is prosecuted to reverse the judgment of the circuit court.

Messrs. Jones & Lytle, for plaintiffs in error:

He who purchases during the pendency of a suit is bound by the decree that may be made against the persons from whom he derives title.

Wells, *Res. Adjudicata*, § 82, and authorities cited; *Shirley v. Fearn*, 33 Miss. 606; *Com. v. Dieffenbach*, 3 Grant, Cas. 375, citing *Bishop of Winchester v. Paine*, 11 Ves. Jr. 197; *Metropolis Nat. Bank v. Sprague*, 21 N. J. Eq. 535; Walker, Am. Law, p. 419, and *note c*.

By the doctrine of *lis pendens* it is well settled that a purchase made of property actually in litigation *pendente lite* for a valuable consideration, and without any express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice, and he will be bound by the judgment or decree in the suit.

Metropolis Nat. Bank v. Sprague, *supra*; 1 Story, Eq. par. 405, and authorities cited, *note 1 (a)*; *Bishop of Winchester v. Paine*, *supra*; *Green v. Rick*, 121 Pa. 180; *Newman v. Chapman*, 2 Rand. 98, 14 Am. Dec. 774-779, *note*.

The judgment in a real action overreaches an alienation after writ.

Bennet v. Williams, 5 Ohio, 463; *Hamlin v. Berans*, 7 Ohio (pt. 1) 161; *Toiverton v. Williard*, 80 Ohio St. 579.

Mr. J. Hipple, for defendant in error:

The court in Union County had no jurisdiction of the action to recover the real estate in Delaware County.

Rev. Stat. §§ 5022, 5023.

A judgment rendered by a court having no jurisdiction of the subject matter or of parties is void and may be shown in any collateral or other proceeding in which it is drawn in question.

Gilliland v. Sellers, 2 Ohio St. 223; *Buchanan v. Roy*, 2 Ohio St. 251, 269; *Rohn v. Dunbar*, 18 Ohio St. 572; *Evans v. Iles*, 7 Ohio St. 233; *The General Buell v. Long*, 18 Ohio St. 521.

Dickman, J., delivered the opinion of the court:

The object of the suit in Union County was to set aside the deed of conveyance, executed by Phebe Benton to Daniel S. Benton and Lewis Benton, of the tract of land in Delaware County, upon which Mary J. Shafer holds the mortgage in controversy, also, to recover the real property embraced in the mortgage, and to cause partition of the same to be made among the heirs of Phebe Benton. In the same suit, partition among the same heirs was sought of another tract of land, situated in Union County. The land in Union County is not a continuous and entire tract with the land in Delaware County, but the two are separate and independent tracts, several miles apart.

Although when the estate is situated in two or more counties, proceedings for partition

such estate is situated, and a recovery of real property when the entire tract, yet, in partition common, coparcener or other son, is entitled to be named as in; and in an action to recover an entire tract and situate in county, all persons claiming interest in the property may be

Conceding that all the proceedings before the court at the common action in Union County, and when Mary J. Shafer received from Daniel S. Benton, the mortgage, upon the agreed fact case, she is to be concluded rendered in the Union County action she was not a party; commencement and ever since resident of Delaware County; actual notice of the suit in Union County of the proceedings therein, Benton executed and delivered mortgage in litigation. mortgage after searching the Delaware County, where she found Phebe Benton to Daniel S. Benton, and no record of any suit affecting the title of the land.

The decision of the Court of Union County was rendered and the final decree in the action on appeal, March 10, 1883, court. The mortgage to Mary date October 28, 1882, and was November 11, 1882. It is contended that, notwithstanding the facts the suit in Union County was Daniel S. Benton executed after the mortgage on the land County, she acquired no interest matter of the suit, as against the Benton, the purchaser at the sale the other plaintiffs in error.

The rule concerning the effect of *lis pendens* by statute, would stand stern and inequitable in

In *Bellamy v. Sabine*, 1 De. was said by Turner, L. J.: "I to speak of *lis pendens* as affecting through the doctrine of notice, doubtfully the language of the describes its operation. It affects cause it amounts to notice, but it does not allow litigant parties to pending the litigation, rights to in dispute, so as to prejudice party." And yet the doctrine not been eliminated in determination of alienating property in dispute litigation.

But, the rule concerning consequences by *lis pendens* has always been regarded by courts as a harsh one in its application to purchasers for value.

In *Hayden v. Bucklin*, 9 Paige for Walworth said: "This common requiring purchasers at their peril of the pendency of suits in court for the recovery of the property to purchase, although it is near

have been commenced, has always been considered a hard rule, and is by no means a favorite with the court of chancery." The stringency of the rule has led the English Parliament and the Legislatures of many States to interfere, resulting in most material statutory modifications and restrictions. An example of such legislation is found in the English statute which provides that a pending suit will not affect a purchaser for value and without express notice, unless a notice of *lis pendens* has been properly registered in compliance with the statutory directions. Stat. 2 and 8 Vict. chap. 11, § 7; Pom. Eq. Jur. §§ 639, 640.

Our own statutory provisions are found in §§ 5055 and 5056 of the Revised Statutes. Section 5055 reads as follows: "When the summons has been served or publication made, the action is pending so as to charge third persons with notice of its pendency; and while pending, no interest can be acquired by third persons in the subject matter thereof as against the plaintiff's title."

Under this section, if the land mortgaged to Mary J. Shafer had been situated in Union County instead of Delaware County, she would have taken the mortgage with constructive notice of the pending litigation, and would have acquired no interest in the property, as against the title of the plaintiffs in the action. The general rule is that, as to real property located within the jurisdiction of the court where its judgments and decrees may become or be made liens upon the property, all men must take notice of and be bound by the pending litigation without regard to residence. But a mortgagee of real property not part of an entire tract situate in more than one county, will not be charged with constructive notice of an action for the recovery of such property, pending in a county other than that in which the property is situated.

Section 5056 of the Revised Statutes, on the subject of *lis pendens* as to suits in other counties, provides as follows: "When any part of real property, the subject matter of an action, is situate in any county or counties other than the one in which the action is brought, a certified copy of the judgment in such action must be recorded in the recorder's office of such other county or counties, before it shall operate therein as notice so as to charge third persons as provided in the preceding section; but it shall operate as such notice, without record, in the county where it is rendered."

By this section of the Statutes, where part of the real property in litigation is located in the county where the action is brought, and part in another county, the judgment, in the county where it is rendered, is made to operate as notice of the pending of the action, without record. In the county where the action is brought and judgment rendered, and the real property or a part thereof is situated, it is presumed, under the Statute, that a purchaser of the subject matter of the suit situated in that county has knowledge of the prior proceedings upon which the judgment is founded, without regard to its record. But in a county where the action is not brought, and the judgment is not rendered, and the title to real property therein located is sought to be changed or af-

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such knowledge of the pending action or proceedings leading to the judgment, and hence the Statute requires the judgment to be recorded in such county before it can operate therein as notice to a purchaser, as provided in the preceding § 5055 of the Revised Statutes.

In the case at bar, it is among the agreed facts that the proceedings, or decree rendered, in the suit in Union County, have not been recorded in the County of Delaware.

If the purchaser of a tract of land situated entirely in the county of his domicile, who has no actual notice or information of any judicial proceedings in any county in reference to such land, searches the records of the county where the land is located, and finds no pending proceedings, judgment liens or other incumbrances affecting the title to the same, it is not the intent of the Statute that such purchaser shall be compelled to examine the records of the courts of every county in the State, to find whether a suit is pending that would affect the title. And the section of the Statute now under consideration, in the protection of the innocent purchaser for value and without actual notice, accordingly provides that a judgment rendered in a county other than that in which the purchased part of the land lies shall be recorded in the county where such land is situated, before it shall operate therein as notice of the pendency of an action in the county where such judgment was rendered.

But the doctrine of *lis pendens*, which has been invoked in behalf of the plaintiffs in error, rests upon the jurisdiction of the court over the subject matter involved in the suit. "To make the pendency of a suit notice, so as to affect the conscience of a purchaser, it is essential that the court have jurisdiction over the thing." McLean, J., in *Carrington v. Brents*, 1 McLean, 167.

In *Jones v. Lusk*, 2 Met. (Ky.) 356, it is said by Duvall, J.: "Unless the petition shows upon its face a case for the jurisdiction of the chancellor, the proceeding cannot operate as a *lis pendens*, even from the date of the service of process, so as to affect the property sought to be subjected, or to overreach a subsequent sale or other disposition of it." See also Fonbl. Eq. B. 2, chap. 6, § 3, note n; *Sorrell v. Carpenter*, 2 P. Wms. 482; *Worsley v. Earl of Scarborough*, 3 Atk. 392; *Bishop of Winchester v. Paine*, 11 Ves. Jr. 194; *Murray v. Ballou*, 1 Johns. Ch. 566; *Bennett, Lis Pendens*, §§ 98-100.

It is true that the action in Union County was to have partition of lands lying in that county, and also in Delaware County; and when the estate to be partitioned is situated in two or more counties, the proceedings, as before observed, may be had in any county wherein a part of such estate is situated. But, the purpose of that action, as appears from the agreed statement of facts, was also to set aside the deed of conveyance made by Phebe Benton to Daniel S. Benton and Lewis Benton, of the tract of land in Delaware County mortgaged to Mary J. Shafer, "and to recover the said real estate situated in Delaware County."

By § 5023 of the Revised Statutes, "when the property is situated in more than one county, the action may be brought in either;

tract." The mortgaged real property situated in Delaware County was not part of an entire tract situate in more than one county, but was a separate and independent tract of land located entirely in Delaware County. As the

embraced in the mortgage was located, the defendant in error, Mary J. Shafer, cannot be held chargeable with constructive notice of the pendency of the action.
Judgment affirmed.

WISCONSIN SUPREME COURT.

Elizabeth MOLETOR, by Guardian ad Litem,

Appt.,

v.

Mathias SINNEN, Resp't.

(.....Wis.....)

A person who has been brought within the jurisdiction of a court from another State, upon a requisition, as a fugitive from justice, and has been tried for or discharged as to the offense charged against him, is not subject to arrest on a civil process until a reasonable time and opportunity have been given him to return to the State from which he was taken.

(March 18, 1890.)

APPEAL, by plaintiff from an order of the Circuit Court for Sheboygan County setting aside the service of summons and complaint and vacating the order for arrest of defendant. *Affirmed.*

The case sufficiently appears in the opinion.

Mr. D. T. Phalen, with **Mr. Simon Gillen**, for appellant:

If the defendant was a fugitive from justice at the time he entered upon, or took up, his residence in the State of Illinois, then he cannot claim a legal residence, domicile or citizenship in the State of Illinois; for his residence there lacks, in law, the bona fide intent, which is the legal foundation of a residence or domicile for the purpose of acquiring a citizenship.

2 Bouvier, L. Dict.; Anderson, L. Dict. 892; *Dutcher v. Dutcher*, 33 Wis. 658; *Hall v. Hall*, 25 Wis. 607; *Crawford v. Wilson*, 4 Barb. 501; *Re Thompson*, 1 Wend. 43; *Re Wrigley*, 8 Wend. 134; *Gracillon v. Richard*, 13 La. 203; *Lyman v. Fiske*, 17 Pick. 231.

Before the defendant can claim the relief granted him in the order appealed from, he must show that he is privileged generally from the service of process, or that fraud, deceit or abuse of the process of the court has been had by the plaintiff, or some person acting for her and in her behalf, in procuring the service of the summons, complaint and order of arrest served upon the defendant in this action.

1 Greenl. Ev. § 74; 1 Wharton, Ev. § 354; *Cottigan v. Mohawk & H. R. Co.* 2 Denio, 609; *Watnorth v. Pool*, 9 Ark. 394; *King v. Steiren*, 44 Pa. 99; *Jones v. Jones*, 2 Swan, 605; *Benninghoff v. Osceola*, 37 How. Pr. 235; *Townsend v. Smith*, 47 Wis. 623; *Chubbuck v. Cleveland*, 37 Minn. 466; *Dunlap v. Cody*, 31 Iowa, 260.

Where a defendant in a criminal action is brought from one jurisdiction or State to another as a fugitive from justice upon criminal process duly issued, and after being

released on bail or acquittal on trial, he is subject to arrest on civil process.

Williams v. Bacon, 10 Wend. 636; *Lucas v. Albee*, 1 Denio, 666; *Lynch's Case*, 1 City Hall Rec. 138; *Shotwell's Case*, 4 City Hall Rec. 75; *Moore v. Green*, 73 N. C. 394; *Adrianse v. Lagrave*, 59 N. Y. 110; *Slade v. Joseph*, 5 Daly, 187; *Com. v. Daniel*, 4 Pa. L. J. Rep. (Clark) 49, 6 Pa. L. J. 330; *Key v. Jetto*, 1 Pittsb. 117; *Scott v. Curtis*, 37 Vt. 762; *Hare v. Hyde*, 16 Q. B. 394; *Jacobs v. Jacobs*, 3 Dowl. P. C. 675; *Reg. v. Douglas*, 7 Jur. 39; *Goodwin v. London*, 1 Ad. & El. 378; *Addicks v. Bush*, 1 Phila. 19; *Bours v. Tuckerman*, 7 Johns. 538; *Lagrade's Case*, 14 Abb. Pr. N. S. 333, note.

Messrs. William H. Seaman and Francis Williams, for respondent:

Where there is an irregular arrest, and an advantage is taken of the irregularity to charge him in custody at the suit of another person, the courts of law will discharge him from both.

Ex parte Wilson, 1 Atk. 152; *Townsend v. Smith*, 47 Wis. 623; *Carpenter v. Spooner*, 2 Sandf. 717; *Mattheys v. Tufts*, 87 N. Y. 568; *Person v. Grier*, 66 N. Y. 124; *Compton v. Wilder*, 40 Ohio St. 130; *People v. Judge*, 40 Mich. 729; *Cannon's Case*, 47 Mich. 482; *Baldwin v. Judge*, 48 Mich. 525; *Sherman v. Gundlach*, 37 Minn. 118; *Chubbuck v. Cleveland*, 37 Minn. 466; *Palmer v. R van*, 21 Neb. 452; *Jacobson v. Hosmer*, 76 Mich. 234; *Halsey v. Stewart*, 4 N. J. L. 366; *Williams ad. Reed*, 29 N. J. L. 385; *Atchison v. Morris*, 11 Fed. Rep. 582; *Small v. Montgomery*, 23 Fed. Rep. 707; *Juneau Bank v. McSpedan*, 5 Biss. 64; *United States v. Bridgman*, 9 Biss. 221; *Blair v. Turtle*, 1 McCrary, 372; *Wanzer v. Bright*, 52 Ill. 35; *Hill v. Goodrich*, 32 Conn. 588.

Cole, Ch. J., delivered the opinion of the court:

Did the circuit court properly set aside the service of the summons and complaint in this action, and vacate the order of arrest therein? The defendant was brought into this State upon a requisition upon the governor of Illinois, having been charged with the crime of seducing the plaintiff under a promise of marriage, and alleging that he was a fugitive from justice. Upon an examination before a magistrate, he was bound over for trial. At the April Term of the Circuit Court of Sheboygan County, 1889, an information was filed in that court charging the defendant with having committed the crime of seduction. At the October Term of that court the defendant was duly arraigned, and a plea in abatement was interposed, setting up the Statute of Limitations a

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after his discharge, and before he had departed from the court-room, the deputy sheriff made service of summons and complaint, and order of arrest, upon him, at the suit of the plaintiff, for a breach of promise. It appears that the defendant, at the time of the alleged seduction, was a resident of Sheboygan County. He left the State in January, 1888, and remained outside the State, except that he returned in the nighttime in the same month, and transacted some business, and immediately left. He was brought back on a requisition as a defendant in a criminal action, and as a fugitive from justice. It is said by the counsel for appellant that the affidavit of the defendant upon which the order of the court setting aside the service and order of arrest is based, is insufficient, because it fails to show any fraud or abuse of the process of the court by the appellant, or by any person acting for her, in the procurement of the return of the defendant on the criminal prosecution; nor does it show that the defendant was, at the time he so returned on the requisition, a bona fide citizen of Illinois. But it appears from the affidavit of the plaintiff which was used to obtain the order of arrest that the defendant was not a resident of this State, but resided in the City of Chicago, and that he was about to return to that State; and, while the promise of marriage was made, and the alleged seduction was accomplished, in 1887, it does not appear that the plaintiff had anything to do in procuring the defendant's return on the requisition of the governor, nor does it appear that there was any fraud used on the part of anyone to get the defendant within the State. In that respect the case is distinguishable from *Townsend v. Smith*, 47 Wis. 623, and cases where jurisdiction is obtained by fraudulent means.

It is assumed, in this case, as a fact, that the defendant had committed the crime of seduction, as alleged, and had withdrawn himself from the State to avoid a prosecution therefor, so as to be a fugitive from justice in a legal sense. Still, having been forcibly brought to the State on a requisition, and the court having exhausted its jurisdiction over him in respect to the crime with which he was charged, could he properly be arrested in a civil action until a reasonable time and opportunity had been given him, after his discharge, to return to the State from which he had been forcibly taken? This is the question involved in the appeal; and we think sound principle requires that, where a person has been brought within the jurisdiction of a court upon a requisition as a fugitive from justice, and has been tried for, or discharged as to, the offense charged against him, that he ought not to be subject to arrest on a civil process until a reasonable time and opportunity had been given him to return to the State from which he was taken.

In the courts of the United States, the weight of judicial opinion is in favor of the proposition that, where a party in good faith is brought within the jurisdiction of a State, or detained therein, being a nonresident, either as a party to a suit, or as a witness in another suit, he is not subject to service. *Small v. Montgomery*, 23 Fed. Rep. 707; *Juneau Bank v. McSpedan*, 57 L. R. A.

Many of the state courts hold the same rule. *Compton v. Wilder*, 40 Ohio St. 180; *People v. Judge*, 40 Mich. 730; *Cannon's Case*, 47 Mich. 482; *Baldwin v. Judge*, 48 Mich. 525; *Jacobson v. Hoemer*, 76 Mich. 234; *Sherman v. Gundlach*, 87 Minn. 118; *Chubbuck v. Cleveland*, 87 Minn. 466; *Palmer v. Rowan*, 21 Neb. 452; *Wanzer v. Bright*, 53 Ill. 35; *Williams ads. Reed*, 29 N. J. L. 385; *Hill v. Goodrich*, 33 Conn. 588.

The last three cases go upon the same ground as *Townsend v. Smith*, *supra*.

The reason for the rule that a person is exempt from arrest under the circumstances disclosed in this case is that sound public policy requires that a person shall be privileged from arrest while going to or from court in all judicial proceedings. The privilege should exist to subserve great public interests, and the due administration of justice. Moreover, as was said by Campbell, J., in *Cannon's Case*: "It is very well known that the perversion of extradition proceedings has on more than one occasion led to difficulties between nations, and to refusals by state executives to deliver up persons charged with crime whose arrest was supposed to be desired for sinister purposes." The temptation is certainly strong to make such requisitions subservient to private interests; and they are often resorted to to enforce a collection of private debts, or to remove a citizen from his home into a foreign jurisdiction, in order to get service on him in a civil action. For the most cogent reasons, therefore, we think courts of justice are bound to see that no improper use be made of such proceedings, which would look like a violation of good faith, and a perversion of measures which had to be resorted to in order to bring the party accused within their jurisdiction. We do not deem it necessary to comment in detail upon all the cases cited. We will observe, however, that in cases of extradition by a foreign government, under a treaty, the Supreme Court of the United States holds that a person who has been brought within the jurisdiction of a court by virtue of proceedings under an extradition treaty could only be tried for one of the offenses described in said treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity had been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings. *United States v. Rauscher*, 119 U. S. 407 [80 L. ed. 425].

A distinction is made in some of the authorities between civil and criminal cases. In criminal cases, some courts hold that even a forcible seizure in another country, and the transfer by violence or fraud to this country, is no sufficient reason why the party should not answer when brought within the jurisdiction of a court which has the right to try him for such an offense. See *Ker v. Illinois*, 119 U. S. 436 [80 L. ed. 421]; *Mahon v. Justice*, 127 U. S. 700 [32 L. ed. 288].

The offense having been committed in the State to which the party is brought, he may be there tried for it; and neither comity to a sister

State, nor any just appreciation of the rights of a citizen, entitle him to be released. He may be held to answer for the crime he has committed. This question is fully considered in *State v. Stewart*, 60 Wis. 587. But it is ob-

vious there is no fair analogy between civil and criminal cases in this respect, and a different rule applies.

It follows from these views that *the order of the Circuit Court must be affirmed.*

MISSOURI SUPREME COURT.

Herman WEBER, *Resp't.*,

v.

KANSAS CITY CABLE R. CO., *App't.*

(....Mo.....)

1. **Running grip cars** at a rate of speed prohibited by ordinance is negligence *per se*.
2. **The fact that a door** in the side of a grip car is open is no invitation to a passenger to pass through it for the purpose of jumping off the car while the train is running at full speed.
3. **A passenger who alights from a grip car** running at full speed and is instantly struck by a car, running in the other direction, which he could have seen if he had looked for it, is guilty of contributory negligence which will prevent any recovery for his injuries.
4. **A demurrer to plaintiff's evidence** is not waived by defendant by putting in his evidence where he asks the direction of a verdict against the plaintiff at the close of all the evidence.

On Petition for Rehearing.

5. **An exception to a refusal to give requested instructions** taken in the following form: "And said instructions (naming them), as asked, the court refused, to which refusal of the instructions thus asked the defendant by its counsel then and there excepted at the time,"—will not be treated as a general exception to the refused instructions as a whole, but it will entitle the party to have each refused instruction considered in the appellate court.

(January 27, 1890.)

APPEAL by defendant from a judgment of the Circuit Court for Clay County in favor of plaintiff in an action to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are fully stated in the opinion.

Messrs. Johnson & Lucas, for appellant:

NOTE.—Street railroads; cable line.

A street railway company is bound to exercise the greatest care and foresight, in the construction and operation of a cable line, to provide for the safety of passengers. *Watson v. St. Paul City R. Co.* (Minn.) Nov. 18, 1889.

It is the duty of those in charge of a grip cable-car running on the streets of a populous city to be on the lookout, and to take all reasonable measures to avoid injuries to persons who may be on the streets; and this duty is not discharged as a matter of law by ringing the bell and seeing that the track before the car is clear, without looking to the right or the left. *Winters v. Kansas City Cable R. Co.* (Mo.) 6 L. R. A. 538.

A gripman on a cable car is required to use ordinary care to prevent collision with wagons driven in the street. *Pope v. Kansas City Cable R. Co.* (Mo.) Jan. 27, 1890.

Law demands of the gripman in a cable car a vigilant L. R. A.

Plaintiff was guilty of contributory negligence, in stepping from a rapidly moving train in front of another, approaching at the same rate of speed, from the opposite direction. *Leslie v. Wabash, St. L. & P. R. Co.* 3 West. Rep. 824, 88 Mo. 50; *Nelson v. Atlantic & P. R. Co.* 68 Mo. 596.

An unavoidable inference of contributory negligence arises out of plaintiff's evidence. *Thompson, Trials*, § 1680; *Milburn v. Kansas City, St. J. & C. B. R. Co.* 86 Mo. 104; *Buesching v. St. Louis Gaslight Co.* 78 Mo. 229.

The proximate cause of the injury was plaintiff's leaping in front of an approaching car.

Henze v. St. Louis, K. C. & N. R. Co. 71 Mo. 636; *Purl v. St. Louis, K. C. & N. R. Co.* 73 Mo. 171; *Straus v. Kansas City, St. J. & C. B. R. Co.* 75 Mo. 191; *Leduke v. St. Louis, I. M. & S. R. Co.* 4 Mo. App. 485; *Henry v. St. Louis, K. C. & N. R. Co.* 76 Mo. 293; *McCann v. Sixth Ave. R. Co.* 117 N. Y. 505.

There was no evidence that the proximate cause of the injury was the rate of speed at which the trains ran.

Ashbrook v. Frederick Ave. R. Co. 18 Mo. App. 290; *Harlan v. Wabash, St. L. & P. R. Co.* 18 Mo. App. 483; *Leduke v. St. Louis, I. M. & S. R. Co. supra*; *Holman v. Chicago, R. I. & P. R. Co.* 62 Mo. 562; *Fletcher v. Atlantic & P. R. Co.* 64 Mo. 484; *Wallace v. St. Louis, I. M. & S. R. Co.* 74 Mo. 591; *Chicago, B. & Q. R. Co. v. Notzki*, 66 Ill. 455; *Kelley v. Hannibal & St. J. R. Co.* 75 Mo. 193.

Unless the employes on the west-bound train saw plaintiff or could have seen him in time to stop the train, plaintiff cannot recover.

Swigert v. Hannibal & St. J. R. Co. 75 Mo. 475; *Zimmerman v. Hannibal & St. J. R. Co.* 71 Mo. 476.

Mr. Wash Adams, for respondent:

Weber was not bound to look and listen for an approaching train.

lance corresponding to the responsibility placed upon him. *Potts v. Chicago City R. Co.* 33 Fed. Rep. 610.

Pulling down curtains to keep rain out of a car is not negligence on the part of the conductor, although it prevents the view of sides of the street. *Ibid.*

Stepping on the track of a street railroad, whether of horse railroad or grip cable-road, without first stopping to see whether a car is approaching, is not as matter of law, without regard to circumstances, negligence. The character of such action is a question for the jury. See *note to Chicago City R. Co. v. Robinson* (Ill.) 4 L. R. A. 126.

Contributory negligence bars a recovery. See *notes to Erickson v. St. Paul & D. R. Co.* (Minn.) 5 L. R. A. 787; *Watkins v. Southern Pac. Co.* (Or.) 4 L. R. A. 229.

Passenger alighting from moving train presumptively negligent. See *note to New York, P. & N. R. Co. v. Coulbourn* (Md.) 1 L. R. A. 541.

Notwithstanding the concurrent negligence of plaintiff a recovery is not precluded if defendant failed to discover plaintiff's danger through its own recklessness and want of compliance with municipal ordinances.

Dunkman v. Wabash, St. L. & P. R. Co. 10 West. Rep. 896, 95 Mo. 282.

In view of the fact that it was customary for persons to get off moving cars at crossings, and that the street crossings were the places established by defendant for ingress and egress, whether it was negligence for the trains to pass crossings at an unlawful rate of speed was for the jury to determine.

Williams v. Kansas City, S. & M. R. Co. 96 Mo. 281.

A passenger when taking or leaving a railroad car at a station has the right to assume that the company will not expose him to unnecessary danger.

Brassell v. New York Cent. & H. R. R. Co. 84 N. Y. 241.

Black, J., delivered the opinion of the court:

The plaintiff recovered a verdict for \$18,200, and, on the suggestion of the trial court, remitted a part, and accepted a judgment for \$10,000, to reverse which the defendant appealed. The defendant, at the close of the plaintiff's evidence, submitted a demurrer to the evidence, and asked a like instruction at the close of all of the evidence, both of which were refused. These instructions present the question whether the court should have taken the case from the jury. The facts disclosed by the plaintiff's evidence are, in substance, these: "The defendant's road runs east and west through the City of Kansas. The cars run east on the south, and west on the north, track; and when the trains pass there is a space of not more than eighteen inches between the cars. The cars going east stopped only at the east, and those going west at the west, sidewalk crossings; and then only when persons desired to get on or off. The plaintiff, a young man about twenty years old, boarded an east-bound train, composed of a coach and grip car, intending to go to Holmes Street. He took a seat on the north side of the grip car, near the rear end. Besides end doors, this car had two side doors at the rear end,—one opening out on the north, and the other on the south, side. These doors were open, and there was no gate or other contrivance to prevent persons from going out on the north side. Plaintiff testified that when he reached Holmes Street he pulled a cord, which was attached to an air-whistle, twice; that he heard no signal, and the cars did not stop; that he was looking out of the side windows of the car, and then leaned over and looked out of the front-end car door, and did not see any train coming from the east on the north track; that he then got up, went to the rear end of the car, and then stepped out of the north door, and, just as he got upon the ground, a train going west, on the north track hit him and knocked him down. His legs were thrown under the wheels of the cars upon which he had been riding."

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stepped off at or within a few feet of the east crossing. He says the train going west was so close to him when he got off that he could not see it. The whistle attached to the cord was in the grip car, and was out of order, so that it gave no signal. The plaintiff's seat in the car was within six or eight feet of the gripman, and the plaintiff did not notify the conductor or gripman where he desired to leave the car. He had been in the habit of going back and forth, to and from his work, by way of the defendant's road, and was familiar with the running of the cars. There were eight trains on the road, and each made ten or twelve daily trips. These trains were running at the rate of a fraction over seven miles per hour, in violation of a city ordinance which limits the rate of speed to six miles per hour.

The evidence tends to show that it was the custom to ring the bells on both trains when and wherever they passed. The gripman of the train on which plaintiff took passage testified in positive terms that the bells on both trains were ringing at and before plaintiff stepped off; but the plaintiff testified, in answer to the question whether he heard any bells: "I don't remember of one on the car I was on. I never heard the bell on the approaching car." Another witness for the plaintiff, being asked if he was accustomed to hear signals, said: "Yes, sir. On that occasion I cannot say whether I noticed any."

The defendant offered evidence to the effect that there were notices in the cars warning persons not to get off while the cars were in motion. The defendant offered other evidence; but, as it does not aid the plaintiff's case, it need not be recited.

The defendant, in running its trains at a rate of speed prohibited by ordinance, was guilty of negligence *per se*. *Krim v. Union R. & Transit Co.* 90 Mo. 814, 7 West. Rep. 144.

Besides that, there is some evidence, though it is very weak, to the effect that the gripman on the west-bound train did not, as was the custom, ring the bell of his car when passing the east-bound train, upon which plaintiff was a passenger. We shall assume, for all present purposes, that this bell was not rung. It is argued for the defendant that the speed of the train had no direct agency in causing the injury, but we cannot yield a consent to the proposition. There was sufficient evidence of negligence on the part of the defendant. The important question is whether the case should have been taken from the jury because of contributory negligence on the part of the plaintiff.

While carriers of passengers are held to a very high degree of care, there is a corresponding obligation on the part of the passenger to act with prudence; and, if his negligent act contributes to bringing about the injury, he cannot recover. Ordinarily, as has been said by this court on several occasions, contributory negligence is a question of fact, for the jury; but the power and the duty of the court to direct a verdict in proper cases cannot be questioned. As has been said, if it appears, without any conflict of evidence, from the plaintiff's own case, or from the cross-examination of his witnesses, that he was guilty of negligence



that, and granted by what a prudent person would ordinarily do under such circumstances, it seems to us there can be but one conclusion, and that is that the plaintiff was very negligent, to express the result in mild terms. The conclusion of negligence is a necessary and unavoidable result. One cannot thus voluntarily place life and limb in peril, and claim to be free from fault. But for the plaintiff's negligence, he would not have been injured. The court should have sustained the demurrer to the evidence.

The point made that the defendant waived the demurrer to the evidence by putting in its own evidence is not well taken. The demurrer was not only interposed at the close of the plaintiff's evidence, but a like request was made at the close of all the evidence. The defendant, by putting in its evidence, took the chance of aiding the plaintiff's case; but it was not thereby deprived of the right to ask the court to direct a verdict on all of the evidence. We see no reason for remanding this cause, and the judgment is simply reversed.

All concur.

Barclay, J., concurs in reversing the judgment, but is of the opinion that this cause should be remanded.

A motion for rehearing was subsequently filed and on March 23, 1890, the following opinion was delivered:

Per Curiam:

So far as the merits of this case are concerned, we deem it unnecessary to add anything to the opinion heretofore filed. A complaint is made that the court did not give full consideration to the point made in the respondent's brief that exceptions were not properly saved by appellant to the action of the circuit court in refusing certain instructions, among which was one to the effect that, upon the pleadings and evidence, the plaintiff could not recover. This instruction is numbered 10, and is one of thirteen asked by the defendant, but refused by the court. In respect of these refused instructions the bill of exceptions says: "And said instructions Nos. 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22, as asked, the court refused, to which refusal of the instructions thus asked the defendant by its counsel then and there excepted at the time." The argument is that there is here but a gener-

refused, but exception must fail.

Authorities are cited from other States which favor the position taken by the respondent, but such is not, and never has been, the rule of practice in this State. Under our Code of Civil Procedure either party may, after the close of the evidence, move the court to give instructions, which are usually prepared by counsel, and must be in writing; and the practice is to number them, as was done in the present case. The refused instructions must be set out in the bill of exceptions, and a formula often used for saving the exceptions is, "Which instructions the court refused, to which refusal of the instructions thus prayed the defendant by his counsel then and there excepted at the time." *Whittlesey*, Pr. 482.

Such an exception entitles the party to have each refused instruction considered in this court. Whatever may be the ruling of other courts, we must follow the rule which has heretofore prevailed in this court, and we see no reason to depart from it if we were at liberty to do so. This form of saving exceptions is quite as well understood as if the objector had said he excepted to the action of the court in refusing to give said instructions, and each of them. There is nothing in *Harrison v. Bartlett*, 51 Mo. 170, or *St. Joseph v. Ensworth*, 65 Mo. 628, which conflicts with what has been said in this case.

One of the grounds assigned for a new trial was "because the court erred in refusing to give instructions Nos. 10 to 22 inclusive, asked by the defendant." This was sufficient.

Again, counsel for the respondent are in error in supposing that defendant waived its objection to the action of the court, in overruling the demurrer to plaintiff's evidence, by putting in its own evidence. When such a demurrer is made and overruled, and the defendant puts in its evidence, this court in reviewing the ruling will do so in the light of all of the evidence. If, upon all the evidence, no matter by whom or when offered, there is a case to go to the jury, we do not reverse, though the demurrer to the plaintiff's evidence should have been given as the case stood when it was interposed. With these qualifications, the demurrer to the plaintiff's evidence will be considered here, though the defendant should offer evidence after it is overruled. *McPherson v. St. Louis, I. M. & S. R. Co.* 97 Mo. 254.

The motion for rehearing is overruled.

NEW YORK COURT OF APPEALS (2d Div.).

John L. DOUGLASS, Appt.,

v.

MERCHANTS INSURANCE CO., of New York, Resp't.

(118 N. Y. 484.)

1. The secretary of a corporation is chargeable with knowledge of its by-

NOTE.—Remedies of servant wrongfully discharged. See note to *Keedy v. Long* (Md.) 5 L. R. A. 760.

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laws which are printed and issued in a book in which his name appears as secretary.

2. A by-law of a corporation providing for the removal of officers by the board of directors at pleasure constitutes part of the contract of employment of a secretary at a designated yearly salary, with no special agreement as to the time of service.

(February 25, 1890.)

A PPEAL by plaintiff from a judgment of the General Term of the Supreme Court,

First Department, affirming a judgment of the New York Circuit dismissing the complaint in an action brought to recover damages for the alleged breach of a contract to pay plaintiff for the rendition of personal services. *Affirmed.*

The case sufficiently appears in the opinion.

Mr. William W. Badger, for appellant: No lawful discharge of plaintiff was shown "upon the 19th day of January, 1885, at the regular meeting for that month," as the 19th could not be "the second Monday" of the month, as required for the alleged "regular meeting" by article 18 of the by-laws.

As plaintiff was paid only to February 1, he was plainly entitled, at least, to the February salary, as damages.

Moody v. Leverick, 4 Daly, 401-409; *Howard v. Daly*, 61 N. Y. 362; *Everson v. Powers*, 89 N. Y. 527; *Perry v. Dickerson*, 7 Abb. N. C. 470-474, affirmed in 85 N. Y. 850; *Goodman v. Pocock*, 15 Ad. & El. N. S. 576.

The saving grace of common sense and the ordinary obligations of common honesty require that a faithful servant after twenty-eight years of continuous service at "a yearly salary," should not be summarily and arbitrarily dismissed without cause and without any notice or pay.

1 Morawetz, Priv. Corp. § 544; Story, Ag. § 466; Wood, Mast. and S. § 127, and cases cited.

The just and fair application and intention of the by-law is that it might be applied at the end of any year. A yearly salary "during the pleasure of the board" means that.

Martino v. Commerce F. Ins. Co. 15 Jones & S. 521; *King v. Steiren*, 44 Pa. 104; *McDaniel v. Parks*, 19 Ark. 871; *Watworth v. Pool*, 9 Ark. 394; *Fowler v. Armour*, 24 Ala. 194; *Webster v. Wade*, 19 Cal. 291.

Otherwise the by-law is a nullity under the Constitution, as "impairing the obligation of the contract."

Laws 1849, chap. 308, § 12; Ang. & A. Corp. §§ 833, 426, and cases cited. See also *Soldiers' Orphans Home v. Shaffer*, 63 Ill. 243-245.

A corporation loses its general power of removal, contained in its charter, if it make a special contract.

Williams v. Byrne, 7 Ad. & El. 177; *Costigan v. Mohawk & H. R. Co.* 2 Denio, 609, 618.

Corporations seeking to enforce by-laws must show their power to pass such by-laws, and bring themselves by proof within that power, and must act at regular meetings or prove notice given of the meetings and also prove express assent to them by their employes.

1 Parsons, Cont. p. 476, and cases there cited of assent; 1 Morawetz, Priv. Corp. § 532; *People v. Albany & S. R. Co.* 55 Barb. 845; 1 Waterman, Corp. §§ 49, 64; *Dunham v. Rochester*, 5 Cow. 462; *Taylor v. Griswold*, 14 N. J. L. 228.

A contract for services for a yearly salary, if continued into succeeding years without further words, is thereby renewed by the year.

Huntingdon v. Claffin, 88 N. Y. 182; *Vail v. Jersey Little Falls Mfg. Co.* 82 Barb. 564; *Tattersson v. Suffolk Mfg. Co.* 106 Mass. 56; *Davis v. Marshall*, 6 Hurlst. & N. 916, as to yearly contracts for wages payable monthly.

The case is analogous to a contract to the satisfaction of defendants, which cannot be
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terminated capriciously nor without just cause of honest dissatisfaction.

Brooklyn v. Brooklyn R. Co. 47 N. Y. 479. See also *Doll v. Noble*, 116 N. Y. 280.

Mr. Francis Lynde Stetson, for respondent:

A continuance in the employment, with the consent of the defendants, after the expiration of the current year, was equivalent to a new hiring upon the same terms.

Vail v. Jersey L. F. Mfg. Co. 82 Barb. 564-567; *Huntingdon v. Claffin*, 88 N. Y. 182.

The by-law in question being in force when plaintiff's original contract was made, and ever since, and being necessarily within his knowledge, formed part of his contract for the year 1885.

Hunter v. Sun Mut. Ins. Co. 26 La. Ann. 13.

The by-law in question, forming part of plaintiff's contract for 1885, accomplished its clear purpose, and reserved to the defendant a right to discharge the plaintiff at any time.

Wood, Mast. and S. p. 274; *Smith v. Buffalo Street R.* 35 Hun, 204; *Tyler v. Ames*, 6 Lans. 280; *Spring v. Ansonia Clock Co.* 24 Hun, 175.

Bradley, J., delivered the opinion of the court:

The plaintiff on or about the 1st day of January, 1857, went into the service of the defendant as secretary, at the yearly salary of \$1,500; his salary, from time to time changed, was on the 1st of January, 1884, increased to \$4,500 a year. He continued as such secretary in the service of the defendant at that annual salary until January 19, 1885, when he was, by the board of directors of the defendant, removed from the office of secretary. He, having been paid up to February 1, brought this action to recover as damages a sum equal to the salary for the residue, or eleven months, of the then current year. This claim is made for the alleged reason that he was in the defendant's service from year to year, and that the defendant could not, without liability to him for damages, discharge him from its service until the end of any year upon which he had entered in such service.

When a party enters into service of another at a stipulated annual compensation or salary, and continues beyond a year, the presumption is that he does so on the same terms. *Huntingdon v. Claffin*, 88 N. Y. 182; *Vail v. Jersey Little Falls Mfg. Co.* 82 Barb. 564; *Ranck v. Albright*, 36 Pa. 367; *Tattersson v. Suffolk Mfg. Co.* 106 Mass. 56.

There is no evidence that the original hiring was for a year, other than in the fact that the plaintiff's salary was annual. The plaintiff, for his evidence in that respect, relied solely upon the admission in the defendant's answer. By the answer it is alleged that a by-law of the defendant, known to the plaintiff, was part of the contract of employment under which he went into and continued in its service. This by-law was adopted and went into effect in 1850, and provided that "the president, vice-president, secretary, surveyor and clerks shall respectively hold their offices during the pleasure of the board of directors, and until the appointment of a successor either permanent or *pro tem.*, and no officer or clerk shall be removed without a concurrence of a majority of the whole board of directors." A new edition

of the by-laws, including this one, was printed and issued in 1861, under the direction of a committee, in a book in which appeared the name of the plaintiff as secretary. The plaintiff had or was chargeable with knowledge of this by-law, and it may be assumed that it constituted part of the contract of his employment under which he served as secretary of the defendant. And the main question is, whether the defendant had the right in the manner mentioned in the by-law, without cause, to terminate the plaintiff's service as secretary before the end of the current year, and not subject itself to liability to him for damages as for breach of contract. It is urged on the part of the plaintiff that he was in service under a contract for a year, and that the by-law was not in the way of making such a contract effectual; and when made, the pleasure of removal could be exercised to take effect only at the expiration of the year.

In *Soldiers' Orphans Home v. Shaffer*, 63 Ill. 243, cited in support of that proposition, the plaintiff's charter provided that the trustees might remove any officer or employé if the interests of the institution required the removal. The plaintiff there was by special contract hired for a year, and the court held that a corporation loses its general power of removal contained in its charter if it makes a special contract. It may be observed that in the case cited the power of removal was not unqualified or to be exercised at pleasure.

And in *Martino v. Commerce F. Ins. Co.*, 15 Jones & S. 520, it was held that the by-laws of the defendant, providing that officers, clerks, etc., should be elected during the pleasure of the board, did not deny to the defendant the power, by special contract, to overcome it or set it aside.

It may be assumed for the purposes of the question that this is within the power of the board which creates the by-laws, and that when it appears that a special contract is made by such board, in terms which indicate an intent of the parties to exclude from it the operation of the by-laws having relation to the right of terminating service, such contract of employment may not be subject to it. The employment of the plaintiff does not come within that proposition. He went into the defendant's service upwards of twenty-eight years before the time of his removal. There does not appear to have been any special contract as to term of service. The compensation was designated as a yearly salary, which the plaintiff in his complaint alleges was payable in monthly or quarterly installments. This would indicate that his service for a year was contemplated,

and the terms would presumptively be the same each subsequent year, except so far as modified by the parties, and without some reserved right of termination it may be assumed that his service was not terminable without cause until the end of any current year. *Williams v. Byrne*, 7 Ad. & El. 177.

But here was no special contract which indicated any purpose to abridge the right of removal at pleasure given by the by-law which entered into the contract of employment, and subject to which the plaintiff went into and continued in the defendant's service until this reserved power was exercised. Nor is it seen that this right of removal was qualified in respect to the time of its exercise. Our attention is called to but very little judicial authority upon the question.

In *Hunter v. Sun Mut. Ins. Co.*, 26 La. Ann. 18, the plaintiff was employed by the defendant for one year from in February, 1869, which he served, and on the expiration of that term he was employed by the defendant for another year. He was discharged in April of the second year without cause, and brought his action to recover damages for alleged breach of the contract. There was a by-law of the defendant, in terms, giving the right to remove its officers at pleasure. It was there held that the officer so employed was presumed to have known of the existence of the by-law, that it was part of the contract, and the law governing their rights in that respect, and "therefore the plaintiff knew the precarious tenure of his position" and was not entitled to recover.

In *Smith v. Buffalo Street R. Co.*, 35 Hun. 204, the question as to the right to discharge an employé within the term arose upon a provision in the contract that the employer might discharge him "at any time." It was held that the right to discharge him was unqualified. In the present case the power of removal at any time must be deemed to have been reserved in the contract of employment. And it seems to have been properly exercised. It was done at a meeting of the board of directors by concurrence of a majority of the whole board, and a secretary *pro tem.* was then appointed, and he was made permanent secretary on the tenth of the following month. No question was made on the trial as to the regularity of the meeting of the board at which the removal was made. Nor does there appear in the record any support for the contention that it was not a meeting at which the removal may have been accomplished.

The judgment should be affirmed.
All concur.

MICHIGAN SUPREME COURT.

Clarence M. BURTON, *Relator*,
v.

Thomas P. TUIE, Treasurer of the City
of Detroit.

(....Mich....)

Stub receipt books in a city treasurer's office,
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which contain the record of canceled certificates of tax sales, the list of lots redeemed from sales for special city taxes and also the list of lots sold to the city for delinquent taxes and afterwards assigned to individuals, are public records within the meaning of Pub. Acts 1880, No. 205, which provides for the inspection of such records, notwithstanding the fact that all data contained in

such books, are at the convenience of the treasurer, to be entered in record books which are accessible to the public.

(April 12, 1890.)

PETITION for rule to show cause why defendant should not be punished for contempt for refusing to comply with the direction contained in a writ of mandamus commanding him to permit relator to inspect certain public records. *Judgment against defendant.*

The case sufficiently appears in the opinion. *Mr. Henry A. Chaney* for relator.

Mr. John W. McGrath for respondent.

Morse, J., delivered the opinion of the court:

The respondent is City Treasurer of Detroit. The relator is engaged in the abstract business in said city. We held, upon application of the relator for mandamus (see *Burton v. Tuite, ante*, 78) that certain records in said treasurer's office were public records, and that relator had a right to examine them, and to make memoranda or transcripts therefrom under Act No. 205, Pub. Acts 1889,* subject to such proper and reasonable regulations as the treasurer might make consistent with the public use of such records. Our order in the case, as made and entered in the journal on the 11th day of January, 1890, commanded the said Tuite not only to allow the relator to inspect and examine the particular records involved in that case, but also to generally furnish to him and his subordinates reasonable and proper facilities for the inspection and examination of the records and files in his office, and for making memoranda and transcripts therefrom in compliance with said above-named Act of the Legislature. In the opinion, as well as in the order, of this court we meant to so express our views and commands as that there should be no mistake or misunderstanding as to the rights and duties of the respective parties to this controversy. But we are now called upon to enforce our order. January 13, 1890, a petition was filed in this court by the relator showing the proper service of our writ of peremptory mandamus upon respondent, and setting forth that, notwithstanding our order and command therein contained, the respondent had since said service refused to allow relator to have access to or look at certain other public records in said office of the City Treasurer, to wit: One book containing the record of the certificates of tax-sales that have been canceled; one book containing a list of such lots as have been sold to the City of Detroit, or to individuals, for special city taxes, and have been from time to time redeemed; and a book containing a list of such lots or parcels of land in the City of Detroit as have been heretofore sold to said city

for delinquent city taxes, said sales being afterwards assigned by the city to individuals. Upon this petition, January 15, 1890, we issued an order to the said Thomas P. Tuite to show cause why he should not be punished for contempt and disobedience of the said writ of mandamus of date January 8, 1890.

Respondent answered this order on the 28th day of January, 1890, denying that the above-named books were public records, or that the relator had any right to examine them under the Statute, or our decision and order above stated. The books in question were denominated by the respondent as "Stub Receipt Books," and it was insisted in said answer that the same were not public records, but mere memoranda for the convenience of the office, and that all the data contained therein is entered in the "Record Books," which are accessible to relator. It was, however, admitted upon the argument that the transferring of the data upon these stub books to the record books might be delayed for days or weeks, at the pleasure of the respondent.

After hearing both parties by counsel upon the petition and answer, we directed certain interrogatories to be served upon the respondent, to be answered by him under oath, and that other proofs be taken touching the truth of the matters involved in the petition and answer, as well as the nature and character and use of said books. The answers to said interrogatories and other testimony taken have been returned to us. We do not intend to again go into the discussion of the questions that were settled by us in the first opinion filed in this case. We are satisfied that the books referred to, by whatever name they are called, are public records in the treasurer's office in the full sense of the Statute, and, under the opinion above referred to, that the respondent is guilty of contempt and disobedience of the order of this court in refusing to the relator the privilege of examining them, and making transcripts thereof. We think, however, that this disobedience has occurred, not so much from a willful disregard of our command, as from bad advice. Under these circumstances, we are not disposed to impose a heavy penalty, but we hope that our orders will hereafter be strictly complied with, and without delay or attempted evasion, as the fine in this case will not stand as a precedent in any future case of disobedience of the mandates or decrees of this court. An order will be entered adjudging the said Thomas P. Tuite guilty of contempt and disobedience of our aforesaid writ of mandamus, and that he pay to the people of the State of Michigan a fine of \$25, with the costs of this proceeding to be taxed by the clerk of this court, such payment to be made to said clerk within ten days after a copy of such order shall be served upon him.

The other Justices concurred.

*The material portion of that Act is as follows:

"The officers having the custody of any county, city or town records in this State shall furnish proper and reasonable facilities for the inspection and examination of the records and files in their
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respective offices, and for making memoranda or transcripts therefrom, during the usual business hours, to all persons having occasion to make examination of them for any lawful purpose."
[Rep.]

RHODE ISLAND SUPREME COURT

Ellen O. PECK *et al.*
v.
BANK OF AMERICA *et al.*

(16 R. I....)

1. Whatever puts upon inquiry in equity notice of what inquiry would disclose.
2. A bank is put upon inquiry as to the right of an executrix to transfer stock in the bank to herself as an individual by a proposal to make such transfer as security for her indorsement of the note of another; and if the bank relies upon the statement of the maker of the note as to her ownership, instead of consulting the will, and the transfer by the executrix was unauthorized, it can claim no lien as security for such indorsement against those who are entitled to the stock under the will.
3. In cases of fraud the Statute of Limitations begins to run, in equity, not at the time the fraud is perpetrated, but from the time of its discovery.

(February 8, 1890.)

BILL in equity to establish title to certain corporate stock alleged to have been illegally transferred by the executrix of the will of Allen O. Peck, deceased. *Judgment for complainants.*

NOTE.—Statute does not begin to run till discovery of the fraud.

Where the action is for relief on the ground of fraud, the Statute does not commence running until discovery of the fraud. *Currey v. Allen*, 34 Cal. 254; *Rowe v. Bentley*, 29 Gratt. 761; *Kilbourn v. Sunderland*, 130 U. S. 505 (32 L. ed. 1006); *Moore v. Greene*, 60 U. S. 19 How. 69 (15 L. ed. 538); *Meador v. Norton*, 78 U. S. 11 Wall. 442 (20 L. ed. 184).

The Statute will run from the time facts are brought home to the knowledge of the party. *Bent v. Priest*, 1 West. Rep. 753, 36 Mo. 475.

No laches can arise from delay in taking steps to undo a fraud, until after knowledge of the fraud has been acquired. *Jones v. Lloyd*, 6 West. Rep. 35, 117 Ill. 597.

They will not avail as a defense in a proceeding to restrain the use of a trade-name, where the name was adopted with a fraudulent intent. *Sanders v. Jacob*, 2 West. Rep. 408, 20 Mo. App. 96.

Where the Legislature has adopted the equitable rule that a cause of action for fraud shall not accrue until discovery of the fraud, the principles of equity must be applied in ascertaining what conditions constitute a discovery. *Teall v. Slaven*, 40 Fed. Rep. 774.

Instances; late cases.

A cause of action to recover back an excess of freight charges runs only from discovery of the fact. *Carrier v. Chicago, R. I. & P. R. Co. (Iowa)* 6 L. R. A. 799.

When there is fraud in the action of an administrator in not paying over the shares of the estate to heirs who are under his guardianship, the Statute only runs from the discovery of the fraud. *Gabler's App. (Pa.)* 5 Cent. Rep. 814.

The rule that the Statute does not run till discovery of the fraud is applicable to an action to set aside transfers and conveyances in fraud of creditors. *Fitts v. Beardley*, 28 N. Y. S. R. 658.

So where a widow is not suing for her dower but for property of which she has been defrauded, the 7 L. R. A.

The facts are fully stated in the opinion.

Mr. Joseph C. Ely, for complainants:

The defendant Bank was charged with notice that this transfer was improperly made and therefore takes no lien other than that on Mrs. Peck's beneficial interest in said sixteen shares of stock under the will of Allen O. Peck, if it has any claim thereon.

Lowry v. Commercial & F. Bank, Taney, C. C. Dec. 310; *Lowell*, Transfer of Stock, § 152; *Holden v. New York & E. Bank*, 73 N. Y. 286; *Stewart v. Firemen's Ins. Co.* 53 Md. 564. See also *Covington v. Anderson*, 16 Lea, 814.

The Bank in view of the facts was charged with notice of the will and all the probate proceedings.

Hill v. Simpson, 7 Ves. Jr. 152; *Albert v. Baltimore Sav. Bank*, 1 Md. Ch. 407; *Caulkins v. Memphis Gaslight Co.* 85 Tenn. 683; *Covington v. Anderson*, 16 Lea (Tenn.) 810.

The Statute of Limitations furnishes no defense as the action of the Bank was fraudulent in contemplation of law. In such contingency the Statute does not run until the facts are discovered.

Perry, Tr. 8d ed. § 811; *Story*, Eq. Jur. §§ 1521, 1521 a.

Mr. Benjamin W. Smith for defendant, *pro se.*

Statute of Limitations begins to run only from the discovery of the fraud. *Jones v. Van Doren*, 130 U. S. 634 (32 L. ed. 1077).

A cause of action for relief against fraudulent misappropriation of corporate property does not accrue until discovery by the aggrieved party of the facts constituting the fraud. *Moyle v. Landers*, 78 Cal. 99.

Fraudulent concealment of facts.

Where there was fraud and concealment on the part of defendants, such facts, whenever they exist, are sufficient to prevent the operation of the Statute in view of a court of equity. *Mayne v. Griswold*, 3 Sandf. 484, 9 N. Y. Leg. Obs. 88; *Bertine v. Varian*, 1 Edw. Ch. 343, 6 N. Y. Ch. L. ed. 165; *Morgan v. Tener*, 33 Pa. 305; *Wickersham v. Lea*, Id. 416.

Fraudulent concealment by defendant of the fact of overpayment of a bank check avoids the bar of the Statute. *Manufacturers Nat. Bank v. Perry*, 3 New Eng. Rep. 927, 144 Mass. 313.

A bank which has concealed its conversion of a special deposit is not permitted to avail itself of the Statute. *Hughes v. Waynesburg Nat. Bank*, 1 Cent. Rep. 349, 110 Pa. 428.

Concealment by a former partner of the fact that he had collected money belonging to the partnership prevents the running of the Statute against the other partner, until the discovery of the fraud. *Fisher v. Tuller (Ind.)* Jan. 30, 1890.

Where a proper record of assessment proceedings is open for inspection, mere passive silence does not amount to such a concealment as will take the case out of the operation of the Statute. *Churcho-man v. Indianapolis*, 3 West. Rep. 917, 110 Ind. 259.

That a bankrupt omitted to mention life policies in his schedules in bankruptcy, and that neither he nor his administrator informed the assignee of them, but took no means to conceal them, does not establish fraudulent concealment of them so as to prevent the running of the Statute of Limitations. *Avery v. Cleary*, 132 U. S. 604 (33 L. ed. 490).

America, defendant:

An executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate and they cannot be followed by creditors or legatees into the hands of aliens.

2 Wms. Exrs. 968; 1 Perry, Tr. § 225 and cases; Schouler, Exrs. and Admsrs. § 850.

Letters testamentary are always sufficient evidence of authority to transfer stock, because a sale and transfer are in the line of duty of an executor, whose primary duty is to dispose of the property to pay debts of testator.

Bayard v. Farmers & M. Bank, 52 Pa. 282; Schouler, Exrs. and Admsrs. § 851; 2 Wms. Exrs. 743.

And therefore banks may safely permit a transfer of stock by an executor without looking for his authority beyond his letters, and have no right to require any further evidence of his authority.

Hartig v. Bank of England, 3 Ves. Jr. 55; *Bank of England v. Parsons*, 5 Ves. Jr. 665; *Bank of England v. Lunn*, 15 Ves. Jr. 569; *Franklin v. Bank of England*, 9 Barn. & C. 156, 1 Russ. Ch. 575; *Fowler v. Churchill*, 11 Mees. & W. 823; *Ashton v. Atlantic Bank*, 3 Allen, 217; *Bayard v. Farmers & M. Bank*, *supra*.

Courts of equity, although not in strictness bound by the Statute of Limitations, act by

equitable rule, the limitation prescribed by the Statute.

Sherwood v. Sutton, 5 Mason, 143; *Pratt v. Northam*, 5 Mason, 95; *Baker v. Biddle*, Baldwin, 394; *Union Bank v. Stafford*, 53 U. S. 12 How. 327 (18 L. ed. 1009); *Thomas v. Brockenbrough*, 28 U. S. 10 Wheat. 146 (6 L. ed. 287); *Elmendorf v. Taylor*, 28 U. S. 10 Wheat. 152 (6 L. ed. 289).

The rule that the Statute of Limitations will not protect trustees applies only to express and not to constructive trusts.

Boone v. Chiles, 35 U. S. 10 Pet. 177 (9 L. ed. 888); *Hayman v. Keally*, 3 Cranch, C. C. 325; *Elmendorf v. Taylor*, *supra*; *Beaubien v. Beaubien*, 64 U. S. 23 How. 190 (16 L. ed. 484); *Wilmerding v. Russ*, 83 Conn. 67.

Statute begins to run in equity from the time the cause of complaint accrues, not from the time the transaction is discovered.

Littlejohn v. Gordon, 82 Miss. 235; *Buckner v. Caloote*, 28 Miss. 432; *Pfecher v. Flinn*, 80 Ind. 202.

Matteson, J., delivered the opinion of the court:

This is a bill brought by the children, residuary devisees and legatees of Allen O. Peck, deceased, against Mary E. Peck, their mother, Benjamin W. Smith, her assignee for the benefit of creditors, and the Bank of Amer-

Although concealment of fraud has been held ground for suspending the Statute of Limitations, yet the evasion of the service of process is not fraud in the legal sense of the term, and is no valid answer to the statutory bar. *Amy v. Watertown*, 120 U. S. 320 (32 L. ed. 958).

In New York the concealment of a cause of action *ex contractu* does not, in courts of law, interrupt or delay the running of the Statute of Limitations as a bar to the action. *Andrew v. Redfield*, 98 U. S. 225 (25 L. ed. 153).

An allegation that the defendant "tried to conceal, and did conceal," from the plaintiff the facts constituting the cause of action, does not bring the case within the rule, where there is no allegation that the concealment was effected by any artifice or false statement, or where the ultimate fact of fraud is not pleaded. *Brunson v. Ballou*, 70 Iowa, 84.

Exception to the rule.

The rule that in cases of fraud the Statute of Limitations begins to run only from the discovery of the fraud, does not apply where the party affected by the fraud might, with ordinary diligence, have discovered it. *Vigus v. O'Bannon*, 6 West. Rep. 219, 113 Ill. 334.

But the failure of such diligence may be excused where there exists some relation of trust and confidence between the party committing the fraud and the party affected by it, rendering it a duty of the former to disclose to the latter the true state of the transaction. *Atlantic Nat. Bank v. Harris*, 118 Mass. 147; *Harrisburg Bank v. Forster*, 8 Watts, 12; *Wear v. Skinner*, 46 Md. 257; *Wilson v. Ivy*, 32 Miss. 233; *Buckner v. Caloote*, 28 Miss. 432; *Bigelow, Fr. 445*; *Way v. Cutting*, 20 N. H. 137; *Loesch v. Pickett*, 36 Kan. 216.

Where complainant's claim is based upon a fraud which defendant has concealed, the statutory period will not commence until the fraud is discovered, or until it would have been discovered had reasonable diligence been exercised. *Somerset Co. Bank v. Veghte*, 4 Cent. Rep. 406, 48 N. J. Eq. 7 L. R. A.

89; *Todd v. Rafferty*, 80 N. J. Eq. 254; *Story, Eq. § 1521*; *Fritschler v. Koehler*, 38 Ky. 78.

There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself; and the circumstances of the discovery must be fully stated and proved; and the delay which has occurred must be shown to be consistent with the requisite diligence. *Putnam v. New Albany & S. C. J. R. Co.* ("Burke v. Smith") 83 U. S. 16 Wall. 390 (21 L. ed. 361); *Teall v. Slaven*, 40 Fed. Rep. 774.

The provision of N. Y. Code Civ. Proc., that certain actions for fraud shall not be deemed to accrue until discovery of the facts constituting the fraud, does not apply to an action to procure a judgment for a sum of money. *Miller v. Wood*, 116 N. Y. 361.

A party with notice sufficient to lead him to a fact cannot become a bona fide purchaser or mortgagee, when knowledge of the truth would render him otherwise. *Pendleton v. Fay*, 2 Paige, 202; *Wright v. Ross*, 36 Cal. 437.

If it appears that the party has knowledge or information of facts sufficient to put a prudent man upon inquiry, and that he wholly neglects to make any inquiry, or, having begun, fails to prosecute it in a reasonable manner, the inference of actual notice is necessary and absolute. *Spofford v. Weston*, 29 Me. 140; *Warren v. Swett*, 81 N. H. 332; *Nute v. Nute*, 41 N. H. 60; *Balsdell v. Stevens*, 16 Vt. 173; *Stafford v. Ballou*, 17 Vt. 329; *McDaniels v. Flower Brook Mfg. Co.* 22 Vt. 274; *Stevens v. Goodenough*, 26 Vt. 676; *Blatchley v. Osborn*, 33 Conn. 223; *Sigourney v. Munn*, 7 Conn. 324; *Peters v. Goodrich*, 3 Conn. 146; *Raritan Water Power Co. v. Veghte*, 21 N. J. Eq. 463; *Hoy v. Bramhall*, 19 N. J. Eq. 563; *Williamson v. Brown*, 15 N. Y. 354; *Swarthout v. Curtis*, 5 N. Y. 301; *Danforth v. Dart*, 4 Duer, 101; *Jackson v. Cadwell*, 1 Cow. 622; *Farrish v. Brooks*, 4 Brewst. 154; *Kerns v. Swope*, 2 Watts, 73; *Jaques v. Weeks*, 7 Watts, 261; *Epley v. Witherow*, 7 Watts, 163; *Bellas v. McCarty*, 10 Watts, 18; *Randall v. Silverthorn*, 4 Pa. 173; *Trefts v. King*, 13 Pa. 137; *Ringgold v. Bryan*, 3 Md. Ch. 433; *Stockett v*

ica. The purpose of the bill is to determine the rights of the complainants and of the respondent Bank to sixteen shares in the capital stock of the latter. The cause was heard on bill, answers and an agreed statement of facts. The case, as it appeared upon the hearing, was as follows, viz.: Allen O. Peck died September 15, 1871, leaving a last will and testament, the residuary clause of which was as follows, to wit: "I give, devise and bequeath all the residue and remainder of my estate, of all kinds, to my children, share and share alike, to have and to hold the same to them, and their respective heirs, subject, however, to the following provision for my wife, Mary Elizabeth Peck, in lieu of her dower in my said estate: My said wife may use, occupy and enjoy such parts of my estate as she may at any time elect, for the residence of herself and my children, and the income of all other parts of my said estate for the use and benefit of herself and my children during her life, and until the day of her marriage; but from the day of her marriage, and for the remainder of her life, she may have the use and income of one half of my estate, including such part thereof as she may select for her residence, and the household furniture."

This will was duly proved in the Municipal Court in Providence, and the respondent, Mary E. Peck, named therein as executrix, accepted the trust, qualified herself to act, administered

the estate, and on September 8, 1874, having completed the administration, filed a statement in said municipal court, showing that there remained of said estate certain property, among which were the sixteen shares in suit. Being unused to business, she relied in her business transactions on the advice and direction of her brother, the late Henry C. Whitaker, who, however, took advantage of her inexperience for his own ends, and misled and deceived her, and thereby obtained her indorsement on various promissory notes of which he was the maker, the proceeds of which he applied to his own use. He also obtained from her a blank power of attorney signed by her as executrix, by which, on his statement that said sixteen shares belonged to her, he, on July 9, 1880, procured the transfer of said shares to her individually, and also the discount by the respondent Bank of his note, bearing her indorsement, the proceeds of which were, at his request, placed to his credit, and paid out on his checks. This note was renewed from time to time, until Whitaker died, in 1887, when the true state of affairs came to light. Neither the respondent Mary E. Peck, nor the estate of Allen O. Peck, received any part of the proceeds of said note. The respondent Bank, in discounting the original note, and in the renewals thereof, relied for security on the indorsement of said Mary E. Peck, and her supposed ownership of said shares, and the lien

Taylor, 3 Md. Ch. 337; Bunting v. Ricks, 2 Dev. & B. Eq. 130; Gibbs v. Cobb, 7 Rich. Eq. 54; Maybin v. Kirby, 4 Rich. Eq. 106; Center v. Planters & M. Bank, 22 Ala. 743; McGehee v. Gindrat, 20 Ala. 95; Ringgold v. Waggoner, 14 Ark. 69; Bartlett v. Glasscock, 4 Mo. 62; Doyle v. Teas, 5 Ill. 202; Hoxie v. Carr, 1 Sumr. 173; Hinde v. Vattier, 1 McLean, 110; Vattier v. Hinde, 32 U. S. 7 Pet. 252 (8 L. ed. 675); Lambert v. Newman, 55 Ala. 623; Helms v. Chadbourne, 45 Wis. 60, 70; Brinkman v. Jones, 44 Wis. 498, 519; Chicago, R. I. & P. R. Co. v. Kennedy, 70 Ill. 350, 381; Shephardson v. Stevens, 71 Ill. 646; Erickson v. Hafferty, 79 Ill. 200, 212; Reynolds v. Buckman, 35 Mich. 30; Loughridge v. Bowland, 62 Miss. 546, 555; Brown v. Volkening, 64 N. Y. 76, 82; Chicago v. Wict, 75 Ill. 211; Buok v. Paine, 50 Miss. 648, 656; McLeod v. First Nat. Bank, 42 Miss. 99, 112; Parker v. Foy, 43 Miss. 280; Carter v. Portland, 4 Or. 389, 390; Prinkle v. Dunn, 37 Wis. 449, 466; Shotwell v. Harrison, 30 Mich. 179; Munroe v. Eastman, 81 Mich. 238; Eck v. Hatcher, 58 Mo. 236; Maul v. Rider, 59 Pa. 167, 171, 172; Lawton v. Gordon, 37 Cal. 203, 206.

A party must, for the purposes of the Statute of Limitations, be held to have knowledge, if he had the means of knowledge and the circumstances were such as to charge him on inquiry. Moore v. Boyd, 74 Cal. 167.

When a party is put upon an inquiry, and the circumstances are such that the inquiry if duly prosecuted must necessarily lead to knowledge of the prior adverse title, the presumption that he obtained the knowledge is conclusive. See Brice v. Brice, 5 Barb. 533; Hanley v. Morse, 32 Me. 287; McLaughlin v. Shepherd, Id. 143; Webster v. Maddox, 6 Me. 256; Kent v. Plummer, 7 Me. 464; Jaques v. Weeks, *supra*; Kerr v. Day, 14 Pa. 112; Hardy v. Summers, 10 Gill & J. 316; Macon v. Sheppard, 2 Humph. 385; Morton v. Roberts, 4 Dana, 258; Buck v. Holloway, 2 J. J. Marsh. 180; Burt v. Cassety, 12 Ala. 736; Scroggins v. McDougald, 3 Ala. 332; Grimstone v. Carter, 3 Paige, 421.

If a party steadily avoids all inquiry and omits all examination, he will be chargeable with all the 7 L. R. A.

consequences of positive notice, actual fraud or willful neglect; for whatever is sufficient to put a party upon inquiry is in equity held to be good notice. Kellogg v. Smith, 26 N. Y. 24; Brown v. Blydenburgh, 7 N. Y. 141.

Notice which puts the party upon inquiry is sufficient even under the Registry Act. Williamson v. Brown, 15 N. Y. 363.

Where the source of information has been pointed out, any ignorance in this respect will be considered voluntary. Livingston v. Wells, 8 S. C. 350; McLure v. Ashby, 7 Rich. Eq. 444; Maxwell v. Kennedy, 49 U. S. 8 How. 220 (12 L. ed. 1056); 2 Story, Eq. § 1521.

Whether a second indorsee received notes after their maturity, or out of the ordinary course of business, or under circumstances which authorize an inference that he had knowledge of fraud in the first indorsement, are questions for the jury, and if they so find he cannot recover. Smith v. Strader, 45 U. S. 4 How. 404 (11 L. ed. 1081).

A judgment creditor is chargeable with notice of a deed from his debtor to the wife of the latter from the time of its recording. Hawley v. Page, 77 Iowa, 239.

Where a deed showing fraud on its face has been on record for thirty years, it cannot be held that the Statute of Limitations did not run because the fraud was not discovered. Teall v. Slaven, 40 Fed. Rep. 774.

Where the party interested had notice in his lifetime of all the facts which constituted the ground of fraud alleged in the bill, his heirs are not entitled to the benefit of an exemption from the bar of the Statute on the ground of recent discovery of the fraud. Clarke v. Johnston, 85 U. S. 18 Wall. 493 (21 L. ed. 904).

The courts cannot create an exception to the operation of the Statute of Limitations, not made by the Statute itself, where the party designedly eludes the service of process. Amy v. Watertown, 130 U. S. 320 (32 L. ed. 933).

The rule of diligence to entitle the party de-

the Bank shall be allowed to sell or transfer his or her stock without the consent of the directors; and this, whether indebted as principal, surety or indorser, and whether the debt has become due or not. The stock of each stockholder shall be liable, and may be sold at auction by order of the president and directors, for the payment of any debt due from such stockholder to the Bank, or so much thereof as may be necessary on default of payment thereof when due; but sixty days' previous notice shall be given of such sale in some one of the newspapers printed in the City of Providence." The respondent Bank had no knowledge of any misleading advice of said Whitaker to said Mary E. Peck, nor of any imposition practiced on her by him; nor had the complainants any knowledge of the transactions whereby said Bank claims its lien until after the death of said Whitaker. All of the dividends upon said shares since July 9, 1880, except one, have been drawn by the complainant Mary T. Peck for, and as agent of, said Mary E. Peck. After the death of said Whitaker, suits were brought against said Mary E. Peck, and attachments were placed upon her property, to dissolve which she made a general assignment, under Pub. Stat. R. I., chap. 287, § 12, to the respondent Smith, for the benefit of her creditors.

said wife above quoted, said a life estate in the residuary if not wholly, free from trusts, and that her benefit was assignable. The court held that the respondent Bank was not bound to give notice that the transfer of said stock to said Mary E. Peck as executrix to her was improper, and therefore that the respondent Bank was not liable thereon, or, at most, acquiesced only to the extent of her negligence. The respondent Bank denied that it was chargeable. It argues, as it did, that there was no actual notice, and that the transfer was improper, therefore, notice of such impropriety was not required. It contends that, as a matter of principle, it was bound to follow the will. It contends that it was not the duty of an executor or administrator to exercise its power of disposal over the estate of his testator or intestate, and that it was not to be followed by creditors or legatees of the hands of the alienee; that liens are always sufficient evidence of a right to transfer stock, because a sale in the line of duty of an administrator to dispose of the property to satisfy debts, and it therefore insists that it should safely permit a transfer of stock without looking for his

fraudulent to the rescission of a contract is well established; but want of diligence alone in discovering the fraud, when the rights of third parties have not intervened, will not affect the right to rescind. *Duffield v. Barnum W. & L. Works*, 7 West. Rep. 610, 64 Mich. 208.

Bill for relief, against concealed fraud.

The right to rescind a contract for fraud must be exercised immediately upon its discovery. *Strong v. Strong*, 3 Cent. Rep. 49, 102 N. Y. 69.

No relief can be had against a fraudulent sale by a trustee for the benefit of creditors, unless the bill is brought without unreasonable delay. *Martin v. Globe Ins. Co.* 4 West. Rep. 127, 116 Ill. 654.

Laches will defeat setting aside a conveyance, unless it is shown by clearest and most satisfactory evidence that it was fraudulent. *Ibid.*

Where a party injured by fraud is in ignorance of its existence, the duty to commence proceedings arises only upon discovery; and mere submission to an injury, after the act inflicting it is completed, cannot generally and in the absence of other circumstances take away a right of action, unless such acquiescence continues for the period limited by the Statute for the enforcement of such right. *Kilbourn v. Sunderland*, 180 U. S. 505, 82 L. ed. 1005.

It was necessary to allege in the bill such facts as were required to repel the presumption arising from the lapse of time; and where the fraud was committed more than six years before suit brought it was necessary to allege and prove that the discovery of it was within six years. *Erickson v. Quinn*, 3 Lana. 306; *Moore v. Greene*, 60 U. R. 19 How. 69 (15 L. ed. 533); *Feld v. Wilson*, 6 B. Mon. 475; *Carr v. Hilton*, 1 Curt. 390; *Stearns v. Page*, 48 U. S. 7 How. 819 (12 L. ed. 923); *Baldwin v. Martin*, 3 Jones & S. 98; *Miller v. McIntyre*, 31 U. S. 6 Pet. 61 (8 L. ed. 320).

A bill filed for relief on the ground of fraud, which shows on its face that the fraud was committed more than six years before the filing of the bill, should not merely state in anticipation of the

defense of the Statute of Limitations that the fraud was discovered within six years, but should state that it could not with reasonable diligence have been discovered sooner. *Parker v. Kuykendall*, 100 Mich. 100.

Within two years after discovery.

A cause of action for relief from fraud is barred by the two year statute in Civ. Code, § 18, subd. 3, if the fraud was committed more than two years before the action was commenced. *Loesch v. Pickett*, 36 Mich. 100.

The Michigan Statute is not a bar to an action where the plaintiff who entirely neglected to search for the fraud, and information was to be found, and the fraud was not an obvious one. *Purdon v. Seligman* (Mich.) Nov. 1898.

Within three years.

Under the Statute (Gen. Stat. § 18, subd. 3) relief on the ground of fraud must be brought within three years after the discovery of the facts constituting the fraud. *Bohm v. Bohm*, 9 Colo. 100.

Under the California Code an action for relief from fraudulent misappropriation of property is not barred until the discovery of the facts constituting the fraud. *Moyle v. Larned*, 100 Cal. 100.

The liability of a stockholder for the fraud of another is not created by law, but must be created by statute. *Moore v. B. & O. R. Co.*, 100 Cal. 100.

A suit attacking a sale of property obtained by fraud is not barred by the statute of limitations when brought within three years after the discovery of the fraud, and less than eighteen months after the execution of the sheriff's deeds, and the discovery of the fraud. *Great Northern B. Co. v. Woodman*, 120 Minn. 12.

In Florida, an action brought on the ground of fraud, eight years after the discovery of the fraud by plaintiff, is barred.

the proposed transfer is apparently to the ordinary course of administration, for the purpose of raising money to pay the testator's debts, or the legacies given by the will. In such a case, the officer of the corporation whose duty it is to supervise the transfer can have no means of ascertaining whether or not the transfer is for the purposes named, except by inquiry of the executor himself, since, generally, no one else would have knowledge of the condition of the estate. If, however, the circumstances attending the proposed transfer show that it is not in the ordinary course of administration, it becomes the duty of the transfer officer, before permitting it, to inquire into the authority of the executor to make it. Corporations stand upon the footing of trustees, in relation to their stockholders, for the protection of their interests. Being custodians of the primary evidence of title to the stock, they are held to the exercise of reasonable care and diligence in its preservation. Their safety therefore requires them, before permitting a transfer, to be satisfied of the authority of the person to make it. Hence they are entitled to require the production of satisfactory evidence of such authority, and though, generally, the possession of the legal title is sufficient evidence thereof, it is not always so, since the real equitable ownership may be in some other than the holder of the legal right; and this is especially true of an executor, for it not infrequently

may work a serious wrong to the equitable owner; and if the corporation allows it to be made with notice of the want of authority, or if put upon inquiry, without proper investigation into the authority, it becomes a party to the wrong. In equity, whatever puts upon inquiry is notice of what inquiry would disclose. *Bayard v. Farmers & M. Bank*, 52 Pa. 232.

In *Lourey v. Commercial & F. Bank*, 3 Am. L. J. N. S. 111, it was held that where bank stock had been bequeathed to an executor in trust to pay the dividends to certain persons and the executor had transferred it to one who made advances on it for the use of the executor, the bank which issued the certificate, having notice that the stock belonged originally to the testator, was bound to look to the title of the executor under the will before it permitted the transfer. In this case the transfer was made by the executor as such, and there was no proof of any actual notice to the bank that other persons were equitably interested in the stock, or that the executor was abusing his trust, and applying the stock to his own use. But Taney, *Ch. J.*, held that the bank was bound to take notice of the will when the transfer was proposed by one of the executors; that it was negligence in the bank not to examine it; and that, if it was ignorant of its contents and of the specific bequest of the stock, it was its own fault, that it must be dealt with as if it had possessed actual knowledge

years' Statute of Limitations of that State. *Codding v. Pensacola & G. R. Co.* 103 U. S. 409 (26 L. ed. 400).

Within four years.

An action for relief on the ground of fraud may be commenced at any time within four years after a discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery. *Parker v. Kuhn*, 21 Neb. 413; *Hellman v. Davis*, 24 Neb. 793.

Within five years.

An action to set aside a fraudulent conveyance of real estate is barred in five years after the fraud is discovered; and it is conclusively presumed to be discovered when the fraudulent conveyance is filed for record. *Laird v. Kilbourne*, 70 Iowa, 83.

And where the action is by an assignee, it not appearing when the debt was assigned, it is not sufficient for the plaintiff to allege that he did not discover the fraud within five years before the commencement of the action, since the assignor might have done so within that time, and before the assignment of the debt. *Fritschler v. Koehler*, 83 Ky. 78.

A suit by an administrator to avoid the fraudulent conveyance of lands by his intestate can only be sustained within five years after the death of his intestate; and it must appear by averment that it is brought within the time. *Rev. Stat. 1881, § 2334*; *Cook v. Chambers*, 5 West. Rep. 224, 107 Ind. 67.

Within six years.

An action for damages occasioned by false representations is barred in six years. *Code Civ. Proc. § 382, subd. 3*; *Miller v. Wood*, 41 Hun, 600.

The six years' limitation of the New York Code of Civil Procedure of actions "to procure a judg-

ment other than for a sum of money, on the ground of fraud," cannot begin to run as to a suit in equity in the courts of the United States until the discovery of the fraud. *Kirby v. Lake Shore & M. S. R. Co.* 120 U. S. 130 (30 L. ed. 569).

In Indiana, actions for fraud must be commenced within six years. The Statute begins to run when the fraud is perpetrated, or, where there is concealment by trick or contrivance intended to prevent inquiry, such actions may be brought within the time limited after the discovery of the cause of action. *Wood v. Carpenter*, 101 U. S. 135 (25 L. ed. 807); *New Albany v. Burke*, 78 U. S. 11 Wall. 96 (30 L. ed. 155).

An action by the vendor of land to set aside the conveyance, on the ground that the agent employed by him to make the sale was the real purchaser, must be brought within six years after his discovery of that fact. *Rev. Stat. § 4322, subd. 7*; *O'Dell v. Rogers*, 67 Wis. 168.

Within ten years.

After ten years from the perpetration of the fraud, no action can be brought to set aside a conveyance as fraudulent, it matters not when the fraud was discovered. *Fritschler v. Koehler*, 83 Ky. 79.

Against an action in equity to set aside a judgment for fraud, the Statute does not begin to run until the discovery, at any time within ten years, of the fraud. The three years' limitation prescribed in *Rev. Stat., § 3686*, does not apply to such an action. *Hyatt v. Wolfe*, 4 West. Rep. 873, 22 Mo. App. 191.

Within fifteen years.

The rescission of a contract of insurance for alleged fraud will not be granted after the lapse of more than fifteen years after the fraud was committed. *MacIntyre v. Cotton States L. Ins. Co.* 52 Ga. 473.

executors during the lifetime of the complainant. He then proceeded to show that while it might have been sold, if necessary, for the payment of debts, there was enough to indicate to the Bank that it was not needed for such a use. The Bank was therefore held liable as a party to the fraud of the executor. And see also *Stewart v. Firemen's Ins. Co.* 53 Md. 564; *Covington v. Anderson*, 16 Lea, 310; *Caultkins v. Memphis Gaslight Co.* 85 Tenn. (1 Pickle) 683; *Hill v. Simpson*, 7 Ves. Jr. 152.

The transfer in the present case was not apparently in the ordinary course of administration. It was made nearly nine years after the testator's death, and nearly six years after the period limited by the law of this State for the settlement of estates had elapsed. Moreover, it was made, not to another person, for the purpose of raising money for the benefit of the testator's estate, but to the executrix individually, for the purpose of affording security for her indorsement on the note of Whitaker. These circumstances of the proposed transfer were enough to have put the transfer officer of the Bank upon inquiry. The fact that the proposed transfer was to be made by an executrix was notice of the existence of the will. An examination of the will, the production of which, or a certified copy of the record of which, he could have required, would have disclosed the true state of the title to the stock. It was negligence in him to rely upon the statement of Whitaker as to the ownership, instead of consulting the will, and if loss is to result it should be borne by the Bank, whose agent he was, and not by the complainants.

The respondent Bank further contends that

The transfer of the stock, in the circumstances recited, was, in contemplation of equity, a fraud upon the rights of the complainants. In equity, in cases of fraud, the Statute of Limitations begins to run, not at the time the fraud is perpetrated, but from the time of its discovery. *Parham v. McCrary*, 6 Rich. Eq. 140; *Meador v. Norton*, 78 U. S. 11 Wall. 443 [20 L. ed. 184]; *Evans v. Bacon*, 99 Mass. 218; *Bertine v. Varian*, 1 Edw. Ch. 343; *Henry County v. Winnebago Swamp Drainage Co.* 52 Ill. 299.

The complainants had no knowledge of the transaction in question until 1887, and the bill was filed January 17, 1888. We think the complainants are entitled to a decree that the respondent Bank has a lien upon said sixteen shares, only to the extent of the beneficial interest of the said Mary E. Peck therein. What this interest is was discussed to some extent in the complainant's brief, but was not considered in that of the respondent Bank. We are not prepared to pass upon that matter without further argument.

Order accordingly.

The extent of the interest of Mary E. Peck was afterwards brought on for argument, and the court, after consideration of the matter, handed down the following rescript:

"The court think that the interest of Mary E. Peck in the sixteen shares, in so far as it is separable from that of her daughter, extends to only one fifth of the income thereof during her life, and that the Bank is entitled to a lien thereon to that extent, but only to that extent, for the payment of its claim against her."

ARKANSAS SUPREME COURT.

Thomas H. JONES, *Appt.*,

H. E. GLIDEWELL.

(....Ark.....)

1. Where the law makes the judge the trier of facts in cases to which the constitutional right of trial by jury does not extend, as has been done in contested election cases, his findings of fact are as conclusive on appeal as the verdict of a jury.

2. Although the supreme court will not attempt to ascertain where the weight or the preponderance of the evidence lies in a contested election case, it will determine whether or not a given finding is sustained by the testimony.

3. The conclusion of law to be deduced from a special finding of facts is a question to be finally determined by the supreme court.

4. The fact that a systematic plan to coerce a class of citizens to vote a particular

NOTE.—Election contest.

The right of the person elected to an office may be contested by any elector of the district or county. *Dalton v. State*, 1 West. Rep. 784, 43 Ohio St. 662.

The provisions of the Election Law entitled "Contesting Elections" are cumulative, and are not an exclusive remedy. *State v. Frazier* (Neb.) Jan. 7, 1890.

A proceeding to contest an election affords an adequate remedy in cases of the fraudulent acts of election officers. *Dalton v. State*, 1 West. Rep. 778, 43 Ohio St. 662.

A party challenging the validity of an election on the ground of violence, intimidation and fraud must prove the same. *Tarbox v. Sughrue*, 86 Kan. 226.

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The jurisdiction, mode of trial and whole contest are purely statutory. Courts of equity have no inherent power to try election cases. *Keating v. Stack*, 2 West. Rep. 623, 116 Ill. 191.

Proceedings to contest an election are not equity proceedings, and chancery has no jurisdiction to inquire into an election. *Jennings v. Joyce*, 2 West. Rep. 879, 116 Ill. 179; *Moore v. Holsington*, 81 Ill. 243; *Diokey v. Reed*, 78 Ill. 271.

If the contest point to a supposed criminal charge, the party charged is entitled to his trial before a jury. *Grinstead v. Scott*, 82 Ky. 88.

A voter casting a lawful ballot cannot be compelled to disclose the names of the persons for whom he voted. *Pedigo v. Grimes*, 11 West. Rep. 843, 118 Ind. 143.

See also 33 L. R. A. 703.

use of the influence of the church, threats of ostracism from society and indignities falling short of intimidation, is not sufficient to avoid the election.

5. **The privilege of secrecy is inherent** in the constitutional guaranty of a vote by ballot; and if a plan for coercing voters by requiring them to disclose the contents of their ballots to the bystanders is so generally carried out as to render the result doubtful, the candidate for whose benefit such plan was devised must purge the poll of its effect or suffer the penalty of having the favorable majority cast thereto excluded from his count of votes.
6. **The anticipation of fraud on the part of the judges of an election** will not justify the compelling of voters to exhibit the contents of their ballots to bystanders, although it is done for the purpose of serving as a check upon such fraud.
7. **The fact that some of the ballots cast at an election were stolen** before they were counted, leaving a majority in favor of a candidate who received a certificate of election on the faith thereof, will not entitle his opponent to the office unless he establishes his right thereto upon the strength of his own title; and he will not be injured by the burglary if he is permitted to prove by secondary evidence the contents of the election returns.
8. **The fact that a party is compelled to close his case** before all his witnesses have been examined is not reversible error, where the time for taking testimony was limited at his request in order that a decision might be reached before the adjournment of the term, and he was allowed more time than he said he would require when the date for closing the trial was fixed; especially where he does not show that any material evidence was thereby lost.

(April 19, 1890.)

A PPEAL by contestant from a judgment of the Circuit Court for Pulaski County reversing a judgment of the County Court in his favor in a proceeding to contest the declared result of a certain election. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. F. M. Fulk, Compton & Compton and Blackwood & Williams for appellant.

Messrs. F. T. Vaughan, T. B. Martin and W. L. Terry for appellee.

Cockrill, Ch. J., delivered the opinion of the court:

Jones and Glidewell were opposing candidates for the office of County Treasurer of Pulaski County at the general election in 1888. Glidewell received the certificate of election, and entered upon the duties of the office. Jones thereupon instituted this contest for the office. In the circuit court where the cause was heard on appeal from the county court, the judge found that Jones had received a majority of the votes cast at the election, but refused to award him the office upon the ground that the evidence showed that his adherents had been guilty of illegal practices of such character, and so wide spread, as to avoid the election. Jones contends that the finding is not warranted by the testimony, and asks us to review the

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and has never been the practice of this court, to enter anew into the investigation of issues of fact which have been tried in a law case by a circuit judge upon conflicting testimony delivered *ore tenus* by the witnesses in his presence. When a jury is waived by the parties, and the issues of fact are tried before the judge, his findings of fact are as conclusive on appeal as the verdict of a jury; and when the law makes the judge the trier of facts in cases to which the constitutional right of trial by jury does not extend, the same presumption attends his findings. *Corley v. State*, 59 Ark. 305.

The reasons which sustain the rule in the one case exist as well in the other. The statute has not established a different rule for election cases, and there is nothing in the policy of the law to warrant the courts in doing so. On the contrary, the rule was followed in *Powell v. Holman*, 50 Ark. 85, and in *Wheat v. Smith*, Id. 264; and in *Govan v. Jackson*, 82 Ark. 553, and *Patton v. Coates*, 41 Ark. 111, where there was no special finding of facts, in the nature of a special verdict, the cause was remanded to the circuit court for a new trial, whereas, if the court were at liberty to review the facts as in an equity case, judgment would have been entered here in accordance with this court's conclusion upon the facts. But while we will not enter upon an investigation to ascertain where the weight or the preponderance of the testimony lies, it is our province to determine whether a given finding or verdict has testimony to sustain it; and where there is no conflict in the evidence, or the facts are specially found, the conclusion of law or the judgment to be deduced therefrom is purely a question of law to be finally determined by this court.

In the case at bar the court found generally for the contestee, refused the contestant's request to find that the evidence of illegal practices was not sufficient to warrant the exclusion of the vote of any precinct, and made a special finding of facts. The trial consumed many days and the record is voluminous. The evidence which counsel have pointed out as material is in hopeless conflict upon most of the issues, but these conflicts have been determined by the trial judge in favor of the contestee, and that determination is, as we have seen, final. The questions are, What conclusions of fact could the trial court legally draw from the evidence? and, What judgment does the law pronounce upon those conclusions?

It may be said that a preponderance of the testimony shows that at the outset of the campaign many of the negro electors of Pulaski County evinced a desire to vote for favored candidates on the Democratic ticket—the contestee among the number; that as the election approached a bitter feeling was engendered against them among the people of their own race on that account; that it grew to such an extent that negro adherents of the Democratic ticket were silenced in public meetings, stoned in political parade, and cut off, in a great measure, from the society and sympathy of their race, or threatened with that fate if they persisted in so doing. There was testimony tending to show that ministers of the Gospel

liege of worship in their accustomed places, if they persisted in the design of voting for a Democrat; and that voting with that political party was denounced as a sin from some of their pulpits, and that the church influence with the negro race was potent. These practices were disapproved as to other negro churches, and it was shown that some of their most intelligent and influential men, who were adherents of the contestant, discountenanced all these practices and advised the electors to vote intelligently as they pleased. But that the spirit of animosity was common in the township where the black race predominates, the preponderance of the evidence establishes; and that threats of social ostracism, expulsion from the community and of personal violence and of persecutions from Republican candidates for township offices in case of success, and many indignities which the circuit judge has specially pointed out, were freely indulged in, even to the close of the polls on election day, the circuit judge has specially found from evidence which we are not at liberty to disregard. These influences operated with more or less intensity at different localities, but the court was justified in finding they were the result of a common spirit on the part of a large part of the black citizens to enforce their political views at the polls against those of their race who were disposed to differ from them. To make the plan effective, political societies were formed just before the election, in some of which it was resolved, and in others the members were sworn, to vote open or unfolded tickets. The circuit judge after finding that a systematic plan was arranged before the election to have all the negroes vote open tickets, and that it served the purpose of keeping a reasonably accurate tally for testing the returns of the election officers, and also of disclosing to his fellows any negro voter who might try to slip in what was called a "Democratic split or striped ticket," by which was meant a Union Labor or Republican ticket containing the names of Democrats pasted or written on the printed form, concluded as follows: "This [the latter] object seemed to be especially emphasized by the fact that when a colored man would try to vote without exhibiting his ticket, the cry was often raised, 'Democratic nigger,' 'Mark him,' 'Spot him,' 'We will remember him,' and various such like methods. Representative colored men were shown to be at the polls for the purpose of keeping these tallies, examining their ballots, and noting how all the colored men voted. There did not appear to be as much noisy demonstration at the polls as had been made on former occasions, but those regulations as to open tickets, voting, and keeping tallies seem to have been very persistently and strenuously enforced in many of the outside townships; and, as was said by some of the witnesses, it was almost impossible for a colored man to get in a vote for any part of the Democratic ticket, that is by 'stripping' his ticket, without it being discovered. And many of the witnesses testified that the colored men, with but few exceptions, did not like to have it known that they were voting any part of the Democratic ticket."

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at bar, but there is a marriage between the two. There is the same spirit of intolerance, on the part of the blacks to in politics through the influence of ostracism from society and fall short of intimidation as (But there is lacking in this of threats and acts of violence the judgment avoiding the would not have been reached proof in this case of threats towards negro electors to vote the Democratic ticket, and would not justify it prevailed to such an extent result doubtful. There is, ment in this case which did *Patton-Coates Case*, and the requiring voters to deposit in a manner as to disclose the standers. The effect of such an election presents an impeding determination.

The Constitution declares by the people shall be by b tions shall be free and equal power, civil or military, shall prevent the free exercise of franchise." Art. 3, §§ 2, 3.

The system of voting by ballot is generally, though not universal in the United States, and within a few years has been adopted in England. Public opinion is still partially preserving the State of Kentucky—the system claiming that it prevents the free exercise of the individual responsibility. On the other hand, that the ballot promotes tranquility and gives greater security for thought; that it presents an obstacle by undue influences by "unfolding" and concealing their tickets it checks bribery through the bribed party will vote. These, which are some of the reasons for the adoption of the system of ballot, are all based upon the "The distinguishing feature of voting," says Judge Cooley, "is that the voter is thus enabled to secure most complete and inviolable secrecy to the persons for whom he votes, and escapes the influences which, in the case of oral suffrages, may be brought to bear upon him with a view to overbear his free will and thus prevent the real expression of sentiment." "The system of ballot, if continued, rests upon the principle that the elector is to be entirely at liberty to vote for whom he pleases, and with a view to overbear his free will, and thus prevent the real expression of sentiment." "The system of ballot, if continued, rests upon the principle that the elector is to be entirely at liberty to vote for whom he pleases, and with a view to overbear his free will, and thus prevent the real expression of sentiment." Const. Lim. 604, 605.

Many of the States have prohibited a ballot from being counted, if, by color, mark or otherwise, it can be distinguished from the others. That these statutes are enacted

secure, is attested by all the adjudicated cases on the subject. "The object of such Acts," say the Supreme Court of Indiana, "is evidently to protect the elector from the undue influence and control of others and secure to him entire freedom of opinion in the exercise of the elective franchise, by enabling him to cast his vote in such manner as to prevent others, who from their particular relations to him, might, by intimidation or otherwise, seek to control his vote, from being able to determine from the color of the ticket or some distinguishing mark thereon, the party or person for whom he voted." *Druliner v. State*, 29 Ind. 308.

"The purpose is," says the Supreme Court of Minnesota, "to protect the secrecy of the ballot, so as to secure the voter against intimidation, and not to compel men to vote the 'straight ticket.'" *Quinn v. Markoe*, 87 Minn. 439.

These views of the object of the vote by ballot are sanctioned by all the authorities. *McCreary, Elections*, § 454 *et seq.*; *Williams v. Stein*, 38 Ind. 89; *Brislin v. Cleary*, 26 Minn. 107; *People v. Cicott*, 16 Mich. 288, 97 Am. Dec. 141, and *note*; *Atty-Gen. v. Detroit*, 58 Mich. 213; *Woodward v. Sarsons*, L. R. 10 C. P. 733.

So jealously have the courts guarded the right when it is secured by the Constitution, that Acts of Legislatures requiring election officers to number the ballots as they are cast, have been held to be void because they afford the opportunity of raising the veil of secrecy which the Constitution guarantees to the voter. *Williams v. Stein* and *Brislin v. Cleary*, *supra*. See *Hodge v. Linn*, 100 Ill. 397.

The framers of our Constitution saw proper to remove this difficulty, by providing in that instrument for the numbering of ballots, but the officers to whom the arrangement of secrecy is intrusted by the Constitution can divulge it only by the violation of a trust which the law declares a crime. As further evidence of the regard the law entertains for the secrecy of the ballot, a voter cannot be compelled to disclose for whom he voted by a court of justice. *Dixon v. Orr*, 49 Ark. 238.

And this results, not from any direct prohibition found in the Statute or Constitution, but because the privilege of secrecy is inherent in the constitutional guaranty of a vote by ballot.

If, then, the right is so carefully guarded against infringement by the Legislature, and public policy prohibits the enforced disclosure by the voter in the courts of the contents of his ballot, can it be held that the adherents of a candidate may, by an enforced system of open voting at the polls, which the voter cannot escape without incurring their odium, defeat the fundamental object of the ballot system? Such a view, says Judge Cooley, "would establish this remarkable anomaly, that while the law, from motives of public policy, establishes the secret ballot with a view to conceal the elector's action, it at the same time encourages a system of espionage, by means of which the veil of secrecy may be penetrated and the voter's action disclosed to the public." The practice is certainly inconsistent with the secrecy of the ballot—the question is, Does it avoid the election?

The Constitution makes a vote by ballot of
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fering with the system, and binds the elector himself to its observance. Neither can it be dispensed with. The elective franchise is an unrestrained license—it can be exercised in accordance with the law. An election by *visa voce* voting, although it should record the will of the people, would not be a constitutional election. It must be conducted in accordance with the principles of an election by ballot, or it is no election. But an election by ballot means at least the privilege of exercising the elective franchise in secret, and an election practiced at the polls which makes it impossible to believe that the electors have been benefited by the deprivation of secrecy from casting a candidate whom a majority prefer an illegal annulment of the will of the majority and not a lawful election of the unpopular candidate, whatever the ballots actually may purport to show. The secrecy of the ballot is a personal privilege which the elector may waive if it is his wish, but of which he cannot be lawfully deprived; and any practice at a poll which defeats the freedom of choice of enough electors to render the result doubtful, destroys the freedom of the election. *Patton v. Coates*, *supra*.

The use of different colored ballots by political party managers are enabled to distinguish ballots in the hand of the voter, though opposed, as Judge Cooley points out, to the provisions of the Constitution, does not, in the absence of a statute prohibiting it, avoid the election. (*Cooley*, Const. Lim. 605), because it is still the voter's privilege to change the ticket as he desires, so that the exterior shall not in fact claim its contents. But when the voter is forced to the alternative of opening his ticket to the view of clamorous by-standers at the polls, to prove that its contents are what its color indicates, or else be subjected to the ignominy which the previous threats of his race against him he will meet, he cannot be said to exercise the privilege but surrenders it under coercion.

This systematic plan of coercion which the circuit judge found was prevalent before the election, although it is inimical to the efficient administration of a republican form of government, does not, as we have seen, avoid the result, because the voters, if undisturbed at the polls, may exercise their freedom of choice without detection, and consequently without incurring the penalty attached to independent voting; but when there is no escape from incurring the penalty save by exposure of the ballot, the election ceases to be free within the meaning of the constitutional guaranty.

It is not necessary to show that a man was actually prevented from voting, or that against their wishes by reason of the practice. When the wrong is flagrant and its influence diffusive, it is sufficient that it renders the result doubtful. There is no division, I think, in the authorities upon that proposition. It was said by the court in *Patton v. Coates*, 111 Ark. 111: "There is a distinction, in the nature of things, between particular illegal votes which may be proven and exactly computed, and which certainly ought to be excluded when cast, and the effects of fraudulent con-



of the case at the special term, the time for the further examination of witnesses must be limited to one week. "Counsel for the contestant," says the record, "expressed a decided opinion for having the case decided during the proposed adjourned session, and remarked that he thought they could finish their testimony in two days after the contestee closed, if, he added, the other side does not take up too much of the time in cross-examination." The court thereupon gave notice that the contestee would be allowed four days and the contestant two in the first week of the adjourned term. When the time arrived the contestee was accorded his allotted time, and on the second day of the contestant's allotted time, which was Saturday, the court adjourned at 1 P. M.; but to compensate him for the loss of the remaining judicial hours of that day, gave him the entire day until 6:30 P. M. on the following Monday, when in accordance with his previous notice, the trial was closed.

This course of conduct does not indicate abuse of judicial discretion in the regulation of the trial. The time was limited in accordance

with no effort to show that unnecessary time was consumed in the cross-examination of his witnesses, and no surprise by the court's action is claimed. Moreover, it is not shown to what points the testimony of the witnesses was to be directed. Whether it was material or would have tended to affect the result, counsel have made no effort to establish.

Limiting the time for the examination of witnesses, the number of witnesses to a given point, stopping repetitions and irrelevant examinations, are matters necessarily confided to a trial judge. Business could not well be dispatched without it. Thompson, Trials, §§ 352, 353.

It is only when the complaining party shows that this discretion has been abused that we interfere. It is not shown in this case. Finding no error in the record, the judgment is affirmed.

Battle, Sandels and Hemingway, JJ., concur; **Hughes, J.,** having been of counsel for parties claiming under the same election, did not participate.

KENTUCKY COURT OF APPEALS.

Samuel D. McCULLOUGH'S ADMINIS-
TRATOR, Appt.,

Joseph ANDERSON et al.

(.....Ky.....)

1. A life estate in one, with remainder to another, may be created by will, and at the

same time power given to the life tenant to defeat the remainder by disposal of the property.

2. Giving a life estate to testator's widow, with authority to dispose of the whole of the property as she pleases, but providing that whatever may remain undisposed of at her death, and not disposed of by her will, shall be given to certain other persons, does not give her the absolute ownership, and her heirs do not take

NOTE.—Will; creation of life estate by.

Where an estate can fairly pass as a remainder or an absolute estate can be inferred in the first taker, it should not be construed as an executory devise. Howard v. Carusi, 109 U. S. 725 (27 L. ed. 1089). See Gifford v. Choate, 100 Mass. 343; Hale v. Marsh, 100 Mass. 468; Ramesdell v. Ramesdell, 21 Me. 383.

In all such cases the remainder over is void because inconsistent with the absolute estate expressly given or necessarily implied. 4 Kent, Com. 271.

But a fee given in the first clause of a will may prove to be so restrained by subsequent words as to reduce it to a life estate. Ulrich's App. 86 Pa. 386.

But the intent of the testator to that effect must clearly appear from the language of the will. *Ibid.*; Fairfax v. Brown, 60 Md. 50.

Where there are no words of limitation to a devise, the devise takes an estate for life only, unless, from the language there used, or from other parts of the will, there is a plain intention to give a larger estate. Wright v. Page, 23 U. S. 10 Wheat. 204 (6 L. ed. 303); King v. Ackerman, 67 U. S. 2 Black, 408 (17 L. ed. 292).

Notwithstanding any formal limitation over, the limitation over is void when the will shows a clear purpose to give an absolute power of disposition to the first taker. Ide v. Ide, 5 Mass. 500; Bowen v. Dean, 110 Mass. 438; Gifford v. Choate, 100 Mass. 343; Jackson v. Bull, 10 Johns. 19; Cutbbert v. Purrier, Jacob, 415; Bourn v. Gibbs, 1 Russ. & M. 614; Holmes 7 L. R. A.

v. Godson, 8 DeG. M. & G. 152; Howard v. Carusi, 109 U. S. 725 (27 L. ed. 1083).

Instances of devises and bequests of life estate.

A will giving to testator's wife all property, real and personal, with the right to sell and reinvest, "as she may desire, any part of the same, for her separate use and benefit, and at her death I desire that any portion of my estate remaining undisposed of shall go to my three daughters."—construed as a trust vested in the widow for the children in remainder, subject to her right to use the property for her support and maintenance during life. Harrison v. James, 7 West. Rep. 293, 30 Mo. 411.

A devise of lands to a wife expressed to be in lieu of dower, while other lands are devised expressly to a son, his heirs and assigns, passes only a life estate. Busby v. Busby (Ch. Com. Pl. Phila.) 1 U. S. 1 Dall. 226 (1 L. ed. 111).

The words "all the rest of my lands" do not import a devise of the fee, but, unless aided by the context, the devisee, whether he be sole or residuary, will, if there be no word of limitation, take only a life estate. Wright v. Page, 23 U. S. 10 Wheat. 204 (6 L. ed. 303).

The word "tenants" has never been construed in a will, independent of other circumstances, to pass a fee. *Ibid.*

A will giving to testator's wife all his estate, real and personal, "during the whole period of her natural life," and after her death giving all such property, "or so much thereof as may remain un-

A PFEAL by complainant from a judgment of the Circuit Court for Fayette County construing the will of Samuel D. McCullough, deceased, as having passed his estate to his wife in fee. *Reversed.*

The case is fully stated in the opinion.

Messrs. Breckinridge & Shelby, for appellant:

There is a wide distinction between powers and estates.

1 Sugd. Powers, *40; 4 Kent, Com. *815, 816; Wms. Real Prop. *272; *Jones v. Clifton*, 101 U. S. 225 (25 L. ed. 908); *Burleigh v. Clough*, 52 N. H. 271, 272.

The gift of an estate expressly for life, with the grant of an absolute power of disposal to the life tenant, does not constitute an estate in fee nor render invalid the remainders limited to take effect after the expiration of the life estate and the non-exercise of the power.

4 Kent, Com. *819, 585, 586; 1 Hilliard, Real Prop. 622; 2 Hilliard, Real Prop. 590; *Tomlinson v. Dighton*, 1 P. Wms. 171; *Jackson v. Robins*, 16 Johns. 588; 2 Preston, Estates, *80-82; *Glover v. Stillson*, 56 Conn. 816; *Fairman v. Beal*, 14 Ill. 244; *Kunk v. Eggleston*, 92 Ill. 533; *Caleb v. Field*, 9 Dana, 846; *Thompson v. Vance*, 1 Met. (Ky.) 676, 677; *Johnson v. Cushing*, 15 N. H. 298, 41 Am. Dec. 704, note; *Rubey v. Barnett*, 13 Mo. 3, 49 Am. Dec. 115, note; *Tiedeman*, Real Prop. § 564; 1 Sugd. Powers, *120-126; *Burleigh v. Clough*, 52 N. H. 271-272; *Denson v. Mitchell*, 26 Ala. 370.

Messrs. Beck & Thornton for appellees.

Pryor, J., delivered the opinion of the court:

In the year 1873, Samuel McCullough died

expended," to his children, gives her only a life estate in the real property. *Cox v. Sims*, 125 Pa. 522.

Under the following provisions in a will: "I give my wife all my property, real and personal, to hold and enjoy during her life, in trust for the equal benefit of herself and my son and daughter; I give to my said children, in equal parts, and their heirs, all my estate that shall remain after the death of their mother;" it was held that the wife took a life estate only. *Thaw v. Ritchie* (D. C.) 1 Cent. Rep. 838, 4 Mackey, 347.

A gift by will of personal property to a widow, "so long as she may live," gives her only a life estate therein. *Re Foster's Will*, 76 Iowa, 364.

Estates for life determinable upon events happening.

An estate for life may be determinable upon the happening of some event, as marriage or cessation of coverture, or residence on the premises by the grantees. 1 Inst. 42.

A will devising to the wife of the testator all his estate during life, "and to dispose of discretionary, according to her own free will and judgment, providing that she never marries a second time," in which event the property to go to the testator's children, gives to the widow a life estate only, and the power of disposal is limited to that estate. *Douglass v. Sharp* (Ark.) Oct. 19, 1889.

In a devise of land in fee simple to the testator's son's widow while she remained such she takes only the life estate, and cannot make a good deed in fee simple. *McGuire's App.* (Pa.) 9 Cent. Rep. 649, 7 L. R. A.

"To my most precious son I give during her life all personal, whether in possession with full and ample authority whole of it as she pleases. If she not have previously made disposition of all remaining, I desire that such remainder be herein directed to my niece, Mrs. Mary, of India house and lot on High Street, etc." The testator made other special devises, etc., within two months of his wife, to sell and dispose of the property left undisposed of by him to distribute the proceeds as he had no children, and his wife died in the year 1887, he property devised to her in controversy is between the will of the husband and the wife, each claiming the property of by the wife. The person McCullough filed his petition the devisees of the one and the other, in which he claimed the undisposed of passed by the testator. The heirs of Harriet wife, filed an answer, in which the estate passed under the husband and Distribution to the heir chancellor below adjudged this answer that on the death (testate) the real estate in Kentucky to her heirs in fee, and the her heirs and distributees; in under the will of the husband

A will, one paragraph of which gave all the estate, and another puts the control and desire of my property managed by her as she may provides if she marries again, I desire "that she may give security remaining on hand, for the purpose of my children; and, should she at her death I desire that all the property be divided equally" and the wife being appointed security,—gives to her an estate in widowhood, with power of sale remains a widow. *Best v. Bos*

A will giving the wife of testator keep for her own use as long as she may live, and giving her power, "that a part of the land to pay debts in case of her remarriage she shall have all his real and personal property, does not give her a fee in the estate, even if it be a gift in fee, in case of remarriage. *Long v. Pa*

A devise to testator's wife of personal property, to remain here, and dispose of it as shall seem to her proper, so long as she shall remain single, the express condition that, if she that part of the estate given to her may remain, shall go to other persons only what may remain of personal estate; and a deed ex

only, with the power to dispose of it as she saw proper during her life, or at her death by last will and testament, and, not having exercised that power, the estate left passed by the will; that, while the life estate might have been enlarged by the exercise of the power of disposition, the wife, having failed to exercise that power, left the estate to pass as the testator directed it should. The power of absolute disposition carries with it, nothing else appearing, the absolute property in that which is to be disposed of, but there may be such an intention arising from the language used as will limit the power or confine its exercise to the life of the first taker.

It is manifest from the provisions of this will the testator desired that his wife should use and dispose of this estate during her life as she wished, and to make a testamentary disposition of it if she saw proper; but the testator, in the event the wife declined to exercise the power given her, made provision for those who had claims upon his bounty, and intended that those devisees, after the termination of the life estate of the wife, should take what was undisposed of by her. The testator doubtless thought that the necessities or wants of the wife, or the changes that time might bring in reference to the property or its value, might require the expenditure of the whole estate, or that his wife might desire to give the estate to her own kindred instead of having it pass to his; and to provide for her wants or to gratify

proper, but if she failed to do this, then the testator provided that his own kindred should take. Here was simply a devise over after the termination of the life estate, and the failure of the life tenant to make any disposition of the property whatever under the power conferred.

In considering a question of the importance that this is, although aided by arguments on each side evidencing great ability and much research, we find it difficult to reconcile many of the cases with the general doctrine on the subject, or to follow them, unless we lose sight of the intention of the maker of this will, and adopt a rule of construction so technical in its character and application as to defeat the very object the testator had in view when executing the paper. His purpose was to give to his wife the benefit of his entire estate, and to provide for his kindred out of that portion of it that might remain undisposed of at her death. After a careful review of all the authorities to which our attention has been called, the rule sanctioned and followed is this: If the estate is given or devised generally or indefinitely, with a power of disposition, it passes a fee; but where the devisor or grantor owning the fee gives to the first taker an estate for life, with the power to dispose of the fee, no greater estate is vested in the first taker than that carved out of the fee, and vested in him by the devisor or grantor. He is given a life estate in express terms, and the failure to exercise the power gives to the remainderman the fee, be-

before remarriage passes the fee. *Little v. Giles*, 25 Neb. 318.

Life estate, with superadded power.

When a testamentary gift is expressly limited to the donee for life, a superadded power given to the donee to sell and appropriate the proceeds will not enlarge his interest into an absolute estate. *Rhode Island H. Trust Co. v. Commercial Nat. Bank*, 1 New Eng. Rep. 20, 14 R. L. 625; *Bean v. Myers*, 1 Cold. 226; *Davis v. Richardson*, 10 Verg. 290; *May v. Joynea*, 20 Gratt. 692; *Irwin v. Farrer*, 19 Ves. Jr. 86.

For an express bequest of an estate for life negatives the intention to give the absolute property, and converts the superadded right of disposition into a mere power. *Denson v. Mitchell*, 26 Ala. 360.

In such case the remainder over is valid, and at the death of the life tenant takes effect in the remainderman. *Harblson v. James*, 7 West. Rep. 298, 90 Mo. 411.

A will should, if possible, be construed according to the intention of the testator, and the power bestowed should be treated as power and not as property, in order to give effect to the limitation over. 4 Kent, Com. *435; *Jackson v. Robins*, 16 Johns. 537, 538; *Ayer v. Ayer*, 128 Mass. 575; *Burwell v. Anderson*, 3 Leigh, 343, 356-358; *Stuart v. Walker*, 72 Me. 145; *McCauley's App.* 98 Pa. 102; *Flintham's App.* 11 Serg. & R. 16; *Burleigh v. Clough*, 52 N. H. 267; *Pennock v. Pennock*, L. R. 13 Eq. 144; *Herring v. Barron*, L. R. 18 Ch. Div. 144; *Smith v. Bell*, 31 U. S. 6 Pet. 68 (8 L. ed. 322).

Where the power of disposal accompanies a bequest or devise of a mere life estate the power is limited to such disposition as a tenant for life can make, unless other words indicate that a larger power was intended. *Smith v. Bell*, 31 U. S. 6 Pet. 7 L. R. A.

68 (8 L. ed. 322); *Brant v. Virginia Coal & Iron Co.* 93 U. S. 326 (23 L. ed. 327); *Boyd v. Strahan*, 36 Ill. 355.

Such a power of disposition does not, however, enlarge the life estate into a fee unless inconsistent with an estate for life only. *Glover v. Stillson*, 56 Conn. 316; *Wetter v. Walker*, 62 Ga. 142; *Cory v. Cory*, 37 N. J. Eq. 198; *Rhode Island H. Trust Co. v. Commercial Nat. Bank*, 1 New Eng. Rep. 20, 14 R. L. 625.

A power of sale conferred upon the widow in her character as executrix, in order to enable her to accomplish certain purposes having no relation to her own benefit, does not enlarge her estate so as to make it absolute. *Robertson v. Robertson*, 120 Ind. 333.

A devise of realty to a wife for life, directing her to make large payments out of the estate to a number of relatives, etc., is only for life where the language in which the will makes such disposal of the residue shows that the devise to her was not enlarged into a fee. *Lee v. Babcock*, 11 Cent. Rep. 745, 45 N. J. Eq. 353.

Where a testator made a bequest of all his estate, real and personal, to his wife, to have and to hold during her life, and to do with it as she sees proper before her death, the wife took a life estate in the property, with only such power as a life tenant can have; and her conveyance of all her real property passed no greater interest. *Brant v. Virginia Coal & Iron Co.* 93 U. S. 326 (23 L. ed. 327); *Patty v. Goolsby*, 51 Ark. 61.

The power is limited to such disposition as a tenant for life can make, unless other words clearly indicate that a larger power is intended. *Giles v. Little*, 104 U. S. 291 (26 L. ed. 745).

It will not enable the donee to mortgage more than his life interest. *Rhode Island H. Trust Co. v. Commercial Nat. Bank*, *supra*.

a person generally or indefinitely with a power of disposition, it carries a fee, unless the testator gives the first taker an estate for life only, and annexes to it a power of disposition. . . . In that case the express limitation for life will control the operation of the power, and prevent it from enlarging the estate into a fee." 4 Kent, Com. 535, 538.

Counsel for the appellees has referred us to several cases, English and American, in direct antagonism to the doctrine laid down by *Chancellor Kent*.

In *Barford v. Street*, 16 Ves. Jr. 135, there was a devise of real and personal estate in trust to pay the rents and dividends to Mary Barford during her life, and after her death to convey according to her appointment, by deed or will, with a limitation over in case of her death in the lifetime of the testator or in default of appointment. Mary Barford filed her bill, in which she alleged that she was, by reason of the unqualified power of appointment by deed or will, invested with the fee; and it was held by Sir William Grant, *M. R.*, that she had the absolute estate, and in determining the extent of her interest he said: "An estate for life, with an unqualified power of appointing the inheritance, comprehends everything."

In the case of *May v. Joyner*, reported in 20 Gratt. 602, the devise was: "I give to my beloved and excellent wife, subject to the provisions hereafter declared, my whole estate, real and personal, and especially all real estate which I may hereafter acquire, to her during her life, but with full power to make sale of any part of the said estate, and to convey absolute titles to the purchasers, and use the purchase money for investment, or any purpose that she pleases, with only this restriction; that whatever remains at her death shall, after paying any debts she may owe or any legacies she may leave, be divided as follows," etc. The court held that the limitation over was repugnant to the grant of the fee, and that the wife was vested with the absolute estate.

In *Puliam v. Byrd*, 2 Strobr. Eq. 134, and in *Smith v. Bell*, Mart. & Y. 302, the same rule was recognized, the court remarking, in the first-named case, that "when a life estate is created in terms, and to this is added a power of ulterior disposition, unconfined as to mode or object, no case has been produced suggesting that this power is a naked power, and requiring to be executed in order to divest the grantor of the fee."

In *David v. Bridgman*, 2 Yerg. 557, the same utterance is made, the court holding that the wife took the absolute and unqualified property in the estate devised. Following these cases might be cited many others recognizing the rule under which the first taker took the fee, and, whether exercising the power of appointment or not, the limitation over in nearly all the cases was held void, as being repugnant to the fee.

In view of these authorities, it is maintained that, although the wife, Harriet, in this case, was given a life estate, there was coupled with it a power to dispose of the entire estate for her own use or that of another at any time during

ing, the fee must necessarily have passed to the wife, and such was the intention of the testator. The argument certainly strikes one with much force, for, if the dominion over the estate is such that it can be used, conveyed, devised or otherwise disposed of by the donee without restriction or limitation, the power over it is as great as any that could have been exercised by the one grantor or deviser in whom the title to the estate was originally vested. We perceive, however, no reason why such a power may not be conferred, if it appears from a consideration of the whole will that the intention of the testator was not to create a fee in the first taker. The right of absolute dominion and control, with the power to sell or devise, would, unexplained, pass the absolute estate. In this case the testator proceeds in the first place to give to his wife, Harriet, during her life, all his estate, real and personal, with the full power to dispose of the whole of it as she pleases. Now, if he had intended to vest the wife with the fee, or to give her the absolute estate without any limitation, it could have been readily expressed, and there would have been no necessity for carving a life estate out of the fee, and then conferring upon the life tenant the power to pass the fee by deed or will, if she desired to do so. The provision of the will giving the wife this power shows that upon its exercise alone could the wife pass the fee, so as to defeat the objects of the testator's bounty, designated to take the remainder. Such was his plain intention. He described the estate in express terms that the wife was to have, and that was a life estate; but as she might need the entire estate, or desire to make some other disposition of it than that I have made, I will vest in her the power to destroy the rights of those in remainder, and she may dispose of the whole of it; but, failing to do so, the remainder will pass to those who are named to take at her death.

The provisions of the will were plain and easily understood. The testator had placed it within the power of his wife to destroy the devises made to his own kindred, and by will or deed give it to those of her own blood. The wife must have known the contents of the will, and, although living for many years after her husband's death, failed or declined to disturb the devises to his kindred, but left the estate to pass in the precise manner the testator wished. The fact of a life estate having been carved out for the wife with a power to appoint or dispose of as she pleased, and if she fails to appoint or dispose of the estate to pass to others in remainder, negatives the idea that the testator intended to vest in the wife the absolute fee.

As said in *Burleigh v. Clough*, 52 N.H. 267, where a testator gives a life estate, with a general power of appointment of the inheritance, and, in case of a failure to appoint, gives the estate to other parties, the latter take a vested remainder, subject to be defeated by the exercise of the power. Where an estate is given for life only, though a general power of appointment is annexed, it does not convert the estate into a fee, but the donee takes a life estate, unless there is some manifest general in

In 16 Johns. 587, in the case of *Jackson v. Robins*, Chancellor Kent said: "We may lay it down as an incontrovertible rule that, where an estate is given to a person generally or indefinitely with a power of disposition, it carries a fee, and the only exception to the rule is where the testator gives to the first taker an estate for life only by certain and express words, and annexes to it a power of disposal. In that particular and special case the devisee for life will not take an estate in fee, notwithstanding the distinct and naked gift of a power of disposition of the reversion. This distinction is carefully marked and settled in the cases."

In *Fairman v. Beal*, 14 Ill. 244, the testator devised his farm, describing it, to his wife "during her natural life, to take the issues and profits thereof; at her death she may dispose of as she pleases." The wife under this power conveyed the land to Waddle, the court holding that the wife took a life estate under her husband's will, with the power to dispose of the inheritance, and, as the mode of exerting the power was not prescribed by the will, the conveyance made by the wife was a rightful exertion of the power.

In the case of *Glover v. Stillson*, 56 Conn. 816, the will contained this provision: "I give, devise and bequeath the residue of my estate, both real and personal, unto my sisters, Polly A. Stillson and Mary A. Stillson, for the term of their natural lives; hereby empowering my sisters to dispose of any portion of my estate, either real or personal, if they should so desire." It was held that the life estate was not enlarged into a fee by the power given to sell.

In *Funk v. Eggleston*, 92 Ill. 515, the testator devised, after the payment of debts, "two thirds of my real and personal estate," to his wife, "during her life, with full power and authority for her to dispose of the same as she may think proper," by will or otherwise, before her death. The testator then proceeded to dispose of what estate might remain undisposed of by his wife at her death. It was held that the wife had a life estate only, with power of disposition by will or deed.

In the case of *Moore v. Webb*, 2 B. Mon. 283, the life tenant had exerted the power; and in

decisive of the question.

We are to arrive at the intention of the testator in interpreting his will by looking to the whole instrument and the objects of his bounty. That his wife was first looked to as the prime object of his care is evident, but in the event she did not wish to appropriate all the estate by making a disposition of it, as authorized, he saw proper to provide for others. It seems to us the only question presented in this case is, Can a testator, in disposing of his estate by will, create a life estate in one with remainder to another, and at the same time give to the life tenant the power to defeat the remainder by disposing of the property by deed or devise to whomsoever he pleases? It will not be contended that, with a devise of the absolute fee in the first taker, a limitation over can be upheld; but there is no such devise in the will before us, but the testator, with the right to dispose of his property as he sees proper by last will, having complied with the rules of law in its execution, has given to his wife a life estate in all the property he owned, with the right to dispose of it as she may please, but if she fails to do so the devisee over takes the estate. The testator in this case is particular to name each one of those to take the remainder, making a special devise to each, and in more than one provision of the will is disposing of what his wife may leave of the devised property by reason of her failure to exercise the power given her.

We think there is a marked distinction between a power given to one who already has the fee and that given to a life tenant, who may acquire the fee by the exercise of the power given him. In the latter instance it is the manifest intention of the testator that the life tenant must acquire the fee in the mode provided by the will, and, if the power is not exerted, those in remainder take the estate. In our opinion, therefore, the devisees of the testator are entitled to the estate, and not the heirs of the wife.

The judgment is therefore reversed, and remanded, with directions to sustain the demurrer to the answer, and for proceedings consistent with this opinion.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Charles R. BATT

v.

Mary F. MALLON.

(....Mass.....)

Where a deed is made to one as trustee for a certain person without specifying the terms

of the trust the possibility that some undisclosed deed of trust may exist by which the trustee is to hold the property for the benefit of other parties *que* trust does not constitute a material defect in a chain of title otherwise perfect, which will warrant a refusal to accept it, where every reasonable attempt has been made to discover such deed of trust if one exists and all have proved unavailing, and where a decree of a court of

NOTE.—Notice: putting purchaser on inquiry.

A purchaser is charged with notice of any deed forming a part of his direct chain of title and of every collateral instrument recited or referred to, 7 L. R. A.

as well when it is unrecorded as when it is recorded. *Corbitt v. Clenny*, 52 Ala. 480; *Sticham v. Matthews*, 29 Ark. 650; *Johnson v. Thwaitt*, 18 Ala. 741; *Price v. McDonald*, 1 Md. 403; *Hudson v. Warner*, 2 Harr.



McMechan v. Griffing, 3 Pick. 150; *Parker v. Osgood*, 3 Allen, 487.

The trust is definite and complete on its face. The law is not solicitous to extend words implying notice, or putting one on inquiry beyond their plain meaning.

Cheeman v. Cummings, 2 New Eng. Rep. 350, 142 Mass. 65, 70, 71.

One who takes title after all possible inquiry is protected.

Ashton v. Atlantic Bank, 3 Allen, 217; *Sturtevant v. Jaques*, 14 Allen, 523; *Shaw v. Spencer*, 100 Mass. 388.

Messrs. I. R. Clark and Fletcher Ranney, for defendant:

There is evidence that there was a trust instrument existing. If there was such a trust instrument, it can be identified, and connected with Bray's deed by parol.

Cleveland v. Hallett, 6 Cush. 403.

Bray's deed to Vincent, trustee, gives notice that there was a trust, and raises a presumption that a trust existed, of the terms of which we are ignorant, and cannot tell what equitable estates in persons other than Mrs. Dexter may exist under it.

Sturtevant v. Jaques, 14 Allen, 523; *Smith v. Burgess*, 133 Mass. 511.

Devens, J., delivered the opinion of the court:

The Dixon will, as it has been termed, is not before us, but it is assumed by both parties that Bray, who was the trustee thereunder and his successor, had full right to convey in fee the premises the title to which has been discussed in the case at bar. If the deed made by him to "William H. Vincent, trustee for Mrs. Sarah Ellen Dexter, his heirs and assigns," did not pass an absolute fee but an estate for the life of Mrs. Dexter only, so that if the title of Vincent is vested in the plaintiff, it would not be an absolute fee, yet the confirmatory release from Bray's successor in the trust under the Dixon will and that from Cordelia Tremlett, the sole heir and *cestui que trust* under the Dixon will, to the plaintiff must have transferred to him all title to any trust resulting to the Dixon estate. *McElroy v. McElroy*, 113 Mass. 509.

It is also clear that the plaintiff has all the title both of Vincent, the trustee, and Mrs. Dexter. By Vincent's will he devised all his real estate to his wife for life, the remainder to Mrs. Dexter for the benefit of herself and children. Vincent having deceased and subsequently Mrs. Vincent, any possible life estate of Mrs. Vincent has terminated. Mrs. Dexter has now also deceased, having devised all her estate to her two daughters, who were her only heirs, and who have conveyed to the plaintiff.

The bill in the case at bar is for a decree requiring the defendant to specifically perform her contract to purchase these premises which is resisted by her upon the allegation that the title offered by the plaintiff is defective, the memorandum of sale requiring that the premises should be conveyed "by a good and suffi-

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Suffolk County, appointing a trustee in place of Vincent, deceased, terminating the trust and directing a confirmatory release to the plaintiff, which release has since been made. These proceedings, by agreement of counsel, are to be taken as if completed before the tender. *Weed v. Donovan*, 114 Mass. 181.

The defendant objects that the trusts on which Vincent held may at some future time be proved to have included other beneficiaries beside Mrs. Dexter who may hereafter make successful claim to the estate. It is agreed by the parties that if, under the facts and circumstances, the trust to Vincent does not constitute a material defect in the title, the decree is to be entered for the plaintiff.

It is suggested by the defendant that there may be some instrument or deed of trust, and that such is implied by the deed to Vincent, as trustee, under which there may be equitable rights in persons other than Mrs. Dexter, and that thus the title is clouded.

As she was the only person named for whom Vincent held in trust, it is only by some effort that an ulterior or more remote trust can be imagined. Every reasonable attempt appears to have been made to ascertain whether there was or could have been any other trust than that for Mrs. Dexter, and none such has been disclosed, nor has there been evidence of any. The trust in the deed to Vincent was complete in itself; it named the subject of the trust, the trustee and the *cestui que trust* and the only trust disclosed has been extinguished by the vesting of the estate in the *cestui que trust*. Even if the trust of Mrs. Dexter was for life only, the word "heirs" not being mentioned in connection with Mrs. Dexter's name, it was not the less a definite trust for her alone so far as it was disclosed, and any estate beyond, if any there was, this the plaintiff has by confirmatory deed from the successor of Bray, the original trustee under the Dixon will.

Again, a bona fide purchaser for value of the premises under the title now offered would be protected by the Statute, which enacts that "no trust concerning lands, whether implied by law or created or declared by the parties, shall defeat the title of a purchaser for a valuable consideration without notice of the trust." The only trust of which there is notice, or as to which there is anything to put a purchaser on inquiry, was definite and complete on its face, and has been extinguished. If there was any other trust than that for Mrs. Dexter so far as it was possible this has terminated by the decree of the probate court after full public notice and the appointment of a guardian *ad litem* to represent all parties who might then or thereafter be interested ordering the trustee appointed in place of Vincent to release to the plaintiff.

Under all the circumstances, we think the plaintiff has offered the defendant a title which is good beyond reasonable doubt. *Sturtevant v. Jaques*, 14 Allen, 523; *Smith v. Burgess*, 133 Mass. 513.

Decree for plaintiff.

(....Mass....)

It is not negligence as matter of law for a passenger upon a railroad train—who is familiar with the management of railroads, and who knows from his familiarity with the train schedule that a collision between the train upon which he is riding and one coming from the opposite direction is imminent and liable to occur at any moment because of the negligence of the company's employees—to go forward into the baggage car and, just as the trains are about to collide, to jump to the ground, so as to prevent his recovering from the company the damages thereby occasioned, even although passengers who remained their seats in the cars were not seriously injured; the question as to the existence of negligence on his part is for the jury under all the circumstances of the case.

(May 10, 1890.)

EXCEPTIONS by defendant to a judgment of the Superior Court for Suffolk County in favor of plaintiff in an action to recover damages for injuries received by plaintiff in jumping from defendant's train which was about to collide with a train coming from the opposite direction. *Overruled.*

After the evidence was all in, defendant requested the court to instruct the jury that there was no evidence to show that plaintiff was in the exercise of due care, and that therefore he could not maintain the action; and that he was wrongfully in the baggage car at the time of the injury, and that the fact of his being there contributed to his injury and he could not recover. The court refused to give these instructions, but instructed the jury, *inter alia*, as follows:

"If the plaintiff's own evidence shows that he has left the place assigned for passengers, and is occupying an exposed position, and that the injury is due, in part, to the fact of such position, then he must necessarily fail unless he can also make it appear, upon some ground of necessity or propriety, that his being in that position was consistent with the exercise of proper care and caution upon his part. If a man voluntarily, and for his own convenience, takes an exposed position which is not intended for passengers, and while in this position an emergency occurs, and he is placed in an exciting and alarming situation by the defendant's wrong doing, he cannot recover, although what he does in the emergency would have been justified had he not been in such a position.

"If the plaintiff went into the baggage car simply to ride as a passenger, or simply out of

just cause, however, the plaintiff, while riding in the smoking car where he had a right to be, was placed in a perilous situation in consequence of the defendant's failure to fulfill its obligations, and as a prudent precaution, for the purpose of self-preservation, went into the baggage car intending to jump in case the other train did approach, then the fact of his being in the baggage car just before jumping does not prevent the plaintiff from maintaining the action, if, while endeavoring to escape, he conducted himself with ordinary and reasonable prudence and discretion.

"If you find that his going into the baggage car was under a reasonable apprehension of danger, then comes another question, which is this: Was his going into the baggage car a reasonable precaution to avoid actual danger, such as persons of common prudence and discretion would naturally take or be likely to take under the same circumstances? If there was any want of due care in his own conduct which contributed to the injury, he cannot recover, however great the defendant's fault; and it must appear that under all the circumstances in which he was placed his conduct and the course he pursued was the natural, proper and prudent precaution for the preservation of his life.

"In considering this, the law does not hold a man under circumstances like those in this case where a collision is about to take place, it does not hold him bound to do the best and the wisest thing under all the circumstances. It only holds him to that degree of care which other men of prudence and discretion would exercise under like circumstances. The fact that one man ran back is not conclusive upon the question that that was the best thing for this man to do, or the fact that some men jumped off the engine is not conclusive that that was the best for the plaintiff, to run and jump off. The mere fact that one man does one thing, and one another, is not conclusive, but the jury are to take all the circumstances in the case and to say whether the course which this man pursued, under all the circumstances, was a reasonable, prudent and discreet one. If you find that it was, then the plaintiff is entitled to recover. If you find that it was not, then your verdict should be for the defendant."

The defendant excepted to the rulings and to the refusals to rule, and, a verdict having been returned in favor of plaintiff, brought the case to this court.

Messrs. H. E. Bolles and R. D. Weston-Smith, for defendant:

A passenger who rides in a baggage car, knowing it to be against the rules of the road, without invitation and in the absence of just-

NORM.—Party placed in dilemma by another's fault.

Where the wrong of one person places another in a dilemma, such wrong is to be deemed the proximate cause of injury which may result therefrom. See note to Smith v. County Court (W. Va.), 8 L. R. A. —.

So if defendant's negligence places one in a situation of peril, to escape which the latter voluntarily incurs another danger, defendant is liable 7 L. R. A.

(Harris v. Clinton Twp. 7 West. Rep. 666, 64 Mich. 447); and this is so although plaintiff may not in the emergency have pursued the course which ordinary prudence would have dictated. *Ibid.*

Where the whole transaction is the occurrence of a moment, a man is not to be held responsible for contributory negligence, if he errs in the estimate of the danger that confronts him. See note to Louisville, N. A. & C. R. Co. v. Lucas (Ind.) 6 L. R. A. 195.

See also 43 L. R. A. 833.

place contributed.
Bates v. Old Colony R. Co. 6 New Eng. Rep. 553, 147 Mass. 255, 265; *Pennsylvania R. Co. v. Langdon*, 92 Pa. 21, 27; *Peoria & R. I. R. Co. v. Lane*, 83 Ill. 448; *Houston & T. C. R. Co. v. Clemmons*, 55 Tex. 88; *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439 (24 L. ed. 503).

The mere existence of danger, or the mere knowledge of danger, or much less a mere apprehension of danger, does not in itself constitute an emergency.

A person who is in danger must still exercise due care, and a degree of care proportionate to the danger which he is in. It is only when the danger is so great, sudden and imminent that a prudent man might act instantly and without reflection, that he is excused for doing the wrong thing.

Lund v. Tyngsboro, 11 Cush. 568; *Linnehan v. Sampson*, 126 Mass. 506; *Shearm. & Redf. Neg.* 4th ed. § 89, notes and cases cited.

If due care required the plaintiff to remain where he was, in the smoking car, or to go to the rear car, and, instead of doing either, he went into the baggage car, and was negligently or wrongfully there, and while there an emergency arose which made it unsafe for him to return to the passenger car or remain in the baggage car, he cannot recover for injuries sustained in jumping therefrom, although, being in that position, due care required that he should jump, for it was his own wrongful act which brought upon him the necessity.

Lucas v. New Bedford & T. R. Co. 6 Gray, 64, 72; *Little v. Brockton*, 123 Mass. 511, 515.

Mr. Stillman B. Allen, for plaintiff:

The question whether the plaintiff was using due care in going into the baggage car, in standing there, in opening the door and in jumping, was properly submitted to the jury.

See *fuel v. New York Cent. R. Co.* 31 N. Y. 814-819; *Jones v. Boyce*, 1 Stark. 498; *Sears v. Dennis*, 105 Mass. 810; *Woolley v. Scovell*, 3 Man. & Ry. 105; *Filer v. New York Cent. R. Co.* 49 N. Y. 47; *Dyer v. Erie R. Co.* 71 N. Y. 228; *Twomley v. Central Park, N. & E. R. R. Co.* 69 N. Y. 158; *Mobile & M. R. Co. v. Ashcraft*, 48 Ala. 15; *Wilson v. Northern Pac. R. Co.* 26 Minn. 278; *Iron R. Co. v. Mowery*, 86 Ohio St. 418; *Stokes v. Saltonstall*, 88 U. S. 13 Pet. 181 (10 L. ed. 115); *Ingalls v. Bills*, 9 Met. 1; *Worthen v. Grand Trunk R. Co.* 125 Mass. 99; *South Covington & O. Street R. Co. v. Ware*, 84 Ky. 267.

Devens, J., delivered the opinion of the court:

It was admitted that the collision between the train on which the plaintiff was a passenger and another train coming in the opposite direction, occurred through the negligence of defendant's servants. The question for the jury was only whether the plaintiff was, himself, in the exercise of due care, or was guilty of negligence which contributed to his injury. The plaintiff had taken his seat in that portion of the compartment car, used, also, for the baggage, which was appropriated to smokers, and was reading his paper when the train started. He did not at first notice that the train had commenced its journey, but after it was fairly

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might occur at any moment. He threw down his cigar, passed into the baggage portion of the compartment car, stood at the door with his hand upon the knob, prepared to jump and did jump just before the two trains collided.

If a passenger is in so dangerous a situation by reason of the peril arising from an accident for the occurrence of which those who undertake to transport him are responsible, as to render his jumping a reasonable precaution, and is injured thereby, they are answerable to him in damages even if he might safely have retained his seat. *Ingalls v. Bills*, 9 Met. 1; *Sears v. Dennis*, 105 Mass. 810; *Worthen v. Grand Trunk R. Co.* 125 Mass. 99; *Linnehan v. Sampson*, 126 Mass. 506.

It is the contention of the defendant that the action of the plaintiff in going into the baggage compartment shows a lack of due care on his part which should prevent him from maintaining this action, that he was wrongfully there, without any justifying emergency, and thus that he assumed all the risks incident thereto. *Bates v. Old Colony R. Co.* 147 Mass. 255, 265, 6 New Eng. Rep. 553.

The plaintiff did not go into the baggage compartment for the purpose of being there transported, but in order to do something to save himself if a collision occurred. He was accustomed to the management of railroads, had often worked upon them, and might expect that he could, with a reasonable chance of safety, leap from the train when collision was imminent. The defendant urges that as by his own admissions it appears that plaintiff knew that the place he assumed was more dangerous than that he left, and that the rear car was the safest place in the train, these facts are conclusive that the plaintiff was negligent in going there. No such conclusion follows. The place where he sat and the rear car were safer if plaintiff proposed to do nothing to extricate himself from the peril in which the defendant had placed him. He could not in either place ascertain when the collision would take place and could there only abide the shock. Nor could he get to the end of the rear car without danger. He could not tell when the collision would occur; it might be that he would be thrown down in passing from one car to the other or in walking along the alley of the car with his back to the engine when he would be in most serious danger. Even if all the passengers in the two cars who remained in their seats in ignorance of the impending danger had escaped without injury it would not be conclusive that the plaintiff was guilty of negligence in going into the baggage car, or had recklessly or unwisely misjudged what was prudent for him to attempt. *Buel v. New York Cent. R. Co.* 31 N. Y. 814, 818.

The prudence of the plaintiff's conduct is not necessarily to be tested by the results of the accident to others in a different position. Even if it were, as the case reported shows that serious injury did result to those who were sitting or moving in those parts of the train appropriated to passengers. It is entirely possible that plaintiff would have sustained more serious injury if he had remained in his

sent or had attempted to reach the end of the rear car than he did by his action. The question whether the plaintiff acted with due and reasonable care under all the circumstances

was one peculiarly for the jury and was submitted under proper instructions.
Exceptions overruled.

COLORADO SUPREME COURT.

GERMAN NATIONAL BANK of Denver

Adolph COORS, App^t.

(....Colo....)

1. Letters to a bank by the holder of drafts indorsed in blank, and which are re-discounted by him with the bank, referring to his account and to the drafts as "collections," "discounts" and "acceptances" of the drawer, are not notice that such holder is not the absolute owner.
2. A bona fide purchaser of drafts indorsed in blank for the purpose of collection has a good title without regard to prior equities between the owner and the collecting agent.

(February 28, 1890.)

APPEAL by defendant from a judgment of the Superior Court of Denver in favor of plaintiff in an action to recover the amount alleged to be due on a promissory note to which defendant claimed certain offsets. *Affirmed.* Commissioner's opinion.

The facts are fully stated in the opinion.

Mr. Luther S. Dixon, for appellant:

No title to the acceptances passed, or could have passed, to the Bank as a holder for value, until they were actually credited upon its books.

Bank of the Metropolis v. New England Bank, 47 U. S. 8 How. 212 (12 L. ed. 409); *Sweeney v. Easter*, 68 U. S. 1 Wall. 166 (17 L. ed. 681); *United States v. State Nat. Bank*, 96 U. S. 80 (24 L. ed. 647); *Wyman v. Colorado Nat. Bank*, 5 Colo. 30; *Warner v. Lee*, 6 N. Y. 144; *Scott v. Ocean Bank*, 23 N. Y. 239; *Hoffman v. Miller*, 1 Am. L. Reg. N. S. 676, 9 Bosw. 334; *Dickerson v. Wason*, 47 N. Y. 439; *Clark v. Merchants Bank*, 1 Sandf. 493, affirmed, 2 N. Y. 380; *Wilson v. Smith*, 44 U. S. 8 How. 763 (11 L. ed. 820).

The indorsements by Coors to Everett, made for the purpose of enabling Everett to collect, did not operate to clothe Everett with the legal title as against Coors, and so of the indorsements by Everett to the Bank for the same purpose.

Bank of Washington v. Triplett, 26 U. S. 1 Pet. 25 (7 L. ed. 87).

A bank receiving negotiable paper from another bank for collection obtains no better title thereto, or its proceeds, than the remitting bank had, unless the collecting bank become a purchaser for value without notice of any defect of title.

Commercial Bank v. Marine Bank, 8 Keyes, 387.

Messrs. Patterson & Thomas for appellee.

Reed, C., delivered the following opinion:

Coors, the appellant, who was defendant below, was, and for many years had been, a brewer at Golden, Jefferson County. His sales were mostly by car lots or large quantities, shipped to various parties, and sold on time. It was his custom on the shipment to fill an order, to draw a draft payable to his own order, and, at the expiration of the time of credit given, send the draft to the consignee for acceptance, to be returned to him. F. E. Everett was a private banker at Golden, and had been for many years. In July, 1884, he died insolvent. He kept an account and transacted business with appellee in Denver, and acted as agent and correspondent of appellee at Golden. Appellant, Coors, transacted his business and kept his account with Everett until the time of his death. His accepted drafts, when returned to him, were by him indorsed in blank, and deposited with Everett, the proceeds to be placed to his credit when collected. When in need of money, he made his notes payable to Everett, by whom they were discounted. It appears that Everett was in the habit of re-discounting these notes with appellee, which fact was not known to Coors; and, as appellee was in the habit of transmitting the notes at maturity to Everett for collection, Coors did not, necessarily, know that the notes had been re-discounted.

On the 26th of March, 1884, Coors made his note to Everett for \$1,500, payable ninety days after date, with interest. On the 8th of May, Coors made a note for \$1,000, with interest,

NOTE.—Banking; ownership of paper indorsed in blank.

Where an owner of a note indorsed it in blank and placed it for collection in a bank, which indorsed it payable to its account and transmitted it to defendants for collection, who collected it without notice as to who was the real owner, defendants are liable to the owner for the amount collected, unless they have purchased the note, or made advances, or given credit upon it in ignorance of the true owner. *Hackett v. Reynolds*, 5 Cent. Rep. 621, 114 Pa. 323.

To constitute a defense to an action for the proceeds of the note brought by the owner, defendants

must show not only that balances were suffered to remain upon the faith of the remittance, but also that defendants, relying upon the remittance, incurred some liability or actually did, or forebore to do, something by which their condition was worse than it would otherwise have been. *Ibid.*

Banking; receiving paper for collection. See notes to *Freeman v. Citizens Nat. Bank* (Iowa) 4 L. R. A. 422; *Pittsburgh Fifth Nat. Bank v. Ashworth* (Pa.) 2 L. R. A. 491; *Manufacturers Nat. Bank v. Continental Bank* (Mass.) 2 L. R. A. 609; *Corn Exch. Bank v. Farmers Nat. Bank* (N. Y.) 7 L. R. A. 559. See generally, *Pickle v. People's Nat. Bank* (Tenn.) 7 L. R. A. 93, and cases referred to in note.

Both notes were indorsed in blank by Everett, and re-discounted for him by the appellee. After the death of Everett, Coors opened an account with the appellee.

On the 8th day of May, 1884, Coors drew a draft on Keppler & Co., of Leadville, payable at sixty days, for \$471.90. On the 21st of May he drew a second draft on Keppler for the same amount, at sixty days. On the 27th of May he drew his draft on Dyer & Northington, of Rawlins, Wyo., for \$748.25, at sixty days. On May 14 he drew his draft on Crystal Bros., Pitkin, Colo., for \$228, at seventy-five days, —all of which drafts were accepted by the drawees, returned to Coors, indorsed by him in blank, and deposited with Everett for collection. The drafts above described amounted in the aggregate to \$2,181.12. The drafts were not discounted by Everett, nor passed by him to the credit of Coors.

On the 24th of June, when the two notes of Coors for the sums, respectively, of \$1,500 and \$1,000, were nearing maturity, Everett applied to appellee to have the Coors drafts above described, and perhaps others, discounted to meet the maturing notes. On the 27th of June an interview was had on the same subject, at which appellee declined to discount drafts to meet both notes, but discounted drafts on Crystal Bros. for \$228, Keppler's draft of May 21 for \$471.90, and draft on Dyer & Northington for \$748.25, to pay the note of \$1,500. The note, having been paid by Everett to appellee, was returned to Everett; and Coors, knowing nothing of the discount of his drafts by Everett to pay the note, and having no knowledge of the re-discount of the note by appellee, paid the same to Everett. The other drafts, not discounted, were left with appellee for collection. When collected, the proceeds were to be put to the credit of Everett.

At the time of Everett's death, the note of Coors for \$1,000 was unpaid in the hands of appellee. There was at that time, or afterwards, a small balance in its hands, the proceeds of collections of Coors' drafts, to the credit of Everett. At the time of the bringing of this suit there was also in the hands of appellee a small balance to the credit of Coors. This suit was brought to recover the amount of the \$1,000 note. The defendant pleaded payment, and set up as counterclaims the amounts received by appellee on each of the above-mentioned drafts of Coors, collected by appellee. The case was tried by the court without a jury, who allowed as offsets the balance of proceeds of the Coors drafts to the credit of Everett in the hands of the appellee, and the balance on the account of Coors in the Bank to the credit of Coors, leaving a balance on the note of \$364.18, for which appellee had judgment. There was no serious dispute in regard to the facts. It was not claimed that Coors had any knowledge of the re-discounts of the notes made by Everett with appellee, nor the transfer and discounts of his drafts left for collection with Everett; nor is it claimed that appellee had any actual notice or knowledge that Everett was not the owner of the drafts of Coors.

The contention for Coors is: *first*, that un-
7 L. R. A.

second, that by the language used in the letters of Everett in regard to the Coors drafts, appellee was notified, or should have been, that they were not the property of Everett, but of Coors. The language relied upon was as follows:

"Golden, Colo., July 8th, 1884.

"W. I. Jenkins, Esq., Cashier, Denver.

"Dear Sir: I advise Cr. to-day of 15,844. A Coors, due Ju. 27, \$1,500, int. \$5, \$1,503. Of the list of collections left with you of his, amt'g \$2,617.05, \$697 has been paid, & placed to Cr. my ac.," etc.

Also of July 12th:

"I note disc'ts Coors, \$1,438.55, from list, leaving our 20,144, \$471.90, due 10th, and extended five days as a collection for Cr. when paid."

And from a memorandum made by Everett, and handed Jenkins, cashier of appellee, dated June 27, on which Everett had written:

"Discount A. Coors accept's, coll'n No. 20,144. Rem. June 8th, Keppler & Company, Leadville, due June 23 & 26th, \$468.75," etc.

We do not think the position of counsel on this last point tenable, and that there was anything in the language used by which appellee could be informed of anything in regard to the ownership of the drafts. It can only be regarded as description to designate the paper. We can find no authority, and none is cited by counsel, where it is held that any such descriptive language can be construed to indicate ownership; and certainly no such interference could arise when Everett was the holder of them, properly indorsed without limitation, and dealing with them as his own.

The only question to be determined is whether Coors, having indorsed the drafts in blank to Everett for the purpose of having them collected and the proceeds placed to his credit, and Everett, wrongfully assuming to be the owner, could sell and dispose of them, and appellee, without knowledge of the want of ownership in Everett, could be invested with good title, so as to retain the proceeds as against Coors.

It is a well-settled rule of law that one who acquires negotiable paper, in the usual course of business, before maturity, in good faith, for a valuable consideration, from one capable of transferring the same, becomes a bona fide holder, and takes it divested of all prior equities. See § 4, chap. 1, Code.

And it has been so held in this court. *Wyman v. Colorado Nat. Bank*, 5 Colo. 30, and *Merchants Bank v. McClelland*, 9 Colo. 608.

It is contended by the able counsel of appellant that "it was the duty of the bank proposing to purchase from Everett to have sought Coors, and ascertained from him whether Everett had any authority to sell or not." This is not in harmony with the law or the decisions of this court.

In *Merchants Bank v. McClelland*, *supra*, it was said by the present chief justice, at page 610, 9 Colo.: "If there is nothing upon the face of a negotiable instrument or in the written indorsement or assignment to notify the assignee that the instrument was originally given upon an illegal consideration (gambling

recover as against the maker. This is true, even though such assignee be in possession of facts or circumstances sufficient to arouse suspicion in the mind of a person of ordinary prudence, and though he is guilty of negligence in not first following up such information, for the purpose of discovering the fraud or illegality to which the suspicious circumstances may seem to point." The rule adopted in this court is that of the federal courts and a majority of the States. See *Bank of Metropo's v. New England Bank*, 42 U. S. 1 How. 234 [11 L. ed. 115]; 47 U. S. 6 How. 212 [12 L. ed. 409]; *Swift v. Smith*, 102 U. S. 442 [26 L. ed. 193]; *Hotchkiss v. Nat. Shoe & Leather Bank*, 88 U. S. 21 Wall. 354 [22 L. ed. 645]; *Murray v. Lardner*, 69 U. S. 2 Wall. 110 [17 L. ed. 857]; *Brown v. Spofford*, 95 U. S. 474 [24 L. ed. 508].

We are aware that in the State of New York, and some other States, following its decisions,

founded in reason, and necessary in the interest of commerce, that requires that such paper should be allowed to pass from hand to hand with the greatest freedom possible consistent with safety; and it works no injustice to the owner of paper to say that he shall be held responsible for his own acts, and not an innocent party who has been misled by them. Coors could by a word have limited his indorsement so as to protect himself and others. That he failed to do so was not the fault of appellee, but his own, and he must suffer the loss according to a principle so well known that a repetition here is unnecessary. The judgment should be affirmed.

Pattison and Richmond, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, *the judgment is affirmed.*

NEW YORK COURT OF APPEALS (2d Div.).

**Esther K. PORTER et al., Admr., etc., of
Oliver Porter, Deceased, Appls.,
v.**

Franklin PIERCE et al., Repts.

(.....N. Y.)

Sunday is to be deemed a dies non in determining a creditor's right to redeem premises sold on execution from a prior redeeming creditor under a statute requiring him to redeem within twenty-four hours after the former redeems, where his redemption must be made at the sheriff's office, which the law does not require to be kept open on Sunday. In such case redemption may be made on the following Monday, if the prior redemption was made on Saturday.

(April 15, 1890.)

APPPEAL by plaintiffs from a judgment of the General Term of the Supreme Court, Fourth Department, affirming a judgment of the Cortland Special Term dismissing the complaint in an action brought to set aside a sheriff's deed to a creditor who had attempted to redeem certain premises from an execution sale, and to compel the giving of a deed to plaintiffs. *Affirmed.*

The facts sufficiently appear in the opinion.

Mr. O. U. Kellogg, for appellants:

If the last day of the fifteen months happens on Sunday the redemption may be made on that day, if the sheriff is at his office, and accepts the tender.

Story v. Elliot, 8 Cow. 27. See *Sayles v. Smith*, 12 Wend. 57.

NOTE.—Sunday. See notes to *Henderson v. Reynolds* (Ga.) 7 L. R. A. 327; *Anderson v. Bellinger* (Ala.) 4 L. R. A. 680; *Western U. Teleg. Co. v. Yopst* (Ind.) 3 L. R. A. 224.

A non-judicial day. See notes to *Parsons v. Lindsay* (Kan.) 3 L. R. A. 652, 7 L. R. A.

A deed made and delivered on Sunday passes the title.

Balsford v. Every, 44 Barb. 618, and cases there cited.

The redemption on Sunday is not prohibited by statute or by the common law.

See *People v. Luther*, 1 Wend. 43.

Sunday has, in no case, been excluded in the computation of statute time.

Ex parte Dodge, 7 Cow. 147.

The redemption of land, sold under execution, is a ministerial act, not a judicial act, and must be made within the time limited.

Rice v. Davis, 7 Lans. 393.

An ordinary contract is valid although made on Sunday.

Boynton v. Page, 13 Wend. 425-429; *Maxson v. Annas*, 1 Denio. 204-206; *Miller v. Roessler*, 4 E. D. Smith, 234; *Shuman v. Shuman*, 27 Pa. 90.

Messrs. Pierce & Stone, for respondents:

The "twenty-four hours" contemplated by the Statute within which the second redemption may be made are twenty-four business hours, and by the general and universal custom of the country, in contemplation of which it must be presumed the Statute was passed, Sunday is not a day of business, and the running of statutory time was suspended during the twenty-four hours of November 1.

Thayer v. Felt, 4 Pick. 354; *People v. Luther*, 1 Wend. 42; *Salter v. Burt*, 20 Wend. 205; *Howard v. Ives*, 1 Hill, 263; *Anonymous*, 2 Hill, 375; *Whipple v. Williams*, 4 How. Pr. 28; *Van Vechten v. Paddock*, 12 Johns. 178; *Vanderwerker v. People*, 5 Wend. 530; *Campbell v. International L. Assur. Society*, 4 Bosw. 299; *Anaemia Brass & Copper Co. v. Conner*, 5 Cent. Rep. 408, 103 N. Y. 502, 509; *Edmundson v. Wragg*, 104 Pa. 500, 49 Am. Rep. 590; *Oressey v. Parks*, 75 Me. 387, 46 Am. Rep. 406, and cases collected at p. 409; *Barnes v. Eddy*, 13 R. L. 25; *Shaw v. Williams*, 87

See also 8 L. R. A. 427.

Ind. 158, 28 Alb. L. J. 68, 69; *Ormsby v. Louisville*, 79 Ky. 197, 20 Am. L. Reg. N. S. 209; *Acey v. Stewart*, 2 Conn. 69; *Barrett v. Allen*, 10 Ohio, 426; *Hammond v. American Mut. L. Ins. Co.* 10 Gray, 806; *Bazley v. Bennett*, 83 Ga. 146; *Kuntz v. Tempel*, 48 Mo. 71.

Bradley, J., delivered the opinion of the court:

The premises in question were sold by the defendant Borthwick as sheriff of the County of Cortland, upon two executions issued upon judgments held by the defendant Pierce as administrator, etc., of Thomas Galvin, deceased, against Mary Sullivan, and bid off by Pierce as such administrator on the first day of August, 1884. No redemption was made within the year, and on Saturday, the 31st day of October, 1885, at 12 o'clock noon, Esther K. Porter, as assignee of Oliver Porter of a judgment recovered on that day by him against Mary Sullivan, redeemed the premises from the sale by paying the sheriff the amount paid for them on such sale with interest, and by presenting the requisite papers for such purpose to the sheriff who delivered to her the certificate required by the Statute. Code, § 1489.

The next day was Sunday, and on Monday following (November 2, at 11:15 A. M.), the defendant Pierce, as such administrator, proceeded to redeem the premises upon a judgment recovered by him as such administrator against Mary Sullivan November 19, 1884, and then took a certificate of redemption from the sheriff, who afterwards made to him a deed pursuant to such redemption. The certificate made to Esther K. Porter was afterwards assigned by her to the plaintiff, and he brought this action to set aside that deed and to require the defendant Borthwick to make to him a deed. And the ground upon which such relief is sought, is that the redemption by the defendant Pierce was not made within the time in which by the Statute he was permitted to make it.

The statutory provision from which was derived the right to make that redemption is that "a creditor who might have redeemed within fifteen months after the sale, . . . may redeem from any other redeeming creditor, although the fifteen months have elapsed; provided that he thus redeems within twenty-four hours after the last previous redemption." Id. § 1454.

This was not done by the defendant within the requisite time, and his redemption was ineffectual if Sunday should have been included within the time in which he was permitted to make it. That day, like any other, occupies time, and, except so far as prohibited by the common law or the Statute, transactions on that day, not in themselves immoral, are not unlawful or invalid. *Story v. Elliot*, 8 Cow. 27; *Sayles v. Smith*, 12 Wend. 57.

But for reasons founded in public policy, the maxim *dies non juridicus* is given a liberal construction and effect, so as to embrace in it that which may be deemed within its purpose and meaning. *Field v. Park*, 20 Johns. 140; *Van Vechten v. Paddock*, 12 Johns. 178.

It is now quite well established that the observance of the Sabbath day as such is a right which may be enjoyed without molestation by transactions of a secular character. Hence 7 L. R. A.

Sunday cannot, for the purpose of performing a contract, be regarded as a day in law, and when it is due on Sunday, performance on Monday following is in time. *Acey v. Stewart*, 2 Conn. 69, 7 Am. Dec. 240; *Salter v. Burt*, 20 Wend. 205; *Howard v. Ives*, 1 Hill, 263; *Campbell v. International L. Assur. Society*, 4 Bosw. 299.

When the Statute requires that something be done within a given time, it must be so done, and although the last day be Sunday, it must be embraced in the computation of the time. *Ex parte Dodge*, 7 Cow. 147; *People v. Luther*, 1 Wend. 42.

This is not uniformly the rule applied when the time is less than a week. *Anonymous*, 3 Hill, 375.

But, however that may be, the situation in the present case was peculiar; and although the transaction of the redemption made by the defendant may not come within acts prohibited by law to be performed on Sunday, there was a difficulty in the way of the exercise of that right by him on that day, arising out of the Statute, which provides that a redemption made by a creditor on or after the last day of the fifteen months, must be made at the sheriff's office. Code, § 1455.

And it cannot then lawfully be made elsewhere. *Morris v. Purvis*, 63 N. Y. 225.

The sheriff is required himself, or by his under-sheriff or deputy, to be in attendance at the sheriff's office, and keep it open on that day, and each day thereafter on which redemption can be made. But the sheriff is not required to have his office open on Sunday. 3 Rev. Stat. 245, § 55.

The defendant, therefore, had not the right to make the redemption on Sunday. The purpose of the Statute was that a judgment creditor should have such right, and for its accomplishment twenty-four hours after the making of the next previous redemption. If the Statute should be given the construction and effect to include Sunday within that time when the last day of the fifteen months falls on Sunday, the redemption made on the Saturday before might operate to defeat the right of redemption by another creditor however diligent he might be in his attempt to exercise it. The effect would be the same if the last day of the fifteen months was Saturday and a redemption made on that day. It might be made at the last moment of Saturday, and the twenty-four hours would expire with Sunday. In practical effect the lawful denial of the exercise of the right of redemption on Sunday would be no different than the inhibition of it by law on that day. The Statute is entitled to a construction which will permit its purpose to be effectuated. The legislative intent evidently was to permit, within the time prescribed, any creditor entitled to do it, to effect redemption by way of protection of his right as such; and that he should have twenty-four hours for that purpose. It would therefore seem that to carry out such intention when Sunday intervened, it must be deemed *dies non* within the contemplation of the Statute. And the statutes before referred to may be treated as *in pari materia*, and taken to provide for redemption within twenty-four hours of the day or days in which the sheriff is required to be in attend-

ance at his office, to enable the creditor to exercise his right in that respect. Any other view might deny to the Statute the apparent purposes of its makers. If these views are correct the redemption by the defendant on Mon-

day, the 2d day of November, was in due time and regularly made, and *the judgment should be affirmed.*

All concur, except Follett, Ch. J., not sitting.

KENTUCKY COURT OF APPEALS.

DEPOSIT BANK of Georgetown, *Appt.*

FAYETTE NATIONAL BANK.

SAME v. SECOND NATIONAL BANK of Lexington.

(...Ky....)

A bank which pays forged checks, purporting to have been drawn by one of its depositors, to other banks which had in good faith advanced money on them to the forger, must, as between itself and the other banks, bear the loss, especially where the depositor lived near by and the checks continued to be presented and paid for several months before the forgery was discovered.

(March 8, 1890.)

APPEALS by plaintiff from judgments of the Circuit Court for Fayette County dismissing its petitions in actions brought to recover back the money which it had paid on certain forged checks, from the banks by which they had been cashed and forwarded for collection and to which payment had been made. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. A. Duvall, Breckinridge & Shelby and William Lindsay for appellant.

Messrs. J. D. Hunt and Beck & Thornton for appellees.

Pryor, J., delivered the opinion of the court:

These two cases involve similar questions, and have therefore been considered as one case. The Deposit Bank of Georgetown, the appellant in this court and the plaintiff below, paid a number of forged checks purporting to have been drawn on that Bank by one of its depositors, Thomas J. Burgess. The checks were

successively presented through a period of four or five months, there being eighteen in number, and were all paid by the Georgetown Bank in good faith, and before any discovery of the fraud had been made. All the checks were drawn in the name of Thomas J. Burgess, who was a regular depositor and customer of the Bank, the first check having been paid early in December of the year 1883, and the last check paid in April, 1884. The name of Burgess was discovered to be a forgery on the 8th of May, and notice given to the appellees, the two Banks to whom these checks were presented and paid, on the 9th of that month. John R. Wolfe, who had committed all these forgeries, had at one time been a clerk in the Bank of the appellant, and was in that way familiar with the account and deposits of Burgess. The checks were drawn by Thomas J. Burgess, whose name was forged, in favor of Williamson & Wolfe, on the appellant, and were presented to the two Lexington Banks by John R. Wolfe, the payee, and payment asked of these Banks. The Fayette National Bank, before advancing the money on the first check, made inquiry as to the account of Burgess, and, receiving a satisfactory response, upon the indorsement made by Williamson & Wolfe, paid over the money. Wolfe was identified, and no reason on the part of the Fayette National Bank existed for indulging a suspicion as to the bona fides of the transaction. There were sixteen checks in all taken up by this Bank, and forwarded to the drawee, the appellant. They were taken in the usual course of business, and when sent to the Georgetown Bank charged to the account of its depositor, Burgess. There was in fact no such firm as Williamson & Wolfe, but the fictitious firm name used by Wolfe in the perpetration of his forgeries. Both the appellant and the appellees acted in good faith, the former believing that Burgess was in fact the drawer of the paper, and the latter advancing its money on the

NOTE.—Banking; payment of forged paper.

The banker is bound to know the handwriting of his customer, and the drawee is bound to know the signature of his drawer; and one who parts with money by reason of his negligence in this regard must bear the loss. *Price v. Neale*, 3 Burr. 135; *Wilkinson v. Lutwidge*, 1 Strange, 648; *Jenys v. Fowler*, 2 Strange, 948; *Weisser v. Denison*, 10 N. Y. 68; *Commercial & F. Nat. Bank v. First Nat. Bank*, 30 Md. 11.

The acceptor of a check is bound to know the drawer's handwriting and by his acceptance to take this knowledge upon himself. *Levy v. Bank of U. S.*, 4 U. S. 4 Dall. 234 (1 L. ed. 814), 1 Binn. 38; *Bank of U. S. v. Bank of Georgia*, 23 U. S. 10 Wheat. 354 (6 L. ed. 840).

The drawee who has paid upon a forged signature is held to bear the loss because of his negligence. *L. R. A.*

Genoe. Bank of Commerce v. Union Bank, 3 N. Y. 230; *Goddard v. Merchants Bank*, 4 N. Y. 147; *Allen v. Fourth Nat. Bank*, 5 Jones & S. 187; *First Nat. Bank v. Ricker*, 71 Ill. 459; *Bernheimer v. Marshall*, 2 Minn. 78.

Where a party to whom a forged check is offered sends it to the bank on which it is drawn, for information, the law presumes that the bank has knowledge of the drawer's signature and of the state of his account, and it is responsible for answers on these points. *Espy v. First Nat. Bank*, 38 U. S. 18 Wall. 604 (21 L. ed. 847).

Payment to a stranger upon an unauthorized indorsement is not an acceptance of a check, authorizing an action by the real owner to recover its amount as upon an accepted check. *First Nat. Bank v. Whitman*, 34 U. S. 871 (24 L. ed. 229). See *note* to *Goussier Nat. Bank v. Bingham* (N. Y.) ante, 595.

drawer.

Which of the Banks should lose the money, — the Bank at Georgetown, where the depositor, Burgess, whose name had been forged, deposited his money, or the Banks at Lexington, where the money was paid to Wolfe under the belief that the checks were genuine, and Burgess in fact the drawer? It is evident that the Bank at Georgetown honored the checks drawn upon it by Burgess, for the reason that its officers believed the name of the drawer was genuine; and, if the liability of the Lexington Banks to refund this money is to be determined by the well-known rule of law applicable to the payment of money through a mistake of fact, the judgment in this case is erroneous. It is insisted, however, that it is a rule of commercial law long since recognized, and now firmly established, applicable at least between parties equally innocent of fraud, that the Bank or its officers must know the signature of its depositor; and if such a doctrine is made to apply in this case, the appellant is the loser, and the judgment dismissing its petition was proper.

The rule laid down by *Lord Mansfield* is that, if the banker or drawee makes a payment or gives credit upon the strength of a forged signature, the loss must be his, as between himself and the holder. "He has not known what he is bound to know." *Price v. Neale*, 3 Burr. 1355.

This doctrine of commercial law has been followed and recognized by nearly all the courts of the country, and as said by *Mr. Justice Story* in the case of *Bank of U. S. v. Bank of Georgia*, 23 U. S. 10 Wheat. 333 [6 L. ed. 334], delivered in 1825, has never been departed from, and, in the earlier cases on the subject, able jurists, in alluding to this rule, regarded it as essential as a rule of justice and right between business men. *Mr. Morse*, in his work on Banking, has collated the authorities, and presented what he terms the modern doctrine on this subject; but after a careful examination of the authorities referred to, it will be found that the decided weight of authority is with *Lord Mansfield*, and the rule laid down in *Price v. Neale* is criticized only as being too sweeping in its character. Nor is it just to say that the rule adopted requiring the bank to know the signature of its depositor is without an exception; for it is undoubtedly true that the neglect or knowledge of intervening parties who come into the possession of the check, and receive the money on it from the bank where it is payable, will in some instances be of such a character as to enable the bank to recover back the money. This doctrine is recognized by *Mr. Daniel* in his work on Negotiable Instruments; and, while doubting the justice of the rule recognized by nearly all the authorities, under which the bank is required to know the signature of its depositor, he proceeds to say that when one knows that it is a forgery, or takes it "under circumstances of suspicion, without proper precaution, or whose conduct has been such as to mislead the bank," the money may be recovered back. Vol. 2, p. 669.

The case of *National Bank of North America v. Bangs*, reported in 106 Mass. 441, and relied on by 7 L. R. A.

the order of E. D. & G. W. Bangs, on the National Bank of North America. Bangs indorsed the check, and the bank paid the money, and, when discovering the forgery, notified Bangs, the payee and indorser, and sued to recover the money back, and a judgment was obtained. This, we think, was proper, as it would be an exceedingly harsh rule to permit one who negotiates with the payor, and obtains his check payable to the use of the party obtaining the money, who then indorses it to a bank, to hold on to the money when the payee has himself contracted with the payor, and given credit to the payor by his indorsement, that led the bank to believe the paper was genuine.

The case of *Ellis v. Ohio L. Ins. & Trust Co.*, reported in 4 Ohio St. 628, sustains this view of the question. The case relied on is unlike the case before us. The Banks at Lexington took the checks in the usual course of business, with the indorsement of the payee, and then indorsed the paper for collection, forwarding it to appellant's Bank, where the money was credited to the Lexington Banks, and charged to the account of the one supposed to be the bona fide drawer of the paper.

In the case relied on, of *National Bank of North America v. Bangs*, it is said: "If the suit were between the bank or drawee and a party who took the check in the usual course of business, finding it in circulation, or even by first indorsement from the payee, the loss would fall upon the bank; because, having greater means and opportunity to become familiar with the handwriting of their correspondents or depositors, the law presumes that drawees will know their signatures and be able to detect forgeries. . . . But this responsibility, based upon presumption alone, is decisive only when the party receiving the money has in no way contributed to the success of the fraud, or to the mistake of fact under which the payment was made."

There is a manifest distinction between the case of one who is both the payee and indorser of the check, and who negotiates directly with the payor in the loan or advance of the money for which the check is given, and a bank taking a check by indorsement from the payee in the usual course of business, with no ground of suspicion, and that receives the money on the check from a bank where the funds of the drawer are deposited. One of the two innocent parties must suffer, and there must be some rule of commercial law to guide banks and business men in this character of business transactions. Therefore, when a bank has the means of knowing the signature of the drawer of a check upon it by reason of the drawer being its depositor or customer, the relation between the bank and its depositor is such that the bank must be presumed to know that the signature is genuine when making payment.

The case of *Ellis v. Ohio L. Ins. & Trust Co.*, reported in 4 Ohio St. 628, recognizes this rule, and says the foundation for it is: "The party is supposed to know his own handwriting in the one case, or that of his customer or correspondent in the other, much better than

bility of determining as to the genuineness of the instrument, and, if he fails to discover the forgery, imputes to him negligence, and, as between him and the innocent holder, compels him to suffer the loss."

After conceding the general doctrine on the subject, the court proceeds to say that the holder may by his negligent conduct deprive himself of the benefit of this rule, and that case was decided upon the ground that the holder had contributed to induce the payee to believe the paper was genuine. All the cases cited in the text-books or relied on by the appellant, while they criticise the rule as harsh, only make the particular case under consideration an exception to the rule, and permit the recovery by the drawee for the reason that the holder of the paper receiving the money was himself neglectful, and caused the loss, or by his conduct made the drawee believe the paper was genuine. These cases are exceptions to the rule, but all recognize the doctrine that where the parties are equally innocent the drawee paying the money must suffer the loss. The two cases—one found in 22 Neb. 769, of *First Nat. Bank v. State Bank*, and the other of *People's Bank v. Franklin Bank* (Tenn.) 6 L. R. A. 724,—go further in discarding the rule than any cases to which our attention has been called; but in those cases the banks upon which the checks were drawn were permitted to recover upon the ground that the banks paying the checks had neglected to make the proper inquiry as to the identity of the holder, who was a stranger, and that this was such a want of precaution as deprived the bank advancing the money of any superior equity as against the bank upon which the checks were drawn. The court expressly says in the Nebraska case that the loss may therefore be traced directly to the negligence of the plaintiff in error.

Whether the facts of those cases justified the conclusion reached is not necessary to inquire, as, after a careful review of all the authorities, it is found that the general doctrine fixing the liability on the drawee in such cases is fully sustained.

In the case of *Espy v. First Nat. Bank*, reported in 85 U. S. 18 Wall. 604 [21 L. ed. 947], the money was paid on a raised check, neither party being in fault. It was held that the money could be recovered back as having been paid without consideration. The principle involved in the case being considered was not discussed in that case, nor could it have been well applied, as the bank paying the money could not be presumed to have had knowledge of the fraud practiced by the holder in raising the amount of the check that had been given by its regular depositor.

We find no court as rigid in adhering to the rule that a bank is bound to know the signature of its depositor on this kind of paper as the Supreme Court of the United States.

In *Lery v. Bank of U. S.* 1 Binn. 27, a forged check, drawn on a bank was accepted and carried to the credit of the holder when the fraud was discovered, in a few hours after, and it was held that the bank was the loser. And the Supreme Court in the case of *Bank of U. S. v. Bank of Georgia*, when discussing the doctrine that the acceptor is presumed to know the drawer's

in which the general doctrine thus asserted has been shaken, or even doubted; and the diligence of the counsel for the defendants on the present occasion has not been more successful than our own."

In the case cited, reported in 23 U. S. 10 Wheat. 333 [6 L. ed. 334], the Bank of Georgia issued originally the bank notes that when put in circulation were fraudulently altered. The Bank of the United States, coming into possession of the notes, presented them to the Bank of Georgia, and the latter received them as genuine, placing the amount to the credit of the United States Bank. The forgery was discovered, and the Bank of Georgia claimed that the Bank of the United States should lose the money. The court held that the Georgia Bank must lose, as it was bound to know its own paper.

There is a manifest distinction between the last-named case and that of *Espy v. First Nat. Bank*, reported in 85 U. S. 18 Wall. 604 [21 L. ed. 947]. In the *Case of Espy*, if the Cincinnati bank had recognized the name of the drawer as genuine, it could not well have known that the check had been raised. It was not the bank's own check, but that of another; and while, as between parties equally innocent, it is presumed to know the signature of its regular customer on the class of paper in question, it is not presumed to know that the amount is all correct, or that no fraud has been perpetrated in that regard.

While it rests upon one signing his own name, or that of a bank affixing its signature, to notes to pass as current money, to know that the signature is genuine, it also rests on a bank, where checks are drawn upon it in the name of its customer, to know his signature; and instead of the party to whom the money is paid being required to show negligence in the bank paying the money, it devolves on the drawee to show negligence in the indorser or holder who in good faith has received the money before the drawee can escape liability. When the parties are equally innocent the drawee is the loser. There is no precedent in this court on the question. Still, we are not inclined to follow the views of text-writers, in the face of so many adjudications on the subject, and with no case presented that goes further than to modify the rule in cases where bad faith or negligence is to be attributed to the holder or indorsee when taking the check. Besides, it appears from the finding of facts in this case that Burgess, the real depositor, and whose name has been forged, lived near Georgetown, in which the appellant is located, and was one of its largest depositors. These checks were continued to be paid during a period of nearly five months before the forgery was discovered,—a fact, it seems to us, that should be decisive of this case; and while the appellant, by its officers, was acting all the while in the best of faith, believing that the signature of Burgess was genuine, the length of time these checks were being received for collection, and paid without question, by the appellant, must necessarily fix the responsibility where it was placed by the court below.

The judgment denying the right of recovery by the appellant is therefore affirmed.

Charles E. HUBBELL, Assignee of Wilkin-
son & Co., Impleaded, etc., *Resp.*

(117 N. Y. 384.)

1. The title to commercial paper payable on demand which is sent by one bank to another for collection and so indorsed, does not pass to the latter bank prior to its collection, although it is accompanied by a letter stating that it is sent "for collection and credit" and its amount is credited upon the account of the transmitting bank immediately upon its receipt by the collecting bank in pursuance of a custom existing between the two banks in regard to their dealings.
2. The assignee of a bank holding such paper uncollected takes no title thereto, and if he collects the same it is his duty to remit the proceeds to the transmitting bank; and the fact that he has expended such proceeds in the payment of the debts of his assignor in good faith, without notice of the claim of the transmitting bank, and under an order of court for the payment of a dividend to creditors, is no defense to a suit by the latter to recover them.
3. As to the proceeds of the paper collected by the bank before its assignment and paid out by it in the usual course of its business in payment of its debts, the transmitting bank occupies a position no different from that

of other creditors of the assigning bank, where its custom was to remit the proceeds of such collections once a week and the identical moneys collected upon the paper were not expected to be sent to the transmitting bank.

4. It is not such laches on the part of the transmitting bank to fail for sixteen days after the recording of the assignment to give notice of its claim and make demand upon the assignee for the proceeds of the paper belonging to it as will bar its right of action to recover them from the assignee; especially where there was no reason to suppose that he would use its money to pay his assignor's debts.

(November 26, 1880.)

APPEAL by plaintiff from a judgment of the General Term of the Supreme Court, Fourth Department, affirming a judgment of the Onondaga Special Term in favor of defendant Hubbell in an action to recover the proceeds of certain commercial paper sent to Hubbell's assignor for collection. *Reversed.*

Statement by Peckham, J.:

This is an appeal from a judgment of the general term, affirming a judgment in favor of the respondent, Hubbell, entered upon the decision of a single judge at special term. The following are the material facts, as found by the justice trying the cause: The plaintiff is a duly constituted banking corporation, located and doing business in the City of New York.

NOTE. — Bank collections: collection of paper indorsed in blank.

If a bank to whom paper indorsed in blank is sent for collection has notice that the transmitting bank has no interest in such paper, and that it acted merely as agent in forwarding the paper, the collecting bank cannot retain the proceeds thereof for a general balance of the account of the transmitting bank; even if there was no notice the collecting bank has no lien as against the true owner unless advances have been made on the faith of it. *Bank of the Metropolis v. New England Bank*, 47 U. S. 6 How. 212 (12 L. ed. 403); *Hackett v. Reynolds*, 5 Cent. Rep. 521, 114 Pa. 323; *Van Amee v. Bank of Troy*, 8 Barb. 312.

Where a person deposits a check with a bank for collection in the absence of any special contract, the property in the check remains in him although it is indorsed in blank, and the bank merely becomes his agent for its collection. *Balbach v. Freilinghuyse*, 15 Fed. Rep. 675.

A bank receiving from another for collection notes indorsed in blank obtains no better title to them or the proceeds than the remitting bank had, unless it becomes a purchaser for value without notice of any defect of title; and the mere fact that it has a general balance against the remitting bank will not constitute it a holder for value. *McBride v. Farmers Bank*, 26 N. Y. 450.

A bank which collects drafts sent to it for collection cannot set off the proceeds against an indebtedness of the transmitting bank even although all the indorsements are in blank, if no new credit has been given on the faith of such drafts and there has been no alteration in the situation of the parties because thereof. *Lawrence v. Stonington Bank*, 6 Conn. 521.

Effect of restrictive indorsement.

In England it seems to have been well settled in 1828 that an indorsement "for my use" was a *res* 7 L. R. A.

strictive indorsement, and it was held that if bankers discounted a bill so indorsed, for the indorsee, who misapplied the proceeds, the bank was liable to the owner of the bill for its amount when paid by the drawee. *Sigourney v. Lloyd*, 8 Darn. & C. 622.

In *White v. Miners Nat. Bank*, 102 U. S. 658 (26 L. ed. 250), the court regards the question of whether or not a restrictive indorsement by the payee of a draft directing payment to the indorsee for account of the payee, would transfer the title to the paper as one of first impression and refuses to decide it, but strongly intimates that such indorsement would transfer neither title to the paper nor the ownership of the money when received.

Troyer will lie for bills of exchange indorsed to an agent of the plaintiffs or order for their account and deposited with the defendants by such agent as a security for past and future advances by the defendants to him. *Treuttel v. Barandon*, 8 Taunt. 100.

Indorsement specifically "For collection."

An indorsement "For collection," placed upon commercial paper, is notice to all parties subsequently dealing therewith that the owner has not transferred the title thereto, and subsequent holders can only succeed to the rights conferred by the restrictive indorsement. *Bank of Metropolis v. First Nat. Bank*, 19 Fed. Rep. 301, 22 Blatchf. 58; *First Nat. Bank v. Beno Co. Bank*, 1 McCrary 491, 3 Fed. Rep. 257; *Lee v. Chillicothe Branch Bank*, 1 Bond. 387; *Claffin v. Wilson*, 51 Iowa, 15; *Hoffman v. First Nat. Bank*, 46 N. J. L. 604; *Thompson v. Gloucester City Sav. Inst.* (N. J.) 6 Cent. Rep. 323; *Snee v. Prescott*, 1 Ark. 249.

The restrictive indorsement is notice that a trust attaches to the paper and the collecting bank becomes liable to the owner if it diverts the proceeds into another channel. *Blaine v. Bourne*, 11 R. L. 119; *Cecil Bank v. Farmers Bank*, 23 Md. 164.

On, and for many years prior to December 9, 1884, the defendants J. Forman and Alfred Wilkinson were copartners, doing business under the firm name of Wilkinson & Co., as private bankers at the City of Syracuse, N. Y. For a number of years prior to December 9, 1884, the plaintiff had been accustomed to forward to the firm of Wilkinson & Co., for collection, checks, drafts and notes belonging to it, and made payable at different places, at the City of Syracuse and vicinity, the firm being the correspondents of the plaintiff in that portion of the State. The course of business pursued by the plaintiff and the firm of Wilkinson & Co. was as follows: The plaintiff upon receiving checks, drafts and notes payable at Syracuse or its vicinity, made upon such paper an indorsement in the following terms:

"Pay Wilkinson & Co., or order for coll. for account of National Butchers & Drovers Bank of the City of New York. W. H. Chase, Cash."

The plaintiff thereupon inclosed said checks, drafts and notes in a letter addressed to the firm of Wilkinson & Co., which was in the following form:

National Butchers & Drovers Bank, N. Y. 188.

Messrs. Wilkinson & Co.

Dear Sirs: Your favor of the — inst. is received, with inclosures, as stated. I inclose for collection and credit bills as stated below.

Respectfully yours,

William H. Chase, Cashier.

Whereupon follows an itemized statement of checks, drafts, etc., naming the bank where payable, the city where such bank is located, and the amount of the checks, drafts, etc. All above the itemized statement in the letter was in print, except the address, "Messrs. Wilkinson & Co." Thereupon the plaintiff, upon its books, charged to Wilkinson & Co. the various drafts, checks, etc., thus forwarded to them, and upon the credit side of their account credited them for whatever moneys were remitted to and received by the plaintiff from Wilkinson & Co. The charges against Wilkinson & Co. were made upon the ledger of the plaintiff day by day, as the checks, drafts, etc., were sent, and on the days they were sent. Upon receipt by Wilkinson & Co. of the checks, drafts, etc., such of them as were payable on demand were immediately, upon their receipt, credited to the account of the plaintiff, kept upon the books of Wilkinson & Co., for their face value. Such paper as was not payable on demand, but had some time to run, was not entered upon the account of the plaintiff until it was actually paid. Such of the checks, bills and notes as were payable at banks of the City of Syracuse were thereupon collected by Wilkinson & Co. through the clearing-house. If any of the paper, however, was protested, it was charged back upon the books of Wilkinson & Co. to the plaintiff, and returned to it, and the expenses of protest charged to plaintiff. Such of the paper received by Wilkinson & Co. from the plaintiff as was payable at banks out of the City of Syracuse was forwarded by

In *McLeod v. Evans*, 66 Wis. 401, the court assumes as a basis for its decision that the proceeds of a draft given to a bank for collection constitute a trust fund which cannot be diverted from the purposes for which the trust was constituted.

Under such indorsement the relation created between the transmitting and receiving bank is merely one of principal and agent, which no act of the agent can change, and the owner of the draft may follow and recover his funds so long as they can be traced and identified. *First Nat. Bank v. Armstrong*, 36 Fed. Rep. 59.

Title to commercial paper received for collection by a bank, and forwarded to its correspondent in the usual course of business, without an express agreement in reference thereto, does not rest in such correspondent, even if he has remitted on general account in anticipation of collection; but title passes only by a contract to that effect, to be expressly proved or inferred from an unequivocal course of dealing. *Arnot v. Bingham*, 55 Hun, 553, 22 N. Y. S. R. 878.

Such indorsement placed upon paper sent by one bank to another will, in and of itself, make the collecting bank the agent of the transmitting bank, and will prevent the title to the paper or to the proceeds from passing to the collecting bank; but this result is placed beyond all question where there is a contract between the two banks that all paper sent is to be collected and the proceeds transmitted on certain specified days in each month next after collection. *Commercial Nat. Bank v. Armstrong*, 20 Fed. Rep. 684.

Such indorsement will not pass title.

It seems to be universally held that an indorsement "For collection" will prevent the indorsee from acquiring any valid title to the paper which he can either transfer or rely on as against the true owner.

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Such is the New York rule. *National Park Bank v. Seaboard Bank*, 114 N. Y. 23; *Dickerson v. Watson*, 47 N. Y. 429; *Warner v. Lee*, 6 N. Y. 144; *People v. Bank of Danville*, 30 Hun, 187; *Hoffman v. Miller*, 9 Bosw. 384.

It has been so held in Pennsylvania. *First Nat. Bank v. Gregg*, 79 Pa. 384.

In Minnesota. *Third Nat. Bank v. Clark*, 23 Minn. 263; *Rock Co. Nat. Bank v. Hollister*, 21 Minn. 383.

In Indiana. *Crown Point First Nat. Bank v. Richmond First Nat. Bank*, 76 Ind. 561.

In Missouri. *Mechanics Bank v. Valley Packing Co.*, 70 Mo. 643.

In England. *Williams v. Shadbolt*, 1 Cababé & Ellis, 529.

And such also is the doctrine held in the following Federal cases: *Levi v. Missouri Nat. Bank*, 5 Dill. 104; *Re Armstrong*, 53 Fed. Rep. 406; *Fifth Nat. Bank v. Armstrong*, 40 Fed. Rep. 44.

In Massachusetts it is held that the title passed only so far as to enable the indorsee to demand, receive and sue for the money to be paid. The owner may control his paper until it is paid and may intercept the proceeds thereof in the hands of an intermediate agent. *Freeman's Nat. Bank v. National Tube Works (Mass.)*, 8 L. R. A. —.

In Mississippi it is held that where one bank sends to another a draft for collection, restrictively indorsed, the receiving bank does not become a purchaser of the paper for value, although the forwarding bank is indebted to it on account of collections and has failed after the paper is sent. In such cases the owner of the paper may stop payment thereon or recover the proceeds if it has been paid, although he indorsed it in blank to the transmitting bank. *First Nat. Bank v. Strauss*, 66 Miss. 479.

In general collecting bank cannot apply proceeds.

A bank receiving a note so indorsed cannot re-

Wilkinson & Co. to their own correspondents at the cities and villages where such payments were to be made, and Wilkinson & Co. received from them the proceeds of such paper when collected. On Thursday of each week Wilkinson & Co. remitted to the plaintiff, by a draft on New York, the amount standing to the credit of the plaintiff upon their books up to that time, less about $\frac{1}{4}$ of 1 per cent for their services. These remittances were generally made in the morning, regardless of whether Wilkinson & Co. had at the time actually received the proceeds of all the checks, drafts, etc., which then stood upon its book credited to the plaintiff. This manner of doing business had been carried on for a number of years prior to the failure of Wilkinson & Co., and was understood by the plaintiff, and was the existing arrangement. In pursuance of this arrangement, the plaintiff on and for a number of days prior to December 8, 1884, forwarded to Wilkinson & Co. various drafts, checks and notes, indorsed by the plaintiff in the manner above described, inclosed in letters in the form specified, amounting in all to \$14,260.36, all of which, except time collections amounting to \$488.67, were credited to the plaintiff upon their books. From this total Wilkinson & Co., prior to December 9, 1884, had sent various sums for collection to other agents, leaving a balance of \$13,822.43 to be accounted for. Of this sum there had been paid to and received by Wilkinson & Co., on and prior to December 9, 1884, the sum of \$9,195.50, which sum was received by Wil-

kinson & Co. in divers sums from December 4 to December 9, 1884, both dates inclusive, and no part of that sum has been paid to the plaintiff but all of it was paid out by Wilkinson & Co. in due course of business before December 9, 1884.

On the 9th of December, 1884, Wilkinson & Co. executed and delivered to the defendant, Charles E. Hubbell, a general assignment for the benefit of their creditors of their property, both real and personal, and Hubbell duly accepted the trust created, and duly qualified as such assignee, and took possession thereunder on the morning of December 10, 1884, said assignment being duly recorded on the 10th day of December, 1884. Between the execution and delivery of the assignment and the 20th of February, 1885, Hubbell, as such assignee, received of the checks, drafts, etc., sent by plaintiff to Wilkinson & Co. the sum of \$4,626.83, being the balance of said sum of \$13,822.43. The defendant remitted to the plaintiff \$488.67 of above amount, being proceeds of time paper sent for collection, as to which a different practice had prevailed, but defendant, Hubbell, as such assignee, refused to pay the balance of said \$4,626.83, being the sum of \$4,188.16, to the plaintiff.

Prior to a notice of the plaintiff's claim served on defendant, Hubbell, December 26, 1884, he had, as assignee of Wilkinson & Co., received from the entire estate the sum of \$10,908.36, which sum included all but \$295.48 of the above-named amount, \$4,198.16, and the assignee, prior to receiving the notice,

tain the proceeds to apply to a balance due from the bank sending it, unless authorized by some course of dealing, or by some other matter outside of the indorsement. *Sweeny v. Easter*, 68 U. S. 1 Wall. 166 (17 L. ed. 681); *Stark v. U. S. Nat. Bank*, 41 Hun. 506.

A bank which has received from its correspondent a draft indorsed "For collection" which is indorsed in like manner to its correspondent, cannot apply the proceeds to the latter's debt and refuse to pay the owner. *City Bank of Sherman v. Weiss*, 67 Tex. 331.

Where a draft sent to a bank for collection was paid by the drawee by check, which the bank collected through the clearing house, and a memorandum was placed with the bank's cash to indicate that the proceeds of the draft was the property of the sender, and the next morning the bank was closed and the receiver credited such proceeds to the sender of the draft on the books of the bank, the sender can recover the same, as the fund was not so mingled that it could not be traced and identified. *First Nat. Bank v. Armstrong*, 36 Fed. Rep. 59.

What will give collecting bank a right to apply proceeds.

It appears to be well settled that the mere crediting of the amount of the draft upon the account of the transmitting bank will not give the collecting bank any claim thereon prior to its collection, at least if the credit is not an absolute one but is made "subject to payment." *Fifth Nat. Bank v. Armstrong*, 40 Fed. Rep. 46; *First Nat. Bank v. Reno Co. Bank*, 3 Fed. Rep. 237, 1 McCrary, 491.

It is also held that such crediting of moneys collected on bills and notes remitted for collection does not prevent the real owner of such bills and notes from reclaiming the proceeds in the hands of the collecting banker. *Arnold v. Clark*, 1 Sandf. 491; *Lawrence v. Stonington Bank*, 6 Conn. 521. 7 L. R. A.

On the contrary, it has been held in Ohio that the receipt of the proceeds of a draft by a collecting bank, and the entry of such proceeds on its books to the credit of the transmitting bank, which is at the time an apparently solvent institution, and there being no notice but that the draft was its absolute property, is a payment to the transmitting bank which relieves the collecting bank from all liability to the owner of the draft. *Reeves v. State Bank*, 8 Ohio St. 465.

It is, however, intimated in that case that before the collection of the draft its owner may, by notification to the collecting bank, make it his agent and thereafter control the application of the proceeds. *Id.* 484.

Effect of advances and overdrafts.

An advance made by a collecting bank on the faith of a draft sent it for collection and so indorsed will give it no right to retain the proceeds thereof as against the true owner. *First Nat. Bank v. Bank of Monroe*, 33 Fed. Rep. 408.

Where one bank receives from another a draft belonging to a customer, for collection merely, without advancing any money or giving any credit thereon, it has no title to the draft which will authorize it to retain the moneys received thereon, as against the true owner, on account of overdrafts of the remitting bank. *Lindauer v. Fourth Nat. Bank*, 55 Barb. 75; *Dod v. Fourth Nat. Bank*, 59 Barb. 265; *McBride v. Farmers Bank*, 25 Barb. 657; *Commercial Bank v. Maine Bank*, 1 Trans. App. 303, 8 Keyes, 337.

Absolute credit of amount.

The deposit of a check in a bank, and the credit, with the depositor's consent, of the amount thereof in his pass book as cash, vests title to the check in the bank, and the depositor thereby loses all control over it. *Metropolitan Nat. Bank v. Loyd*, 99 N. Y. 530.



all others; therefore these restrictive indorsements upon this paper must govern.

Ex parte Pease, 19 Ves. Jr. 25; *Ex parte Thompson*, 1 Mont. & MacA. 102; *White v. Miners Nat. Bank*, 102 U. S. 659 (26 L. ed. 250); *Van Amee v. Bank of Troy*, 8 Barb. 812; *People v. City Bank*, 96 N. Y. 87.

This restrictive form of indorsement and forwarding the same for collection has become a part of the law-merchant for the world since the decision in 1701 of *Filby v. East India Co.*, 2 Burr. 1228, and of this custom courts must take judicial notice.

Jones v. Peppercoats, 23 L. J. N. S. Ch. 158; *East Haddam Bank v. Scooil*, 12 Conn. 814; *Fabens v. Mercantile Bank*, 23 Pick. 830; *Merchants Bank v. Hall*, 83 N. Y. 845.

These collections being thus restrictively indorsed by the plaintiff for a specific purpose, such indorsement conferred no title to the same nor to the proceeds thereof, upon Wilkinson & Co., or said Hubbell, but the same remained in the plaintiff.

Snes v. Prescol, 1 Atk. 249; *Ancher v. Bank of England*, 2 Doug. 637; *Edie v. East India Co.*, 2 Burr. 1227; *Sigourney v. Lloyd*, 8 Barn. & C. 623; *White v. Miners Nat. Bank*, *supra*; *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 460; *People v. Danville Bank*, 89 Hun, 168; *McBride v. Farmers Bank*, 26 N. Y. 450.

A bank does not become the bona fide holder of paper sent it for collection unless it makes subsequent advances upon the faith of the specific paper in question.

Arnold v. Clark, 1 Sandf. 401; *West v. Ameri-*

can Exchange Bank, 41 Barb. 176; *McMide v. Farmers Bank*, *supra*; *Hoffman v. Miller*, 9 Bosw. 834.

In the case at bar there are no mutual accounts or collections; hence the plaintiff did not part with its title to these collections nor to the avails thereof, nor did the same pass to Wilkinson & Co.

White v. Miners Nat. Bank, *People v. Danville's Bank*, *Van Amee v. Bank of Troy*, *supra*; *Dickerson v. Watson*, 47 N. Y. 439; *Scott v. Ocean Bank*, 28 N. Y. 289; *McBride v. Farmers Bank*, *supra*; *Commercial Bank v. Marine Bank*, 8 Keyes, 837; *Montgomery Co. Bank v. Albany City Bank*, *supra*; *Agourney v. Lloyd*, 8 Barn. & C. 623, 5 Bing. 525.

As no title to said collections or the proceeds thereof passed to or vested in Wilkinson & Co., it follows that no title to the same passed or vested in said assignee by virtue of said assignment.

Re Haves, 1 Palge, 125; *Shirley v. Congress Steam Sugar Refinery*, 2 Edw. Ch. 513; *Addison v. Burckmyer*, 4 Sandf. Ch. 498; *Leger v. Bonnaffe*, 2 Barb. 476; 2 Sugd. Vend. and P. pp. 74, 75; *People v. Danville Bank*, 89 Hun, 168; *Bishop, Insolv. Debtors*, 2d ed. 801; *Van Heusen v. Radcliff*, 17 N. Y. 534; *Giles v. Perkins*, 9 East, 12; *Thompson v. Giles*, 3 Dow. & Ry. 712; *Carpenter v. Marnel*, 8 Bos. & P. 40; *Rhoades v. Blackiston*, 106 Mass. 834; *Full v. Harrell*, 7 Nat. Bankr. Reg. 400; *Re Kimball*, 1 Nat. Bankr. Reg. XLII. (193); *Re Lambright*, 2 Nat. Bankr. Reg. 157.

Hubbell, as assignee, acted in such a negli-

Proceeds in hands of receiver.

The transmitting bank can recover from the receiver of the collecting bank, which has failed, only such portion of the proceeds as it shows has come into the receiver's possession. *Commercial Nat. Bank v. Armstrong*, 50 Fed. Rep. 664.

How subject affected by repudiation of doctrine of sub-agency of collecting bank.

A class of cases of which *Hoover v. Wise*, 91 U. S. 803 (23 L. ed. 802); *Allen v. Merchants Bank*, 22 Wend. 215; *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 459; *Commercial Bank v. Union Bank*, 11 N. Y. 203; *Ayrault v. Pacific Bank*, 47 N. Y. 570; *Mackera v. Ramsays*, 9 Clark & F. 818, and *Bradstreet v. Everson*, 73 Pa. 124,—are types, have held that the bank to whom a draft is given for collection cannot appoint a sub-agent for the owner, but that its correspondent is its agent for whose conduct it alone is answerable and whose actions it alone can control, and that consequently no privity exists between the owner of the draft and the collecting bank, which will sustain a suit by the former against the latter. The Supreme Court of Ohio in *Reeves v. State Bank*, 8 Ohio St. 405, applied this doctrine to the right of the owner to recover the proceeds of a collected draft from the collecting bank and refused to permit a recovery. And the same ruling was afterwards made in the United States Circuit Court for the Northern District of Illinois (Hopkins, J.), *Hyde v. First Nat. Bank*, 7 Ill. 156; and it has been the ground for one or two recent dissenting opinions by federal judges.

Bank for collection; liability for neglect or default of correspondents and agents.

A bank receiving a draft or bill of exchange in one State for collection in another State, from a drawee residing there, is liable for neglect of duty 7 L. R. A.

occurring in its collection, whether arising from the default of its own officers or from that of its correspondent in the other State, or of an agent employed by such correspondent, in the absence of any express or implied contract varying such liability. *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276 (23 L. ed. 723); *Tradesman's Nat. Bank v. Third Nat. Bank*, 112 U. S. 293 (23 L. ed. 723); *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459; *Commercial Bank v. Union Bank*, 11 N. Y. 203; *Allen v. Merchants Bank*, 22 Wend. 215; *Bank of Orleans v. Smith*, 8 Hill, 560.

The same doctrine has been held in Indiana (*Tyson v. State Bank*, 6 Blackf. 225; *Abbott v. Smith*, 4 Ind. 452); in Michigan (*Simpson v. Waldbury*, 6 West. Rep. 158, 63 Mich. 439); in Montana (*Power v. First Nat. Bank*, 6 Mont. 261); in New Jersey (*Titus v. Mechanics Nat. Bank*, 35 N. J. L. 588); in Ohio (*Reeves v. State Bank*, 8 Ohio St. 405), and in Pennsylvania. *Wingate v. Mechanics Bank*, 10 Pa. 104. Compare, however, *Merchants Nat. Bank v. Goodman*, 1 Cent. Rep. 427, 109 Pa. 422; and see, in support of the doctrine, *Kent v. Dawson Bank*, 13 Blatchf. 237; *Tuber v. Perrot*, 2 Gall. 545; *Van Wart v. Woolley*, 3 Barn. & C. 429; *Mackera v. Ramsays*, 9 Clark & F. 818.

Where a bank receives a note for collection, its position is that of an independent contractor, and the instruments employed by it are its agents and not the sub-agents of the owner of the note. *Hoover v. Wise*, 91 U. S. 803 (23 L. ed. 802); *Bradstreet v. Everson*, 73 Pa. 124; *Lewis v. Peck*, 10 Ala. 142; *Cobb v. Beale*, 6 Ad. & El. N. S. 980.

The case of *Britton v. Nicolls*, 104 U. S. 737 (23 L. ed. 917), was one in which the defendant acted under specific directions from the plaintiff.

Where a check is received on deposit as cash, the depositor to continue liable as indorser until payment, the bank is bound, equally with the one receiving the check for collection, to use diligence in

held liable to the plaintiff for the avails of its collections received by him after December 9, 1884.

Litchfield v. White, 7 N. Y. 438.

The assignee is not a trustee for his assignors alone, but he is a trustee for all persons interested in the assigned estate.

Bishop, Assignm. 2d ed. 808, § 283; *Anon. v. Gelpcke*, 5 Hun, 245, and cases cited therein.

And it was his duty to have ascertained beyond any doubt to whom this \$8,587.88 belonged before he paid it to any one.

Bishop, Assignm. 2d ed. p. 808; *Anon. v. Gelpcke*, 5 Hun, 245; *Shipman's Petition*, 1 Abb. N. C. 406.

Plaintiff is entitled to recover against Hubbell either individually or as such assignee.

Van Heusen v. Radcliff, *Giles v. Perkins*, *Thompson v. Giles*, *Carpenter v. Marnell* and *Rhoades v. Blackiston*, *supra*.

Mr. Louis Marshall, for respondent:

By virtue of the course of business pursued between the plaintiff and Wilkinson & Co., the latter were, upon receipt by them of the checks, drafts, etc., forwarded to them by the plaintiff for collection and credit, and by the giving of credit to the plaintiff for the amount of such checks, drafts, etc., invested with the title to the proceeds thereof.

Clark v. Merchants Bank, 3 N. Y. 830; *Briggs v. Central Nat. Bank*, 89 N. Y. 182. See also *Briggs v. Central Nat Bank*, 61 How. Pr. 250; *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 530; *People v. City Bank*, 98 N. Y. 582;

Wend. 94; *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82; *People v. Merchants & M. Bank*, 73 N. Y. 260; *Chapman v. White*, 6 N. Y. 412.

Assuming that no title was conferred upon Wilkinson & Co., to the checks, drafts, etc., remitted to it by the plaintiff, the latter is entitled to no relief against their assignee or receivers for the moneys which Wilkinson & Co. collected prior to their assignment, the proceeds of such checks and drafts having been paid out prior to that time.

Cavin v. Gleason, 7 Cent. Rep. 235, 105 N. Y. 256; *Ferrie v. Van Vechten*, 73 N. Y. 118; *Hart v. Bulkeley*, 2 Edw. Ch. 71; *Dows v. Kidder*, 84 N. Y. 181; *Huiler v. Sprague*, 66 N. Y. 392; *People v. Merchants & M. Bank*, *supra*; *Cook v. Tull*, 85 U. S. 18 Wall. 832 (21 L. ed. 933); *Higgins v. Higgins*, 14 Abb. N. C. 24.

The plaintiff is entitled to no relief against their assignee or receivers with respect to the proceeds of such paper as was received by the assignee, he having expended them in good faith and without notice of any pretended equities of the plaintiff prior to the making of any demand or the service of any notice by the plaintiff upon him.

Gondwin v. Wertheimer, 99 N. Y. 149; *Southwick v. First Nat. Bank*, 84 N. Y. 420; *Jessup v. Miller*, 2 Abb. App. Dec. 419; *Hall v. Robinson*, 2 N. Y. 292; *Miss v. Cottle*, 82 Barb. 322; *Stevens v. Hyde*, 82 Barb. 171; *Scotfield v. Whitelegge*, 49 N. Y. 259.

Even where an assignment is fraudulent, if

collecting; it should employ an agent to make demand and receive payment. If the bank transmits the instrument directly to the maker, it acts at its peril. *Merchants Nat. Bank v. Goodman*, 1 Cent. Rep. 427, 109 Pa. 422; *German Nat. Bank v. Burns*, 12 Colo. 539.

A contrary doctrine, that its liability in taking the drafts for collection, extended merely to the exercise of due care in the selection of a competent agent, and to the transmission of the drafts to such agent with proper instructions; and that the bank selected was not its agent but the agent of the plaintiff, and for whose default defendant, exercising due care in the selection of that bank as collecting agent, is not liable, is held in Connecticut (*Lawrence v. Stonington Bank*, 6 Conn. 521; *East Haddam Bank v. Souvil*, 12 Conn. 303); in Illinois (*Ætna Ins. Co. v. Alton City Bank*, 25 Ill. 243); in Iowa (*Guelich v. National State Bank*, 56 Iowa, 434); in Maryland (*Jackson v. Union Bank*, 6 Harr. & J. 146); in Massachusetts (*Fabens v. Mercantile Bank*, 23 Pick. 330; *Dorchester & M. Bank v. New England Bank*, 1 Cush. 177); in Missouri (*Millikin v. Shapleigh*, 36 Mo. 596; *Daly v. Butchers & D. Bank*, 56 Mo. 94); in Tennessee (*Bank of Louisville v. First Nat. Bank*, 5 Bart. 101), and in Wisconsin. *Stacy v. Dane County Bank*, 12 Wis. 639.

An agent with whom a check or bill is deposited for collection must transmit it to a suitable agent to demand payment in such manner that no loss may happen either to the depositor, indorser or indorsee, or holder; it must be someone other than the party who is to make payment. *Drovers Nat. Bank v. Anglo-American P. & P. Co.* 4 West. Rep. 148, 117 Ill. 100; *Merchants Nat. Bank v. Goodman*, 1 Cent. Rep. 427, 109 Pa. 422.

A bank is not the agent of the payee for collection of bonds not deposited with it, although pay-
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able there. *Ward v. Smith*, 74 U. S. 7 Wall. 447 (19 L. ed. 207).

When an obligation is lodged with a bank for collection, the bank becomes the agent of the payee or obligee to receive payment. *Ibid*.

A collecting bank is the agent of the holder of the note, and in no sense the agent of the maker. *Dodge v. Freedman's Sav. & Trust Co.* 98 U. S. 379 (23 L. ed. 930).

Consequently, it may so act as to discharge the drawer, without becoming liable to its principal. *Bank of Washington v. Triplett*, 26 U. S. 1 Pet. 25 (7 L. ed. 37).

The president of a bank at which a note is payable may, without special authority, agree to receive the money through an agent at another place. *Vilas Nat. Bank v. Strait*, 3 New Eng. Rep. 112, 59 Vt. 448.

A bank which receives drafts with bills of lading of wheat from another bank, and instructions to deliver the wheat to another, on payment of the drafts, becomes the agent of the transmitting bank, and should not deliver the wheat until all drafts drawn against each cargo are paid. *Milwaukee Nat. Bank v. City Bank*, 108 U. S. 668 (26 L. ed. 417).

Duties, rights, obligations and liabilities of bank for collection.

The deposit in one bank, of a bill to be collected in another, is a common usage, and the duty of the bank receiving such bill is precisely the same whoever may be the owner; and if unwilling to undertake the collection, the duty ought to be declined. *Bank of Washington v. Triplett*, 26 U. S. 1 Pet. 25 (7 L. ed. 37).

A bank holding a check for collection has no right, unless specially authorized to do so, to accept

in pursuance thereof before any of the creditors obtain a general or specific lien upon the assigned property by a creditor's bill or attachment, the other creditors cannot compel the assignee to account to them for such property.

Wakeman v. Grover, 4 Paige, 23, affirmed, 11 Wend. 187; *Ames v. Blunt*, 5 Paige, 18; *Barney v. Griffin*, 4 Sandf. Ch. 552; *Averill v. Loucks*, 6 Barb. 470; *Re Mitchell v. Tenant*, 40 Hun, 635; *Collumb v. Read*, 24 N. Y. 505; *Sullivan v. Miller*, 9 Cent. Rep. 477, 103 N. Y. 635; *Herring v. New York, L. E. & W. R. Co.* 7 Cent. Rep. 308, 105 N. Y. 875; *Young v. Brush*, 28 N. Y. 671.

Peckham, J., delivered the opinion of the court:

The defendant, Hubbell, as one defense to the claim of the plaintiff, insists that Wilkinson & Co., upon the receipt by them of the various checks and drafts or other pieces of paper payable on demand, and upon the crediting of the amounts thereof to the plaintiff upon their books, without waiting for the payment of the same, became the owners thereof, and that these facts amounted to a transfer of the title to the paper or its proceeds to Wilkinson & Co. In that we think he is mistaken. The indorsement upon each piece of paper was for collection simply, and by virtue of that indorsement no title passed to the firm; but, on the contrary, it became simply the agent of the plaintiff to present the paper, demand payment thereof, and remit to it. Under such circumstances, the title to the paper remained in the party sending it. *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 459; *Dickerson v. Watson*, 47 N. Y. 439; *White v. Miners Nat. Bank*, 102 U. S. 658 [26 L. ed. 250].

The letter accompanying the inclosures of paper amounted simply to a direction to credit after the collection was made, and up to the time that the funds were actually received by

only. Nor does the finding of the learned justice at special term as to the custom pursued between the parties alter the law in regard to the title to the paper before the funds arising from the payment thereof were actually received by the firm. The finding shows that the credit was a provisional one only. It was a mere matter of bookkeeping. It would seem to have been more in the form of a memorandum of the different pieces of paper received; because if any were not paid, such as went to protest were at once charged back upon the books of the firm against the plaintiff, and returned to it, with the expenses of protest charged to it. The firm never became absolutely responsible to the plaintiff for the amount of these collections until the collections were actually made, and the proceeds received by them. The property in these different pieces of paper therefore never vested in the firm, and the firm never purchased them or advanced any money upon them. Hence, the firm never owned them. *Scott v. Ocean Bank*, 23 N. Y. 289; *Dickerson v. Watson*, *supra*.

These pieces of paper were undoubtedly subject to the direction of the plaintiff at any time prior to their payment, and it would have been the duty of the firm to have obeyed such direction. The plaintiff could have withdrawn the paper, or made such other disposition of it as seemed to it proper. It might have been liable to pay the firm for the services performed by them; but that had no effect or bearing upon the title to the paper.

The cases relied on by the counsel for the defendant for the purpose of showing title in the firm were decided upon an essentially different state of facts.

In *Clark v. Merchants Bank*, 2 N. Y. 380, the indorsement was in blank, which the court said *prima facie* imported a transfer of the title to the note, and that it was not sent for collection merely. Upon looking at the other facts in the

anything in lieu of money. *Fifth Nat. Bank v. Ashworth*, 2 L. R. A. 491, 123 Pa. 212.

The receipt by a bank to which a note was forwarded for collection, of the maker's check in payment thereof, and the cancellation and surrender of the note, deducting the amount of the check from the maker's account, are in effect a collection of the check from the general funds in the hands of the bank. *Arnot v. Bingham*, 29 N. Y. St. Rep. 872, 55 Hun, 553.

By the law of Mississippi, the duty of a bank receiving commercial paper for collection, in case of nonpayment, is to place the paper in the hands of a notary public, to be proceeded with in such manner as to charge the parties to it and secure the rights of the real owners; and the bank is not liable in such cases for the failure of the notary to perform his duty. *Britton v. Nicolls*, 104 U. S. 757 (23 L. ed. 917).

The notary is the sub-agent of the owner of the note, and as such is liable to him; he is not the agent of the bank. *Ibid*.

The indorsing bank having received it from a prior indorser on deposit and given him credit therefor, is not a bona fide purchaser for value under the Mississippi statute giving the benefit of certain defenses and set-offs previous to notice of assignment as though the suit had been brought by 7 L. R. A.

the payee. *First Nat. Bank v. Strauss*, 66 Miss. 473.

When the drawer and drawee of a draft proceed together to the bank to deposit the draft for collection, the instruction given to the bank officer by the parties as to the disposal of the money when collected, are questions of fact; and the judgment of the appellate court upon those questions is final. *International Bank v. Ferris*, 6 West. Rep. 511, 118 Ill. 465.

A bank with which a note is deposited by the payee, for collection, cannot refuse to return the note, or its proceeds, to the depositor, on the ground that it was given to defraud creditors of a third person, unless the bank is one of those creditors. *First Nat. Bank v. Leppel*, 9 Colo. 594.

To hold a bank with which a note is deposited for collection, as garnishee, a special notice is necessary, specifying the note in question as the property of a person other than the depositor. *Ibid*.

When a bank became an agent to receive and to collect, not money, but Confederate notes or promises, the obligation it assumed was to pay Confederate notes when they should be demanded. *Planters Bank v. Union Bank*, 33 U. S. 16 Wall. 423 (21 L. ed. 473).

Duties and liabilities of bank receiving drafts for collection. See note to *Freeman v. Citizens Nat. Bank (Iowa)* 4 L. R. A. 423.

intended to pass the title. *Gardiner, J.*, in that case said: "The whole fund was, by the course of dealing, and in this instance by the directions of the plaintiffs, treated as cash. It was passed to their credit according to their instructions, and the draft in question was for account." Again he said: "The whole arrangement was one of mutual convenience; and to hold that such drafts were transmitted for collection merely, with no right to a credit, or to draw against them until they were actually paid, is to lose sight of the situation of these brokers, their business and their necessities."

In *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 580, the bank received the check from the depositor as a deposit of money, and entered the amount as cash to the credit of the depositor in his bank pass-book, which was returned to him. There it was held that the title to the check passed to the bank. It was not received merely for collection. The court, per Danforth, J., said: "It is not disputed that Murray [the depositor] held the check as owner. . . . It was his property, to do with as he pleased. He had held other checks. Some of these he placed in the Troy Bank for collection. Others he deposited, and took credit therefor as cash upon his pass-book. As to the first, he could give and revoke his own directions as often as

to his control." There, again, the credit was of so much cash. It was nothing less than the purchase of the check. The indorsement was in blank, and the bank took it as owner.

In *Briggs v. Central Nat. Bank*, 89 N. Y. 182, the defendant made the First National Bank of Newark its collecting agent. The bank upon which the check was drawn upon its receipt charged the check to the drawer, and credited the defendant with the amount in its account. By the transaction the check was paid to the Newark bank, and it was only necessary for it to remit its collections once a week to the bank in New York, under its agreement. The next day, however, it suspended payment, and, in an action by the person who gave the check to the defendant for collection, it was held that the defendant was liable for the payment thereof, although it had not received the amount from its own agent in Newark. The case is not in the least similar to the one at bar.

In *People v. City Bank*, 93 N. Y. 582, that bank and the Utica City National Bank each acted as agent for, and kept a running account with the other, the balance being struck once a week, and the bank found indebted remitting the balance due. The crediting of the paper was entirely different, and there was a mutual

Liability of collecting bank.

If a collecting bank can relieve itself from liability for loss by sending a certificate of deposit issued by another bank to a suitable agent, the agent must be someone other than the bank which is to make the payment. *German Nat. Bank v. Burns*, 12 Colo. 539.

Proof of a custom of banks to transmit checks drawn on other banks to those banks for collection will not justify a bank in sending a certified check for collection to the bank bound to pay such check. *Drovers Nat. Bank v. Anglo Am. Packing etc. Co.* (Ill.) 4 West. Rep. 148.

If a bank fail to demand payment of a bill held for collection, it makes the bill its own, and becomes liable for the amount. *Ibid.*; *Bird v. Louisiana State Bank*, 98 U. S. 98 (23 L. ed. 818).

Where a letter to a bank states that a note is inclosed therein for collection, the neglect of such bank receiving it to give notice that the note was not found inclosed therein is, if unexplained, equivalent to an admission that the note was received. *First Nat. Bank of Dubois v. First Nat. Bank of Williamsport (Pa.)* 5 Cent. Rep. 194.

A bank which has received a draft for collection and given credit to the sender for the amount, in the regular course of business, without assuming any title, ownership, interest or property in the draft, and thereafter makes the collection, cannot be held liable to the drawee for any portion of the amount received thereon, although the draft had been raised beyond the original sum, of which both were ignorant at the time of payment, where the collecting bank, when notified of the mistake, had previously paid over to the sender all that was due to the latter on the account between them, including the amount credited for this draft. *National Park Bank v. Seaboard Bank*, 114 N. Y. 28.

In cases of insolvency of collecting bank.

The collecting bank cannot, some time after, pay the amount collected in depreciated currency, but 7 L. R. A.

must pay the value of the currency at the time the money was collected by it. *Marine Bank v. Fulton Co. Bank*, 69 U. S. 2 Wall. 252 (17 L. ed. 735).

Where, at the time of the failure of a bank, it is indebted to its correspondent bank, a portion of which indebtedness had been collected by the latter on drafts of other banks sent to it by the failing bank, to which the proceeds had been credited, the correspondent bank should be allowed to prove its claims, and the receiver be allowed to accept the proof and pay a dividend on the claim presented. *Eikhart First Nat. Bank v. Armstrong*, 39 Fed. Rep. 231.

Where a bank in New Orleans remitted to a foreign banking firm bills of exchange for collection, and then failed, such firm cannot recover of the receiver of the bank the 10 per cent damages allowed by the laws of Louisiana upon protest of foreign bills of exchange, in addition to the expenses of protest. *Hambro v. Casey*, 110 U. S. 216 (28 L. ed. 125).

A bank received a cashier's check of another bank as a conditional payment of a debt of a third party; the latter bank made an assignment in trust for creditors, and the check was not paid upon presentation. At the time of the assignment there was, upon the books of the first bank, a credit to the insolvent bank of the proceeds of notes indorsed and discounted for the latter's accommodation. In an action by the first bank against the debtor, for the debt, it was held, that this deposit was not a valid set-off against the debt. *Union Nat. Bank v. Cannonsburgh Iron Co. (Pa.)* 4 Cent. Rep. 292.

Where the money is allowed to remain for months with the collecting bank, which meantime becomes insolvent, the bank for which the collection was made will be treated as an ordinary creditor. *Philadelphia Nat. Bank v. Dowd (N. C.)* 2 L. R. A. 480.

Where a collecting bank under contract has a right to mingle collections with its own funds, that right ceases on its insolvency. See note to *Manufacturers Nat. Bank v. Continental Bank (Mass.)* 2 L. R. A. 692.

were paid the relation between the banks was simply that of debtor and creditor. We cannot see, therefore, that as to the paper not actually collected, and the cash received by Wilkinson & Co. before their failure, it ever became the property of that firm, or that the title to the proceeds thereof ever vested in that firm or its assignee. As to the moneys received by the firm in payment of checks and drafts sent to it for collection by the plaintiff, and by the firm paid out before the assignment, and in the usual course of business, in payment of the debts of the firm, and of course never received by the assignee, we do not see that the plaintiff occupies any different position in that regard towards the firm than any other creditor. As the firm was to remit but once a week, of course it was not expected that the identical moneys received by it in payment of paper sent to it for collection were to be sent to the plaintiff. The firm, by the arrangement, had the right to retain the moneys, and to remit weekly; and of course from one week to another it had the right to use the money, and the plaintiff relied upon the credit of the firm for such time as it had the right to retain the money.

But it is claimed on the part of the defendant assignee that, assuming that no title to the checks passed to Wilkinson & Co., the plaintiff is not entitled to recover so far as regards the proceeds of the paper that were received by the assignee, and expended by him in good faith, and without notice by him of any claim on the part of the plaintiff prior to the making of the demand, or the service of the notice by the plaintiff upon him. We think this claim cannot be maintained. In the first place, the moneys received by the assignee, as proceeds of the paper sent by the plaintiff to the firm for collection, and not collected by the firm before the assignment, never became the property of that firm, and therefore the legal title never passed to the assignee of the firm. It was not transferred by the firm to the assignee, because at the time when the assignment was made the money had not been collected, and had not come into the hands of the assignors. It never came into the hands of the assignee by virtue of the assignment, in any legal sense of the term. The moneys came to him from the various collecting agents to whom the drafts and checks had been sent by the firm. The assignee could get no better title to the moneys than his assignor, and neither had any right to apply such moneys collected after the failure to the payment of firm debts. If it be said that he received and applied them in good faith, it may be answered that good faith did not change the title of the plaintiff to the proceeds of its property.

There are cases in which an assignee or trustee is protected for acts done in good faith under an instrument creating the trust, and before such instrument had been declared invalid. Where an assignee, under an assignment for the benefit of creditors, fraudulent upon its face, pays money to bona fide creditors of the assignor in accordance with the directions of the assignment, he will be protected, provided he does it in good faith, and before any other creditor has obtained a lien upon the money. This is because the assignment, as between the

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assignor might at that time lawfully have been made if no assignment had been made. In such case all that can be said is, if the assignment be declared void, that the assignor paid certain of his creditors indirectly, and through the agency of the assignee, at a time when he had the right to do it directly, but for the assignment.

Such was the case of *Ames v. Blunt*, 5 Paige, 18, where the chancellor said that the liability of the assignee depended upon the question whether the rights of the plaintiff had been affected by the distribution of the proceeds of the assigned property to bona fide creditors of the assignor; and it was held that the plaintiff was not thereby injured, because the assignee had done no more than the assignor might have done at any time before the plaintiff obtained a lien upon the money paid by the assignee. To the same effect are the cases of *Collumb v. Read*, 24 N. Y. 505; *Averill v. Loucks*, 6 Barb. 470, 477; *Iddings v. Bruen*, 4 Sandf. Ch. 252, 258.

The case of *Sullivan v. Miller*, 106 N. Y. 635, 9 Cent. Rep. 477, is also an instance of the same general principle. In that case the property belonged to the assignor, and was assigned to the assignee subject to a mortgage. The action of the assignee, or his successor, the receiver, was upheld by the court. The title to the property was in the assignor. It was not property of a third person, which he disposed of.

It is argued, also, that as this property came honestly into the possession of the assignee, the plaintiff would have to prove a demand upon, and a refusal by, him to give it up before an action could be maintained; and it is then claimed that where such an assignee, before notice has been given to him, or any demand made upon him for a surrender of the property, has disposed of the same in good faith, he is relieved from liability. The cases cited by counsel are those where property has come into the hands of the assignor tortiously, and under such circumstances that, as between him and the original owner, the latter could insist upon his title. In such case, where possession of the property is given to the assignee under the assignment, it is held that, he having innocently come into possession of the same, before an action can be maintained against him, demand must be made for the surrender of the property. Such is the case of property obtained by the assignor by fraudulent representations, where the vendor has the right to rescind the contract and take back the property. *Barnard v. Campbell*, 58 N. Y. 73; *Goodwin v. Wertheimer*, 99 N. Y. 149. But in such case the legal title is in the assignor at the time he makes the assignment, and that title passing to the assignee, who is innocent of the fraud, a demand by the vendor must be made before an action for its recovery can be maintained.

The case of *Hagerty v. Palmer*, 6 Johns. Ch. 487, is of a similar nature. The legal title to the property was in the assignor, and the assignee took it. If disposed of by him to a bona fide purchaser for value, without notice, the vendee might be protected, and the assignee, also, if he sold before he himself had any notice. Here the property was never the property of the assignor.

indeed, he must have known that the property did not belong to the assignor; at least, an inspection of their books would have shown, as it seems to us, enough to put him upon inquiry as to where the title to these moneys rested. It did not rest with the assignor, and it could transfer none to its assignee. Again, we do not think that the order of the county court or the county judge for the payment of the dividend was the least protection to the assignee. That order did not assume to say what moneys should be used in the payment of the dividend. It did not assume to decide whether these moneys were the moneys of the assignor. That question was not before the court. It simply gave directions to the assignee to pay a certain dividend, upon papers which it is to be presumed showed to the court or judge that the assignee claimed to have moneys enough of the assignor in his hands at the time to pay it with. But, even if it had assumed to direct that these particular moneys should be paid, we see no protection thereby given to the assignee. The plaintiffs could not be concluded upon a question as to the title to their property by any *ex parte* decision of the county judge.

The case of *Herring v. New York, L. E. & W. R. Co.*, 105 N.Y. 875, 7 Cent. Rep. 808, has nothing to do with the point. The plaintiff here was no lienor of property in the possession of the assignee. It was, as we have seen, the absolute owner of it, and it could not be divested of its title without some notice.

Lastly, the claim is made that the plaintiff has been guilty of laches in asserting its rights, and that therefore the payment made by the assignee in ignorance of the existence of its claim is to be protected. If laches were a defense, we see no facts upon which their existence can be founded. The plaintiff heard of

the 20th the demand on its behalf for these moneys was made of the assignee. It seems that under an *ex parte* order of the county court or judge, made on the 23d of December, he had already paid out a large part of this money. It would be a pretty stern application of the doctrine of laches to hold that a plaintiff should be deprived of all title to its property by reason of not making a demand for it, of an assignee of a third person for the benefit of creditors, within less than sixteen days after it heard of the assignment, and where it had no reason to suppose that the assignee would take its property to pay the debts of the assignors. The defense of laches is not made out.

Whether the funds, if there are any, in the hands of the assignee, collected by him since the service of the notice and the demand, should be impressed with a trust to reimburse the plaintiff the amount of its property used to pay the debts of the assignors, we do not now decide. We should want more facts before us. We should, among other things, want to know whether any liens had been acquired by any other creditor upon such moneys, and under what circumstances, so as to be able to decide understandingly as between different claimants to such funds. Perhaps other parties would have to be brought in. Upon the whole, we think the assignee is liable to account to the plaintiff for the moneys received by him subsequent to the 9th day of December, 1884, being the proceeds of the checks or drafts above referred to.

It results from these views that *the judgment of the General and Special Terms should be reversed as to the assignee, and a new trial granted against him, with costs to abide the event.*

All concur, except Ruger, Ch. J., and Andrews, J., not voting.

UNITED STATES COURT OF CLAIMS.

Charlotte A. WADDELL, Exr., etc., of William C. H. Waddell, Deceased,
v.

UNITED STATES.

(25 Ct. Cl. R....)

1. The Court of Claims has no jurisdiction to render judgment in favor of a claim

NOTE.—Court of claims; limitation of time to present claims.

Claims against the United States in the court of claims are barred by statute unless filed within six years after claim accrues. *Clark v. United States*, 99 U. S. 498 (25 L. ed. 481); *Kendall v. United States*, 107 U. S. 123 (27 L. ed. 471). See *Nichols v. United States*, 74 U. S. 7 Wall. 126 (19 L. ed. 127).

They are barred within six years after suit could be commenced thereon against the government. *Finn v. United States*, 123 U. S. 227 (31 L. ed. 128).

Judgment holding an action brought on a claim against the United States under a special Act more than six years thereafter to be barred,—affirmed by a divided court. *Rice v. United States*, 122 U. S. 611 (30 L. ed. 793).

The clause of Rev. Stat., § 1059, which invests the court of claims with jurisdiction of claims referred to it by either House of Congress, is subject to other clauses defining its jurisdiction and fixing the 7 L. R. A.

against the United States which accrued more than six years before the filing of the petition.

2. Public officers cannot open and re-examine claims against the government which were rejected by their predecessors in office, in the absence of fraud, mistake in matters of fact arising from errors in calculation or of newly discovered material evidence.

period within which all claims must be asserted against the United States. *Ford v. United States*, 116 U. S. 213 (29 L. ed. 608).

The petitioner's right to sue in the court of claims under §§ 1059, 1062, did not accrue until the accounting officers held him liable for the sum lost, by refusing to credit his account therewith. *United States v. Clark*, 96 U. S. 87 (24 L. ed. 696).

Where a petition in the court of claims shows that the claim is barred by six years' lapse of time, it may be dismissed on demurrer. *Kendall v. United States*, 107 U. S. 123 (27 L. ed. 487).

Where the government, although a nominal plaintiff, has no real interest in the litigation, the defense of the Statute of Limitations is available as between individuals. *United States v. Beebe*, 127 U. S. 538 (33 L. ed. 121).

A judgment in the court of claims for a claim which the record shows to be barred by statute is erroneous. *Finn v. United States*, *supra*.

of a distress warrant, which accrued more than forty-seven years before it was presented to the Treasury Department, is a stale claim which the accounting officers have no right to receive, examine or settle.

(April 21, 1890.)

CLAIMS for money alleged to be due to a former United States marshal, transmitted for the opinion of the court by the Committee on Claims of the House of Representatives and by the Secretary of the Treasury. *Judgment against claimant.*

Mr. George A. King for claimant.

Messrs. William H. H. Miller, Atty-Gen., and John C. Chaney, Asst. Atty-Gen., for the United States:

The court made the following findings of facts:

I. The claimant is executrix of the estate of William C. H. Waddell, deceased.

II. Said W. C. H. Waddell was appointed marshal of the United States for the Southern District of New York by Andrew Jackson, President, and by that appointment and re-appointment held the office from November 7, 1831, to December 10, 1839, when his last commission expired.

III. In 1846 the claimant's testator (W. C. H. Waddell) presented to the Treasury Department for adjustment and payment accounts for fees, disbursements, cartage, labor, storage, insurances and other costs in cases in which the United States were a party, which costs had previously been taxed and allowed by the District Judge of the United States for the Southern District of New York. These accounts were examined by the accounting officers, and on the 7th day of April, 1851, the sum of \$3,829.42 was allowed and subsequently paid, and the balance, \$10,927.04, was disallowed by the first comptroller. No further action was taken for the collection of the claim until December 5, 1885, when it was again presented to the Treasury Department for payment by the attorney of the present claimant as executrix.

Another claim is thus stated in the petitions:

"Fees, expenses and poundage upon the service of a warrant of distress issued by the solicitor of the treasury in the nature of a *ca. sa. et fi. fa.*, dated November 12, 1838, against Samuel Swartwout, late collector of customs for the Port of New York, for the sum of \$1,344,119 \$18,102.33."

This last-mentioned claim was never presented to the Treasury Department until December 5, 1885, when, with the other accounts, it was sent to the department and payment demanded by said attorneys of the present claimant. No allegations are made of fraud, mistake in matters of fact arising from errors in calculation or newly discovered material evidence.

Conclusions of law. Upon the prayer for judgment in the amended petition in Departmental Case No. 28, the claimant's amended petition must be dismissed on the ground that the claims are barred by the provisions of section 1069 of the Revised Statutes.

The first claim of \$10,927.04 cannot be re-examined by the present accounting officers
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re-opened except for fraud, manifest mistake in matters of fact arising from an error in calculation, or newly discovered material evidence.

The second claim for \$18,102.33 cannot be considered by the accounting officers because it is a stale claim which accrued, if at all, more than forty-seven years before its presentation to the Treasury Department.

Richardson, Ch. J., delivered the opinion of the court:

This case is before us under three distinct provisions of the statutes conferring jurisdiction upon the court.

1. June 5, 1834, it was transmitted by the Committee on Claims of the House of Representatives for a finding of fact by the court under section one of the Bowman Act of March 3, 1833, chap. 116 (22 Stat. at L. 485). In that case the claimant filed her petition April 22, 1885.

2. April 8, 1886, it was transmitted by the Secretary of the Treasury, under section 2 of that Act, for finding of facts, conclusions of law and opinion. In that case the claimant filed her petition April 20, 1886.

3. After the passage of the Act of March 3, 1837, chap. 359 (24 Stat. at L. 505), the claimant filed an amended petition in the latter case, which, after setting out the allegations of facts relied upon, prays that the court will find, as a conclusion of law, that there is due the claimant the sum of \$82,868.79, and that the court will thereupon proceed to render judgment in her favor for that amount in accordance with the provisions of section 13 of the latter Act. That section is as follows:

"Sec. 13. That in every case which shall come before the court of claims, or is now pending therein, under the provisions of an Act entitled 'An Act to Afford Assistance and Relief to Congress and the Executive Departments in the Investigation of Claims and Demands against the Government,' approved March 3d, eighteen hundred and eighty-three, if it shall appear to the satisfaction of the court, upon the facts established, that it has jurisdiction to render judgment or decree thereon under existing laws or under the provisions of this Act, it shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment justice shall require, and report its proceedings therein to either House of Congress or to the department by which the same was referred to said court."

There are two claims in the case transmitted by the Secretary of the Treasury, differing somewhat in the principles of law to which they give rise.

The first is a claim presented to the department and disallowed more than thirty-five years ago by the predecessors of the present accounting officers, who were asked, after that lapse of time, to pass upon and allow it, without allegations of fraud, mistake or newly discovered evidence.

The second claim accrued, if at all, more than forty-seven years before it was presented to the Treasury Department, December 5, 1885.

more than six years before the filing of the petition, and section 13 of the Act of 1887 authorizes a judgment in petitions under that Act or the Act of 1883 (the Bowman Act) only when "it shall appear to the satisfaction of the court, upon the facts established, that it has jurisdiction to render judgment or decree thereon under existing laws or under the provisions of this Act." There is no provision in the Act itself for judgment in such case, and the pre-existing law forever barred the claims. The amended petition must therefore be dismissed.

The two claims cannot be received, examined and allowed by the accounting officers of the Treasury for other reasons not alike in relation to each claim.

The first claim, disallowed more than thirty-five years ago, has passed beyond the control of the accounting officers and the head of the department who have been appointed since the time of that disallowance. The law has been too well settled to be in doubt at this time, that public officers cannot open and re-examine cases decided by their predecessors except for fraud, mistake in matters of fact arising from errors in calculation or newly discovered material evidence. *United States v. Bank of Metropolis*, 40 U. S. 15 Pet. 401 [10 L. ed. 783]; *La-valette's Case*, 1 Ct. Cl. 149; *Jackson v. U. S.* 19 Ct. Cl. 504; *Illinois v. U. S.* 20 Ct. Cl. 342; *Day v. U. S.* 21 Ct. Cl. 262; *Collins' Line of Steamships*, 9 Ops. Atty-Gen. 84; *Beale & Dixon's Claim*, 12 Ops. Atty-Gen. 172; *Chorpenning's Case*, Id. 858; *Western Pac. R. Co's Case*, 18 Ops. Atty-Gen. 387; *McGoon's Case*, Id. 456; *Internal Revenue Case*, 14 Ops. Atty-Gen. 275.

The second claim, which accrued, if at all, in 1838, was not presented to the Treasury Department until December 5, 1885, a period of forty seven years. It is therefore a stale claim, which the accounting officers have no right to receive, examine and settle. It was not the purpose of Congress by the Bowman Act and the Act of 1887 to open and revive stale claims, but rather to provide for a judicial investigation of live and open accounts which are within the cognizance of the accounting officers, and for the determination of other matters. *McClure v. U. S.* 19 Ct. Cl. 18.

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ing officers of the Treasury Department, and that is undoubtedly so. But there is an unwritten law recognized by courts of equity and admiralty in which no Statute of Limitation is applicable, against entertaining and enforcing stale claims (*Speidel v. Henrici*, 120 U. S. 387 [80 L. ed. 719]), and numerous cases there cited; *Willard v. Dorr*, 8 Mason, 161), and that law the accounting officers may rightly invoke and rely upon.

A stale claim is one that has not been presented for payment for a long period of time, during which the claimant has slept upon his rights and thus created a presumption that the claim was never an honest and just one, and that he has been waiting until it was forgotten by the alleged debtor, and all evidence against it is lost or destroyed. Courts of equity usually follow the law and adopt the Statutes of Limitation as fixing the period beyond which delay requires explanation, and which, unless satisfactorily accounted for, will constitute a bar to demands. We see no reason why the accounting officers may not rightly adopt the same rule.

But there is much indebtedness of the United States which no lapse of time in making application for payment renders stale, such as interest on registered bonds and other balances stated in favor of parties on the books of the Treasury Department, as to which the only proof to be made is the identity of the claimant or his right to represent the record-creditor (Rev. Stat. §§ 806-808, *Hall's Case*, 17 Ct. Cl. 39), the public debt evidenced by bonds and coupons of record in the department, and, no doubt, other indebtedness of like kind which we have not considered.

The clerk will certify the findings of fact and conclusions of law and opinion to the Treasury Department for its guidance and action, will certify the findings of fact with this opinion to the Committee on Claims of the House of Representatives, and will enter judgment in the case transmitted to the court by the Secretary of the Treasury (Departmental, No. 28) dismissing the amended petition.

END OF CASES IN BOOK VII.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SUBJECTS Discussed and Points Decided During the Third Quarter of the Judicial Year, Beginning with Oct., 1889, Classified as Follows.

- I. GOVERNMENTAL AND POLITICAL RELATIONS.
- II. CONTRACTUAL RELATIONS.
- III. COMMERCIAL RELATIONS.
- IV. FIDUCIARY RELATIONS.
- V. DOMESTIC RELATIONS.
- VI. PROPERTY RIGHTS AND REMEDIES.
- VII. DAMAGES FOR TORTS.
- VIII. CRIMINAL LAW AND PRACTICE.

I. GOVERNMENTAL AND POLITICAL RELATIONS.

State power of eminent domain. Although the determination of the Legislature is not conclusive that a purpose is a public use, yet, if the use is public, it is conclusive that the necessity exists. (Mass.) 151. Legislative Acts which provide for taking flats in a harbor for improving the harbor are not unconstitutional as authorizing a taking for a use not public. *Id.* Owners of lands taken are not, by merely petitioning for damages, estopped from disputing the validity of the taking. *Id.* An abutting owner has an easement in a street which cannot be taken away, even by the Legislature, without compensation. (N. C.) 548. The damages to such owners, by the destruction of their easements for ingress and egress and for the free circulation of light and air, by the construction of an elevated railroad, are consequential, and the jury may consider benefits as well as injuries. (N. Y.) 289. In an action by a lessee to recover damages, the rental value of the property is an element to consider. *Id.* The construction of a telegraph line on a railroad's right of way imposes an additional servitude for which the owners are entitled to compensation. (Minn.) 121. Whatever injuriously affects the property may be considered as additional expense and loss, the cost of new appliances for continuing the business, etc. *Id.* A condemnation by a railroad corporation of the upland abutting upon the water embraces the incidental riparian right of improvement of the submerged lands. (Minn.) 722.

Taxation. By the Constitution all property is compelled to be taxed according to its true value in money, and by a uniform rule. (N. C.) 589. "Property" includes moneys, credits, investments and other choses in action. *Id.* But securities in the actual possession and control of a nonresident trustee, the beneficiaries also being nonresident, are not taxable. (N. Y.) 407. The board of equalization cannot include money, notes or mortgages not within the State. (Or.) 449. In proceedings before the board the rules of practice in civil actions do not apply; so notice to a taxpayer of a proposed increase of assessment need not specify the property to be added. *Id.* Where a taxpayer

appears pursuant to notice, a reply to his answer need not be filed. *Id.* The separate classification of railroad property, and a separate tribunal for valuation and assessment of such property, are not unconstitutional. (Ark.) 374. Nor does a provision for different intervals of time for making assessments of the respective classes of such property violate the Constitution. *Id.* The time and place of meeting of the board being provided by statute, notice thereof need not be given; and the failure to provide for an appeal does not render the Act void. *Id.* A schoolhouse in the City of New York, the property of a religious society, is not exempt from taxation if the society be unincorporated. (N. Y.) 70. The designation of a person against whom a tax warrant is issued by a wrong name will not excuse the collector's failure to collect. (Me.) 463.

Police power. The State under its police power may require railroad employes to be examined as to their fitness for their service. (Ala.) 266. A statutory liquor bond which must be approved by the town board, and then filed, becomes operative on its approval and before filing, so as to make the sureties liable. (Mich.) 740. If dated back several days before signing, it covers the period from its date. *Id.* The sureties thereon are estopped to deny their liability by a recital that the principal then professes to carry on the business. *Id.* The taking of fish with nets in specified waters may be prohibited by the Legislature, and the setting of nets be declared a public nuisance. (N. Y.) 184. The public remedy for abatement of a nuisance by judicial prosecution *in rem* or *in personam* is not exclusive where a summary remedy given by statute is appropriate to the object to be accomplished. *Id.* Where the location or use of personal property interferes with or obstructs a public right or regulation the Legislature may authorize its summary abatement by executive agencies, without judicial proceedings, and the destruction of nets set out to catch fish interferes with no legal right. *Id.* A state statute prohibiting the sale of goods by hawkers or peddlers is not void as a regulation of commerce. (Pa.) 667.

is a peddler. (Pa.) 666. The right to sell goods as a peddler is not included in the constitutional protection of the right of "acquiring, possessing and protecting property." *Id.* A mere suspicion that a woman on the street is a prostitute will not justify her arrest without a warrant. (Mich.) 507. Being saucy to an officer, or daring him to arrest, will not justify arrest. *Id.* An officer is liable for assault and illegal arrest on mere suspicion. *Id.* Evidence of specific acts of lewdness is inadmissible in an action for false arrest as a prostitute. *Id.*

Constitutional law. If the title fairly gives notice of the subject of the Act it is all that is necessary. It need not be an index to its contents. (Pa.) 369. Principle applied to an Act showing a purpose to charter a "passenger railway company." *Id.* The terms "railway" and "railroad" have the same meaning. *Id.* The title of a supplemental statute which refers to the subject matter only by reference to the title of the principal Act is sufficient if the legislation in the supplement is germane to the subject of the original bill. *Id.* A title reading "An Act to Facilitate the Carriage of Passengers and Property by Railroad Companies" is insufficient to sustain a statute which provides that no right shall exist to condemn any real estate for landings, and that the Act shall apply only to such railroad companies as owned the landing for their water craft. (Ill.) 145. Such a statute is in violation of the constitutional provision against local or special laws. *Id.* The classification of cities for the purpose of facilitating the convenient exercise of corporate powers is not prohibited by the Constitution. (Pa.) 193. The fact that diverse results may flow from the execution of granted powers does not render the enabling statute special or local, if bestowed upon all municipalities of the same class. (N. J.) 431. The legislation for the several classes into which cities are divided must relate to the exercise of the corporate powers possessed by cities of the particular class, of which the legislation relates. (Pa.) 193. Local or special laws relating to proceedings in road cases are prohibited by the Constitution and cannot be upheld under this power. *Id.* Sections of an Act, although in form local, may be upheld. *Id.* An Act regulating the mode of transferring securities for loans is not special legislation upon the affairs of corporations. (Pa.) 313. The power of a married woman to sell and transfer loans of the Commonwealth or city extends to foreign or nonresident married women. *Id.* A State has the power to change the rule that the validity of a transfer of personal property is to be determined by the law of the owner's domicile. *Id.* If constitutional and unconstitutional provisions of an Act are perfectly distinct and separable, the former may stand though the latter fall. (Ill.) 145; (N. Y.) 134. Where portions of an Act have been declared unconstitutional, if it is apparent that the Legislature, had it foreseen this fact, would not have enacted the other portions of the Act, the whole Act must fall. (Mich.) 99. That a law would necessitate incurring large expense is not a sufficient

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at which it delegates legislative power to a judicial officer, where the judge of the district by virtue of that Statute exercises only judicial power. (Kan.) 736. A statute requiring a railroad company to build a private crossing if such crossing is to be considered for a public use, is unconstitutional. (Mich.) 717.

Elections and officers. A Registration Law providing that inspectors of the last election shall act, but not out of their own precincts, where the number of precincts was increased, is inoperative. (Mich.) 99. A law which compels registration and provides but five days in the year for registration with no exception for sickness or absence is void; and where it fixes the last day for registration ten days before election, it violates the Constitution. *Id.* A provision requiring naturalized foreigners to produce evidence other than their own oaths is unreasonable and void. *Id.* A law which provides only for native-born and naturalized citizens is not valid as to inhabitants made voters by the State Constitution. *Id.* The Legislature cannot disfranchise legal voters, in its attempt to prevent fraud, nor can it deprive the elector of his constitutional right to vote. *Id.* The privilege of secrecy is inherent in the constitutional guaranty of a vote by ballot. The fact that a systematic plan to coerce a class of citizens to vote a particular ticket at an election was formed and carried out is not sufficient to invalidate the election. (Ark.) 831. Anticipation of fraud will not justify the judges in compelling voters to exhibit their ballots. *Id.* The fact that some ballots cast were stolen will not entitle the losing candidate to the office. *Id.* The failure of a school superintendent elected and duly inducted into office to give the special bond required by statute will not *per se* forfeit his title to the office. (Ind.) 694. Where there is a question as to the time of filing the bond, a declaration that he has vacated the office, made without a hearing, does not oust him. *Id.* One elected and inducted into office, who institutes proceedings to determine his right after an attempt to oust him, need not prove himself eligible. *Id.* Mandamus does not apply where the rejection of the bond operates as a decision against the right to the office. *Id.* A statute authorizing the mayor of a city to appoint municipal officers, if adopted by election of the city, is constitutional. (N. J.) 431. And in case of his absence the power may be vested in a specified officer who can proclaim the election. *Id.* A misrecital of some provisions of the Act in the proclamation of an election will not render it devoid of legal effect. *Id.* The Legislature may provide for the speedy determination of controversies relating to municipal offices. *Id.* In Alabama an officer may be impeached for habitual drunkenness. (Ala.) 426. The authority of notaries public to administer oaths is now judicially recognized, and affidavits, authenticated by the official seals of notaries of other States, are placed on the same footing as their authentications of commercial documents. (Minn.) 149.

Courts of justice; jurisdiction. An Act providing for the appointment of supreme court commissioners "to assist in performance of its duties" is constitutional. (Cal.) 348. Such

commissioners do not usurp judicial functions, or exercise judicial powers; and the possibility that the court may be influenced by them does not affect the question of constitutionality of the Act. *Id.* Consent of parties is sufficient to give jurisdiction over them if the court has jurisdiction of the subject matter; and the filing of pleadings and appearance by the parties is a waiver of process. (Mich.) 511. The right of citizens of other States to bring suit in a state court is guaranteed and protected by the Federal Constitution; and the court has no discretion to refuse to hear the cause. *Id.* The Statute prescribing the counties within which a railroad company may be sued relates solely to the jurisdiction of the person. Like a natural person it may submit itself to the jurisdiction. (Ohio) 701. A court of law having equity jurisdiction cannot exercise it without pleadings suitable for the purpose. (Ga.) 143.

United States Court of Claims. The court of claims has no jurisdiction to render judgment in favor of a claim which accrued more than six years before the filing of the petition. (U. S. Ct. Cl.) 861. In the absence of fraud or mistake in fact, public officers cannot re-examine claims rejected by their predecessors. *Id.* A claim of a United States marshal, which accrued more than forty-seven years before it was presented, is a stale claim, and should not be received or examined. *Id.*

Municipal corporations. The section of a statute requiring notice of resolution to make improvements does not contemplate a committee to hear and determine objections, provisions for this purpose being made in another section. (Ind.) 681. One who signed the agreement authorizing the improvement cannot question the assessment therefor. *Id.* The validity of bonds or certificates to raise funds to construct the same is not affected by the constitutional limitation of indebtedness of such corporations; and where a portion of the expense is to be paid in cash no indebtedness can be said to be incurred. *Id.* Where a city contracts for construction of waterworks, a property owner may sue in his own name for damages for breach of the contract, and the contractor will be liable for damages to property by fire, resulting from his neglect to furnish the stipulated amount of water, unless excused under the terms of the contract. (Ky.) 77. The question in such action is whether the fire could have been prevented had defendant performed his contract. *Id.* Municipalities cannot borrow money for municipal purposes unless expressly authorized to do so by statute, or unless such power is implied. (N.Y.) 759. The power to raise money does not include the power to borrow. *Id.* Where its charter gives it power to establish and control market houses, a city has power to forbid the selling of fresh meats elsewhere than at market houses established by it. (Tex.) 797. A license to keep a private meat market may be withdrawn, and a person is not deprived of his property by an ordinance forbidding private markets within certain limits. *Id.* Denying the privilege to sell meats in a city except at certain places is not void as in restraint of trade. *Id.* A city is not bound to make a chemical analysis of the water of free public wells where it has no notice of its unwholesomeness, and is not liable

for injuries caused by drinking therefrom. (N.Y.) 592. A municipal corporation is liable for injuries to a land owner, caused by the negligent backing up of water in a drain which he has a right to maintain. (Mass.) 156. A municipal agency incorporated for the protection of the city, and without means of raising money by taxation, i. e., waterworks commissioners, is not liable for negligence of its servants. (Mich.) 170. A city is not liable for a privilege tax on waterworks, which are its corporate property; nor can the question of its liability be determined in a suit to recover back money paid under protest, as the amount of the tax depends on population. (Tenn.) 469.

Counties. A new county cannot discharge its debt by delivery of its bonds; it must convert them into cash and pay the debt. (Mont.) 105. Commissioners derive their power from the law alone, not from the county; and when the Legislature directs the county to pay money their refusal to act constitutes a case of money "withheld by an unreasonable and vexatious delay," and the county will be liable for interest for their failure to take action. *Id.* But when the law itself imposes a duty on them, and they are not appointed thereto by the county, the county will not be responsible for their breach of duty or nonfeasance or misfeasance. *Id.* Fees of a county attorney may be taxed in a proceeding by writ of mandate, and the balance only can be taxed in his favor where the percentage allowed would make a total more than he is entitled to by law. *Id.* A contract by the commissioners with a legal adviser for a term extending beyond the period of their term of office is against public policy and void. (Ind.) 160.

Towns. A town may employ counsel to oppose a petition for the division of its territory, and its vote is not necessary to authorize incurring expense for this purpose. (Conn.) 776. A town council has no power to appropriate funds to aid in building a county court-house; and taxpayers may by suit prevent town officers from misapplying town funds. (Ark.) 180. Equity has jurisdiction to cancel warrants drawn and unpaid, and to compel repayment of money paid, and annul an illegal appropriation. *Id.* Where members of a town council vote an appropriation for their own benefit it is a conversion of trust funds for which each will be liable. *Id.* A town or village authorized to incorporate for school purposes cannot be extended to an inordinate size. (Tex.) 783. Where the inhabitants voted that a person might purchase from Indians, the town is estopped, many years after acquiescence in the limits and bounds of his patent, from disputing his title to the land purchased. (N.Y.) 755. Citizens can be taxed only for lawful public purposes; and a town cannot vote a tax to reimburse a collector who has improperly taken a note for taxes. (Me.) 463. The expiration of a license given to a town to maintain a drain over lands of the licensor will not relieve the town from liability for injuries caused by the subsequent obstruction of the drain whose use is continued the same after as before the license expired. (Mass.) 156.

Street improvements. Taxes and assessments for street improvements must be paid by the life tenant. (Md.) 532. Chancery cannot or-

tenant and infant remainderman, and the Legislature cannot validate a judicial sale without a provision for compensating the owners. *Id.* Stub receipt books in the city treasurer's office (Mich. 824), and books of the receiver of taxes handed over to the city treasurer, are public records which an abstract maker has a right to inspect. (Mich.) 78.

Street railroads. Power given to a railroad company by the Legislature to construct and operate its road in the streets of a town or city is independent of the municipality. (Pa.) 869. The adoption of a narrow gauge will not prevent it thereafter adopting any ordinary gauge. *Id.* The notice to abutters of the purpose to lay its tracks does not require a designation of the motive power to be used; and a location under an ordinance permitting horse power is not affected by permitting the use of electricity by means of any system of application approved as suitable; and courts will not take judicial notice that such use is dangerous. (R. I.) 205. The use of electricity is not an imposition of an additional servitude. *Id.* The building by a railroad company of a side track in a street on its right of way constitutes no additional burden upon property abutting upon the street. (Ind.) 257.

Private corporations. The secretary of a corporation is chargeable with knowledge of its by laws (N. Y. 822); and a by-law providing for the removal of officers by the board of directors is a part of the contract of employment. *Id.* A by-law providing that when a director shall die or otherwise create a vacancy in the board, it may proceed to supply the vacancy, does not authorize the board to create a vacancy, nor oust a director who is nonresident. (Pa.) 857. Regulations as to stockholders voting, and voting by proxy, are reasonable and uniform in operation. *Id.* When a corporation is made the agent of another it acts through the same instrumentalities as when acting for itself and has capacity to execute a deed as attorney in fact. (Or.) 683. Where it invests an agent with general authority the declarations of that agent are competent evidence against his principal. (Ind.) 214. A corporation violating the Organic Law forfeits its franchise, but is not thereby subject to the escheat or confiscation of its property. (Pa.) 684. A foreign corporation owning all the stock of a domestic corporation does not thereby "acquire or hold" the real estate so as to violate the Act prescribing the penalty of escheat. *Id.* The penalty of escheat is removed as to land in the possession of owners having the right to hold the same. *Id.*

Who may be stockholders. A resident alien and property holder may become a stockholder entitled to vote for and be elected as a director. (Pa.) 800. Nonresidents take their shares with all the rights and privileges of citizens, and may become directors. (Pa.) 857. They may become stockholders of corporations for the promotion of agriculture, etc., in the absence of any charter prohibition. *Id.*

Stockholders' liabilities. The agreement to take stock is not enforceable until the subscriber has acknowledged the articles of association. (Ind.) 591. A stockholder's liability to credi-

tor liabilities, where no attempt is made to transfer his shares, will not avail; nor will such attempt be aided by issue of stock to new subscribers; and the fact that he was misled by the manager's statements will not relieve him from his liability, as a mistake of law does not relieve in equity any more than at law. *Id.* The assignee of a corporation is not estopped from enforcing the liability of a stockholder by suffering the stockholders to resume business, he taking a bond for protection of the machinery assigned to him. *Id.* One employed by a corporation on a monthly salary, part of the time as a drummer, and the rest of the time shipping and receiving goods, etc., is a clerk within the General Incorporation Act making stockholders individually liable for moneys due laborers, servants, clerks, etc., in case of insolvency. (Tenn.) 96.

Railroad corporations. A railroad company which has acquired a majority of the stock of another company in the absence of express statutory authority cannot vote such stock in the election of officers, or in matters pertaining to the management and control of the latter company, at least where they are rivals. (Ala.) 605. An averment of refusal by the officers of a corporation, upon request, to prevent the unlawful voting of corporate stock, will authorize a suit by stockholders in their own names for that purpose. *Id.* Averments upon information and belief are insufficient in the absence of allegation that the information is true. *Id.*

Associations other than for politics or business. Statutes which provide for the incorporation of clubs without requiring them to pay a tax on capital stock are void in so far as they undertake to allow the creation of corporations for other than benevolent, religious, scientific or educational purposes. (Mo.) 784. An association for the encouragement of debating, reading and literature, and social amusements, and lawful games, with no pecuniary profits, and no connection with business or politics, and whose articles provide that no saloon shall be kept or liquors sold in connection with it, may be incorporated without the payment of a tax on capital stock. *Id.*

State institutions; public schools. The regulation of the public schools is a state matter exclusively within the dominion of the Legislature. (Ind.) 240. The fact that it has always intrusted the management of school affairs to local organizations will not preclude it from at any time changing the system. *Id.* As incident to its constitutional power, the Legislature may provide that the books shall be obtained through the medium of a contract awarded to the best or lowest bidder. *Id.* It may impose upon all officers whose tenure is legislative such duties as it deems proper, and these duties may be enforced by mandamus. *Id.* It may give one person the exclusive right for a certain time to furnish books to public schools, and may permit the selection of copyrighted works without the Act being within the constitutional provision against monopolies. *Id.* The stated reading of the Bible in a public school renders it a place of worship within the provision of the Constitution, and renders the school a re-

religious seminary within the prohibition of the Constitution that no money shall be drawn from the treasury for the benefit of religious seminaries. (Wis.) 830. The "sectarian instruction" prohibited by the Constitution is instruction in religious doctrines which are believed by some sects and rejected by others. *Id.* Courts will take judicial notice of the

contents of the Bible, and that the religious world is divided into sects, and of the general doctrines maintained by each sect. *Id.* The use of the Bible as a text-book in the public schools without restriction is "sectarian instruction." *Id.* There is no room for construction of a constitution outside of the words themselves if they are unambiguous. *Id.*

II. CONTRACTUAL RELATIONS.

Contracts in general; construction; validity. An ambiguous term with an established meaning should be treated as used according to that understanding. (N. Y.) 831. Doctrine applied to the contract for services of a ball player giving the right to "reserve" such player for the ensuing season. *Id.* A parol lease for one year, to commence *in futuro*, is invalid. (Minn.) 871. A negotiable note growing out of a wager contract is invalid. (Tenn.) 703. But papers executed to shield the maker's son from a threatened prosecution for a felony are not executed under duress and may be enforced. (Ark.) 551. Where a written proposition is made by one party, which, after a parol modification of some of its terms, is accepted, such written proposition is the best evidence of so much of the resulting contract as it contains. (Ohio St.) 701. The Statute of Frauds has no application to a contract performed by one of the parties thereto. (Ind.) 784. A contract within the Statute of Frauds is not void but voidable. *Id.*

Marine policy. Where the insurer of a vessel assumes all risk of damage by fires except those caused by boiler explosions, a subsequent clause will not relieve from liability for loss by other causes of fire. (Ind.) 899. The violation of warranties need not be negated by insured in an action upon the policy. *Id.* The six months' limit of action on the policy begins to run from the close of the sixty days allowed the company for payment. (W. Va.) 572. A charterer in possession has an insurable interest, and may insure and recover indemnity for the owner as well as himself. *Id.*

Fire insurance policy. Failure to furnish proof of loss within the time required by the policy of fire insurance is waived when the insured is lulled into security by the acts of the company or its agents. (Ky.) 81. A co-owner of a part of unpartitioned land being a life tenant of the rest of the land, stating that he is an unconditional owner, does not make a material misrepresentation which will avoid the policy where neither fraudulent nor material to the risk. *Id.* The mere expression of opinion as to value cannot, in the absence of bad faith, defeat the right to recover on a fire policy. *Id.* An entry by a landlord to rebuild under an agreement with the tenant relieves the company from its contract to indemnify the tenant against payment of rent during the time the premises were untenable. (Pa.) 411.

Life insurance policies. The amount for which a policy may be taken out by a person on his own life is not limited. (Tex.) 217. One has an insurable interest in the life of his brother. *Id.* The designation of a beneficiary who has no insurable interest in the life of the

insured does not render the policy void; he may be treated as assignee, appointee or trustee of the proceeds. *Id.* The signature of an applicant written at the beginning of the paper is for purposes of identification merely. *Id.* His warranty that his answers to the medical examiner are true does not make him responsible if his answers are incorrectly written down. *Id.* Yet it is his duty to see that proper corrections are made or he will be estopped to dispute them as written. *Id.* If payment is contested because of false answers, the jury must be confined to such answers as were put in issue. *Id.* Where an applicant states that no prior application by him was ever rejected, he may show that the agent informed him that certain societies were not regarded as life insurance companies and need not be so considered by him. *Id.* Failure of insured to pay a premium becoming due before his death, where no notice that it is due has been sent him, does not destroy the validity of the policy. (N. Y.) 293. The company must show that notice was given, and payment or tender before action on the policy is not necessary. *Id.*

Benefit certificates. The insanity of a member of a benefit society brings him within the provisions of its rule which entitles him to weekly benefits for incapacity to earn his living. (Pa.) 310. The purchaser of a certificate subsequently substituted as beneficiary may, on death of insured, collect the money due and retain the amount of his advancements, assessments, etc., with interest, but will hold the residue as trustee for the heirs of insured. (Tex.) 189.

For services. An agreement between master and servant that if either terminates the employment without notice he shall forfeit two weeks' wages is reasonable. (Conn.) 286. Such forfeiture is a defense although no special damage is shown. *Id.*

Contracts of sale; real property. The signature of the vendor to the contract is not necessary. (Conn.) 87. A contract to purchase of a man "his place" in a certain town, "containing fifteen acres more or less," sufficiently describes the property. *Id.* The objection that it is void for uncertainty cannot be raised on appeal. *Id.*

Personal property. The purchaser of wheat for seed is subject to the rule of *caveat emptor*. (Mont.) 471. There is no warranty of quality where the seller said he did not know what kind it was. *Id.* A contract may be rescinded on insolvency of the buyer before delivery. (Iowa) 189.

Conveyances. The possession of a deed by the grantee is prima facie evidence of delivery. (N. Y.) 555. The grantee of the heirs of one

need to be acknowledged. *Id.* The grantee in a quit-claim deed takes with notice of prior equities, and is not protected against an unrecorded bond for a deed for value. (Iowa) 524. The undeclared lunacy of a grantor does not impair the title of a bona fide purchaser for value without notice from his grantee. (N. C.) 118. A conveyance while the common-law right to dower was suspended bars all claim of the wife although she did not join in the conveyance. (N. C.) 118. A will is not invalid because made on Sunday. The drafting and execution do not constitute "common labor" within the Statute. (Ind.) 498.

Sealed instruments. Any valid contract be-

material particular, will vitiate the note as to the surety if made without his consent. (S. C.) 743. An addendum increasing the rate of interest is a material alteration and imports no consideration. *Id.* Indulgence to the debtor by extending time for payment is a valuable consideration, as against a surety on a note given for the same debt. (S. C.) 745. A partner signing a bond as surety, in expectation that his partner would also sign, is not relieved from liability because the latter refuses to do so. (Pa.) 749. The approval on a legal holiday of the bond of an assignee for creditors by a court commissioner is not prohibited by the Legal Holiday Act. (Wis.) 423.

III. COMMERCIAL RELATIONS.

Regulation of commerce. In view of the power of Congress to regulate commerce, an Act extending the benefits of the Limited Liability Act to vessels engaged in inland navigation is valid. (Ga.) 55. If by an Act of Congress internal commerce is only incidentally affected, and the subjects are separable and partly under national control, an Act of Congress will be sustained wherever the power of Congress extends; and it is immaterial that somewhere it has a casual or contingent effect upon the domain of state legislation. *Id.* The entire purpose of the limited liability enactments was to encourage investments in shipping, and they may be extended wherever the admiralty courts of the United States have jurisdiction. *Id.* The section of the Statute prohibiting the exportation of fish from Idaho is unconstitutional. (Idaho) 288. Intoxicating liquors transported from another State to a point in Kansas are subject to the laws of Kansas relating to the sale and disposition of such property, as are other intoxicating liquors already rightfully existing in the State, and cannot be sold at the place of destination, in the original packages or other form, except as the laws of the State prescribe. The police power of the State, so exercised, does not infringe on the power delegated to Congress to regulate commerce between the States. (Kan.) 183. Intoxicating liquors transported from one State cannot be sold within another State for uses forbidden by its laws, although the transportation itself cannot be prevented by such State. (Iowa) 295. When a carrier ceases to be a carrier and becomes a warehouseman, he cannot be protected as a carrier by the constitutional provisions as to regulations of commerce. *Id.* A railroad company which aids in violation of the law, in the sale of liquors, cannot defeat the right to condemn them by claiming a lien on the liquors for freight. *Id.*

Commercial paper. To be a promissory note, the instrument must contain on its face an express promise to pay money; hence an I. O. U. is not a promissory note. (Mass.) 892. A note for a valuable consideration, payable at maker's convenience, may be enforced after a reasonable time on demand and refusal to pay. (Ill.) 264. But suit cannot be maintained on a note surrendered up for a new note. (Ind.) 7 L. R. A.

590. An Indian, as such, is not capable of giving a valid note. (Ind.) 782. A provision in a note for attorney's fees is not contrary to public policy and therefore void (N. M. 445); but a provision for a percentage of the amount due as attorney's fees destroys its negotiability. (Cal.) 224. Where the amount of his fees is fixed by the contract it will be presumed to be reasonable. (N. M.) 445. A recital in a note that it is given for a privilege which may subsequently be withdrawn will not destroy its negotiability; and indorsees are not put upon inquiry as to subsequent failure of consideration. (Ill.) 537. A promissory note will pass by delivery without indorsement as a gift *inter vivos*. (R. I.) 387.

Carriers of merchandise. A domestic corporation, engaged as a common carrier, has no right to discriminate in its freight rates; and where it fixes a rate per hundred pounds for carrying petroleum oil in oil-tank cars, it is exercising its franchise in contravention of law. (Ohio) 319. Where a railway company exercises its franchise in contravention of law the state court has jurisdiction though the corporation may be engaged in interstate commerce. *Id.* A state statute providing a penalty for refusal to deliver freight on payment or tender of charges is not invalid as a regulation of commerce. (Tex.) 478. The penalty applies to the company only which executes, authorizes or ratifies the execution of the bill of lading, and another company bound by statute to transport cannot be considered as ratifying the original contract. *Id.* The original way-bill is evidence as to the payment of charges, and exhibition of the bill of lading is not a condition precedent of right to recover the penalty. *Id.* A common carrier waives his right to detain goods for freight if he refuses to deliver upon the ground that they are not in his possession at the place where demand is made. (Ind.) 213.

Banks and banking. The title to commercial paper sent by one bank to another for collection does not pass to the latter prior to collection, although sent "for collection and credit." (N. Y.) 852. Nor is it laches to fail for sixteen days to give notice of its claim and make demand on the assignee of the latter bank for the proceeds of the paper. *Id.* Such assignee takes no title, but it is his duty to re-

of other creditors of the assigning bank. *Id.* The bank receiving a draft for collection is liable for the failure and default of its correspondent. (Minn.) 363. A telegram stating: "Rate is good. Send on your paper,"—is a written acceptance of a check. (Mo.) 428. A letter to a bank, that the writer will honor consignor's drafts with bill of lading attached, is governed by the usage of trade known to both parties. (Pa.) 209. A bank which has charged up to the drawer, canceled and sent a draft in payment of a check, cannot stop its payment to the correspondent bank, because of the insolvency of the bank first receiving the check for collection. (N. Y.) 559. Only the first of several banks successively receiving a check for collection is the agent of the payee. *Id.* A letter to a bank by the holder of drafts indorsed in blank, referring to his bank account and to the drafts as "collections," "discounts" and "acceptances," is not notice that he is not the absolute owner. (Colo.) 845. A bona fide purchaser of such drafts has a good title without regard to prior equities between the owner and the collecting agent. *Id.* Presentation of a check, and notice of nonpayment to the drawer, are not necessary when the drawer has no funds on deposit. (Ind.) 489. One who accepts a certified check in the usual course of business does not assume the risk of the solvency of the bank upon which it is drawn, but may look to the drawer for payment. (Ind.) 443. Its acceptance does not *ipso facto* constitute payment, or novation of the debt. *Id.* Acceptance is necessary to give the holder a right of action against the bank; it is inferred

drawn. (Ienn.) 90. The possession of an unindorsed check, by a bank, does not raise the presumption of payment to the nominal payee. *Id.* A bank is put upon inquiry as to the right of an executrix to transfer stock to herself as an individual; and if the bank relies upon the statement of another as to her ownership, instead of consulting the will, it can claim no lien as security against those who are entitled to the stock under the will. (R. I.) 233. The purchaser of a check for value without notice, made payable to the drawer's own order, the certification procured by fraud, who by mistake takes it without indorsement of payee, holds it subject to all defenses which the bank would have against it in the hands of the payee. (N. Y.) 595.

Partnership. A patent right is property within the meaning of the Act which permits the contribution of property to the capital of a limited copartnership. (Pa.) 663. And a description which gives the number of the patent, name of the inventor and date of its issue is sufficient. *Id.* Different letters-patent may be considered and valued together. *Id.* The fact that valuation was grossly excessive will not remove the limitation upon the partner's liability, if made under a mere mistake. *Id.* Declarations of one partner as to the business may be proved against the other partner. (Ind.) 90. Where a partnership property is kept for the purpose of carrying on a particular business, and not for sale, neither partner has power to make a sale of the entire property. (Ind.) 784.

IV. FIDUCIARY RELATIONS

Trust and trustees. Where a deed is made to a trustee without specifying the terms of the trust, the possibility that some other deed may exist for the benefit of other beneficiaries is not such defect in the chain of title as will warrant a refusal to accept the trust. (Mass.) 840. Where one article of a will provided for a certain fund to aid deserving college students, the fund referred to in a later article is to be used for the purposes specified. (Vt.) 517. Where a fund is given to a person absolutely, subject to a charge for the support of another during life, the court will not interfere at the suit of a third person to change the relation of the parties or the character of the fund. (Mass.) 893. One electing to take a devise under a will, requiring him to convey certain land of which he holds the title, cannot refuse to make such conveyance and claim the land. (Ky.) 454. Where trustees are authorized to carry on a business and contract debts therein, on termination of the trust a creditor of such trustees may bring suit in equity to reach the trust fund for the satisfaction of his debt without first recovering a judgment at law, and without an offer to make good to the trust estate losses incurred by defaults, for which the estate would have a claim on the trustee. (Mass.) 771. If two trustees retire, the other may carry on the business. *Id.* The right to a mortgage given to secure debts of creditors contracted while the

three trustees acted will be lost if steps are not taken to secure it until proceedings are begun to wind up the trust, and bills have been filed by other creditors. *Id.*

Gift causa mortis. A valid gift *causa mortis* is made where one confined to his bed by a sickness and who is fully apprised of the probable fatal termination of the malady, instructs a person to whom he has intrusted the keys to a private box in a bank vault, to count therefrom a certain amount and place it into a separate package labeled as the property of a certain third person, and to deliver it to him in the event of the donor's death. (Ind.) 439. The person who receives the instructions in such case is a trustee for the donee, and not the agent of the donor. *Id.*

Gifts for public beneficial uses. The gift of a fund to a town to establish a public library to be held and managed by trustees for such use, and its acceptance by the town, constitute a contract protected by the constitutional prohibition against the impairment of contracts. (Mass.) 765. Persons making gifts to a fund already established are presumed to intend that it shall be held on the same trusts. *Id.* The taking of money by a private corporation administering a public charity is not a taking under the power of eminent domain. *Id.* It is a misappropriation of corporate funds for trustees of a benevolent association to donate

necessarily before action by a member to compel restoration. *Id.*

Trust estates. A trust estate is not chargeable with compensation of a broker for securing a loan for the benefit of the trust, and the death of the trustee will not render it so liable. (Ill.) 656. The trustees of an insolvent takes the estate subject to all outstanding equities; so, a solvent surety may set off his claim for payment, against debts due to his insolvent principal. (Conn.) 84. The assignee of an insolvent, receiving the deed of assignment and key to his storehouse, is in possession of the debtor's property; but such delivery of possession before filing the inventory and executing the bond avoids the assignment. (Ark.) 408. A party to an illegal trust combination cannot claim the proceeds of goods furnished against a receiver of the trust assets. The rule against relieving a party to an illegal contract does not apply to such receiver. (N. Y.) 46.

Surviving partner. A surviving partner has the right to sell and convey partnership real estate to pay the debts of the firm. (Ind.) 481. Such sale will not be invalidated by a prior conveyance by the trustee of the deceased partner. *Id.* The widow of a deceased partner, who has received proceeds in excess of the amount necessary to pay firm debts, is estopped from claiming any interest in the real estate as against purchasers. (Ind.) 481.

V. DOMESTIC RELATIONS.

Marriage and divorce. Those belonging to an Indian tribe within the State, recognized by custom and the law of the tribe as married, must be so treated and their offspring be regarded as legitimate. (Minn.) 125. A marriage between a man and his housekeeper may be established without proof of a marriage ceremony. His introduction of her as his wife, and she being so regarded by the community, are sufficient. (Cal.) 799. Marriage may be proved by the conduct of the parties where the habit and repute is all uniform and undivided, although the connection of the parties was in its beginning meretricious. *Id.* The presumption that a connection is illicit is rebuttable, and evidence of cohabitation and repute is proof of marriage in a suit for divorce. *Id.* In Georgia marriages between whites and persons of African descent are void. (Ga.) 50. Where the Statute is silent as to the legal effect of marriage entered into in a foreign State to evade the laws of this State, it will be held void; but when the statutory inhibition relates to form, or ceremony, or qualifications depending on age, etc., it may be upheld. *Id.* Marriage is not a "contract," within the constitutional inhibition as to the impairment of obligations of contract; it is more than a contract, and the rights and qualifications of the parties thereto depend on state legislation and control. *Id.* The words of the Statute "physically and incurably incapacitated from entering into the marriage state," mean impotency to consummate the marriage. (Ala.) 425. To discover this a personal examination by physicians or matrons skilled in such matters may be ordered, 7 L. R. A.

final account and charges himself with an amount retained by him to pay annuities, the annuitants cannot impress the funds in the hands of the assignee with a trust for payment of their annuities. (Mass.) 570. The trust will attach to the money held by the trustee only so long as it can be identified. *Id.* A sale of land by executors under a will is not affected by a statute regulating the conduct of judicial sales of land directed by will to be sold. (Ind.) 788. An executor may convey his testator's interest in partnership real estate, and the surviving partner may purchase the same. Such sale is authorized by a will giving power to settle, adjust and compromise all debts owing by the testator; and equity will not disturb the settlement and final accounting so consummated between them. After fourteen years the settlement and accounting will not be opened up although it was irregularly made. *Id.*

Warehouseman as bailee. A deposit of grain is a bailment, the title remaining in the depositor. (Minn.) 529. Holders of receipts for such deposits are tenants in common in the mass, and the warehouseman himself may be one of them, and if he sells any grain in excess of his receipts his sale passes no title and depositors may follow it into the hands of his purchasers. *Id.*

in cases of malformation or abnormal development, or where defendant contests the woman's right to relief. *Id.* A decree *a mensa et thoro*, entered under the Statute, does not bar an action for divorce *a vinculo matrimonii*, upon any of the grounds specified by statute. (Minn.) 448. Cruelty, as a statutory ground of divorce, may be set up by a plea of recrimination as a bar to a bill for divorce on the ground of adultery. (R. I.) 335.

Husband and wife. A husband has no rights as tenant by the curtesy in his wife's estate in remainder where she died before expiration of the life tenancy. (Conn.) 693. The damages which a husband may recover for loss of his wife's services may include their value as manager of his business. (Ind.) 852. Her right to carry on business does not prevent her rendering him services in his business. *Id.* Nor does the marital relation prevent him from acting as her agent. (Fla.) 640. At common law a married woman cannot contract so as to bind herself personally, and no exception to this rule is created by a marriage contract. *Id.* She cannot bind herself by a judgment note, unless given for the benefit of her separate estate, or for her separate business, or for necessities. (Pa.) 211. Where coverture avoids a contract it likewise bars a personal recovery against the wife on the ground of the fraud connected therewith. (Fla.) 640. A married woman is personally liable for her civil torts, including frauds other than those applicable to her contracts. *Id.* Her inchoate right of dower in the foreclosure of a mortgage given by her husband's grantor

is derived from such grantor, and not from her husband, and is not cut off by the foreclosure judgment. (N. Y.) 229. The divorced wife of a member of a mutual benefit society is not entitled to share in the fund payable by the society to his heirs at his death. (Tex.) 189. The possession by a wife of land under a parol gift from her husband is not adverse to his mortgagee while the husband resides with her upon the land. (Ala.) 568.

Parent and child. It is the legal, as well as the moral, duty of parents to support their children during minority, and their express or implied promise to pay for necessities may be

inferred on the grounds of the legal duty imposed. (Iowa) 176. A partial emancipation of a daughter will not exempt the father from liability for necessary services of a physician employed by her. *Id.*

"Family" defined. The relation of husband and wife or of parent and child is not necessary to constitute a family. (S. O.) 747. A brother who lives with his sister in a house belonging to her, she being dependent upon him for a living, is the head of a family, within the Homestead Laws. *Id.* A homestead exemption is allowable in partnership property. *Id.*

VI. PROPERTY RIGHTS AND REMEDIES.

In general. The use of stairways in a building erected by several owners as a single structure cannot be denied to a part owner. (Pa.) 752. A permission or license to use property in a particular manner, or for a particular purpose, on the faith of expenditure of money, is executed and irrevocable. *Id.* Purchasers are chargeable with notice of the servitude. *Id.* The right to assign a contract does not permit one who has ordered machines, agreeing to give his own notes therefor and turn over as collateral any notes taken by him from purchasers, to assign the contract so as to substitute another in his stead whose note must be accepted in lieu of his own. (Iowa) 189. The right to kill a dog, given by statute to a person whom the dog had suddenly assaulted, need not be exercised instantly. The person may go for a weapon and return, follow it into the shop of a third person and kill the dog. (R. I.) 888. A person bitten while interfering in a dog fight is not "suddenly assaulted." *Id.* Sunday is to be deemed a *dies non* in determining a creditor's right to redeem premises sold on execution from a prior redeeming creditor. In such a case redemption may be made on the following Monday, if the prior redemption was made on Saturday. (N. Y.) 847. Where pension money can be directly traced to property convenient for the support of the pensioner and his family, such property is exempt from execution; but if mingled with other funds in trade the pensioner loses the benefit of the exemption. (N. Y.) 557.

Notice of right and title to property. Whatever puts upon inquiry is in equity notice of what inquiry would disclose. (R. I.) 826. A mortgagee of real property will not be charged with constructive notice of an action for the recovery of such property pending in another county. (Ohio St.) 812. The doctrine of *lis pendens* applies only where the court has jurisdiction of the subject matter. *Id.* Declarations as to the ownership of property, made by a person in possession thereof, are admissible in evidence upon an issue as to ownership. (Ind.) 784.

Estates in land. A life estate in one, with remainder to another, may be created by will and at the same time power be given to the life tenant to defeat the remainder by disposal of the property. (Ky.) 836. Giving a life estate to the widow with authority to dispose of the property as she pleases, but with re-

mainder over, does not give her the absolute ownership. *Id.* But a remainder over in a will is void for repugnancy, where the estate has been given generally or indefinitely, with an absolute power of disposition. (Vt.) 517. Principle applied to a devise to testator's wife for her sole use during life, and to dispose of as she pleases. *Id.* The exercise of the power of appointment by will by one having a life interest in trust property to confirm title to a person who had previously purchased for a valuable consideration does not make the property assets of the appointor's estate liable in equity for her debts. (Ga.) 148. When a person is, by the terms of an instrument, entitled absolutely to property, any provision therein postponing its transfer or payment to him is void. (Mich.) 877. A general devise to a testator's widow, subject to the payment of debts, funeral charges and expenses of administration, in full confidence that she will make every needful provision for his children, will not include a trust estate. (R. I.) 886. Under a will providing that a daughter shall receive a certain sum for her support, with no devise over except to her father if then living, she is entitled on her father's death to the immediate enjoyment of the entire estate, although she has not yet reached the age specified in the will. (Mich.) 877.

Estate granted by deed. An estate granted by deed cannot be expanded by recitals in a later deed to the injury of an intervening title. (Mass.) 613. The conveyance of a right of way gives the grantee such rights as are incident or necessary to the enjoyment of such right of passage. (N. Y.) 226. No reservation of a right of way or of any use will be presumed in a conveyance. *Id.*

Estates transferred by will. A testator must be presumed to have used words in their ordinary primary sense or meaning. (N. Y.) 867. The words "nephews and nieces hereinbefore named," in the residuary clause of a will, do not include grandnephews and grandnieces who have been twice previously referred to in the will as "children" of a "deceased niece." *Id.* Property disposed of by will under a power of appointment is not liable for appointor's debts unless his assets are insufficient to pay them. (Ga.) 148. The donor of the income of a trust fund to a person for life may qualify the gift by a provision that the right to receive the income shall be inalienable. (Mass.) 894. When so much of the in-

inalienable, and such income cannot be reached by a creditor of the donee. *Id.* Where for a number of years the income is sufficient to pay in full a specific annuity, a surplus in subsequent years should be paid to annuitant in satisfaction of the previous deficiencies, and not to the next of kin. (N. Y.) 861. A legacy of a certain number of shares of certain stock is specific where another clause of the will disposes of certain other shares of the same stock. (Mass.) 390. Such a legacy is adeemed by its subsequent sale, whether the will is republished by a codicil or not. *Id.* A bequest of the use and improvement of testator's estate to certain persons "during their natural lives" gives them a life estate only. (Conn.) 419. Permission to devisees for life to use so much as is necessary for their comfort will give them the right to use what is necessary for their support. *Id.* Children born to them will take under the will the remainder after the life estate to the exclusion of the heirs at law of the testator. *Id.* The adoption of a child does not operate to revoke an antecedent will of the adopting father. (Ind.) 485.

Leasehold estate. Where tenants enter under a lease for a term of more than one year, void for want of authority of the owner's agent to make it and pay the rent, they may become tenants from year to year and the termination of the respective terms will correspond each year with the date of entry, and if they hold over they cannot terminate the tenancy until such date, except that they may quit at the day fixed in the lease, should such day be reached. (N. Y.) 69.

Riparian rights. Riparian rights are not lost by non-user. (Mass.) 618. A grant of a right to draw a quantity of water confers no right to have the water held back to supply the given amount. *Id.* The grant to a lower proprietor to have water flow down sufficient to run two paper engines does not include a quantity sufficient to run the entire mill machinery. *Id.* A provision in the deed requiring grantees to contribute to the expense of the dam flume and gate of the reservoir does not give the right to have the water held back for his benefit. *Id.* The right of mill owners to divert the water of a stream does not include the right to lower the surface of the water of a great natural pond or lake. (Me.) 459. This may be prevented by injunction. *Id.* The right of a riparian proprietor upon navigable waters to improve, reclaim and occupy the submerged lands out to the point of navigability may be separated therefrom, and be transferred to persons having no interest in the original riparian estate. (Minn.) 722.

Liens and incumbrances on real property. A purchaser of land assuming payment of his vendor's purchase-money notes secured by vendor's lien becomes personally responsible to the original lien holder for their payment as well as for the balance of the purchase price owing by him to his immediate vendor. (Tenn.) 83. They are his personal debts, and in case of his death both sums are charged upon his personal estate. *Id.* An affidavit to an account for a mechanic's lien sworn to before the notary of another State, authenticated

by the notary of the original contract. (Pa.) 711. A lien for the price of lubricating oil is not given by a statute giving a lien for materials furnished for protection of the machinery. (Wis.) 191. Work done in engraving copper shells for printing on cloth creates no lien on "cloth-printing machines" sold as complete without such shells. (N. J.) 43.

Mortgage lien. One who takes a mortgage on real estate from an heir pending settlement of the estate acquires no greater interest than that of the heir himself. (Ind.) 235. A mortgagee in possession may lawfully take down or carry away buildings erected by him, the materials being his own and not so connected with the soil that they cannot be removed without injury to it. (Or.) 273. The party having the right to remove a chattel may do so while in possession of the land. *Id.* Where a mortgagor in possession removed a building to another lot the remedy of the mortgagee was at law, for the removal of the building. (N. J. Eq.) 690. Mortgagee may have his lien protected by injunction. *Id.* A provision in a mortgage that the whole sum secured shall become due on any default in payment will not make notes due before their maturity. Priority is to be determined by the order in which they fall due according to their terms. (Iowa) 365. A valid chattel mortgage may be made by the owner of property in possession of another under an execution. (Ill.) 729. A mortgagee is precluded from recovering possession of the mortgaged premises after forfeiture by action; but if he can obtain possession in any lawful or peaceable mode, he may retain possession of such premises, as against the mortgagor or any person claiming under him subsequent to the mortgage, until his mortgage debt is paid. (Or.) 278. Where at a void foreclosure sale the mortgagee becomes the purchaser of the mortgaged premises and attempts to convey such premises, his deed operates as an assignment of the mortgage debt, as well as the mortgage securing the same. *Id.* If for any cause the proceedings in foreclosure are ineffectual and the mortgagee purchases at a sale thereunder, his relation to the mortgaged premises is that of a mortgagee in possession. *Id.*

Partition of estates held in common. An equitable claim for unauthorized improvements of land held in common may be allowed on a sale for purpose of partition. (R. L.) 731. The value of a barn erected under an agreement in the lease by a life tenant and the owners of one half the remainder in fee, should be deducted from the proceeds of the partition sale before distribution. *Id.* A debt due to the estate from an heir may be deducted from his distributive share of the proceeds of real estate which has been sold in process of administration. (Ind.) 235.

Estoppel to claim rights. A false representation or concealment of material facts, or a design to mislead, is not necessary to constitute an equitable estoppel by an act calculated to mislead. (N. Y.) 755. Doctrine applied to a case where one was induced to purchase lands. The party who influenced him was estopped from setting up his own title against that of

money which he had obtained from a forged mortgage on property of the borrower will not estop the latter from setting up the forgery. (Ark.) 551. No stipulation between third persons can continue an obligation from which the law relieves a party. (Pa.) 411. Principle applied to an insurance company's letter stating that it could not be discharged from liability on a policy insuring a tenant against liability for rent in case the leased buildings are burned, and that such defense would not be raised. *Id.* One who has taken the benefit of a building regulation cannot repudiate the conditions on which it is given. (D. C.) 649. One who has executed and delivered securities in consideration of such a promise after his illegal purpose has failed, and a prosecution has been commenced by third parties, cannot rescind the contract and recover back the securities. (Ark.) 551. A bank is not estopped to deny its liability on a check which it has certified, even as against a bona fide holder for value. (N. Y.) 595. A bank whose certification has been procured by fraud cannot maintain an action to recover possession of an undorsed check against a bona fide purchaser from payee. *Id.* An insurance company is not prevented from setting up the suicide of an insured person as a defense to its liability on the policy, notwithstanding the Statute provides only for fraud as a ground of defense. (Pa.) 576.

Arbitration and award. An attorney has no implied authority to submit a case to arbitration *in pais*, nor make any material change in the submission without order or direction of the court. (Conn.) 568. A dispute as to the ownership of a strip of land, claimed by each party in fee simple, cannot be settled by arbitration. (Mich.) 720. A change in a written submission, by which the award is to be made final instead of being returned to court for judgment, is a material change which an attorney cannot make unless expressly authorized. (Conn.) 563.

Limitation of action. The Statute of Limitations cannot run against any person until his or her right has accrued. (Pa.) 658. So the holding of land by the grantee during the life of the grantor is not adverse to the dower right of his wife. *Id.* In cases of fraud the Statute begins to run in equity from the time of discovery of the fraud. (R. I.) 826. When a debt is barred, the new promisor must acknowledge its justness and express willingness to pay. (Tex.) 72. A letter simply saying "I have done my best to raise some money," etc., does not remove the bar. *Id.*

Abatement of action. The death of one of two physicians sued as partners for unskillful treatment does not abate the action as to the survivor. (Ind.) 90. The mere pendency of a suit against the lessee of a wharf to recover damages for injuries caused by its defective condition will not abate a subsequent suit for the same purpose against the owner of the wharf. (Md.) 272.

Writ and process. One brought within the jurisdiction upon requisition as a fugitive from justice, and tried and discharged as to the offense charged, is not subject to arrest on a civil process until a reasonable time and opportunity
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which he was taken. (Wis.) 817. Where a man has a settled abode in another State for business or pleasure he is a nonresident within the Attachment Law. (Cal.) 127. The ratification of an attorney's act in bringing an unauthorized attachment suit will not give priority to the attachment lien. (Ark.) 405. A writ of *ne exeat* will not be issued to aid the collection of a judgment recovered at law against a woman. (Mass.) 896. A suit cannot be carried on by the initials merely of the Christian name of the plaintiff; and a motion to dismiss the writ on this ground is equivalent to a plea in abatement. (Mich.) 629. An injunction may be granted to prevent a cloud on title obtained by adverse possession. (Mo.) 87.

Actions and suits arising under will. A complaint in an action to contest a will, alleging that testator's intention was different from that expressed by the will, is demurrable. (Ind.) 498. Although heirs of a deceased partner cannot compel the surviving partner to account, yet circumstances may exist to make it proper to entertain action on their behalf. (Ind.) 788. In a proceeding taken to put heirs in possession of an estate an issue must be joined, proof must be taken and judgment rendered, recognizing their capacity to take possession. (La. Ann.) 265. Heirs entitled to a third of certain lands, who claim no more than that part which is set off by metes and bounds, may sue therefor without joining other heirs, where the latter have already received a conveyance of a part equivalent to their share. (Ky.) 454. The fact that distributees have received a portion of the estate will not preclude them from exercising their right as covenantees to enforce the covenant, where their liability will in no event be co-extensive with their claim. (Mass.) 804. The indebtedness of a legatee to the estate may be set off against his claim to the legacy. (Ind.) 231. Taxable costs of all parties in a suit for the construction of a will may be ordered to be paid out of the funds of the estate before distribution. (Vt.) 517.

Equitable relief in cases of contract. A suit by a vendor for a specific performance cannot be defeated on the ground that there is a remedy at law. (Conn.) 87. To defeat it the remedy must be as complete and beneficial at law as in equity. *Id.* Where a number of contracts constitute one transaction and are separable, those not within the Statute of Frauds may be enforced, and the others avoided. (Ind.) 782. An action on contract is within the jurisdiction of the courts of the place of performance, although the parties reside in other States. (Mich.) 511. A covenant under seal by a life tenant, having power to dispose of the remainder of the estate by will, to refrain from disposing of a portion of such remainder upon consideration that the will granting the power shall not be contested, is enforceable. (Mass.) 804. But a covenantee who accepts his share of the money paid for a release of his obligation cannot enforce the covenant. *Id.* Proceedings by administration of deceased covenantee, to procure other covenantees to release, will not estop him from setting up an independent right as covenantee. *Id.* The words "then surviving," applied to heirs-at-law, refer to the time of the death of the life tenant. *Id.*

Equity will not relieve from securities executed to shield a person from prosecution for a felony of which he is guilty. (Ark.) 551.

Personal services. Contracts for personal services will not be specifically enforced. (Conn.) 779. Their negative enforcement by injunction will not be made, where the services are purely intellectual, peculiar or individual in character. *Id.* Principle applied to an agreement by an employé not to allow his name to be used in any business similar to that of his employer. *Id.* Services devolved upon an employé by the general manager of the business are not "peculiar" or "individual." *Id.* Equity will not enjoin the breach of a negative promise unless the contract was such that a decree for its specific performance could be enforced by the court. (N. Y.) 331.

Equity; principles as to burden of loss. Where one of two innocent persons must suffer, the loss must fall upon him who put it in the power of a third person to cause the loss. (S. C.) 745. Principle applied to one who signs a negotiable note as surety, upon a condition known only to the principal. *Id.* A bank which pays forged checks to other banks, which had in good faith advanced money on them to the forger, must bear the loss. (Ky.) 849. On the embezzlement of the money received on a mortgage by a person employed by the mortgagor to produce the money, and who was also agent of the lender for the purpose of examining the title, etc., the mortgagor who left the business to the agent without inquiry for months must bear the loss. (Pa.) 750.

VII. DAMAGES FOR TORTS.

In general, liability for torts. Damages for injury to premises by a negligent construction of a sewer must be limited to the actual damage sustained up to the time of bringing suit. (Tenn.) 465. The grantor of a right of way cannot deposit thereon stone or other obstruction, or in any way obstruct or injure the road bed. (N. Y.) 226. A commercial agency is not exempted from liability for gross negligence in erroneously giving the financial standing of a person. (Pa.) 661. An iron railing surmounted with sharp points, placed around an area, will not subject the owner to liability for injury to a traveler who, to save himself from falling, was injured by one of the sharp points. (Pa.) 120. Where several buildings in succession take fire, each from another, the burning of the last building to catch fire was not the proximate result of the setting fire to the first, when the fire was actually communicated by the intermediate buildings. (N. Y.) 180. An action sounding in tort cannot be maintained to recover damages for injuries to lands by surface water from a drain constructed in accordance with a judgment of a court, although subsequently reversed. (Ind.) 495. Where the united and contemporaneous negligence of two persons causes a collision between them, neither can recover for a resulting injury. (Ind.) 678. To stand in the carriage-way of a public street at night is such negligence as will prevent recovery for injuries resulting from being thrown down by a wagon. *Id.* One who causes work to be done is not ordinarily liable for injuries resulting from the negligence of employes of an independent contractor, unless the injury might have been anticipated as a direct or probable consequence of the work contracted for. (Ohio) 701. An agent of a nonresident is personally liable for injuries resulting from the dangerous condition of the premises. (Ill.) 128.

Party cannot shift his responsibility on another. A party under an antecedent obligation to do a thing cannot get rid of his responsibility by deputing it to somebody else. (D. C.) 649. The obligation to make good all damages to an adjoining owner by interference with a party-wall cannot be escaped by employing a contractor to do the work. *Id.* A building regulation established under Act of Congress may properly require owners to make good all

damages to the adjoining owner. *Id.* One who takes the benefit of such regulation cannot repudiate its conditions. *Id.*

Libel and slander. A publication containing imputations that a member of the Legislature went there solely for the purpose of passing a bill to enrich himself and his copartners in a certain scheme is libelous. (Mich.) 300. A caricature printed in connection with charges of corruption in the passage of a legislative bill constitutes a libel if the charges are not true; and the inducement is sufficient where it shows that plaintiff was a member of the Legislature and the introducer of the bill and was the person referred to in the publication. No innuendo is needed where the meaning of the publication is plain. *Id.*

Negligent exercise of profession. For failure of a physician to give proper instructions in the care of a broken leg set by him he is liable for resulting injury. (Iowa) 566. A lawyer cannot be held liable for a mistake in reference to a matter in which members of the profession possessed of reasonable skill and knowledge may differ as to the law. (Ind.) 649. Doctrine applied to advice as to a mortgage of husband and wife given to secure the husband's debts. *Id.*

Telegraph companies. Mental anguish is a ground for the recovery of substantial damages against a telegraph company for failure to deliver a telegram, where the message is sufficient to inform the company that mental anguish will probably result. (Ind.) 588. The complaint to recover the statute penalty must state that the person addressed resided within the prescribed distance from the office. *Id.* The question of sufficiency of a telegram to inform the operator of its meaning is determined by facts and circumstances. (Ill.) 474. If sufficient appears to show that it relates to a commercial transaction, it is sufficient to charge negligence. *Id.*

Injuries to real property. To entitle an owner of land on a navigable river to maintain an action for obstruction to navigation, the obstruction must be the invasion of a private right. (Minn.) 673. Such action must state facts constituting special damage and that the injury was connected with a negligent act, or was the proximate result of such act. *Id.* A

riparian owner has no right of action for the washing away of banks and bottom of a stream by the increased flow of water at times, occasioned by a dam made with legislative authority. (Me.) 460. Incidental injuries to land by a reasonable increase in the flow of water to facilitate driving logs is not a taking of property. *Id.*

Trespass on the case. Actions of trespass on the case are included in the Statute in the word "trespass," allowing an action therefor. (Tex.) 618. Hence the owners of a leased building who contribute to the injury of a tenant by consenting to the erection of an awning are liable for the consequent injuries to the tenants. *Id.* Doctrine applied to the miscarriage of a woman occupying the premises, caused by the falling of the awning and part of the wall attached thereto. *Id.*

Pollution and contamination of water. Although one may appropriate all the underground water in his soil he has no right to poison or contaminate it, so that when it reaches his neighbor's land it will be unfit for use by man or beast. (Ky.) 451. Doctrine applied to the owner of oil stored near a spring. *Id.* If liable to escape either above or under ground, he must answer for the consequences; but on the question of damages evidence that he had previously sold water from the spring is inadmissible. *Id.* Where one erects a large feeding stable for cattle he will be enjoined from polluting a stream passing through neighboring land used for farming purposes. (Neb.) 457.

Nuisances. Damage caused by explosion of a powder magazine located on a lot smaller than that required by an ordinance is caused by the violation of the ordinance, and the destruction of buildings constituted it a nuisance *per se*. (Ill.) 262. The risk of injury by explosions is not assumed by adjoining owners, although other magazines existed when the lot was purchased. *Id.* Nuisances should be removed beyond the immediate neighborhood of residences. *Id.* Where the facts alleged constitute a nuisance, the term "nuisance" need not be used in the pleading. *Id.* A release to a railroad company of a right of way across certain land, with a further release from all claims for damages by reason of the taking and use of the land, will bar the owner from subsequently recovering damages for overflowing his land by the construction of a ditch and culvert. (Pa.) 218.

Carrier's liability for neglect of duty. The duty of common carriers is a duty independent of contract, arising by implication of law. (N. J.) 483. Independent of statutory requirement a railroad company is chargeable with the duty to fence its track if required to keep the track free from obstructions. (N. Y.) 527. A railroad company is not required to use extraordinary care or vigilance in respect to the safety of its highway crossings. (Ind.) 588. A railroad company cannot, by lease or contract or arrangement, turn over to another company its road and franchises, and thereby exempt itself from responsibility for the conduct and management of the road, but will be liable for injuries sustained on that portion of its road operated by the foreign company. (W. Va.) 854. It is, however, not liable for injuries inflicted by the lessee company upon its own

agent or servant in operating the road. *Id.* It cannot be held responsible for injuries done by its servants unless the act was expressly or impliedly authorized or ratified by it. *Id.* A stockholder is not liable for the negligence of the officers, agents or employees of the company in the operation of its road. (Kan.) 414.

Liability of railroads for injuries to travelers and trespassers. An individual, in the exercise of his absolute rights, if it may endanger the safety of others, must exercise them with a due regard for the safety of others. (Ky.) 816. Running grip cars at a rate of speed prohibited by ordinance is negligence *per se*. (Mo.) 819. It is the duty of a railroad company, where a train crosses a public highway on a trestle, to give timely warning of the approach of the train to the crossing. (Ky.) 816. A traveler familiar with the place, who hurries to such crossing and attempts to cross, is guilty of negligence which will prevent recovery for injuries sustained through fright of his horse caused by the train. *Id.* Whether or not the failure to give warning is negligence, should be left to the jury. *Id.* The presumption of negligence of a railroad company as to a passenger does not obtain in case of injuries to the horse of a traveler attempting to cross the railroad track. (Ind.) 588. An unlicensed hack driver specially ordered for a passenger is not a trespasser in going with his carriage, for the purpose of meeting such passenger, upon a wharf used by the steamboat company, although the rules forbid any but private carriages, or carriages which are licensed, to stand upon the wharf. (R. I.) 802.

For death caused by negligence. Under an Act embodying the provisions of Lord Campbell's Act, suits for railway accidents must be brought by the personal representatives for the benefit of the widow and next of kin. (Ark.) 283. It does not take away the right which survives, to recover for injuries accrued by the common law, nor does it deprive the father of his right to sue for loss of service of his minor child; hence the three actions may be prosecuted at the same time and recoveries had in each. *Id.* In the action for the loss of services of a minor child the recovery is limited to damages accrued between the times of the injury and the death. *Id.* An administrator has no right, under the Employers' Liability Act, to recover damages on account of the death of his intestate, in addition to his right as legal representative to recover the damages which accrued to the intestate in his lifetime. (Mass.) 154. In actions for damages for death caused by negligence what was usually and habitually done may be proved to rebut a claim that an employé was negligent. (Mich.) 500. Mortuary tables are admissible in evidence to show expectancy of life. *Id.* Evidence as to the property of the family, and of an incumbency, is inadmissible in an action for the death of plaintiff's husband. *Id.* If no improper testimony has been admitted, the amount of damages awarded is beyond the reach of a writ of error. *Id.*

Injury to railroad employes. Injury to a brakeman from collision of the train with an animal makes the company liable for the damages under the General Railroad Act, which imposes the absolute duty to fence. (N. Y.)

a section hand, he being a superior agent charged with an act which the law imposes as a duty of the master; yet his command will not justify acts of an employé who sees a danger of which his superior is ignorant. (Mich.) 623. So whether the proximate cause of the injury was the act of the engineer or fireman or that of the assistant roadmaster is an important question in determining the liability of the master, and is for the jury to decide. *Id.* It is the duty of the master to supervise, direct and control the operation and management of his business; and a person invested with full control, subject to no supervision except his, stands in the place of the master and is not a fellow servant. (Mich.) 500. A train dispatcher is not a fellow servant with trainmen. *Id.* The contributory negligence of a fellow servant will not prevent the recovery for injury due in part to the negligence of the master. *Id.* A master who carries on an imminently dangerous undertaking is bound to know the character and extent of the danger, and to notify the servant specially and unequivocally. Constructive or obligatory knowledge on his part supplies actual knowledge, and such knowledge is presumed *juris* and *de jure* to exist, while the servant is held to the knowledge of patent defects only (La.) 172. The servant has a right to assume superior knowledge in his employer, to rely on his prudence and judgment and to believe that he will not unnecessarily jeopardize his person and life by avoidable risk. *Id.* An employé does not, by entering the service, assume a risk of danger incident thereto, which by reason of his youth and inexperience he does not know or appreciate, and to which the employer exposes him without warning him of it. (Ark.) 288. Whether or not he ought to have had knowledge or appreciation of the danger, is a question for the jury. *Id.*

As carrier of passengers. Railway companies are bound to keep the platforms at their passenger stations in a safe condition for persons to enter and leave the cars. (Ind.) 687. A passenger is justified in taking the way of passage held out by the company for entrance and exit to the public street, although another passageway might be taken. (N. J.) 485. Passengers have a right to assume that the means of access provided are reasonably safe. *Id.* Knowledge of the unsafe condition of the platform will not prevent a person using it from recovering for injuries caused by its defects. (Ky.) 44; (Ind.) 687. Where connecting companies use a station jointly, one company is not responsible for the neglect of the other over which the passenger is carried. (Kan.) 414. Where a railroad company legally holds stock

negligence of such connecting road. *Id.* If a company neglects its duty to stop at a station, a passenger is not therefore justified in jumping from the moving train, unless expressly invited so to do. His unwillingness to be carried beyond his destination is no excuse. (La.) 111. The fact that the door of the car is open is no invitation to a passenger to pass through it for the purpose of jumping off while the train is running at full speed. (Mo.) 819. Calling the name of a station and stopping the train to take a side track while another train passes will not make the carrier liable for injuries to a passenger. (Ala.) 823. A passenger who alights from a grip car running at full speed is guilty of contributory negligence. (Mo.) 819. But it is not negligence for a passenger familiar with the management of railroads to go forward to the baggage car, and as the trains are about to collide to jump to the ground. (Mass.) 848. Whether or not alighting from a moving train constitutes negligence is a question of fact to be determined by the jury. (Ind.) 687. The fact that the passenger was traveling on Sunday, in violation of the Act concerning vice and immorality, does not preclude her from maintaining the action. (N. J.) 485.

As carrier of merchandise. A carrier of goods must protect the property from destruction or injury, and has the burden of proving that the goods were not in good condition when shipped or when received from a connecting carrier. (Iowa) 280. Nor can custom be invoked to protect it from negligence in failing to transport goods with care; and the rate of charge will not limit the care required, or restrict its liability. *Id.* Doctrine applied to a shipment of butter, destroyed by heat during transportation, by negligence to provide cold storage, and neglect to use ice in the cars used. *Id.*

Carrier; limitation of liability by contract. A limitation of liability in the bill of lading will not control where the damage is the effect of the carrier's negligence. (Ind.) 214. Unless specially provided for, an intermediate carrier can derive no benefit from a contract between the first carrier and the shipper. *Id.* A "fire clause" in a bill of lading exempting from liability for loss where transportation is not offered as an alternative, and no reduction of rates is made as a consideration for the exemption, is invalid. (Tenn.) 162. Mere acquiescence in the use of such bills will not show the reasonableness of the exemption. *Id.* A condition is reasonable only if coupled with compensating advantages to the shipper. *Id.* The contract must be fairly obtained, and must be both just and reasonable. *Id.*

VIII. CRIMINAL LAW AND PRACTICE

Lottery prohibited. "Lottery," within the Statute, embraces only schemes in which a valuable consideration is paid for a chance to draw a prize. (Ala.) 599. Distribution of prizes to holders of tickets where no payment is exacted is not illegal. *Id.*

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Disturbing religious society. An information against certain parties charging willful, malicious and unlawful interruption, molestation and disturbance of a religious society is sufficient to sustain a conviction. (Neb.) 225. A church organization may make rules by which

the admission and expulsion of its members are to be regulated, and the members must conform to these rules. *Id.*

Death penalty. The Legislature may change the manner of inflicting the death penalty. (N. Y.) 715. Evidence is not admissible to show that, in executing a law, some constitutional provision may possibly be violated. *Id.*

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The comparative humanity of different systems of executing the death penalty on a criminal is a question for legislative determination. *Id.*

Removal of cause. The marriage of parties in another State does not furnish a ground for removal of indictments against them for fornication into the United States court. (Ga.) 50.



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TO

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ACTION OR SUIT. See also INDIANS, 3; NUISANCES, 6, 7; PAYMENT, 2; WATER COMPANIES, 2.

1. The fact that distributees who have received a portion of the estate of the decedent, who contracted to procure covenantees to release a covenantor from his obligation, may be called upon to contribute towards the damages which may be recovered for the breach of such contract, will not preclude them from exercising their right as covenantees to enforce the covenant, where their liability will in no event be coextensive with their claim, and there is no means of determining what such liability will be. *Wood v. Bullard* (Mass.) 804

2. Taxpayers may maintain suits against town officers to prevent or remedy misapplication of town funds. *Russell v. Tate* (Ark.) 180

3. Heirs entitled to a third of certain lands, who claim no more than that part, which is set off by metes and bounds, may sue therefor without joining other heirs, where the latter have already received a conveyance of a part, equivalent to their share. *McQuerry v. Gilliland* (Ky.) 454

4. The person in whom the legal title to property is vested in trust for a married woman is a necessary party to a bill seeking to charge the property with the payment of money paid to her. *Prentiss v. Paisley* (Fla.) 640

5. A railroad company, by appearing for any other purpose than to object to jurisdiction, submits itself to the jurisdiction of the court, and waives an objection that the action is brought in the wrong county, contrary to Ohio Rev. Stat. § 5027. *Ohio S. R. Co. v. Morey* (Ohio) 701

6. The word "trespass," in Texas statutes allowing an action for trespass to be brought in the county where it was committed, or where the defendant has his domicile, includes actions of trespass on the case. *Hill v. Kimbrell* (Tex.) 618

7. A stockholder's liability to creditors for failure to make and record the certificate of payment of all the capital stock, as required by the New York Act of 1875, is not penal, and 7 L. R. A.

survives his death. *Cochran v. Matthiessen* (N. Y.) 553

8. The mere pendency of a suit against the lessee of a wharf, for injuries caused by its defective condition, will not abate a subsequent suit against the owner of the wharf. *State, Bashe, v. Boyce* (Md.) 272

9. The death of one of two physicians sued as partners in an action for damages for unskillful treatment, and the abatement of the action as to him, does not abate it as to the survivor. *Hess v. Lowrey* (Ind.) 90

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ADVERSE POSSESSION.

1. The possession by a wife of land under a parol gift from her husband is not adverse to his mortgagee while the husband resides with her upon the land. *Gafford v. Strouse* (Ala.) 568

2. There is no adverse holding by the grantee of land during the life of the grantor, against the dower right of the grantor's wife, who did not join in the conveyance; but it is otherwise in the case of a disseisor who has acquired title by adverse possession as against the husband during his lifetime. *Winters v. De Turk* (Pa.) 658

AFFIDAVIT. See OATH AND AFFIDAVIT.

ALTERATION OF INSTRUMENTS.

1. An alteration may be made in an instrument by words added thereto which are not literally incorporated in the body thereof. *Sanders v. Bagwell* (S. C.) 743

2. An addendum written below the signatures on a sealed note bearing interest at 7 per cent, saying, "The above note is to be accounted for, with interest at 8 per cent per annum," and signed by the principal obligor on the note,—constitutes a material alteration which will avoid the note as against a surety thereon who did not consent to the alteration. *Id.*

3. Any valid contract between the payee and the principal, by which the terms of the original note are altered in any material par- 888

NOTES AND BRIEFS.

Alteration of instruments; effect of; immaterial; effect on surety. 743

ANIMALS.

1. The right of a person whom a dog has suddenly assaulted, to kill the dog, under R. I. Pub. Stat. chap. 93, § 6, need not be exercised instantly, but the person has a right to go for a weapon and return and kill the dog. *Spaight v. McGovern* (R. I.) 838

2. The fact that a person assaulted by a dog followed it into the shop of a third person and killed it there does not make him liable to the owner of the dog, where the statute gave him a right to kill it. *Id.*

3. A man bitten in consequence of his interference between two dogs to separate them is not suddenly assaulted, within the meaning of R. I. Pub. Stat. chap. 93, § 6, so as to give him the right to kill the dog. *Id.*

ANNUITY. See also INSOLVENCY AND ASSIGNMENT FOR CREDITORS, 2, 3.

Where for a number of years the income from an estate was insufficient to pay in full an annuity payable out of the income, a surplus in subsequent years, when such income was more than sufficient, should be applied in satisfaction of the previous deficiencies, and not be paid to the next of kin. *Re Chauncey* (N. Y.) 861

APPEAL AND ERROR.

I. NOTICE; RECORD; EXCEPTIONS.

II. HEARING AND DETERMINATION.

III. EFFECT OF DECISION.

NOTES AND BRIEFS.

I. NOTICE; RECORD; EXCEPTIONS.

1. Notice of appeal to coparties need not be given, under Ind. Rev. Stat. 1881, § 635, where no judgment is rendered against them and they have no interest in the appeal. *Koons v. Mellett* (Ind.) 231

2. An appeal in a suit by the creditor of a legatee against him and the administrator to reach money in the latter's hands is not subject to the provisions of Ind. Rev. Stat. 1881, §§ 2454, 2455, respecting appeals in proceedings for settlement of decedents' estates. *Id.*

3. Only one point or subject should be embraced in an assignment of error. *Kelly v. Bennett* (Pa.) 120

4. A special question withdrawn from the jury by consent of both parties before the general verdict was rendered cannot be considered on appeal as part of the findings and verdict, even if the word "Yes" is written under it. *Read v. Nichols* (N. Y.) 180

5. An exception to "refusals to charge as requested" is not sufficiently definite, where some of the requests were given as requested, others modified, and some refused. *Id.*

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7. A statement in a bill of exceptions, that the court refused to give certain numbered instructions asked by defendant, to which refusal of the instructions thus asked the defendant by his counsel then and there excepted at the time, will entitle defendant to have such refused instructions considered on appeal, and will not be treated as a general exception to the refusal of the instructions as a whole. *Weber v. Kansas City Cable R. Co.* (Mo.) 819

II. HEARING AND DETERMINATION.

8. Controverted questions of fact cannot be considered on appeal from the Appellate Court of Illinois, although the court has not expressly found, in terms, against appellant on those questions, and portions of its opinion are inconsistent with and negative the presumption of such a finding. *Postal Teleg. Cable Co. v. Lathrop* (Ill.) 474

9. The refusal of the court to grant a nonsuit is not assignable as error. *Kelly v. Bennett* (Pa.) 120

10. An objection that a contract is void upon its face for uncertainty cannot be raised for the first time on appeal. *Hodges v. Koving* (Conn.) 87

11. If no improper testimony affecting the subject of damages has been admitted, and the court has given to the jury proper instructions, the amount of damages awarded is beyond the reach of a writ of error. *Hunn v. Michigan C. R. Co.* (Mich.) 500

12. Permitting a witness to answer a question as to what he did on a certain occasion, over an objection that it calls for a conclusion or opinion, is not reversible error where the court subsequently strikes out of the answer all that portion which states a conclusion or opinion. *Pennsylvania Co. v. Marien* (Ind.) 687

13. Where the law makes the judge the trier of facts in cases to which the constitutional right of trial by jury does not extend, as has been done in contested election cases, his findings of fact are as conclusive on appeal as the verdict of a jury. *Jones v. Glidewell* (Ark.) 831

14. Although the supreme court will not attempt to ascertain where the weight or the preponderance of the evidence lies in a contested election case, it will determine whether or not a given finding is sustained by the testimony. *Id.*

15. The conclusion of law to be deduced from a special finding of facts is a question to be finally determined by the supreme court. *Id.*

16. Error in overruling demurrers to certain paragraphs of an answer is immaterial where the same evidence could be introduced and the same facts found under the general denial as under those paragraphs of the answer, and there is a special finding of facts which controls the judgment. *Walling v. Burgess* (Ind.) 431

17. Permitting incompetent evidence tending to support a finding to go to the jury over objection will cause a reversal of the judgment, where the other evidence in support of such finding is not of a satisfactory character. *Terre Haute & I. R. Co. v. Olem* (Ind.) 588

18. A reversal for the admission of irrelevant evidence, where the court tried the case, will not be made unless it appears that the evidence was relied upon. *White v. White* (Cal.) 799

19. An objectionable instruction as to the credit and weight of the testimony of interested witnesses is not cause for reversal where there is no serious conflict between the appellant and any other witness, and nothing to show that it applied to him more than to the other party, who also testified. *Hess v. Lowrey* (Ind.) 90

20. Instructions which are lengthy and in the nature of a *résumé* of the evidence and an argument, do not constitute reversible error, if they are not so unfair to appellant as to have prejudiced the jury. *Postal Teleg. Cable Co. v. Lathrop* (Ill.) 474

21. Excluding evidence is not reversible error where the excluded evidence is subsequently admitted. *Pennsylvania Co. v. Marien* (Ind.) 687

22. The fact that a party is compelled to close his case before all his witnesses have been examined is not reversible error, where the time for taking testimony was limited at his request, in order that a decision might be reached before the adjournment of the term, and he was allowed more time than he said he would require when the date for closing the trial was fixed, especially where he does not show that any material evidence was thereby lost. *Jones v. Glidewell* (Ark.) 831

23. No reversal will be granted for the allowance of leading questions unless there has been a manifest abuse of discretion. *White v. White* (Cal.) 799

24. Want of a finding will not warrant a reversal where the evidence would not have justified a finding in favor of the complaining party. *Id.*

25. A judgment will not be reversed for error in a conclusion of law stated by the lower court, if a proper judgment is rendered upon the facts found by it. *White v. Chicago, St. L. & P. R. Co.* (Ind.) 257

26. Rendering judgment for a sum in excess of that covered by the prayer of the complaint is not ground for reversal, where it does not exceed the amount due, as the complaint might have been amended if the objection had been made in the lower court. *Ke-tuh-e-mun-guah v. McClure* (Ind.) 782

III. EFFECT OF DECISION.

27. An action sounding in tort cannot be maintained to recover damages for injuries resulting to lands by reason of the casting of surface water thereon through a drain which was constructed in good faith in accordance with a judgment of a court having jurisdiction of the parties and subject matter, although such judgment has been subsequently reversed on appeal for error, no stay of proceedings pending the 7 L. R. A.

appeal having been obtained. *Thompson v. Reasoner* (Ind.) 495

NOTES AND BRIEFS.

Appeal and error; parties. 231

APPEARANCE. See ACTION OR SUIT, 5.

ARBITRATION. See also ATTORNEYS, 1-3.

A dispute as to the ownership of a strip of land 108 feet wide, claimed by each party in fee simple under a deed which includes the strip, cannot be settled by arbitration, under How. (Mich.) Stat. § 8475, which allows arbitration to settle boundaries of lands, but not to determine a claim to any estate in fee or for life. *Lang v. Salliotte* (Mich.) 720

NOTES AND BRIEFS.

Arbitration; determination of land titles. 720

Power of attorney to submit case to. 563

ARREST.

1. A mere suspicion that a woman walking on the street in the night is plying the vocation of a prostitute will not justify her arrest, without a warrant, without any act on her part indicating that such is her purpose. *Pinkerton v. Verberg* (Mich.) 507

2. Being saucy to an officer, or daring him to arrest after he has threatened to arrest without warrant or any right to do so, will not justify him in making the arrest. *Id.*

NOTES AND BRIEFS.

Arrest for one purpose will not justify detention and prosecution for another. 817

Evidence to establish character of accused. 507

ASSIGNMENT.

The right to assign a contract, under Iowa Code, § 2084, giving the assignee a right of action in his own name, does not permit one who has ordered machines agreeing to give his own notes therefor, and turn over as collateral any notes taken by him from purchasers, to assign the contract so as to substitute another in his stead whose note must be accepted in lieu of his own. *Rapley v. Racine Seed Co.* (Iowa) 189

ASSIGNMENT FOR CREDITORS.

See INSOLVENCY AND ASSIGNMENT FOR CREDITORS.

ASSOCIATIONS. See CORPORATIONS, 25.

ATTACHMENT.

1. Where a man has a settled abode for the time being in another State for the purpose of business or pleasure, he is a nonresident, within the meaning of the California attachment law. *Hanson v. Graham* (Cal.) 127

2. The ratification of the act of an attorney in bringing an unauthorized attachment suit will not relate back to the time of the commencement of the suit, so as to give the attachment lien priority over the liens of third

parties which have been acquired in good faith during the interval between the bringing of the suit and the ratification. *Carruth-Byrnes Hardware Co. v. Deere* (Ark.) 405

NOTES AND BRIEFS.

Affidavit by a stranger; ratification by principal. 405

ATTORNEYS.

1. An attorney has no implied authority to submit a case in which he is employed, to arbitration by a submission made *in pais*, without order or direction of the court or the knowledge of his client. *Daniels v. New London* (Conn.) 563

2. A material change in a submission to arbitration, made by the parties by an act *in pais*, is not within the authority of an attorney, unless he is expressly authorized to make it. *Id.*

3. A change in a written submission to arbitration by which the award is to be made final, instead of being returned to court for judgment by the court, is a material change such as an attorney cannot make unless expressly authorized. *Id.*

4. A lawyer cannot be held liable for a mistake in reference to a matter in which members of the profession possessed of reasonable skill and knowledge may differ as to the law, until it has been settled in the courts; nor if he is mistaken in a point of law on which reasonable doubt may be entertained by well-informed lawyers. *Citizens Loan, F. & Sav. Asso. v. Friedley* (Ind.) 669

5. A lawyer upon whose advice a mortgage was taken in 1888, executed by a husband and wife upon lands held by them as tenants by entireties, to secure the husband's debt, cannot be held liable for the loss occasioned by the death of the husband and the defeat by the wife of a foreclosure suit upon the ground that she signed as surety for her husband, although it was well settled when the mortgage was executed that the wife's signature was void, since it was not decided until 1884 that such mortgage was void as to both husband and wife. *Id.*

NOTES AND BRIEFS.

Power of attorney; cannot bind client out of court; power to submit to arbitration. 563

ATTORNEYS' FEES. See BILLS AND NOTES, NOTES AND BRIEFS.

BALL PLAYERS. See CONTRACTS, 11, 12.

BANKRUPTCY.

NOTES AND BRIEFS.

Bankruptcy; debts not provable not discharged. 413

BANKS AND BANKING. See also CHECKS, 3, 7, 8.

1. A bank is put upon inquiry as to the right of an executrix to transfer stock in the bank to herself as an individual, by a proposal 7 L. R. A.

to make such transfer as security for her indorsement of the note of another; and if the bank relies upon the statement of the maker of the note as to her ownership, instead of consulting the will, and the transfer by the executrix was unauthorized, it can claim no lien as security for such indorsement against those who are entitled to the stock under the will. *Peck v. Bank of America* (R. I.) 826

2. A bank with which a customer has left for collection his draft upon a party residing at a distant point is liable for the failure and default of a correspondent to whom it forwarded the draft for collection. *Streissguth v. National German Am. Bank* (Minn.) 363

3. A bank which pays forged checks purporting to have been drawn by one of its depositors, to other banks which had in good faith advanced money on them to the forger, must, as between itself and the other banks, bear the loss, especially where the depositor lived near, and the checks continued to be presented and paid for several months before the forgery was discovered. *Deposit Bank v. Fayette Nat. Bank* (Ky.) 849

4. A bank which has charged up to the drawer, canceled, and sent a draft in payment of, a check received through the agency of two other banks which had successively received it for collection, the latter of which, not knowing that the former was not the owner thereof, as the payee's indorsement was in blank, had given credit therefor, reserving the right to charge it back if dishonored, and thereupon sent it on for collection and remittance,—cannot, at the request of the drawer and payee of the check, stop payment of the draft to the correspondent bank because the bank first receiving the check for collection had become insolvent. The insolvent bank only is the agent of the payee of the check, and the drawee, after sending the draft, is not justified in resisting payment, for the benefit of such payee, even assuming that he is entitled to the proceeds thereof. *Corn Ech. Bank v. Farmers Nat. Bank* (N. Y.) 559

5. Only the first of several banks successively receiving a check for collection is the agent of the payee. *Id.*

6. The title to commercial paper payable on demand, which is sent by one bank to another for collection and so indorsed, does not pass to the latter bank prior to its collection, although it is accompanied by a letter stating that it is sent "for collection and credit," and its amount is credited upon the account of the transmitting bank immediately upon its receipt by the collecting bank, in pursuance of a custom existing between the two banks in regard to their dealings. *National Butchers & D. Bank v. Hubbell* (N. Y.) 852

7. The assignee of a bank holding such paper uncollected takes no title thereto, and if he collects the same it is his duty to remit the proceeds to the transmitting bank; and the fact that he has expended such proceeds in the payment of the debts of his assignor in good faith, without notice of the claim of the transmitting bank, and under an order of court for the payment of a dividend to creditors, is no defense to a suit by the latter to recover them. *Id.*

8. As to the proceeds of the paper collected by the bank before its assignment and paid out by it in the usual course of its business in payment of its debts, the transmitting bank occupies a position no different from that of other creditors of the assigning bank, where its custom was to remit the proceeds of such collections once a week, and the identical moneys collected upon the paper were not expected to be sent to the transmitting bank. *Id.*

9. It is not such laches on the part of the transmitting bank to fail for sixteen days after the recording of the assignment to give notice of its claim and make demand upon the assignee for the proceeds of the paper belonging to it as will bar its right of action to recover them from the assignee; especially where there was no reason to suppose that he would use its money to pay his assignor's debts. *Id.*

NOTES AND BRIEFS.

Banks; payment of forged paper. 849

Collections; paper indorsed in blank; restrictive indorsement; indorsement "For collection;" passing of title; application of proceeds; effect of advances and over-drafts; effect of custom or course of dealing; revocation of agency; repudiation of doctrine of sub-agency of collecting bank; neglect or default of correspondents and agents; debts, liabilities, etc., of collecting bank; insolvency of collecting bank. 852

Collecting agent; liability to account; right of owner to control proceeds. 859

Liability of collecting bank for default of its agent. 864

Proof of depositor's account. 491

Right to permit transfer of stock by executor. 827

BENEFIT SOCIETIES.

NOTES AND BRIEFS.

Benefit societies; members of, not creditors; collection of benefit because of insanity. 210

BIBLE. See **SCHOOLS**, 3.

BILLS AND NOTES. See also ALTERATION OF INSTRUMENTS, 2; INDIANS, 2.

1. That an instrument may be a promissory note it must contain on its face an express promise to pay money. Hence an instrument in the following form: "I. O. U. the sum of \$17.05 for value received," signed by the maker, is not a promissory note. *Gay v. Rooks* (Mass.) 592

2. The provision in a promissory note for attorneys' fees of a fixed and definite amount, in case the note is collected by suit, is not contrary to public policy and therefore void, although courts might interfere to prevent oppression or collusion. *Exchange Bank v. Tuttle* (N. M.) 445

3. A provision in a note for a percentage of the amount due, as attorneys' fees "on suit by himself or an attorney employed," destroys its negotiability, under Cal. Civ. Code, § 3068, providing that "negotiable instruments must be without any condition not certain of fulfillment." *Adams v. Seaman* (Cal.) 824

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4. Indulgence to a debtor by extending the time for payment for a certain period is a valuable consideration for a note for the same debt, as against a surety on the note. *Fowler v. Allen* (S. C.) 745

5. One who signs a negotiable note perfect on its face, as surety for another, upon the condition, known only to the principal, that it is not to be delivered to the payee until something else is done, will be liable on the note, even in the hands of the payee, if he has no notice of such condition, although the condition be not complied with. *Id.*

6. A note for value received, promising to pay a certain sum at the maker's "convenience and upon this express condition, that" he is "to be the sole judge of such convenience and time of payment," may be enforced by an action, after the expiration of a reasonable time, on demand and refusal of payment. It does not give the maker the sole right to say when it would suit his convenience to pay it. *Smithers v. Junker* (C. C. N. D. Ill.) 364

7. A statement or recital in a note that it is given for the privilege of hanging advertising signs in street cars for three months from a certain subsequent date will not destroy its negotiability. *Siegel v. Chicago Trust & Sav. Bank* (Ill.) 537

8. Indorsees of a note are not put upon inquiry as to a subsequent failure of consideration, by a statement or recital in the note that it is given for the privilege of hanging advertising signs in street cars after a certain subsequent date. *Id.*

9. Letters by the holder of drafts indorsed in blank, to a bank with which he had rediscounted them, referring to his account and to the drafts as "discounts" and "acceptances" of the drawer, are not notice that such holder is not the absolute owner. *German Nat. Bank v. Coors* (Colo.) 845

10. A bona fide purchaser of drafts indorsed in blank for the purpose of collection has a good title without regard to prior equities between the owner and the collecting agent. *Id.*

11. A telegram stating that "Tate is good. Send on your paper,"—sent by a bank in reply to an inquiry as to whether or not it would pay such person's check for a certain amount, constitutes a written acceptance of such check which will render the bank liable for its amount to a holder thereof who was shown the telegram and took the check for value in reliance thereon. *Garrettsen v. North Atchison Bank* (C. C. W. D. Mo.) 428

12. A letter from one expecting a consignment of goods for sale on commission, to a bank, stating that the writer will honor the consignor's drafts with bill of lading attached, must be read in the light of a usage of trade known to both parties, for the consignor to draw for an amount not exceeding three fourths of the value of the consigned goods, and will render the writer liable only for such amount. *Pike v. Butte First Nat. Bank* (Pa.) 209

NOTES AND BRIEFS.

Bills and notes; when invalid. 706

Given for illegal consideration; validity in hands of bona fide holders. 706

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How far note will pass without indorsement.	388
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Assignment of certified check without indorsement; subsequent indorsement after notice of fraud; rights of parties.	597

BONDS. See also COUNTIES, 2; MUNICIPAL CORPORATIONS, 5.

1. The fact that a surety on a bond signed it in the expectation that his partner also would sign the bond as surety, but that for some reason he failed to do so, will not relieve him from liability. *Whitaker v. Richards* (Pa.) 749
2. A statutory liquor bond which must be approved by the town board, and then filed with the county treasurer, who has no discretion as to the filing, becomes operative on its approval and before filing, so as to make the sureties liable for the acts of the principal between the dates of the approval and the filing. *Brockway v. Petted* (Mich.) 740
3. A liquor bond dated back several days before the time of signing, and reciting that the principal then professes to carry on the business of liquor-dealer, relates back to and covers the period from its date. *Id.*
4. A recital in a liquor bond that the principal then professes to carry on the business of a liquor-dealer estops the sureties from denying that fact. *Id.*

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Bond; delivery essential to validity.	740
Conditional signing by surety; liability upon delivery without compliance with condition.	745
Of liquor-dealer, under Michigan statutes.	740

BOUNDARIES. See ARBITRATION.

BROKERS. See TRUSTS, 8.

BURDEN OF PROOF. See EVIDENCE, II.

CAPITAL PUNISHMENT. See CRIMINAL LAW, 2.

CARRIERS.

I. RIGHTS, DUTIES, AND LIABILITIES.

- a. *As to Passengers.*
- b. *As to Freight.*
- c. *Contracts to Limit Liability.*
- d. *Connecting Carriers.*

II. DISCRIMINATION IN RATES.

NOTES AND BRIEFS.

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See also COMMERCE, 5, 6; CUSTOM AND USAGE; STREET RAILWAYS, 5, 6; SUNDAY, 1.

I. RIGHTS, DUTIES, AND LIABILITIES.

a. As to Passengers.

1. The duty of common carriers with respect to the transportation of persons and property is independent of contract. *Delaware, L. & W. R. Co. v. Trautwein* (N. J.) 435
2. Knowledge of the unsafe condition of a platform provided by a carrier for loading stock will not prevent recovery for injuries to a person on attempting to use it for that purpose in the exercise of due care. *White v. Cincinnati, N. O. & T. P. R. Co.* (Ky.) 44
3. A railway carrier must provide safe means of access to and from its stations for the use of passengers, and passengers have the right to assume that the means provided are reasonably safe. *Delaware, L. & W. R. Co. v. Trautwein* (N. J.) 435
4. A railway company is not absolved from the duty to keep a passageway held out by it for use to and from its depot reasonably safe, by the fact that another passageway is provided. *Id.*
5. A passenger is justified in using a passageway held out by the carrier as a means of entrance and exit from and to the public street; and it is immaterial whether the way is made and kept in repair by the carrier or other parties. *Id.*
6. Railway companies are bound to keep the platforms at their passenger stations in a safe condition for persons to enter and leave the cars; and failure to do so will render the company liable to persons injured, without fault on their part, on account of the defect. *Pennsylvania Co. v. Marien* (Ind.) 687
7. A passenger is not bound to abandon the use of a station platform which is not in good repair, and seek some other way of entering and leaving the cars, if it is still held out by the company as safe, and used by the public. *Id.*
8. The fact that a person may have seen a station platform out of repair at one time does not bind him to carry such defect in mind upon all future occasions when approaching or leaving a train at such place. *Id.*
9. Calling the name of a station, and stopping the train soon after to take a side track while another train passes, will not make the carrier liable for injuries to a passenger who attempts to get off at that place, where all the surroundings indicate that it is not the proper place for alighting. *Smith v. Georgia P. R. Co.* (Ala.) 323
10. While it is the duty of a railroad company to stop its train at a station to which it has contracted to carry a passenger, and to land him safely and conveniently, yet the fact that the company neglects its duty and the train passes the station without stopping does not justify a passenger in jumping from the moving train, unless expressly or impliedly invited to do so by the employes of the company. *Walker v. Vicksburg, S. & P. R. Co.* (La.) 111

b. As to Freight.

11. A carrier's duty is not limited to the transportation of goods delivered for carriage.

and injury from any source, which may be averred and which in the exercise of care and ordinary intelligence may be known or anticipated. *Beard v. Illinois C. R. Co.* (Iowa) 280

12. A carrier that has accepted butter for transportation cannot escape liability for damage to the butter from the heat during transportation by the fact that it did not have refrigerator cars which were ready for use; at least when it could have been carried safely by the use of ice in the cars used. *Id.*

13. The sealing of a car containing butter when received from a connecting carrier is no excuse for failure to put ice in the car if necessary to protect the butter from the heat. *Id.*

14. The rate of charges as shown by the waybill of butter, if it does not express a contract to excuse the carrier from the exercise of the care required by law, although it is the rate for common cars, will not limit the care to be exercised by the carrier or restrict its liability. *Id.*

15. The penalty provided by the Texas statute for the refusal of a railroad company to deliver freight on payment or tender of the charges due as shown by the bill of lading applies only to a company which has itself executed, authorized, or ratified the execution of the bill of lading. *Dwyer v. Gulf, C. & S. F. R. Co.* (Tex.) 478

16. The exhibition of the bill of lading at the time of the tender of the charges and demand of the goods is not a condition precedent to the recovery of a penalty, under the Texas statute, for refusal to deliver the goods, although such penalty should be inflicted only for a willful disregard of the law. *Id.*

17. A common carrier waives his right to detain goods for the freight if he puts his refusal to deliver them to the owner upon the ground that they are not in his possession at the place where a demand is duly made. *Adams Exp. Co. v. Harris* (Ind.) 214

c. Contracts to Limit Liability.

18. A limitation of liability in the bill of lading will not control where the damage is an effect of the carrier's negligence, and where it does not appear that the limitation was in consideration of a lower rate of freight. *Adams Exp. Co. v. Harris* (Ind.) 214

19. To be valid, a contract restricting a carrier's liability must be fairly obtained, just, and reasonable. *Louisville & N. R. Co. v. Gilbert* (Tenn.) 162

20. A condition in a bill of lading which limits the carrier's liability is reasonable if coupled with compensating advantages to the shipper, and the latter has the alternative of getting rid of the condition by paying a reasonably higher freight rate. *Id.*

21. A "fire clause" in a bill of lading, exempting the carrier from liability from loss by fire, is not valid where transportation under the rules of the common law is not offered as an alternative, and no reduction of rates is made as a consideration for the exemption. *Id.*

22. Mere acquiescence by shippers in the
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unreasonableness of the exemption, where the shippers have not had an opportunity of selecting between bills of lading with and those without this clause. *Id.*

d. Connecting Carriers.

23. An intermediate carrier can derive no benefit from a contract between the first carrier and the shipper, limiting the former's liability, which makes no provision for an extension of its benefits to any other than the first carrier. *Adams Exp. Co. v. Harris* (Ind.) 214

24. Where two connecting railroad companies use a station jointly, or hire one person to discharge the duties of ticket agent for both, and such person sells a ticket over one of the roads, the other company is not responsible for the negligence of the connecting road. *Atchison, T. & S. F. R. Co. v. Cochran* (Kan.) 414

25. A carrier cannot be considered as ratifying the original contract of shipment for goods which it receives from another company and transports, when it is bound by statute to perform such service. *Dwyer v. Gulf, C. & S. F. R. Co.* (Tex.) 478

II. DISCRIMINATION IN RATES.

26. A corporation created by the State of Ohio, and engaged in carrying goods for hire as a common carrier, has no franchise, privilege, or right to discriminate in its freight rates in favor of one shipper, even when it is necessary to do so to secure his custom, if the discriminating rate will tend to create a monopoly by excluding from their proper markets the products of the competitors of the favored shipper. *State, Kohler, v. Cincinnati, W. & B. R. Co.* (Ohio) 319

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Carriers; duty to furnish safe stations and platforms; reasonable rules for carriage of passengers; injury to passenger alighting; duty to stop train; passenger carried beyond destination; contributory negligence. 111

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Liability of connecting carrier for damages to goods shipped. 280

CASE.

A miscarriage and serious impairment of the health of a woman occurring leased

premises, caused by fright produced by a boisterous and violent assault upon some negroes on the premises and in her presence, by the landlord, who knew her pregnant condition, gives a cause of action against him. *Hill v. Kimbell* (Tex.) 618

CHARITABLE USES. See CONTRACTS, 1, 18, 19; EMINENT DOMAIN, 1.

CHattel MORTGAGE. See MORTGAGE, 7.

CHECKS. See also BANKS AND BANKING, 4, 5; EVIDENCE, 4; INTEREST, 8; NOVATION; PAYMENT, 1.

1. The purchaser of a check made payable to the drawer's own order, the certification of which has been procured by fraud, who by mistake of both himself and the payee takes it without the latter's indorsement, holds it subject to all defenses which the bank would have against it in the hands of the payee, even although he pays full value for it without notice of the fraud; and a subsequent indorsement made after the purchaser has received such notice will not render the check valid in his hands, at least in the absence of an express agreement to indorse made at the time of the transfer. *Goshen Nat. Bank v. Bingham* (N. Y.) 595

2. A bank is not estopped to deny its liability on a check which it has certified, even as against a bona fide holder for value who purchased upon the faith of the certification, where it has never been indorsed by the payee. *Id.*

3. A bank whose certification of a check has been procured by fraud cannot maintain an action to recover possession thereof against one who has purchased bona fide and for value from the payee, but who took it without the latter's indorsement. *Id.*

4. One who accepts a certified check in the usual course of business does not assume the risk of insolvency of the bank upon which it is drawn, but in case it proves insolvent he may look to the drawer for payment. *Born v. Indianapolis First Nat. Bank* (Ind.) 442

5. Presentation of a check for payment, and notice to the drawer of nonpayment, are unnecessary when the drawer has or leaves no funds on deposit for its payment at the time when it should be presented, or if he consents or agrees that the same shall not be presented for payment. Under such circumstances the drawer's liability becomes fixed at that time without presentation and notice, and whatever takes place afterwards in the state of his account at the bank will not change the rights of the parties. *Culver v. Marks* (Ind.) 489

6. Willingness on the part of the bank officials to pay a check for the payment of which there are no funds on deposit will not render the presentation of the check for payment necessary in order to charge the drawer. *Id.*

7. The acceptance of a check is necessary in order to give the holder a right of action thereon against the bank. *Pickle v. People's Nat. Bank* (Tenn.) 93

8. The acceptance of a check, so as to give

a right of action to the payee, is inferred from the retention of the check by the bank, and a subsequent charge of the check to the drawer, although it was presented by and payment made to an unauthorized person. *Id.*

9. The payee of a check which never came into his hands, but which was paid to some person who had no right to collect it, or was left with the bank to be credited to him, and credit not given through mere oversight, by suing the bank upon it ratifies the receipt of the check from the drawer, as if it had been received by his agent for his use and benefit. *Id.*

NOTES AND BRIEFS.

Checks; nature of; as equitable assignments. 595

Parol certification. 428

What constitute; payment of; demand. 489

CLAIMS. See also LIMITATION OF ACTIONS, 2, 3, NOTES AND BRIEFS.

Public officers cannot open and re-examine claims against the government which were rejected by their predecessors in office, in the absence of fraud, mistake in matters of fact arising from errors in calculations, or of newly discovered material evidence. *Waddell v. United States* (Ct. Cl.) 861

CLERKS. See CORPORATIONS, 12.

CLOUD ON TITLE. See INJUNCTION, 4.

COMMERCE. See also CORPORATIONS, 23; INTOXICATING LIQUORS, 8.

1. The purpose of an Act of Congress relating to commerce being legitimate and warranted by the Constitution, it is wholly immaterial to the consideration of the validity of its action that somewhere it has a casual or contingent effect upon the domain of state legislation. *Lawton v. Comer* (D. C. S. D. Ga.) 55

2. A statute prohibiting the exportation of fish from a Territory is unconstitutional as a regulation of commerce. *Territory v. Evans* (Id.) 283

3. A state statute prohibiting the sale of goods by hawkers or peddlers is not void as a regulation of commerce, where there is no discrimination against nonresidents or goods from out of the State. *Com. v. Gardner* (Pa.) 666

4. Intoxicating liquors transported from one State cannot be sold within a State for uses forbidden by its laws, although the transportation itself cannot be prevented by such State. *State v. Creedon* (Iowa) 295

5. When a carrier ceases to be a carrier and becomes a warehouseman, he cannot be protected as a carrier by the constitutional provisions as to regulations of commerce. *Id.*

6. A state statute providing a penalty for the refusal of a railroad company to deliver freight on payment or tender of the charges due as shown by the bill of lading is not invalid as a regulation of commerce. *Dwyer v. Gulf, C. & S. F. R. Co.* (Tex.) 473

NOTES AND BRIEFS.

Commerce; power of Congress over. 56

Intoxicating liquors as. 184

COMMERCIAL AGENCIES.

A commercial agency is not exempted from liability for gross negligence in erroneously giving the financial standing of a person in consequence of a typographical error, by a provision in the contract that the company shall not be liable for any loss or injury caused by the neglect or other act of any officer or agent of the company in procuring, collecting, and communicating said information, and that such company does not guarantee the correctness of said information. *Crew v. Bradstreet Co. (Pa.)* 661

NOTES AND BRIEFS.

Mercantile agency; liability to subscribers for false information. 663

CONDITION. See **BILLS AND NOTES, 5.**

CONFLICT OF LAWS. See also **HUSBAND AND WIFE, 10.**

1. All marriages solemnized in another State, by parties intending at the time to reside in Georgia, have the same legal effect as if solemnized in the latter State; and parties residing in Georgia cannot evade the provisions of its laws as to marriage by going into another State for the solemnization of the ceremony. *State v. Tutty (C. C. S. D. Ga.)* 50

2. Where the statutory law is silent as to the effect of marriage between persons domiciled in the State and who leave it with the purpose of solemnizing the marriage elsewhere, to evade such laws, but intending to return and live therein, the marriage may be upheld where the inhibition relates to form, ceremony, or qualifications depending on age or like condition. *Id.*

3. Where the State has enacted legislation declaratory of the effect of marriages extra-territorial, of its citizens who seek to evade its positive policy and penal laws, the statute affords the rule of decision. *Id.*

4. A State has the power to change the rule that the validity of a transfer of personal property is to be determined by the law of the owner's domicil, so far as it relates to property within its borders, and to make the transfer thereof subject to its own laws. *Farmers & M. Nat. Bank v. Loftus (Pa.)* 813

NOTES AND BRIEFS.

Conflict of laws; marriage; validity governed by law of place where entered into. 125

CONSTITUTIONAL LAW. See also **COMMERCE; COURTS, 6; DEPOSITIONS; EMINENT DOMAIN, 4; INTOXICATING LIQUORS, 8; MARKETS, 8; PEDDLERS, 2; RAILROADS, 1; SCHOOLS, 8-5; SHIPPING, 1; STATUTES, 5.**

1. The right of citizens of other States to bring suit in a state court, where a citizen of that State may, is guaranteed and protected by U. S. Const. art. 4, § 2. *Cofrode v. Gartner (Mich.)* 511

2. The failure to provide for an appeal from the decision of commissioners placing a valuation upon railroad property for purposes 7 L. R. A.

of taxation will not render as violating the constituting the equal protection of the right to appeal in such the owners of other property. *S. R. Co. v. Worthen (A*

8. There is no room for constitution outside of the if they are unambiguous; a authority of surrounding contemporaneous exposition in such cases. *State, Weiss, (Wis.)*

4. The State under its pquire railroad employes to competent board constitute as to their fitness for their upon the railroad company's pence of such examination tion will not deprive the co without due process of law imposed on any company i the examination of persons or are at any time, actually and as to whom examination *Baldwin v. Louisville & N.*

5. No unlawful delega power to a judicial officer requiring the approval of nance extending the limit general law of the State. of the question whether the tions have been complied *Callen v. Junction City (K*

6. Changing the status of from a farm to city lots, b power granted cities to ext not a deprivation of proper cess of law.

NOTES AND BRIEFS.

See also **STATUTES.**

Delegation of legislative power to local Act.

CONTRACTS.

I. NATURE AND REQUISITES

II. CONSTRUCTION; VALIDITY

III. RESCISSION; RELIEF.

IV. IMPAIRING OBLIGATIONS

NOTES AND BRIEFS.

See also **BILLS AND NOTES, 13.**

I. NATURE AND REQUISITES

1. Persons who make gift ready established for the maintenance of public charity are presumed to know the charity was established and the management thereof; and presumed that they intended to hold upon the same trusts; and of the gift will constitute a contract of the donee that it shall be a gift. *Brady v. Bliss (Mass.)*

2. No consideration is implied in a sealed addendum to a sealed note above note is to be accounted

8. A parol lease of real estate for the term of one year commencing in futuro is invalid, under Minn. Gen. Stat. chap. 41, tit. 2, being an agreement which by its terms is not to be performed within one year from the making thereof. *Jellett v. Rhode* (Minn.) 671

4. The signature of the vendor to a contract for the sale of real estate, which is otherwise sufficient, is not necessary in order to enable him to enforce it against the vendee. *Hodges v. Kowing* (Conn.) 87

5. A contract to purchase of a man "his place" in a certain town, "containing 15 acres more or less," sufficiently describes the property, where he resides on the premises and owns no other real estate in that town. *Id.*

6. The statute prohibiting the making of contracts by parol which are not to be performed within one year has no application to a contract which has been fully performed by one of the parties. *Lowman v. Sheets* (Ind.) 784

7. A contract within the Statute of Frauds is not void, but merely voidable. *Id.*

8. Where a number of contracts are made at the same time and as part of the same transaction, some of which are within the Statute of Frauds and the others not, and they are of such a nature that they can reasonably be considered as separate, the former will be enforced although the latter are avoided. *Id.*

9. A person's title under a valid contract for the purchase of an interest in brood mares, which is coupled with a voidable contract as to their keeping, will not be affected by the avoidance of the latter contract. *Id.*

II. CONSTRUCTION; VALIDITY.

10. If it appears that an ambiguous term in a contract has an established meaning among those engaged in the business to which the contract has reference, and unless it is given that meaning it is indefinite and equivocal, it should be treated, in interpreting the contract, as used according to that understanding. *Metropolitan Exhibition Co. v. Ewing* (C. C. S. D. N. Y.) 881

11. There is no necessity to particularize, in a contract for the services of a ball player which gives the employer the right to "reserve" such player for the season next ensuing, the conditions or characteristics of the option, if, when the contract is made, the term has a well-understood definition. *Id.*

12. A contract giving base ball clubs the right to "reserve" their players for another season simply gives the clubs the right, as against other clubs, to secure the services of such players if the parties can agree, but places no obligations on the players to enter into a contract for such season. Hence the players cannot be compelled to enter into such future contract by a decree of specific performance, and consequently they cannot be enjoined from entering into contracts with other clubs. *Id.*

13. A party to an illegal trust combination, who, in pursuance of the agreement, has furnished goods in the name of the trustee, cannot claim the proceeds as against a receiver of 7 L. R. A.

pointed. *Pittsburgh Carbon Co. v. McMillan* (N. Y.) 46

14. The rule against granting relief to a party to an illegal contract does not apply to prevent a receiver from recovering the fruits of the transaction for the benefit of honest creditors. *Id.*

15. A negotiable note is not valid, even in the hands of a bona fide holder, where it was given in consideration of a wager contract, which is made a crime by statute, a transfer of such note to a party ignorant of its illegality being also made a crime, although the statute does not expressly declare that such notes shall be void in the hands of innocent holders. *Snoddy v. American Nat. Bank* (Tenn.) 705

III. RESCISSION; RELIEF.

16. Equity will not relieve from securities executed to shield a person from prosecution for a felony of which he is guilty, upon the ground that execution for such purpose rendered them void. *Shattuck v. Watson* (Ark.) 551

17. One who has executed and delivered securities in consideration of a promise to refrain from a prosecution for felony of a person guilty thereof cannot, after his illegal purpose has failed from causes other than a breach of the contract, and a prosecution has been commenced by third parties, rescind the contract and recover back the securities. *Id.*

IV. IMPAIRING OBLIGATION.

18. The prohibition against impairing the obligation of contracts, contained in U. S. Const. art. 1, § 10, applies to contracts establishing charitable trusts. *Cary Library v. Bliss* (Mass.) 765

19. The acceptance by a town of a proposition for the donation of a fund for the establishment of a public library, which contains a scheme for the management of the fund and library and the payment of the money in accordance therewith, constitutes a contract between the parties; and the scheme cannot afterwards be changed by the Legislature without the consent of all the parties to the contract,—at least not until the conditions existing at the time the contract was made become so changed as to make it impracticable or inconvenient to further carry out the original scheme. *Id.*

20. The contract of marriage is not a "contract," within the meaning of the provision in the Constitution of the United States prohibiting States from impairing the obligation of a contract. *State v. Tutty* (C. C. S. D. Ga.) 50

NOTES AND BRIEFS.

Contracts; lease for more than one year. 671
Gambling consideration; securities for money lost at play. 705

Specific performance of contracts for services. 779

Not to be performed within one year. 784

Illegal; how far available as a defense. 47

Unlawful; enforcement of claims under. 46

Rescission of, for false statement; effect of

partial performance; insolvency of buyer; assignment of contract. 141

Power of Legislature to alter terms of. 767

CONTRIBUTION.

Contribution cannot be compelled by a judgment debtor who has paid the judgment, from a joint defendant, where, after the latter had been notified that the suit was abandoned, the former had the proceedings renewed and carried to judgment without notice to the other, and assumed to conduct the defense for both without setting up as a defense therein a discharge in bankruptcy which he knew his codefendant had obtained pending the action. *Duncan v. Flanagan* (Pa.) 412

NOTES AND BRIEFS.

Action against one jointly liable on debt. 413

CORPORATIONS.

I. NATURE.

II. POWERS, LIABILITIES, AND OFFICERS.

III. STOCK AND STOCKHOLDERS.

IV. DISSOLUTION.

V. FOREIGN CORPORATIONS.

NOTES AND BRIEFS.

See also ACTION OR SUIT, 7; NOTICE, 2; RAILROADS, 6, 8.

I. NATURE.

1. An association for the encouragement of debating, reading, and literature, and the enjoyment of rational social amusements, and the playing of tenpins, chess, and checkers, and other lawful games, having no pecuniary profit in view, and no connection with any business purposes or with politics, and which provides that no saloon shall be kept in connection therewith, and no drinks sold by the club or any of its members,—may be regarded as an educational association, entitled to be incorporated without the payment of a tax on capital stock, under Mo. Const. art. 10, § 21, and Mo. Rev. Stat. 1869, §§ 2821, 2825. *State v. Henderson, v. Le Sueur* (Mo.) 734

II. POWERS, LIABILITIES, AND OFFICERS.

2. A corporation may execute a deed as an attorney in fact for another. *Killingworth v. Portland Trust Co.* (Or.) 688

3. A person not a citizen of Pennsylvania who is a citizen of the United States can become a member of the Farmers & Mechanics Institute of Northampton County, Pennsylvania, there being no statutory or charter provision against his doing so; and such nonresident stockholder takes his shares with all the rights and privileges which pertain to them in the hands of a citizen, and he may vote upon them, and, where no other qualification than ownership of stock is required of the directors, may become a director. *Detweiler v. Com. Dickinson* (Pa.) 857

4. One who is not a citizen of the United States, but is, and for many years has been, a resident and property-holder in Pennsylvania, can become a stockholder, and is entitled to 7 L. R. A.

vote at the stockholders' meetings, and may be legally elected as a director, of a corporation founded under the Pennsylvania laws. *Com. Robinson, v. Hemingway* (Pa.) 860

5. A regulation of a corporation that stockholders shall have one vote for each share held by them up to ten shares, and fixing the proportion which his votes shall bear to his shares above that number, is a reasonable regulation, uniform in its operation, conflicts with no law, and is binding on all the shareholders. *Detweiler v. Com. Dickinson* (Pa.) 857

6. When the methods of voting are not fixed by general law, corporations may make a law for themselves, subject to the qualification that such laws and regulations as they make shall not conflict with the laws of the United States. *Id.*

7. A regulation of a corporation that votes may be cast by proxy is a reasonable regulation, uniform in its application, works no wrong to any shareholder, and conflicts with no law of Pennsylvania. *Id.*

8. By-laws of a corporation providing that when any director shall die, resign, neglect to serve, or remove out of the county, the board may proceed to supply the vacancy, do not authorize a director to be ousted on the ground of ineligibility. *Id.*

9. A railroad company which has acquired a majority of the stock of another railroad company will not be allowed, in the absence of express statutory authority, to vote such stock, either by itself or by other persons acting in its interest, in the election of officers or in matters pertaining to the management and control of the latter company; at least where the two roads are rivals having substantially the same field of operation, where a conflict of interest may arise in the matter of expenditure, or in the division of patronage or of earnings, or where the profits of one company may be enhanced by a diminution of those of the other. *Memphis & O. R. Co. v. Woods* (Ala.) 605

10. A railroad company in Kansas has the lawful right to purchase and hold stock of a connecting road. *Atchison, T. & S. F. R. Co. v. Cochran* (Kan.) 414

11. A railroad company whose rights and powers in respect to a connecting road are merely those of a stockholder is not liable for the negligence of the connecting railroad. *Id.*

12. One employed by a corporation on a monthly salary, who is part of the time on the road selling goods, making collections, etc., as a drummer, and the rest of the time working in a store, shipping and receiving goods, moving and handling stock, etc., or making sales and collecting bills in the city,—is a "clerk," within the meaning of the Tennessee General Incorporation Act of 1875, § 11, making stockholders individually liable for moneys due "laborers, servants, clerks, and operatives" in case the corporation becomes insolvent. *Cole v. Hand* (Tenn.) 96

13. A by-law of a corporation providing for the removal of officers by the board of directors at pleasure constitutes part of the contract of employment of a secretary at a designated yearly salary, with no special agreement

III. STOCK AND STOCKHOLDERS.

14. An attempt to release a stockholder from his contract by the general manager of a corporation, who is also its largest stockholder, secretary, and treasurer, on the stockholder's request that he would dispose of his stock, whereby he causes entries to be made on the books charging off the balance due for unpaid calls, and crediting to the stockholder the sums paid by him, will not avail to release the stockholder where no attempt is made to transfer his shares, although the manager secures new subscriptions to the stock in place thereof, and both parties suppose that he is authorized to substitute new subscriptions and release the old ones. *Cartwright v. Dickinson* (Tenn.) 706

15. The fact that an overissue of stock will be the result where stock is issued to new subscribers as a substitute for stockholders who wish to withdraw, unless an attempted cancellation of the earlier subscriptions (made, with supposed authority, to effect such substitution) shall be upheld, will not aid such invalid attempt at cancellation. *Id.*

16. A stockholder who is misled by statements of the manager of the corporation, whom he has requested to dispose of his shares, to the effect that they have been sold, when in fact an invalid attempt to cancel them merely has been made, is not thereby released from his contract. If injured, his remedy is one against his agent, the manager. *Id.*

17. An assignee of a corporation who has not resigned his trust, where there are creditors whose claims he must provide for, is not prevented from bringing suit to enforce the liability of a stockholder by the fact that he has suffered the stockholders to resume business with the machinery assigned to him, taking a bond for its protection. *Id.*

18. The agreement of one who signs articles of association for the formation of a corporation, to take stock therein, does not become enforceable until he has acknowledged the articles as required by Ind. Rev. Stat. § 3851. *Coppage v. Hutton* (Ind.) 591

19. A stockholder of a railroad company is not liable for the negligence of the officers, agents, or employés of the company in the operation of its road. *Atchison, T. & S. F. R. Co. v. Cochran* (Kan.) 414

20. An averment of refusal by the officers of a corporation, upon request, to take appropriate legal proceedings to prevent the unlawful voting of corporate stock, will authorize the entertainment of a suit by stockholders in their own names for the accomplishment of that object. *Memphis & C. R. Co. v. Woods* (Ala.) 605

21. A demand on the trustees of a corporation to restore funds misapplied is not necessary before an action by a member to compel such restoration, where the trustees themselves were parties to the unlawful transaction, and contest the action on the ground that their acts were rightful. *Ashton v. Dashaway Asso.* (Cal.) 809

IV. DISSOLUTION.

22. A corporation violating the organic law
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its property. *Com. Attorney-General, v. New York, L. E. & W. R. Co.* (Pa.) 634

23. Where a railroad company incorporated under the laws of Ohio misuses a franchise, privilege, or right conferred upon it, or claims the right to exercise, or has exercised, "a franchise, privilege, or right in contravention of law," the supreme court has jurisdiction to inquire into and correct the mischief, though the corporation may be engaged in interstate commerce, and the misuser or usurpation to be corrected relate to and concern that traffic. *State, Kohler, v. Cincinnati, W. & B. R. Co.* (Ohio) 319

24. Where a corporation fixes a rate of freight per hundred pounds, for carrying petroleum oil in tank cars, substantially lower than its rate for transporting it in barrels in carload lots, it is exercising "a franchise, privilege, or right in contravention of law," within the meaning of Ohio Rev. Stat. § 6761, cl. 4. *Id.*

25. The donation by trustees of an incorporated benevolent association to each member, in pursuance of a unanimous vote of the members present at a meeting when the vote was taken, of a certain sum for past services, when no services had been rendered other than such as the parties were bound to render as members, is a misappropriation of corporate funds, the restoration of which may be compelled by a member who was not a party to the transaction. *Ashton v. Dashaway Asso.* (Cal.) 809

V. FOREIGN CORPORATIONS.

26. A foreign corporation owning all the stock of a domestic corporation, where the statutes allow its stock to be held by other corporations, does not thereby "acquire or hold" the real estate of the domestic corporation so as to violate the Pennsylvania Act of April 26, 1855, against acquiring or holding real estate "directly in the corporate name, or by or through any trustee or other device whatsoever, unless specially authorized," under penalty of escheat. *Com. Attorney-General, v. New York, L. E. & W. R. Co.* (Pa.) 634

NOTES AND BRIEFS.

See also QUO WARRANTO.

Corporations; creation of. 591

Restriction on exercise of powers; dealing in stock of others. 605

Franchises of; how conferred. 370

Power to execute deed as attorney in fact. 638

Power to hold stock in another corporation; rights of foreign corporations; violation of power; escheat of property. 634

Officers bound to notice by-laws. 823

Who may be stockholders; uniformity of by-laws; right of stockholders to vote. 358

Stockholders' liability; laborers' wages. 97

Release of stockholder from subscription; capital stock as trust fund. 706

Liability of stockholders for debts upon failure to file report; survival of action. 554

Refusal to issue stock; damages; release of stockholders; substitution of stockholders; change in amount of stock. 707

COSTS.

Taxable costs of all parties in a suit for the construction of a will may be ordered out of the funds of the estate before distribution. *Powers v. Judevine* (Vt.) 517

NOTES AND BRIEFS.

Costs; county attorney's fees in mandamus proceedings not taxable. 106

COUNTIES. See also INTEREST, 1.

1. A contract by which a board of county commissioners attempts to employ a legal adviser for a period of three years, to commence three months in the future and after the time for the election of a person to fill the vacancy caused by the expiration of the term of office of one member of the board, the term of employment extending over a period during which all the members of the board as constituted at the time of the contract will retire therefrom unless re-elected,—is against public policy and void. *Jay County v. Taylor* (Ind.) 160

2. The county of Cascade, under the Montana Act of Sept. 12, 1887, providing that it "shall be liable for and shall pay the sum of \$30,000" to the county of Choteau, from which it was created, giving it the option to cause warrants to be issued, which on being indorsed, "Not paid for want of funds," shall bear interest, or to issue coupon bonds and sell them,—cannot discharge the debt by delivery of the bonds, but, if it issues the bonds, must convert them into cash and pay the debt. *Territory, Choteau County, v. Cascade County* (Mont.) 105

3. When the law itself imposes a duty on county commissioners as such, and they are not appointed thereto by the county, the county will not be responsible for their breach of duty, or for their nonfeasance or misfeasance in relation to such duty. *Id.*

NOTES AND BRIEFS.

Counties; debts of; how created; how enforced. 106

COURTS. See also SUNDAY, 2; TIME, 1.

1. An action on a contract is within the jurisdiction of the courts of the State in which is the place of performance, although the parties are residents of other States. *Ogfrode v. Gartner* (Mich.) 511

2. Consent of the parties is sufficient to give jurisdiction over them to a court which has jurisdiction of the subject matter. *Id.*

3. A court has no discretion to refuse to hear a case between nonresidents of which it has jurisdiction, merely because the suit is brought there only for convenience of parties and attorneys, and will entail expense upon the county. *Id.*

4. The inability of the beneficiary under a will to bring suit for conveyance of land to him as directed by the will, in the State where the land is situated, because the will is not re-

corded there, will not prevent (after his death) from bringing suit in other State where the will is recorded. *Querry v. Gilliland* (Ky.)

5. A suit to restrain a deed in order to prevent a one "involving title to real estate" is within the jurisdiction of the Missouri courts. *Gardner v. Terry* (Mo.)

6. An Act providing for the appointment of commissioners of the courts to assist in the performance of the duties of the courts under such rules and court may adopt," is not unconstitutional. *Hayne* (Cal.)

7. Commissioners "to not usurp judicial functions, but to take and briefs as a court shall report the result of their deliberations, with opinions and suggestions, for the consideration of the court in the disposition of the cases."

8. The possibility that the Act providing for the appointment of commissioners appointed to assist in the performance of the duties of the courts is shown that they are not unconstitutional. *Id.*

NOTES AND B

Courts; jurisdiction of cases brought out of State.

Appointment of commissioners.

COVENANT.

It seems that a covenantor having power to convey the estate by will disposing of a portion of it shall not be contested, is not unconstitutional. *Bullard* (Mass.)

CRIMINAL LAW. TIONS.

1. The Legislature has the power of inflicting the punishment of death upon a person who has committed a crime. *People, Kemmler, v. Durston*

2. Whether the use of the agency of producing death by the humane method of executing the court in capital cases is a question for the determination of the legislature. The determination of the affirmative, after careful consideration upon the courts; cannot, therefore, be declared unconstitutional provision against usual punishment.

CURTESY.

A husband has no rights in lands in which estate in remainder, where the expiration of the life tenancy right to the possession. *Tod*

during coverage; entry on land; vested remainder or life estate; forfeiture of; liability for husband's debts; disposal of estate by wife. 693

CUSTOM AND USAGE.

A custom to take cars from connecting carriers without changing the goods cannot be invoked to protect from negligence in failing to transport the goods with care. *Beard v. Illinois C. E. Co. (Iowa)* 280

DAMAGES. See also TELEGRAPH COMPANIES, 5.

1. Damages for an alleged negligent construction of a sewer, in consequence of which plaintiff's premises are injured by discharge therefrom, must be limited to the actual damage sustained up to the time of bringing suit, and cannot include prospective damages, on the ground that the defects are permanent, although human labor will be necessary to remedy the defects. *Nashville v. Conner (Tenn.)* 465

2. A railroad cannot be made responsible for exemplary damages on account of injuries done by one of its servants, even though the act was wanton and malicious, unless the act was expressly or impliedly authorized or ratified by the company. *Ricketts v. Chesapeake & O. R. Co. (W. Va.)* 354

3. In proceedings to assess damages for the taking of property for railroad purposes, whatever injuriously affects the owner's adjoining property as the direct and necessary result of the location of the road may be considered by the jury in making their assessment. *Schuyt-kill River E. S. R. Co. v. Kersey (Pa.)* 409

4. Where the location of a railroad across property leased as a coal yard makes necessary new appliances for the continuation of the coal business, and increases the cost of raising and storing the coal, as well as the breakage and waste in handling it, the additional expense and loss, together with the cost of the new appliances, may properly be received in evidence in a proceeding by the lessee to recover damages for such location, not as specific items of claim, but as affecting the market value of the leasehold. *Id.*

5. The benefits which will accrue to property by reason of the construction of a railroad must necessarily be considered in determining the amount of the consequential damages to be allowed to its owner on account of such construction, and their consideration for such purpose is not prohibited by the statute which forbids commissioners, in determining the compensation to be made to owners of property acquired for the construction of railroads, to make any allowance or deduction on account of any real or supposed benefits which the party is interested may derive from the construction of the proposed road. *Newman v. Metropolitan Elev. R. Co. (N. Y.)* 289

6. The damages to abutting-property owners by reason of the destruction of their easements for ingress and egress to and from a public street, and the free circulation of light and

the amount to be awarded as well as the injuries may consider the benefits as well as the injuries resulting from such construction. *Id.*

7. In an action by a lessee of property abutting upon a street through which an elevated railroad is constructed, to recover damages for the permanent impairment of his easement in the street for light, air, and access, the general appreciation of the value of property consequent upon such improvement cannot be considered, as it belongs to the property-owner, but special and peculiar advantages which tend to increase the rental value of the property are elements which the jury must consider in determining the amount of their award. *Id.*

8. Damages for loss of services of plaintiff's wife by reason of personal injuries are not confined to the value of her services within the household, but may include the value of her services as manager of her husband's business, where she was thus engaged at the time of the injury, without any contract or expectation of pay for her services. *Citizens Street R. Co. v. Twinnams (Ind.)* 353

9. In an action by a father to recover for the loss of services of his minor child by reason of injuries inflicted upon him by a third person, which result in his death, the recovery must be limited to the damages which accrued during the period between the injury and the death, and cannot embrace those accruing after the death occurred. *Davis v. St. Louis, I. M. & S. R. Co. (Ark.)* 263

10. Two thousand dollars damages was awarded for the death of plaintiff's son, between eighteen and nineteen years of age, who was robust, earning \$25 per month, and who was a dutiful son employing his wages for the benefit of his father's family. *Myham v. Louisiana Electric Light & P. Co. (La.)* 172

NOTES AND BRIEFS.

Meaning of "exemplary damages," when allowed; jury to determine. 354

Not recoverable by one who contributed to the injury. 262

Measure of, for breach of contract. 78

For wrongful maintenance of a sewer. 465

For neglect to deliver telegram. 583

For property taken in eminent domain; benefits considered. 289

For land taken for railroad. 409

For pollution of stream. 457

DEATH.

1. An administrator has no right, under the Massachusetts Employers' Liability Act (Mass. Laws 1887, chap. 270), to recover damages on account of the death of his intestate from injuries caused by the employers' negligence, in addition to his right as legal representative to recover the damages which accrued to the intestate in his lifetime. *Ramsdell v. New York & N. E. R. Co. (Mass.)* 154

2. The Arkansas Act of 1883 does not take away the right which survives to the per-

sonal representative by Mansf. (Ark.) Dig. § 5223, to recover upon the cause of action for injuries which accrued by the common law to an injured party in his lifetime; nor does it deprive a father of his right to maintain his common-law action for loss of services of his minor child. Therefore in case of the death of a minor the three actions may be prosecuted at the same time and recoveries had in each and all of them. *Davis v. St. Louis, I. M. & S. R. Co.* (Ark.) 283

8. The Arkansas Act of 1883 (Mansf. Dig. §§ 5225, 5226) embodying the provisions of Lord Campbell's Act in regard to suits to recover damages for death resulting from the wrongful act, neglect, or default of another, applies to all cases in which a recovery may be had under that Act, regardless of the agency by which the injury was inflicted, and supercedes the Act of 1875 relating to suits for injuries by railway trains. Hence such suits must be brought by the personal representative for the benefit of the widow and next of kin. *Id.*

NOTES AND BRIEFS.

Death; right of action for damages. 154
Who may recover damages for death from negligence. 283

DECLARATIONS. See EVIDENCE, IV.

DEED.

1. An estate granted by deed cannot be expanded by recitals or statements of the grantor made in a later deed, to the injury of an intervening title. *Whitney v. Wheeler Cotton Mills* (Mass.) 613

2. A reservation, in a conveyance of right of way, of any use to the grantor, will not be presumed in the absence of any provision therefor. *Herrman v. Roberts* (N. Y.) 226

3. The grantee of the heirs of one who has made an unacknowledged deed is not a "purchaser," within 1 N. Y. Rev. Stat. 738, § 137, declaring that an unacknowledged and unattested deed "shall not take effect as against a purchaser or incumbrancer until so acknowledged. *Strough v. Wilder* (N. Y.) 555

NOTES AND BRIEFS.

Deed; attestation and delivery of; presumption as to delivery; effect when lands in possession of third parties. 556
Quitclaim deed as notice. 524

DEFINITIONS. See also CORPORATIONS, 12; PEDDLERS, 1; TAXES, 4; WILLS, 1.

1. The relation of husband and wife, or that of parent and child, is not necessary in order to constitute a "family." *Moyer v. Drummond* (S. C.) 747

2. The terms "railway" and "railroad" have the same meaning. *Millvale v. Evergreen R. Co.* (Pa.) 369

DELIVERY. See INSOLVENCY AND ASSIGNMENT FOR CREDITORS, 4.

DEMURRER. See PLEADING, 9-11. 7 L. R. A.

DEPOSITIONS.

Depositions taken in trial accused may be used on count of death or other ground of the witness cannot in violation of the 6th Constitution of the United States. *Evans* (Id.)

NOTES AND I

Depositions; taken in for

Admissibility of, upon trial

DISTRICT ATTORNEY

1. Under Mont. Comp. Stat. providing that a county attorney certain fees to be taxed as made for the county, such in a proceeding by writ of the payment of money into as in an action brought for money. *Territory, Choteau County* (Mont.)

2. A county attorney not under Mont. Comp. Stat. p. 1 than \$1,200 in fees, the amount received by him must be deposited and the balance only taxed the percentage allowed was more than that sum.

DIVORCE. See HUSBAND AND WIFE, 14, NOTES AND BRIEFS.

DOMICIL. See ATTACHMENT, 1.

DOWER. See also MORTGAGE, 1.

A conveyance by a man during the period in which right of married women to pended barred all claim of husband though she did not join in. *Odum v. Riddick* (N. C.)

DRAFTS. See BILLS AND NOTES, 1.

DRAINS AND SEWERAGE. See MUNICIPAL CORPORATIONS, 4.

DURESS.

Papers executed to shield from a threatened prosecution which he is guilty are not enforceable so as to require their cancellation. *Watson* (Ark.)

NOTES AND BRIEFS.

Duress; what constitutes.

EASEMENTS. See also EJECTMENT, 3.

1. The conveyance of a right to the grantee, not only the right of passage at all times, but also the incident or necessary to the exercise of right of passage. *Herrman* (N. Y.)

2. The grantor of a right in rough rocky land, which is un-

the roadway, cannot deposit stone or other obstruction thereon, or cut it up by drawing heavy loads over it, or in any way materially obstruct or injure the roadbed. *Herrman v. Roberts* (N. Y.) 226

8. The use of stairways in a building erected by several owners of land as a single structure, upon a single plan and under a single contract, no matter whether the land was then partitioned or not, cannot be denied by the owners of that part which includes the stairways to the owner of another part the upper floors of which can be reached in no other way. *Pierce v. Cleland* (Pa.) 752

4. The expiration of a license given to a town to maintain a drain over lands of the licensor will not relieve the town from liability for injuries caused by the subsequent obstruction of the drain, when such drain is the necessary outlet of the sewerage system of the town, and there is nothing to show abandonment thereof on the part of the town, but its use continues the same after as before the license expires, and the town afterwards obtains the further right to continue it. *Bates v. Westbrook* (Mass.) 156

NOTES AND BRIEFS.

Easement; what passes by grant of right of way. 226

ELECTION. See ESTOPPEL, 8.

EMBEZZLEMENT. See PRINCIPAL AND AGENT, 2.

EMINENT DOMAIN. See also DAMAGES, 5-7; HIGHWAYS, 1; RELEASE; WATERS AND WATERCOURSES, 3.

1. The taking of money by a private corporation created to administer a public charity is not a taking of property for a public use which may be authorized under the power of eminent domain. *Cary Library v. Bliss* (Mass.) 765

2. The taking of property which is held by one person for a public use by another person, to be held in the same manner for precisely the same public use, is not a matter of such public necessity that it can be authorized by the Legislature under the power of eminent domain. *Id.*

3. A mere change in the use of land from agricultural to city purposes is not taking private property for public use. *Callen v. Junction City* (Kan.) 736

4. A statute requiring any railroad company to build, at its own expense, a crossing for any individual whose residence is separated by the railroad from a public highway, is, if such crossing is to be considered as for a public use, unconstitutional in taking the property of the company for public use without compensation. *People v. Detroit, G. H. & M. R. Co.* (Mich.) 717

5. The owners of land taken under the provisions of Mass. Acts 1884, chap. 290, authorizing the taking of certain lands for the use of the Commonwealth, are not, by filing a petition, to dispute the validity of the taking and test the constitutionality of the Act, at least if they have not voluntarily proceeded to judgment upon their petition. *Moore v. Sanford* (Mass.) 151

6. Although the determination of the Legislature is not conclusive that a purpose for which it directs property to be taken is a public use, yet it is conclusive, if the use is public, that a necessity exists which requires the property to be taken. *Id.*

7. The reclamation of flats situated upon Boston Harbor and substantially useless in their original condition, for the avowed purpose of improving the harbor and of providing better and more complete accommodations for the railroad and commercial interests of the city of Boston, by filling such flats with solid earth, is a matter of such public benefit that the flats may be taken by the Commonwealth for such purpose, under the power of eminent domain, notwithstanding a possible pecuniary benefit to the Commonwealth may be contemplated by the sale of the flats when filled. Hence Mass. Acts 1884, chap. 290, which provides for such taking, is not unconstitutional as authorizing the taking of land for a use not public. *Id.*

8. The specific mention of and including in the same petition riparian rights in respect to other lands belonging to other persons does not affect the construction of the petition and proceedings in respect to the land in question. *Hanford v. St. Paul & D. R. Co.* (Minn.) 722

9. A clause of a charter authorizing land to be taken, which makes the corporation "accountable to the owners thereof for all damages," does not include consequential injuries. *Brooks v. Cedar Brook & S. C. R. Imp. Co.* (Me.) 460

10. Incidental injuries to land by the washing away of the soil of the banks and bottom of a stream, caused by a reasonable increase of the flow of water at certain times, produced by a dam authorized by the Legislature to facilitate the driving of logs, is not a taking of the property of a riparian owner for which compensation is necessary. *Id.*

11. The building by a railroad company, of a side track in a street along and upon which it has a right of way and has a single track in operation, constitutes no additional burden upon property abutting upon the street, for which damages may be recovered by its owner, where the statutes enabled the company to locate its tracks upon the street and to appropriate a right of way 6 rods wide, and it gave notice that its appropriation would be made "in as full and ample and perfect a manner as may be required" for railroad purposes, and it paid the assessed damages, which were duly accepted. *White v. Chicago, St. L. & P. R. Co.* (Ind.) 257

12. The construction of a telegraph and telephone line on a railroad company's right of way imposes an additional servitude or burden on the land, for which the owners are entitled to compensation, unless it is constructed by the railroad company in good faith for its own use and benefit in the operation of the road and

to facilitate its business, or is reasonably necessary for that purpose. *American Teleph. & Teleg. Co. v. Smith* (Md.) 200

13. The use of electricity by a street-railway company as a motive power will not render its use of the street an imposition of an additional servitude thereon, which will require the making of additional compensation therefor to the owner of the fee, where it does not appear that the occupation of the street is any more exclusive than though the road was operated by horse-power. *Taggart v. Newport Street R. Co.* (R. I.) 205

NOTES AND BRIEFS.

Eminent domain; taking for private, combined with public, use. 152

Vested rights subordinate to. 765

Exercise of right a political, not a judicial, question. 151

Telegraph line along railroad right of way. 200

Compensation to be made only for such taking as transfers title. 461

Assessment of damages; rule for. 409

EQUITY.

1. A suit by a vendor for specific performance of a fair contract for the sale of land cannot be defeated on the ground that there is a remedy at law. *Hodges v. Kowing* (Conn.) 87

2. A remedy at law, to defeat a suit in equity, must be as complete and beneficial as the latter. *Id.*

3. Where an illegal appropriation has been made by a town council and warrants drawn thereon, some of which have been paid, equity has jurisdiction of a suit to cancel the unpaid warrants, to compel repayment of the money paid, and to annul the appropriation; and the recalling and cancellation of the unpaid warrants after suit is brought will not oust the jurisdiction. In such case the court may grant affirmative, as well as injunctive, relief. *Russell v. Tate* (Ark.) 180

NOTES AND BRIEFS.

Equity; remedy at law defeats jurisdiction. 67

Jurisdiction to sell infant's lands. 534

ESCHEAT. See also CORPORATIONS, 22, 26.

The penalty of escheat is removed, although the Act imposing it is not repealed in terms, when, before any inquisition is taken, a statute has declared that the land should be held "indefeasibly as to any right of escheat" in the Commonwealth. *Com. Attorney-General v. New York, L. E. & W. R. Co.* (Pa.) 634

ESTATE. See REAL PROPERTY, NOTES AND BRIEFS.

ESTOPPEL. See also BONDS, 4; CHECKS, 2.

1. One who has taken the benefit of a building regulation cannot repudiate the conditions on which it is given. *Fowler v. Saks* (D. C.) 649

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2. A covenantor who, of his own hand and knowing all the facts, pays money by the way of money paid by the covenantor from his obligation, will be estopped from proceeding to enforce the covenant. *Wood v. Bullard* (Mass.)

3. Proceedings by an executor to enforce a covenant made by a deceased covenantor to release other covenantors to release from his obligation, will be estopped from setting up an independent claim against him as a covenantor to enforce the covenant, although he has not ratified or promised, although they may be exercising any right to enforce which he may claim through the decedent.

4. Where the inhabitant of a town has agreed that a person might purchase land, on his acquainting him with the land, and whether the town laid any claim to the land in the following year, and the person has purchased the land, and the town is estopped from years afterward, that it had purchased by him when he purchased the land. *Brookhaven v. Smith* (N. Y.)

5. A false representation of material facts, or a design to constitute an equitable act which was voluntary, mislead, and actually has misled in good faith.

6. If one is induced to the acts or representations of another to influence his conduct, and the other has a belief on his part, under that he is thereby acquiring the same, the party who has thus been misled is estopped from setting up his claim at the time of the purchase of the property.

7. Borrowing from a forger has obtained upon the security of a mortgage upon property of the mortgagor, does not estop the latter from setting up his claim to defeat the collection of the mortgage. *Shattuck v. Watson* (A.)

8. One who has elected to take a will requiring him to convey certain land of which he holds, and he holds the land, and he refuses to make such conveyance, that the land belongs to him. *Gilliland* (Ky.)

9. The widow of a deceased person has received all the proceeds of the amount necessary to pay the debts, is estopped from claiming in the real estate as against the estate. *Wallington v. Burgess* (Ind.)

NOTES AND BRIEFS.

Estoppel; requisites of.

Equitable; fraud as an element.

EVIDENCE.

- I. JUDICIAL NOTICE.
- II. PRESUMPTIONS AND BURDEN OF PROOF.
- III. BEST AND SECONDARY; DOCUMENTARY; DEMONSTRATIVE.
- IV. OPINIONS; DECLARATIONS.
- V. RELEVANCY; SUFFICIENCY.

NOTES AND BRIEFS.

See also DAMAGES, 4; HUSBAND AND WIFE, 2.

I. JUDICIAL NOTICE.

1. Courts will take judicial notice of the contents of the Bible, and that the religious world is divided into sects, and of the general doctrines maintained by each sect. *State, Weiss, v. School Dist. No. 8 (Wis.)* 380
2. The court will not take judicial notice that electricity as used by a street-railway company for the propulsion of its cars is dangerous. *Taggart v. Newport Street R. Co. (R. I.)* 205

II. PRESUMPTIONS AND BURDEN OF PROOF.

3. The presumption that when a connection between parties is illicit it continues as it began, whether it is a presumption of fact or of law, is rebuttable. *White v. White (Cal.)* 799
4. The possession by a bank of a check which is not indorsed does not raise a presumption that it was paid to the payee named therein, when such payment is denied by the payee, and the only other proof of payment is a custom of the bank to pay checks without indorsement only when presented by the payee. *Pickle v. People's Nat. Bank (Tenn.)* 98
5. Checks dated at a certain place and drawn upon the "First National Bank" will be presumed, in the absence of anything to the contrary, to have been drawn upon the first national bank of such place, where it appears that such bank exists and no other bank or place appears on the check. *Culver v. Marks (Ind.)* 489
6. Where the amount of attorneys' fees called for by a promissory note is fixed by the contract, it will be presumed to be the reasonable value of the services rendered, unless the contrary appears. *Exchange Bank v. Tuttle (N. M.)* 445
7. One who has been duly elected and inducted into an office, and who institutes proceedings to determine his right to continue therein after an attempt has been made to oust him therefrom for failure to file a special bond, need not prove himself eligible to the office. *Knox County v. Johnson (Ind.)* 684
8. To establish contributory negligence of a servant, the burden of proof as to his knowledge of latent danger is on the master. *Myhan v. Louisiana Electric Light & P. Co. (La.)* 172
9. The presumption of negligence on the part of a railroad company, which prevails in case of an injury to its passenger, does not obtain in case of injuries to the horse of a traveler upon a highway, which are received while the traveler is attempting to cross the railroad track. *Terre Haute & I. R. Co. v. Clem (Ind.)* 588

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10. A carrier has the burden of proving that goods were not in good condition when received from a connecting carrier. *Beard v. Illinois C. R. Co. (Iowa)* 280

III. BEST AND SECONDARY; DOCUMENTARY; DEMONSTRATIVE.

11. A written proposition accepted with a parol modification is the best evidence of so much of the resulting contract as the writing contains. *Ohio S. R. Co. v. Morey (Ohio)* 701
12. A written statement of a depositor's account, made by an expert bookkeeper from the books of a bank, may be given in evidence and read to the jury, where such bookkeeper is introduced as a witness and opportunity given for cross-examination. *Culver v. Marks (Ind.)* 489
13. Original entries made in the books of a bank are admissible in evidence to show the state of a depositor's account at a certain past time, where they were made in the usual course of business by authorized bookkeepers in the discharge of their duties, and were correct when made. *Id.*
14. An instrument purporting to be the exemplification of a record in the Imperial Royal District Court of Findland, in the Province of Bohemia, in the Empire of Austria, which does not contain intrinsic evidence of a judgment or decree of that court, and which is not shown by extrinsic evidence to have been in the form of a judgment or decree of such court, is inadmissible in a Louisiana court. *Re Lorenz (La.)* 265
15. Unless a judgment of a foreign country be clothed with the form required to prove its authenticity in the country in which it was pronounced, a copy cannot be admitted in evidence in the courts of Louisiana. *Id.*
16. Mortuary tables contained in How. (Mich.) Stat. § 4245, are admissible in evidence to show a person's expectancy of life at a certain age. *Hunn v. Michigan C. R. Co. (Mich.)* 500
17. The exhibition by plaintiff of an injured shoulder to the jury may be permitted in an action for unskillful treatment. *Hess v. Lourey (Ind.)* 90
18. A personal examination by physicians or matrons skilled in such matters may be ordered of a woman suing for divorce on the ground of malformation or abnormal physical proportions amounting to physical incapacity, and a similar examination of defendant may be ordered if he contests her right to relief. *Anonymous (Ala.)* 425

IV. OPINIONS; DECLARATIONS.

19. A physician will not be permitted to testify regarding answers to inquiries propounded to an injured person whom he had been called to visit professionally, concerning matters in which he had no interest or concern professionally, or which were made for the purpose of qualifying himself as a witness, at least where they in any way relate to the injury or to the patient's former condition. *Pennsylvania Co. v. Marion (Ind.)* 687
20. The testimony of expert or other witnesses is not admissible to show that in carry-

715
21. Evidence that a physician devotes a considerable share of his time to farming is admissible on the question of his professional skill. *Hess v. Lowrey* (Ind.) 90

22. Declarations of a partner in the course of a transaction on which an alleged liability of the firm is based may be proved against the other partner. *Id.*

23. Agency cannot be proved by the declarations of the alleged agent. *Pepper v. Cairns* (Pa.) 750

24. Where a corporation invests an agent with general authority to adjust claims against it, the declarations of that agent, made while endeavoring to secure an adjustment of the claim, are competent evidence against its principal. *Adams Exp. Co. v. Harris* (Ind.) 214

25. Declarations as to the ownership of property, made by a person in possession thereof, are admissible in evidence upon an issue as to such ownership, as part of the *res gestae*. *Lowman v. Sheets* (Ind.) 784

V. RELEVANCY; SUFFICIENCY.

26. On the question of damages for injury to a spring which is not totally destroyed, evidence that the owner had previously sold water from it is inadmissible. *Kinnaird v. Standard Oil Co.* (Ky.) 451

27. Where the applicant stated that no application by him for insurance was ever rejected, and it is shown that his application for membership in a mutual benefit society was rejected, plaintiff may show that the company's agent informed the insured that such societies were not regarded as life insurance companies, and need not be considered as such by him. *Equitable L. Assur. Soc. v. Hazlewood* (Tex.) 217

28. Where a life insurance company contests payment of a policy upon the ground that it was taken out by the beneficiary as a wagering policy, and proves that the beneficiary loaned the insured the money with which he paid the premium, testimony of the agent of the corporation is admissible as to negotiations preceding the application, tending to show that both the beneficiary and the insured were urged by the agent to apply for the insurance; that the premium was paid by insured; and that he thought of taking the policy for the benefit of the minor children of the beneficiary, but did not do so because the beneficiaries could not then be so easily changed in case such change became desirable. *Id.*

29. What was usually and habitually done in the running of trains may be proved to rebut a claim that an employee was negligent in running a train in violation of rules. *Hunn v. Michigan C. R. Co.* (Mich.) 500

30. The original waybill is admissible in evidence in a suit against a connecting carrier for refusal to deliver the goods on tender of the charges agreed on in the bill, where other evidence has been given to show that the carrier had paid accrued charges amounting to as much as the sum specified, as tending to show that

insurance policy sets up a special defense, and offers evidence to support it, after plaintiff has shown his loss and the cause that occasioned it and rested, plaintiff may rebut by offering affirmative evidence to meet that introduced in support of the special defense. *Louisville Underwriters v. Durland* (Ind.) 599

32. A petition charging negligence of a carrier in not taking proper precautions to preserve butter will admit evidence of a custom to put the butter into cold storage until refrigerator cars are ready to receive it. *Beard v. Illinois C. R. Co.* (Iowa) 280

33. Evidence of repairs made after an injury has been sustained is incompetent to show antecedent negligence. *Terre Haute & I. R. Co. v. Clem* (Ind.) 583

34. Evidence as to the extent of the property of the family, and of an incumbrance thereon, is inadmissible in an action for the death of plaintiff's husband. *Hunn v. Michigan C. R. Co.* (Mich.) 500

35. Evidence of specific acts of lewdness are inadmissible in an action for false arrest as a prostitute. *Pinkerton v. Verberg* (Mich.) 507

36. Evidence of cohabitation and repute is admissible to show a marriage, in all cases where there is no question of a public offense involved. *White v. White* (Cal.) 799

37. Proof of marriage by cohabitation and repute may be made in a suit for divorce on the ground of adultery, as well as in other cases. *Id.*

38. The possession of a deed by the grantee is prima facie evidence of delivery, where there is nothing to impeach the bona fides of his possession. *Strough v. Wilder* (N. Y.) 555

39. Evidence supporting one of several counts setting out the same cause of action will sustain a finding for plaintiff in respect to such cause. *Culver v. Marks* (Ind.) 489

NOTES AND BRIEFS.

Privileged communications. 690
Declarations of agent; how far binding on principal. 215

Agent's declarations admissible against principal. 751

Repairs as evidence of negligence. 583

EXECUTION. See LEVY AND SEIZURE; PENSIONS; TIME, 2.

EXECUTORS AND ADMINISTRATORS. See also DEATH, 1; SET-OFF AND COUNTERCLAIM, 1-3.

1. A sale of land by executors, under a will giving them power to sell and convey it either at public or private sale, with or without appraisement, on such terms as to them shall seem best, is not affected by a statute regulating the conduct of sales of land directed by will to be sold, and prescribing the manner of giving notice, conveying, etc., "unless by the terms of the will different directions are given." *Valentine v. Wysox* (Ind.) 738

in partnership real estate is authorized by a will giving power to settle, adjust, and compromise all debts owing by the testator, to make settlements with his former partners, and to sell and convey any or all of his real estate in order to pay and satisfy debts against his estate. *Valentine v. Wyser* (Ind.) 786

8. An executor may convey his testator's interest in partnership real estate to his surviving partner, in consideration of an agreement by the latter to pay partnership debts, where the will authorizes him to make settlements with testator's partners of all matters pertaining to the partnership business, to adjust, settle, and compromise all debts, claims, and demands against the estate, and in his discretion to sell and convey so much of the testator's real estate as should be deemed necessary to satisfy his debts. *Id.*

4. The general lien of a judgment creditor of a legatee upon lands charged with the legacy, or upon the proceeds of a sale thereof, is subject to any equities that may exist in favor of the estate against the legatee. *Koons v. Mellett* (Ind.) 231

5. An incumbrance consisting of a vendor's lien, which is expressly assumed by a subsequent purchaser as part of the purchase price, is as much his personal debt as the remainder of the purchase money which is payable directly to his immediate vendor; and in case of his death it is a charge primarily upon his personal estate, and not a burden on the land in the hands of the heirs. *O'Conner v. O'Conner* (Tenn.) 83

6. In a proceeding to put heirs in possession of an estate, an issue must be joined with the administrator in possession, and proof be taken, and judgment rendered contradictorily, recognizing their capacity. *Re Lorens* (La.) 265

NOTES AND BRIEFS.

Powers of; how far personal trusts. 877

Power to transfer bank stock. 827

Incumbrances on estate; from what payable. 88

Debts to estate from legatee; distribution; collection of debts. 231

EXTRADITION.

A person who has been brought within the jurisdiction of a court, from another State, upon a requisition, as a fugitive from justice, and has been tried for or discharged as to the offense charged against him, is not subject to arrest on a civil process until a reasonable time and opportunity have been given him to return to the State from which he was taken. *Moleator v. Sinnen* (Wis.) 817

NOTES AND BRIEFS.

Extradition; prisoner cannot be prosecuted for another offense if once discharged. 817

FALSE IMPRISONMENT.

An officer is liable for assault and illegal arrest, for arresting a woman without warrant, on mere suspicion that she is plying the
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berg (Mich.) 507

FAMILY. See DEFINITIONS, 1; HOME-STEAD, 1.

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Family; defined. 747

FEEs. See DISTRICT ATTORNEYS.

FENCES. See RAILROADS, 4.

FIRE. See INSURANCE, 1; NEGLIGENCE, 5.

FISHERIES. See also NUISANCES, 10.

The taking of fish with nets in specified waters may be prohibited by the Legislature, and the setting of nets for that purpose declared to be a public nuisance. *Lawton v. Steele* (N. Y.) 134

NOTES AND BRIEFS.

Fisheries; power of Legislature to regulate. 134

FIXTURES.

1. A mortgagee in possession may lawfully take down or carry away buildings erected with his own moneys, and which are not so connected with the soil that they cannot be removed without prejudice. *Cook v. Cooper* (Or.) 273

2. A party in possession of premises who is entitled to remove structures may exercise the right without resort to equity. *Id.*

FOREIGN CORPORATIONS. See CORPORATIONS, V.

FORGERY. See BANKS AND BANKING, 8; ESTOPPEL, 7.

FREIGHT. See CARR.

GIFT.

1. A valid gift *causa mortis* is made where one confined to his bed by a sickness which soon proves fatal, and who is fully apprised of the probable termination of the malady, instructs a person to whom he has entrusted the keys to a private box in a bank vault, which box contains money, etc., to count therefrom a certain amount in gold coin and bank bills, and place it in a separate package labeled as the property of a certain third person, and to deliver it to him, together with a package already so labeled, in the event of the donor's death, and upon being informed that the packages are prepared replies approvingly, and never again takes possession of the keys, although the money is permitted to remain in the donor's box until his death, and although the donee never constitutes the depository his trustee, or even knows of the intended gift or of the delivery. *Devol v. Dye* (Ind.) 439

2. A promissory note will pass by delivery without indorsement as a gift *inter vivos*. *Hopkins v. Manchester* (R. I.) 387

NOTES AND BRIEFS.

Gift of promissory note. 388

Causa mortis. 439

GRANT.**NOTES AND BRIEFS.**

By the public; construction of. 241

GUARANTY.**NOTES AND BRIEFS.**

Letters of credit. 209

HABITUAL DRUNKARDS. See OFFICERS, 4.**HACKMEN.**

An unlicensed hack driver specially ordered for a steamboat passenger is not a trespasser in going upon a wharf used by the steamboat company to receive the passenger, although the rules of the wharf forbid any but private carriages, or hackney carriages which are licensed, to stand upon the wharf. *Griswold v. Webb* (R. I.) 802

HARBOR. See EMINENT DOMAIN, 7.**HAWKERS.** See PEDDLERS, NOTES AND BRIEFS.**HIGHWAYS.** See also NEGLIGENCE, 6; RAILROADS, 8; STATUTES, 11; STREET RAILWAYS.

1. An abutting owner has an easement in a street dedicated to the public when his lot was purchased, his right to which cannot be taken away, even by the Legislature, without compensation; a sale cannot be made of all of it except an alley, for the benefit of the town, even if it owns the fee. *Moose v. Carson* (N. C.) 548

2. Power given to a railroad company by the Legislature to construct and operate its road in the streets of a town or city is altogether independent of the municipality. *Milbale v. Eeergreen R. Co.* (Pa.) 369

3. One who has signed an agreement provided for in an Act authorizing street improvements, that in consideration of the right to pay his assessment in installments he will not question its validity, cannot attack the provision of the Act prohibiting the questioning of the assessment by one in such position. *Quill v. Indianapolis* (Ind.) 681

4. To stand in a public street at night, engaged in conversation, heedless of horses and vehicles that are passing, is such negligence as will prevent recovery for injuries resulting from being thrown down by a wagon the driver of which did not see the person injured, although the driver also was negligent. *Evans v. Adams Exp. Co.* (Ind.) 678

5. Where the united and contemporaneous negligence of two persons causes a collision in a public street, neither can recover from the other for a resulting injury. *Id.*

NOTES AND BRIEFS.

Ownership of fee in streets; rights of abutting owners. 548

Laying out across railroad. 121

Construction of railroads in streets. 369

Negligence for footman to stop in carriage-way. 678

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HOLIDAYS.

The approval, on a legal holiday, of the bond of an assignee for creditors by a court commissioner, even if it is a judicial act, is not prohibited by a statute declaring that "no court shall be opened or transact any business . . . on any legal holiday," except to instruct or discharge a jury, or receive a verdict and render judgment thereon. *Spaulding v. Bernhard* (Wis.) 428

NOTES AND BRIEFS.

Holidays; approval of bond upon; validity. 428, 424

HOMESTEAD.

1. A brother who lives with a sister in a house belonging to her, where they live together as one family, she being dependent upon him for means of living, is the head of a family, within the meaning of the South Carolina homestead laws. *Moyer v. Drummond* (S. C.) 747

2. A homestead exemption is allowable in partnership property, under the South Carolina Constitution as amended in 1880. *Id.*

HUSBAND AND WIFE. See also CONFLICT OF LAWS, 1-3; DAMAGES, 8; EVIDENCE, 8, 18, 37; INDIANS, 1.

1. Marriage may be proved by the conduct of the parties, where the habit and repute to show that the marriage status has been assumed is all uniform and undivided, although the connection of the parties was in its beginning illicit. *White v. White* (Cal.) 799

2. A marriage between a man and his housekeeper was held to be established, although they never had any marriage ceremony performed, and illicit intercourse began between them within one week after she came into his house, without any promise of marriage, and for several years thereafter and until their removal to another place she was not regarded in the community as his wife, where several children were born to them, and after their removal she was treated by him in all respects as his wife, and so introduced by him to the people of the community, and so regarded and treated by all their acquaintances in the limited circle in which they moved. *White v. White* (Cal.) 799

3. By the settled policy of the State of Georgia, marriage relations between white persons and persons of African descent are forever prohibited, and by the statutes of the State such marriages are declared null and void. *State v. Tutty* (C. C. S. D. Ga.) 50

4. Marriage is more than a contract. It is an institution which is the foundation of the family and of society; the rights and qualifications of the parties thereto depend upon the legislation of the State as controlled, for the benefit of the entire community, by principles of public policy. *Id.*

5. A married woman is personally liable for her civil torts, including such frauds as do not grow out of, or are not directly connected with, or a part of, a contract which she has undertaken to make. *Prentiss v. Paisley* (Fla.) 640

6. Wherever coverture avoids a contract

the ground of fraud connected therewith; and the bar cannot be overcome by suing her in an action *ex delicto*. *Prentiss v. Paisley* (Fla.) 640

7. The marital relation does not of itself disqualify the husband from acting as the agent of his wife with reference to her separate estate. *Id.*

8. The existence of a marriage contract between husband and wife, giving her the right to control and manage her separate estate and property the same as if she had remained unmarried, does not make her capable, at common law, of binding herself by a contract. *Id.*

9. A married woman's right to carry on business on her own account does not prevent her from giving her services to her husband in carrying on his business, or prevent him, in that case, from recovering the value of such services, in an action for personal injuries sustained by her. *Citizens Street R. Co. v. Twinnams* (Ind.) 852

10. The power of a married woman to sell and transfer any of the loans of the Commonwealth of Pennsylvania, or of the city of Philadelphia, with like effect as if she were unmarried, under the Pennsylvania Act of March 18, 1875, extends to foreign or nonresident married women owning such securities. *Farmers & M. Nat. Bank v. Loftus* (Pa.) 318

11. A married woman is not empowered to bind herself by a judgment note, by the provisions of the Pennsylvania Married Person's Property Act of June 8, 1887 (Pa. Pub. Laws, 832); at least if it is not given in the management, or for the benefit of, her separate estate, or in the prosecution of any business in which she is engaged, or for necessities. *Roop v. Real Estate Invest. Co.* (Pa.) 211

12. The words "physically and incurably incapacitated from entering into the marriage state," in Ala. Code 1886, § 2822, stating a cause of divorce, mean impotency to consummate the marriage. *Anonymous* (Ala.) 425

13. Cruelty, which is a statutory ground of divorce, may be set up by a plea of recrimination as a bar to a bill for divorce on the ground of adultery. *Church v. Church* (R. I.) 885

14. A decree *a mensa et thoro*, under Minn. Gen. Stat. 1878, chap. 62, § 90 *et seq.*, does not bar an action for a divorce *a vinculo matrimonii* upon any of the grounds specified by statute. *Evans v. Evans* (Minn.) 448

NOTES AND BRIEFS.

See also CONFLICT OF LAWS.

Presumption of marriage; customs of Indian tribes.	125
Proof of marriage, sufficiency of.	799
Wife's capacity to contract; agency of husband; liability for torts.	640
Married woman's power of attorney.	314
Validity of bond of married woman.	211
Personal decree against married woman; husband as agent.	642
Right to recover for injuries to wife.	613
Curtesy in reversion or remainder.	693

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Divorce; *a vinculo* after decree *a mensa et thoro*. 448

IMPROVEMENTS.

An equitable claim for unauthorized improvements by part owners of land held in common may be allowed to them on a sale for purpose of partition, as well as in any case of actual division. *Moore v. Thorp* (R. I.) 731

NOTES AND BRIEFS.

Improvements; allowance for, on partition. 731

INCOMPETENT PERSONS. See INSANE PERSONS, NOTES AND BRIEFS.

INDIANS.

1. An Indian tribe within the State, recognized as such by the United States government, is to be considered as a separate community or people, capable of managing its own affairs, including the domestic relations; and those persons belonging to the tribe, who are recognized by the customs and laws of the tribe as married persons, must be so treated by the courts; and the children of such marriages cannot be regarded as illegitimate. *Earl v. Wilson* (Minn.) 125

2. An Indian is not incapable of giving a valid promissory note by the fact that he belongs to a band which is governed by ancient Indian customs and retains a tribal organization, unless it grows out of some contract prohibited by law. *Ke-tuc-e-mun-quah v. McClure* (Ind.) 782

3. The fact that the lands of a defendant, who is an Indian, are not liable to levy and sale under a judgment, is no ground for refusing a judgment against him. *Id.*

NOTES AND BRIEFS.

Indians; in tribal relation not citizens of State. 125

INDICTMENT, INFORMATION, AND COMPLAINT.

An information charging that defendants "did willfully, maliciously, and unlawfully interrupt, molest, and disturb a religious meeting" and its members, sufficiently describes the manner of disturbance, under Neb. Crim. Code, § 82. *Jones v. State* (Neb.) 825

INFANTS.

The court of chancery in Maryland had no jurisdiction in 1859 to order the sale of city real estate for the payment of taxes and street assessments, upon the joint petition of the life tenant and the infant remainderman suing by next friend, but for whom no guardian was appointed, and who was not made defendant or summoned to answer the bill, although it was alleged that "it would be for the interest and advantage of all parties concerned." *Roche v. Waters* (Md.) 533

NOTES AND BRIEFS.

Infants; sale of lands by court. 534

INJUNCTION.

1. A mortgagee will have the security of his lien protected by injunction. *Betz v. Verner* (N. J.) 680

2. An injunction may be granted to prevent drawing down the water of a pond below its natural low-water line, where defendants avow an intention to do so whenever, in times of drought, the water is needed, and have already lowered it to some extent, although the damages have thus far been nominal only. *Fernald v. Knox Woolen Co.* (Me.) 459

3. Pollution of the waters, and injury to the flow of the current, of a creek by discharging into it the manure and offal from extensive cattle-feeding barns, in such manner and degree as to injure the stream for husbandry, and destroy it for watering livestock on adjacent premises, will be restrained by injunction, although the complainant might be able to supply water for his cattle from an independent source at a comparatively small cost. *Barton v. Union Cattle Co.* (Neb.) 457

4. An injunction may be granted to prevent a sale of land under a deed of trust, in order to prevent a cloud being cast thereby on the title, which has been obtained by adverse possession. *Gardner v. Terry* (Mo.) 67

5. The negative enforcement of a contract for personal services by an injunction will not be made where the services are not purely intellectual, peculiar, or individual in their character. *William Rogers Mfg. Co. v. Rogers* (Conn.) 779

6. A contract for the employment of a person for such services as shall be devolved upon him by the general manager of the business, including such duties as traveling or acting as secretary or other officer of the company, if required of him, does not show that his services are so peculiar or individual that they cannot be performed by any person of ordinary intelligence and fair learning, so as to authorize an injunction in aid of the specific performance of the contract. *Id.*

7. An agreement by an employé not to allow his name to be used in any business similar to that of his employer will not, if the latter does not own the name as a trademark, authorize an injunction against his engaging with his employer's competitor, and allowing him the use of his name, at least if it is not shown that the employer uses, or is entitled to use, such name, or that the use of it by rivals would do him some special injury. *Id.*

8. Although equity will not ordinarily attempt to enforce contracts which cannot be carried out by the machinery of a court, it may nevertheless practically accomplish the same end by enjoining the breach of a negative promise; and this will be done whenever the contract is one of which the court would decree specific performance if by such decree its observance by the party refusing to perform could be practically enforced. *Metropolitan Exhibition Co. v. Baring* (C. C. S. D. N. Y.) 881

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Injunction; to restrain illegal appropriation. 180

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INSANE PERSONS
ANCE, 12.

The undeclared lunacy impair the title of a bona fide purchaser without notice of the lunatic. *Odom v. Rife*

NOTES AND

Insanity; how far a disqualification of incompetent persons; of ratification.

Validity of deed executed in contemplation of death; setting aside of contract of

INSOLVENCY AND
FOR CREDITOR
OFF AND COUNTEROFF

1. A trustee of an insolvent estate, takes the estate subject to the equities. *Mervin v. Austin*

2. Where an executor or administrator renders a final account of himself with a certain amount to pay annuities, and not more, but uses it in his business for his own money, and afterwards assigns it for benefit of creditors, the assignee cannot impress the fund with a trust for the assignee with a trust for the annuitants. *Little v.*

3. The trust will attach to the person in trust to raise annuities; money can be identified as such longer; and in case the trust funds with his own money be traced, and then becomes a trust for the general creditors.

4. The delivery by an assignor of creditors to his assignee of a bill of lading and of the key to the warehouse, in case of the failure of the assignor to exercise any control over the goods, is a delivery of the goods within the meaning of that statute. *Mansf. (Ark.) Dig. § 305. Commercial Union Co. v. London (Ark.)*

5. Delivery of possession to creditors before he has filed a bill of sale executed a bond will avoid the assignment although made in accordance with the agreement between the parties contemporaneously with the deed of assignment, which is that it was for the purpose of the assignee to prepare an inventory

NOTES AND BRIEFS.

Insolvency; Arkansas statute; assignments.

Rights of trustees; jurisdiction.

Assignment for creditors; effect.

Delivery of assigned property.

II. LIFE.

III. MARINE.

NOTES AND BRIEFS.

I. FIRE.

1. Failure to furnish proof of loss within the time required is waived where the insured, after attempting to do everything necessary, is lulled into security by the acts of the company or its agent, and is led to believe they are preparing to adjust his loss. *Kenton Ins. Co. v. Wigginton (Ky.)* 81

2. The owner of an undivided fourth of land, who is merely a life tenant of the rest, to which his claim of ownership in fee is then in litigation, does not, by stating that he is the unconditional owner of the land, make a material misrepresentation which will avoid a policy providing that the application must disclose the true character of the title and the fact of any litigation concerning it, where the building insured was remodeled from a worthless one at his own expense, and he would therefore, in partition, be entitled to it without estimating its value, and to the ground on which it stood; and where it is provided by statute that neither misrepresentations nor warranties shall affect the right to recover unless material to the risk, or fraudulent. *Id.*

3. The mere expression of his opinion as to value of property insured, in the absence of bad faith, cannot defeat the right of a person insured to recover on his policy. *Id.*

4. An entry by a landlord to rebuild a burned building, under an agreement with the tenant that the latter shall continue to pay rent during the time of the rebuilding, in consideration of the landlord's promise to grant a new lease of the improved property on more favorable terms, will relieve an insurance company of its contract to indemnify the tenant for any loss accruing to him by reason of having to pay rent for the insured building during such time as it should be untenable by reason of fire. *Royal Ins. Co. v. Heller (Pa.)* 411

5. An insurance company's letter stating that it could not, by reason of the landlord entering for the purpose of rebuilding, be discharged from liability on a policy insuring a tenant against liability for rent in case the leased buildings are burned, and that such defense would not be raised, will not estop the company from asserting its discharge from further liability by reason of an entry by the landlord under an agreement with the tenant to continue the payment of the rent. *Id.*

II. LIFE.

6. A warranty by an applicant for a life insurance, that his answers to the society's medical examiner are true, does not make him responsible for the truth of such answers as reported to the company; and if, by being incorrectly written down by such examiner without the applicant's knowledge, they are untrue as reported to the company, the policy will not be avoided thereby. *Equitable L. Assur. Soc. v. Hazlewood (Tex.)* 217

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containing his medical examination, is for purposes of identification, rather than for the purpose of binding him for the truth of the contents of the paper. *Id.*

8. While an applicant for life insurance is not bound to exercise supervision over the writing down of his answers by the medical examiner, yet if he knows that his answers have been incorrectly written down, it becomes his duty to see that proper corrections are made, and if he fails to do so he will be estopped from disputing them as written, even although recovery upon the policy is thereby defeated. *Id.*

9. The designation of a person as beneficiary in a life insurance policy, who has no insurable interest in the life of the person taking out the policy, does not render it void; but such person may be treated as an assignee, appointee, or trustee to receive the proceeds for whoever may be lawfully entitled to enjoy them. *Id.*

10. One has an insurable interest in the life of his brother. *Id.*

11. There is no special reason for limiting the amount for which a policy may be taken out, when the insurance is obtained by a person on his own life and made payable originally or by assignment to another having no, or only a limited, insurable interest in his life. *Id.*

12. The insanity of a member of a benefit society brings him within the provisions of its rule that every member who, through sickness or other disability, is unable to follow his usual business or some other occupation whereby he may earn a livelihood for himself and family, shall be entitled to certain benefits. *McCullough v. Expressmens Mut. Ben. Asso. (Pa.)* 210

13. An insurance company is not prevented from setting up the suicide of an insured person as a defense to its liability on the policy insuring his life, by a statute providing that "all companies, after having received three annual premiums on any policy, . . . are estopped from defending on any other ground than fraud, against any claim arising on such policy by reason of any errors, omissions, or misstatements of the assured in any application made by such assured on which the policy was issued, except as to age." *Starck v. Union C. L. Ins. Co. (Pa.)* 576

14. A purchaser or assignee of insurance on the life of another has an interest to the extent of the purchase or other money invested by him, including advancements in the nature of dues, assessments, and premiums to preserve and keep the insurance in force, with lawful interest thereon. *Schonfield v. Turner (Tex.)* 189

15. A divorced wife cannot share in the proceeds of a mutual benefit certificate on the husband's life, which is payable by law to his heirs. *Id.*

16. Failure of a person insured to pay premium becoming due before his death, under a policy which required proof of death "during the life of the policy," where no notice that the premium is due has been sent him, does not destroy the validity of the policy, under the New York Laws of 1877, chap. 321, which re-

quires that, if a premium becomes due, notice must be given and thirty days allowed in which to pay, before the policy can be forfeited for nonpayment of premium. *Baxter v. Brooklyn L. Ins. Co.* (N. Y.) 290

17. Payment or tender of premium which became due before the death of the insured is not necessary before bringing action on a policy which, notwithstanding failure to pay, continued in force under the New York Act of 1877, by reason of the company's failure to give notice after the premium was due. *Id.*

III. MARINE.

18. The six months' limitation for suit on a policy of insurance begins to run at the close of the time allowed the company for payment, and not from the actual loss, where the policy provides that proofs of loss must be made within thirty days after the loss, and suit brought within six months from the same date, and also provides that the loss shall be paid in sixty days after proof of loss. *Murdock v. Franklin Ins. Co.* (W. Va.) 572

19. One who has a barge chartered by him in his custody and possession has an insurable interest, and may insure it in his own name, not only for his own protection, but also for the protection of the owner. *Id.*

20. If the owner of a barge authorizes and ratifies a contract of insurance made in part for his benefit by a charterer, recovery on the policy may include the loss of the owner, as well as that of the charterer. *Id.*

21. Where the insurer of a vessel assumes by express covenant all risk of damages thereto by fires, with the one exception of those caused by explosion of boilers, a subsequent clause in the policy, in which the insured warrants in general terms that the insurer shall be free from any claims for loss or damage occasioned, *inter alia*, "by the collapsing of flues," will not relieve the insurer from liability for loss by fire occasioned by the collapsing of a flue. *Louisville Underwriters v. Durland* (Ind.) 399

NOTES AND BRIEFS.

Insurance against loss by fire; liability fixed by loss. 411

Against fire; statement and proof of loss; waiver of; conditions to impede or hinder; where offer of proofs would be in vain. 81

Transfer of mutual benefit certificates. 189

Life; construction of policy; application; responsibility for acts of agent; insurable interest; wagering policies. 217

Misstatements in application; effect of; warranties. 219

Policy not in accord with representations of insured; right to recover damages; insurable interest of charterer. 572

Restrictive warranties; construction; pleading of. 399

Notice necessary to effect forfeiture; payment of premium a condition precedent. 298

Proof of loss; limitation clause 572

INTEREST.

1. Under the Organic Act of Cascade County, Montana, which imposes upon its commis-
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sioners the duty of selecting methods shall be adopted indebtedness (either by the of bonds), and declares wh they have determined whi adopt, inasmuch as they from the law alone and n the county, the county ca terest on the debt for fail sioners to take action, alth the plain, imperative man Territory, *Choteau Count*, (Mont.)

2. Interest will be allowed cover the amount due u which is a mere acknow only from the service of tl neither prior demand made for payment, nor contrac ing payment of interest, a not a wrongdoer in acquir money. *Gay v. Rooke* (M

8. Checks for the paym is no money on deposit be time when the presentatio made. *Culver v. Marks* (I

4. A judgment entereme nt to W. Va. Code, chs Va. Acts 1882, chap. 120 ments to be entered, with of verdict, should call fo though the verdict was i amendment, when the law est only from the date of t dock v. *Franklin Ins. Co.* (

NOTES AND E

Interest; on judgment.

INTOXICATING LIQ BONDS, 2, 3; COMMER

1. A railroad company v with and aided a person in against the sale of intoxicat ing them in its warehouse fend a proceeding to conder the judgment of the law, o has a lien upon the liquors v. *Creeden* (Iowa)

2. Intoxicating liquors tr other State to a point in K the laws of Kansas relating position of such property, s sold at the place of destinat packages or other form, ex the State prescribe. *State v*

3. The police power of tl the sale of liquors transpo State does not infringe on t to Congress to regulate interi

NOTES AND BI

Intoxicating liquors; br the State; regulation of sale

Right of State to prohibi sale; transportation prohib quors; special licenses; per clists; criminal prosecution; judgment lien; liquor nuisa in junction; contempt; actio

JOINT CREDITOR AND DEBTOR.

See CONTRIBUTION.

JUDGMENT. See also APPEAL AND ERROR, 26; EVIDENCE, 14, 15; EXECUTORS AND ADMINISTRATORS, 4; HUSBAND AND WIFE, 14.

1. A judgment deciding that a mutual benefit society had no power to limit the amount of sick benefits is conclusive against such a defense in a subsequent action for new installments which have become due to the same plaintiff by the continuance of his sickness. *Wiese v. San Francisco Musical Fund Soc. (Cal.)* 577

2. The fact that a judgment was rendered in a suit commenced in a justice's court makes no difference with its conclusiveness, when rendered in the exercise of jurisdiction. *Id.*

3. A judgment by confession entered by a clerk of a court of record in vacation is void where there is no proof filed of the execution of the power of attorney under which it was confessed, since no jurisdiction is obtained of the defendant. *Gardner v. Bunn (Ill.)* 729

NOTES AND BRIEFS.

Judgment; effect of erroneous ruling upon. 495

Doctrine of *res judicata*; by default; on demurrer; foreign judgments; finality; as to what matters and facts conclusive; who bound by; binding though erroneous. 577

Extent of lien. 23

Computation of interest on. 573

JUDICIAL NOTICE. See EVIDENCE, 1.**JUDICIAL SALE.**

The Legislature has no power to validate, by retroactive legislation, a judicial sale of real estate which was void for want of jurisdiction in the court to make it; at least not without making provision for compensating the owners of the property. *Roche v. Waters (Md.)* 533

JURY.

A juror in Idaho must have all the qualifications prescribed for an elector, and a member of a so-called "Mormon Church" cannot be a juror. *Territory v. Evans (Id.)* 646

LANDLORD AND TENANT. See also NEGLIGENCE, 4.

1. Tenants who lease premises for a stated term from an agent whose authority to make the lease is void because not in writing become tenants from year to year as from the time of their entry, and, having entered upon the second year, cannot terminate their relation until the end of the current year. *Coudert v. Colin (N. Y.)* 69

2. A landlord is not liable to a servant of his tenant for injuries occasioned by a dangerous condition of the premises existing at the time of the lease, although he subsequently
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repair in the lease. *Perez v. Raybaud (Tex.)* 620**NOTES AND BRIEFS.**

Liability for rent extinguished by entry of landlord. 411

Liability for rent; term of tenancy. 69

LAW OF PLACE. See CONFLICT OF LAWS.**LEASE.** See CONTRACTS, 3; LANDLORD AND TENANT.**LEGISLATURE.** See CRIMINAL LAW, 1.**LETTER OF CREDIT.** See GUARANTY, NOTES AND BRIEFS.**LEVY AND SEIZURE.**

Where the receipts from a pension can be directly traced to the purchase of property necessary or convenient for the support and maintenance of the pensioner and his family, such property is exempt from execution, under N. Y. Code Civ. Proc. § 1893, which exempts a pension. *Yates County Nat. Bank v. Carpenter (N. Y.)* 557

NOTES AND BRIEFS.

Pensions; exemption from execution. 557

LIBEL AND SLANDER.

1. A publication containing imputations that a member of the Legislature went there solely for the purpose of passing a bill to enrich himself and his copartners in a certain scheme, and that he had used both liquor and money to procure votes therefor from other members, is libelous. *Randall v. Evening News Assn. (Mich.)* 309

2. A picture which is a caricature of a member of the Legislature standing on a platform which rests upon bottles, one of which is marked "Rye," with a cask marked "Gin," with faucet already for opening, upon the platform, on which cask his right foot rests, while his left hand is pressed against his heart, and his right hand extended holds a bag marked "\$," when printed in connection with a publication which charges his corruption in procuring the passage of a bill, means that liquor and money were used by him in procuring its passage, and constitutes a libel, if the implied charges are not true. *Id.*

3. No innuendo is needed in pleading a libel, if the meaning of the publication is plain. *Id.*

NOTES AND BRIEFS.

Essentials to constitute the crime. 810

LIBRARY. See TOWN, 6.**LICENSE.** See also EASEMENTS, 3; MARKETS, 2.

A permission or license, express or implied, to use the property of another in a particular manner or for a particular purpose, on the faith of which one has expended money, is

an executive or irrevocable license which cannot be revoked, where the latter cannot be restored to his original position. *Pierce v. Cleland* (Pa.) 753

NOTES AND BRIEFS.

License; irrevocable; partial execution of contract. 754

LIENS. See also OATH AND AFFIDAVIT, 2.

1. Work done in engraving upon copper shells patterns to be printed on cloth creates no lien on cloth-printing machines which are sold as complete without shells, under N. J. Rev. p. 669, § 6, or N. J. Supp. Rev. p. 456, § 3, giving a lien for work done upon "fixed machinery" or "fixtures for manufacturing purposes." *Griggs v. Stone* (N. J.) 48

2. A lien on "fixed machinery," or "fixtures for manufacturing purposes," will not be extended, in case of doubt, to machinery of such a character that a common-law lien may be had upon it. *Id.*

3. A lien for the price of lubricating oil furnished for use on machinery in a mill is not given by the Wisconsin statute providing for a lien for any materials furnished for the protection of any building, or any machinery which becomes a part of the freehold. *Standard Oil Co. v. Lane* (Wis.) 191

4. A subcontractor who agrees with the principal contractor, knowing him to be such, to execute a part of the work upon a building which the latter has undertaken to construct, is bound to take notice of the terms of the original contract, and his right to a lien on the building is controlled thereby. Hence, if such contract provides that the building shall be delivered free of all liens, he cannot acquire a lien thereon. *Schroeder v. Galland* (Pa.) 711

NOTES AND BRIEFS.

Liens; of subcontractor. 711
Mechanics'; construction of statutes giving; basis of. 191
Strictly construed; oath to. 150
Agreement that property shall be delivered free from lien; effect on subcontract. 712

LIFE INSURANCE. See INSURANCE, II.

LIFE TENANT.

Taxes upon city property and assessments thereon for street improvements must be paid by the life tenant, and he cannot compel the remaindermen to contribute towards such payment. *Rocha v. Waters* (Md.) 533

LIMITATION OF ACTIONS. See also INSURANCE, 18.

1. After an unexplained lapse of fourteen years a settlement and accounting in regard to partnership matters between the surviving partner and the deceased partner's executor will not be opened up, although the settlement was irregularly made. *Valentine v. Wysox* (Ind.) 783

2. The Court of Claims has no jurisdiction to render judgment in favor of a claim against the United States which accrued more than 7 L. R. A.

six years before the filing of the petition. *Waddell v. United States* (Ct. Cl.) 861

3. A claim on behalf of a United States marshal for the allowance, by the government, of expenses incurred by him in the service for it of a distress warrant, which accrued more than forty-seven years before it was presented to the treasury department, is a stale claim which the accounting officers have no right to receive, examine, or settle. *Id.*

4. The Statute of Limitations cannot run against any person until his or her right has accrued. *Winters v. De Turk* (Pa.) 658

5. The cause of action to recover from the drawer the amount called for by a check drawn without funds to meet it rests upon the check, and is not governed by the Statute of Limitations relating to contracts not in writing. *Outer v. Marks* (Ind.) 489

6. In cases of fraud the Statute of Limitations begins to run, in equity, not at the time the fraud is perpetrated, but from the time of its discovery. *Peck v. Bank of America* (R. I.) 826

7. When a debt is barred, a new promise relied on must acknowledge the justness of the claim and express a willingness to pay it. *Krueger v. Krueger* (Tex.) 73

8. A letter saying, "I have done my best to raise some money, but I cannot do it now. . . . But some money we will send you, but not all, because we must live first,"—does not constitute a clear, unequivocal, and unconditional acknowledgment of the justness of the demand, or express a willingness to pay, sufficient to remove the bar of the statute. *Id.*

NOTES AND BRIEFS.

Limitation of actions; equitable rule. 827
When statute begins to run. 658
In case of fraud. 826
Claims against United States. 861

LIMITED LIABILITY. See SHIPPING, 1.

LIS PENDENS.

1. The doctrine of *lis pendens* does not apply unless the court has acquired in some manner jurisdiction of the subject matter involved in the suit. *Benton v. Shafer* (Ohio) 813

2. An action brought in one county to recover a distinct tract of land lying entirely in another county does not give constructive notice of its pendency to a bona fide purchaser or mortgagee in the county where the property is situated. *Id.*

NOTES AND BRIEFS.

Lis pendens; purchase after notice filed. 229
When operates. 813

LOTTERIES.

1. A lottery, within the meaning of statutes against carrying on lotteries, embraces only schemes in which a valuable consideration of some kind is paid directly or indirectly for the chance to draw a prize. *Yellowstone Kit v. State* (Ala.) 599

2. Distributing prizes by lot or chance to

holders of tickets given away is not carrying on a lottery, although it may be done with the view of drawing a large crowd together in the hope of profit from such of them as may choose to buy medicines from the distributor, or tickets to performances given by him, or to pay for seats in the tent where the prizes are selected, where no payment for any purpose is necessary as a condition of receiving a prize. *Yellowstone Kit v. State* (Ala.) 599

NOTES AND BRIEFS.

Lottery; what constitutes; gift enterprise; mailing circulars concerning; constitutional and statutory provisions; prosecution for maintaining; for publishing lottery scheme; sale of tickets. 599

MANDAMUS. See also SCHOOLS, 18.

The rule that mandamus will lie to compel a board of commissioners to approve the bond of a public officer, or show cause for not approving it, does not apply where the rejection of the bond operates as a decision against the right of the applicant to hold the office, since such decision is a judicial one from which an appeal will lie. *Knox County v. Johnson* (Ind.) 684

NOTES AND BRIEFS.

Mandamus; to enforce a public duty. 105

To compel approval of bond. 684, 740

MARINE INSURANCE. See INSURANCE, III.

MARKETS.

1. A city has power to forbid the selling of fresh meats elsewhere than at market-houses established by it, where its charter empowers it to establish market-houses, designate, control, and regulate market-places, and regulate the vending of fresh meats. *Newson v. Galveston* (Tex.) 797

2. Licensing a person to keep a private meat-market for several years does not compel the city to continue granting such a license, or to prohibit keeping a market within the district where it is situated. *Id.*

3. A person is not deprived of his property without due process of law by an ordinance forbidding private markets within certain limits in which he has established a market and expended money thereon. *Id.*

4. Denying the privilege to sell meats in a city except at certain places is not void as in restriction of trade. *Id.*

MARRIAGE. See CONFLICT OF LAWS, 1-3; HUSBAND AND WIFE, 1-4, NOTES AND BRIEFS.

MARRIED WOMAN. See HUSBAND AND WIFE.

MASTER AND SERVANT. See also PARTY-WALL, 2.

1. An agreement between an employer and employé, that either shall forfeit two weeks' wages by terminating the employment without two weeks' notice thereof, is not unreasonable, 7 I. R. A.

and is not affected by Conn. Gen. Stat. § 1748, imposing a penalty upon an employer who withholds any part of the wages of any person because of any agreement requiring notice before leaving the employment. Two weeks' wages of the employé quitting without notice, being forfeited, are not due him, and therefore a refusal to pay them is not a withholding of any part of his wages. *Pierce v. Whittlesey* (Conn.) 286

2. An employé does not, by entering the service, assume a risk of danger incident thereto which, by reason of his youth and inexperience, he does not know or appreciate, and to which the employer exposes him without warning him of it. *Davis v. St. Louis, I. M. & S. R. Co.* (Ark.) 283

3. A master who carries on an imminently dangerous undertaking—such as the generation and distribution of electricity—is bound to know the character and extent of the danger, and to notify the same to the servant specially and unequivocally, so as to be clearly understood by him. *Myhan v. Louisiana Electric Light & P. Co.* (La.) 172

4. A servant is not required to know latent, but only patent, defects. *Id.*

5. Injury to a brakeman from collision of the train with an animal which has come upon the railroad track through a defective fence makes the company liable for the damages, under the New York General Railroad Act of 1850, § 44, which imposes upon railroad companies the absolute duty to fence their tracks. *Donnegan v. Erhardt* (N. Y.) 527

6. One who causes work to be done is liable for the acts of employés of an independent contractor, where the resulting injury, instead of being collateral and flowing from the negligent act of the employé alone, is one that might have been anticipated as a direct or probable consequence of the performance of the work, if reasonable care was omitted in the course of its performance. *Ohio S. R. Co. v. Morey* (Ohio) 701

7. A party under an antecedent obligation to do a thing, or to do it in a particular way, cannot get rid of his responsibility by deputing it to somebody else. *Fowler v. Saks* (D. C.) 649

8. An engineer and fireman of a locomotive are fellow servants of a section hand. *Harrison v. Detroit, L. & N. R. Co.* (Mich.) 628

9. An employé is not a fellow servant, but a superior or agent, for whose acts the master is held liable, so far as he is charged with an act which the law imposes upon the master the duty to perform. *Id.*

10. An assistant roadmaster having general charge of a portion of a railroad, with control of all the section gangs along that line, is not a fellow servant with a section hand so as to prevent recovery by the latter for an injury caused by the negligence of the former in ordering him to continue work while an engine is approaching, thus throwing him off his guard, and then failing to take care to prevent injury by the approach of the engine. *Id.*

11. It is the duty of the master to supervise.

direct, and control the operation and management of his business so that no injury shall ensue to his employes through his own carelessness or negligence in carrying it on, or else to furnish some person who will do so, for whom he must stand sponsor. *Hunn v. Michigan C. R. Co.* (Mich.) 500

12. A person vested with full control in a particular branch of business, subject to no supervision except the master's, over the action of employes whose duty it is to obey him, stands in the place of the master, and is not a fellow servant with them. *Id.*

13. A train despatcher having full control in the telegraph management of trains is not a fellow servant with trainmen. *Id.*

14. The contributory negligence of a fellow servant will not prevent recovery for injury to a servant, where the master was negligent. *Id.*

NOTES AND BRIEFS.

Discharge; contract of service; holding over; by-laws of corporation. 823

Liability for servant's wages; what servants within rule. 97

Exposure of servant to extraordinary risks. 172

Employers' Liability Act; injury to minor; who may sue. 283

Employers' Liability Act; who may sue; what damages may be recovered. 155

Contributory negligence of fellow servant toward injury; effect of; master's duty to caution minors; damages. 173

Fellow servants, who are; vice-principals; independent employment; combined negligence of master and coservants. 500

Liability of master for deeds of independent contractor. 649

MAXIMS. See also NEGLIGENCE, 1.

1. Consensus, non concubitus, facit nuptias. *White v. White* (Cal.) 799

2. Damnum absque injuria. *Kinnaird v. Standard Oil Co.* (Ky.) 451

3. Omnis ratihabitio retrotrahitur et mandato priori aequiparatur. *Pickle v. People's Nat. Bank* (Tenn.) 98

4. Sic utere tuo ut alienum non laedas. *Hanford v. St. Paul & D. R. Co.* (Minn.) 723

5. Ut res magis valeat quam pereat. *Millvale v. Evergreen R. Co.* (Pa.) 869

6. Where one of two innocent persons must suffer, the loss must fall upon him who put it in the power of a third person to cause the loss. *Fowler v. Allen* (S. C.) 745

NOTES AND BRIEFS.

Maxims; loss of one of two innocent parties. 745

MECHANICS' LIEN. See LIENS, 4, NOTES AND BRIEFS.

MISTAKE.

A mistake of law does not relieve in equity any more than at law. *Cartwright v. Dickson* (Tenn.) 708

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MONOPOLY. See SCHOOLS, 11.

NOTES AND BRIEFS.

Monopolies; power to grant. 241

MORMON. See JURY.

MORTGAGE. See also FIXTURES, 1.

1. A provision in a mortgage that the whole sum secured shall become due on any default in payment will not make notes which are not at that time due, according to their terms, due, within the meaning of the rule which gives priority to those first maturing. The priority is to be determined by the order in which they fall due according to their terms. *Leavitt v. Goodwin* (Iowa) 865

2. When a building is sold from mortgaged premises to an innocent purchaser, the lien in equity is gone; and a mortgagee's remedy is an action at law against the mortgagor and those who act with him to impair or defeat the security of the mortgage. *Betz v. Verner* (N. J.) 630

3. A deed by a mortgagee who has become the purchaser of the premises at a void foreclosure sale, and has entered into possession, operates as an assignment of the mortgage debt, as well as of the mortgage securing it; and successive deeds by the purchaser have the same effect. *Cook v. Cooper* (Or.) 273

4. A mortgagee who purchases at a sale under void proceedings, and enters thereunder, becomes a mortgagee in possession. *Id.*

5. If a mortgagee obtains possession in any lawful or peaceable mode he may retain it as against the mortgagor, or any person claiming under him subsequent to the mortgage, until the mortgage debt is paid, although no action is allowed by statute to recover possession. *Id.*

6. The inchoate dower right of the wife of defendant in the foreclosure of a mortgage given by his grantor, where neither she nor the grantor are served or appear as defendants, the grantor being simply named in the summons, although the conveyance was not recorded or known to the plaintiff, is not cut off, under N. Y. Code Civ. Proc. § 132, barring parties who claim under unrecorded deeds from a defendant in foreclosure. Her right is not derived from her husband, but from the grantor. *Kurshedi v. Union Dime Sav. Inst.* (N. Y.) 229

7. A valid chattel mortgage may be made by the owner of property in possession of another under an execution. *Gardner v. Bryn* (Ill.) 729

NOTES AND BRIEFS.

Mortgage; common-law doctrine; equitable theory; American doctrine; title and possession of mortgagor; abandonment of legal theory; rights of mortgagee in possession; purchaser in foreclosure; mortgagee as purchaser; removal of fixtures. 273

Priority of notes secured by. 865

Rights of mortgagor and mortgagee. 630

Right to remove property from the mortgaged premises. 274

Restraint of waste; damages. 631

four hours. 847
MUNICIPAL CORPORATIONS. See
 also CONSTITUTIONAL LAW, 5; COUNTIES,
 8; INTEREST, 1; SCHOOLS, 1; STATUTES,
 9-12; TAXES, 5, 7, 8; WATERS AND WATER-
 COURSES, 14.

1. It is competent for the Legislature to provide for the speedy determination of controversies relating to municipal offices, the statute securing to the incumbents of such offices the same rights in substance that they would have had if the procedure had been by *quo warranto*. *Datz v. Cleveland* (N. J.) 481

2. In the absence of the mayor, where the charter vested all powers of the mayoralty in a specified officer during such absence, the latter could proclaim an election under a statute authorizing mayors of cities to call an election to decide upon the acceptance or rejection of a statute. *Id.*

3. Municipalities are not empowered to borrow money for municipal purposes unless expressly authorized to do so by statute, or, in the absence of a statute, unless the power is necessarily implied from some special duty imposed, for the discharge of which the power to borrow is not only convenient but necessary. *Wells v. Salina* (N. Y.) 759

4. The power to "raise" money for municipal purposes does not include the power to borrow. *Id.*

5. The validity of the issuance by a municipal corporation of bonds or certificates to raise funds to construct a street improvement, which show on their face the purpose for which they are issued, and that they are payable out of a special fund to be derived from assessments upon the property bordering on the street improved, and for the payment of which out of the general fund of the corporation no liability exists,—is not affected by the constitutional provisions limiting the indebtedness of such corporations. *Quill v. Indianapolis* (Ind.) 681

6. Where, by the Act authorizing a municipal corporation to construct street improvements, the portion of the expense thereof chargeable to it is to be paid in cash upon the completion of the work, no indebtedness can be said to be incurred therefor, even although during the pendency of the work bonds may be issued to raise funds to prosecute the same. *Id.*

7. A municipal agency incorporated for the protection of the city from fire and for supplying water, and without means of raising money from taxpayers, is not liable to an action for injuries received from negligence of its servants. *O'Leary v. Fire & W. Comrs.* (Mich.) 170

8. A municipal corporation is liable for injuries to a landowner, caused by the backing up of water in a drain which he has a right to maintain, by reason of negligence on the part of the corporation in permitting the channel into which such drain opens, and which is part of the sewerage system of the corporation, to become obstructed, or in maintaining the same

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face water from its natural course, and turning such quantities of it into such channel that its capacity for carrying off the drainage is not equal to the demand made upon it. *Bates v. Westborough* (Mass.) 156

NOTES AND BRIEFS.

See also STATUTES.

Power of Legislature to change boundaries of.	776
Power to enlarge corporate limits.	786
Building regulations, validity of.	649
Power to borrow money.	759
Power to administer public charity.	765
Power to regulate market.	797
Power to settle claims against themselves.	468
Liability for nuisance; for neglect of duty.	156
Liability for furnishing impure drinking water.	592
Liability for acts of highway commissioners.	157
Damages for wrongful maintenance of a sewer.	465

NAME.

1. A motion in justice's court to dismiss the writ because plaintiff's full Christian name does not appear is equivalent to a plea in abatement, and must be granted where the person appearing for plaintiff says that he cannot amend because he does not know the full name, but does not ask time to ascertain it. *Fisher v. Northrup* (Mich.) 629

2. A suit cannot be carried on by the initials merely of the Christian or first name of the plaintiff, although the one commencing the action does not know the correct name. *Id.*

NE EXEAT.

A writ of *ne exeat* will not be issued to aid in the collection of a judgment which has been recovered at law against a woman. *Moore v. Valda* (Mass.) 396

NOTES AND BRIEFS.

Ne exeat; when granted; nature of writ. 396

NEGLIGENCE. See also CARRIERS, 2; HIGHWAYS, 4, 5; MUNICIPAL CORPORATIONS, 7; PRINCIPAL AND AGENT, 1; TRIAL, 4, 7.

1. An individual, in the exercise of his absolute rights, if it may be reasonably apprehended that their exercise may endanger the safety of others in the exercise of their rights, must exercise them with a due regard for the safety of such others. *Rupard v. Chesapeake & O. R. Co.* (Ky.) 816

2. It is the duty of a railroad company, where a train crosses a public highway on a trestle and there is danger of catching a traveler unawares and frightening the horse that he is

riding or driving, to give some timely warning of the approach of the train to the crossing. *Id.*

8. A traveler familiar with the place, who hurries up to a crossing where a railroad passes over the highway on a trestle, and attempts to cross regardless of the fact that the train may come at any moment, without looking to see whether a train is approaching, and without any reasonable excuse for not looking, although the train could have been easily seen at a distance of several hundred yards, is guilty of negligence which will prevent any recovery for injuries sustained in consequence of the fright of her horse caused by the train. *Id.*

4. The owners of a leased building who consent to the erection of an awning by the tenants, and contribute lumber for its construction, are liable to a person injured by the falling of the awning and a portion of the wall to which it was attached, because the wall was not of sufficient strength to support the burden. *Riley v. Simpson* (Cal.) 622

5. Where several buildings in succession take fire, each from another, and burn, the sparks which set the first one being carried past the last one burned by a strong wind which changed its direction and subsided before the latter buildings took fire, while lack of fire apparatus or ladders prevented extinguishing the fire at the beginning, the burning of the last building is not the proximate result of the setting fire to the first one. *Read v. Nichols* (N. Y.) 180

6. Placing an iron railing with pointed top around an area in front of a house is not negligence such as to create a liability for injuries by one of such points to the hand of a traveler, which he puts out to save himself from falling when he slips on an icy pavement. *Kelly v. Bennett* (Pa.) 120

7. Damage caused by the explosion of a powder magazine which was located upon a lot smaller than that required by an ordinance is caused by violation of the ordinance. *Laffin & R. Powder Co. v. Tearney* (Ill.) 262

NOTES AND BRIEFS.

Negligence; damages for injuries caused by; proximate and remote cause; instances. 180
Proximate cause. 819
Dangerous premises. 620
Contributory, to defeat action. 678
Contract relieving from liability for. 662

NEGOTIABLE PAPER. See BILLS AND NOTES.

NEW TRIAL.

1. Instructing a jury shortly before 12 o'clock Saturday night, that they will have to cease deliberations during Sunday, and will be kept together and given their meals and a place to sleep at their own expense, is sufficient to require a setting aside of a verdict which was rendered by the jury in a few minutes thereafter. *Henderson v. Reynolds* (Ga.) 327

2. New facts declared in an affidavit for new trial will be insufficient if they could not possibly have changed the result. *Louisville & N. R. Co. v. Gilbert* (Tenn.) 163

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NOTARIES. See OATHS.

NOTES AND BILLS.

Notaries; power of; authentication by.

NOTICE. See also BILLS AND NOTES.

1. Whatever puts upon notice of what inquiry was made. *Bank of America* (R. I.)

2. The secretary of a company with knowledge of its printed and issued in a book appears as secretary. *D. Ins. Co.* (N. Y.)

3. Purchasers of real estate with notice of an evident thereon. *Pierce v. Orland*

NOTES AND BILLS.

See also LITIGATION.

Notice; putting purchaser

NOVATION.

The mere acceptance of a certified check from his delinquent a novation. *Born v. Nat. Bank* (Ind.)

NUISANCES. See also WATERCOURSES, 18.

1. If one has on his lot which is dangerous, or a structure above or under the ground constantly using which is liable to injure his neighbor, or that he has the right to use, he must take consequences. *Kinnaird v. (Ky.)*

2. A powder magazine is liable to inflict serious injury on or property of a person in case of an explosion, is a nuisance and liability for such injury care or lack of negligence. *Co. v. Tearney* (Ill.)

3. The fact that an explosion of gunpowder destroyed other shows that keeping the powder considered with reference to quantity, and the surrounding constituted a nuisance *per se*.

4. The risk of injury by a powder magazine is not assumed of premises by reason of the powder magazines were in the lot when the lot was purchased, erected, and that in one of the companies the owner's husband, and that she had leased the companies for storing powder she nor her husband had ever by, or had relations of any owner of the magazine which.

5. Nuisances should be removed from vacant grounds in the immediate neighborhood of the citizens.

6. The right to use a navigable

action for an illegal obstruction to navigation which prevents his use of this public right. *Swanson v. Mississippi & R. R. Boom Co.* (Minn.) 678

7. An obstruction to a navigable stream, which will give the right of a private action to a riparian owner, must constitute an invasion or violation of some private right as distinguished from the public right which he has of navigating the river in common with the rest of the public. *Id.*

8. The public remedy for the abatement of a nuisance by judicial prosecution *in rem* or *in personam* is not exclusive when the statute, in a particular case, gives a remedy by summary abatement, and the remedy is appropriate to the object to be accomplished. *Lawton v. Steele* (N. Y.) 134

9. Where a public nuisance consists in the location or use of tangible personal property so as to interfere with or obstruct a public right or regulation, the Legislature may authorize its summary abatement by executive agencies, without resort to judicial proceedings; and any injury or destruction of the property necessarily incident to the exercise of the summary jurisdiction interferes with no legal right of the owner. *Id.*

10. The destruction by a public officer of nets for catching fish, set in violation of law, is proper, reasonable, and necessary for the abatement of the nuisance; and when done summarily, under authority of a statute, it neither constitutes a taking of property without due process of law, nor renders the officer liable to damages therefor. *Id.*

NOTES AND BRIEFS.

Nuisance, what constitutes; who may maintain action for; who liable for. 132

Liability for maintaining powder magazines; care necessary. 263

Liability of all maintaining. 272

OATH AND AFFIDAVIT.

1. Whether the authority of notaries public to administer oaths be of statutory origin or founded on customary law, it is now universal and should be judicially recognized as one of their general powers, and affidavits authenticated by the official seals of the notaries of other States placed on the same footing as their authentications of commercial documents. *Wood v. St. Paul City R. Co.* (Minn.) 149

2. An affidavit to a statement of account for a mechanics' lien, under Minn. Gen. Stat. chap. 90, sworn to before a notary in another State and authenticated by his official seal, is sufficient. *Id.*

OFFICERS. See also COUNTIES, 1; EVIDENCE, 7; MUNICIPAL CORPORATIONS, 1; SCHOOLS, 9.

1. The failure of a school superintendent who has been elected and duly inducted into office, to give, within the proper time, the special bond required by the Indiana Act of March 2, 1889, will not *per se* forfeit his title to the office. *Knox County v. Johnson* (Ind.) 684
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the Indiana Act of March 2, 1889, as to whether the time within which he is directed to file a special bond in order to be entitled to continue in office begins to run from the date of his election or upon the happening of a future event, and he files the bond within the time designated after such event happens, a declaration that he has vacated the office, made without a hearing, by a board which has no general power to appoint such officers, does not oust him therefrom. *Id.*

8. Although members of a town council are not liable for the exercise of their discretion in voting upon measures before them, yet where they vote an appropriation for their own benefit, which is paid, the transaction is a conversion of trust funds, for which each of them, as well as the mayor who orders and the treasurer who makes the payment, will be liable; and the subsequent re-election of the same parties to office will not affect their liability. *Russell v. Tate* (Ark.) 180

4. An officer is guilty of habitual drunkenness justifying his impeachment, under the Alabama Constitution, where he has become intoxicated six or eight times a year for more than three years, and his sprees or fits of intoxication have lasted from one to two or more days, and once for two or more weeks. *State, Attorney-General, v. Savage* (Ala.) 426

NOTES AND BRIEFS.

Officers; impeachment. 426

OIL. See WATERS AND WATERCOURSES, 13.

OPINIONS. See EVIDENCE, IV.

ORDINANCES. See MARKETS, 4.

NOTES AND BRIEFS.

Ordinance; violation of; liability for incidental damages. 262

PARENT AND CHILD. See also INDIANS, 1.

1. It is the legal, as well as the moral, duty of parents to furnish necessary support to their children during minority. Although a parent cannot be charged for necessities furnished by a stranger for his minor child, except upon an express promise to pay for the same, such promise may be inferred from the grounds of the legal duty imposed. *Porter v. Powell* (Iowa) 176

2. A partial emancipation of a daughter fourteen years of age by permitting her for three years thereafter to reside 80 miles away, controlling and using her own wages, without furnishing her with any money or means of support, will not exempt the father from liability for necessary services of a physician employed by her in sickness, where it does not appear that he intended to waive the right to exercise parental authority over her. *Id.*

NOTES AND BRIEFS.

Parent and child; obligation to support infant child; emancipation. 176

PARTIES. See ACTION OR SUIT, 2-4.

PARTITION. See also IMPROVEMENTS, NOTES AND BRIEFS.

The value of a barn erected by a lessee, under an agreement in a lease by a life tenant and the owners of one half the remainder in fee, to pay him the fair value thereof on expiration of the lease, should be deducted from the proceeds of the partition sale before distribution thereof, and not be charged upon the interests of those only who signed the lease. *Moore v. Thorp* (R. I.) 781

PARTNERSHIP. See also EXECUTORS AND ADMINISTRATORS, 2, 3.

1. A patent-right is property, within the meaning of the Pennsylvania Act of May 1, 1876, which permits the contribution of property to the capital of a limited copartnership. *Rehfuess v. Moore* (Pa.) 663

2. A description of letters patent in the schedule required by the Pennsylvania Act of May 1, 1876, to be made of property contributed to a limited-partnership concern, by giving the respective numbers in the United States patent office, together with the name of the inventor and the date and title of the patent,—is sufficient. *Id.*

3. Different letters patent which are useful only as they unite in forming a single device may all be considered and valued together in adjusting the valuation thereof which is to be placed in a limited-partnership schedule. *Id.*

4. The fact that the valuation placed on property contributed to a limited-partnership concern and inserted in the schedule is grossly excessive will not remove the limitation upon the partner's liability, if it was made honestly and in good faith and through a mistaken idea of the true value of the property. *Id.*

5. Where partnership property is to be kept for the purpose of carrying on a particular business, and not for sale, neither partner has power to make a sale of the entire property. *Lowman v. Sheets* (Ind.) 784

6. Prior conveyance of partnership real estate by the trustee of a deceased partner, and by his grantees to the surviving partner, do not invalidate a sale finally made by the surviving partner to liquidate the firm debts. *Walling v. Burgess* (Ind.) 481

7. A surviving partner has the right to sell and convey partnership real estate if necessary to pay the debts of the firm; and such conveyance passes an equitable title. *Id.*

8. Although heirs of a deceased partner cannot maintain an action to compel the surviving partner to account, in the absence of special circumstances, yet such circumstances may exist as to make it proper for equity to entertain such action on their behalf. *Valentine v. Wyor* (Ind.) 788

9. Heirs of a deceased partner cannot call the surviving partner to account, although they have shown that he has paid all the partnership debts, where it also appears that the estate of the decedent was indebted to him, unless they further make it appear that he has in his hands partnership property in excess of the amount required to reimburse himself. *Id.*

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10. A surviving partner interest of his deceased partnership business, including partnership property from his properly authoritative, where the transaction into.

11. A court of equity will settle and final account matters, actually consuming partner and the deceased partner duly employed until it is impeached as fraudulent or unless collusion between surviving partner is shown thereby became the purchase partner's share.

NOTES AND BILLS

Sale of partnership real

Limited partnership; restrictions.

Dissolution by death; purchase; agreement that surviving partner; surviving partner; rule as to partnership assets of surviving partner of decedent; bond required.

Rights of surviving partner.

PARTY-WALL.

1. A building regulation of Columbia, established by act of Congress, which authorizes a party-wall to be made good, repaired, or replaced by one of the landowners if desired by the inspector of buildings, requires such owner to make good the adjoining owner. *Fou*

2. The obligation to make good a party-wall, whether by building regulations or the common law, cannot be escaped by employing a contractor; and the fact that the contractor is not negligent is no defense.

NOTES AND BILLS

Party-wall; rights in.

PATENTS. See PARTNERSHIP.

PAYMENT. See also COLLECTION.

1. The acceptance by a creditor of a check from his debtor constitutes a payment of the debt. *Indianapolis First Nat. Bank*

2. Suit cannot be maintained after it has been surrendered and judgment taken on the note and judgment is uncollected. *Id.*

NOTES AND BILLS

Payment; by check.

1. A person selling goods from door to door as an agent of the manufacturers at a salary, with no personal interest in the goods or their proceeds, is a peddler, within the meaning of the Pennsylvania Act of April 17, 1848, prohibiting peddling in Schuylkill County. *Com. v. Gardner* (Pa.) 666

2. The right of "acquiring, possessing, and protecting property," given by the Pennsylvania Constitution, does not include the right to sell goods as a peddler, when that is prohibited by statute. *Id.*

NOTES AND BRIEFS.

Peddlers; who are; license of. 666

PENSIONS. See also LEVY AND SEIZURE, NOTES AND BRIEFS.

Where the proceeds of a pension have been embarked in trade, commerce, or speculation, and become mingled with other funds so as to be incapable of identification or separation, the pensioner loses the benefit of the statutory exemption. *Yates County Nat. Bank v. Carpenter* (N. Y.) 557

PHYSICIAN AND SURGEON. See also ACTION OR SUIT, 9.

It is the duty of a physician who has set a broken leg to give proper instructions for the use and care of it; and for failure to do so he is liable in case of a resulting injury. *Beck v. German Klinik* (Iowa) 566

NOTES AND BRIEFS.

Physicians; duty as to instructing patients. 566

PLEADING. See also LIBEL AND SLANDER, 3.

1. A court of law having equity jurisdiction cannot exercise it without pleadings suitable for the purpose. *Patterson v. Lawrence* (Ga.) 143

2. Where the title gives in full the names of plaintiff's partners, they need not be repeated in alleging the partnership. *Adams Exp. Co. v. Harris* (Ind.) 214

3. A complaint against "Adams Express Company" need not specifically allege that it is a corporation. That fact is imported by its name. *Id.*

4. It is not necessary to use the word "nuisance" in a declaration for damages, if the facts alleged constitute a nuisance. *Laftin & R. Powder Co. v. Tearney* (Ill.) 262

5. A petition stating that petitioner is taxed for the support of the public schools and is equally entitled to the benefits thereof, and that the reading of the Bible therein is contradictory to the rights of conscience, and is in violation of law and the Constitution, is sufficient to raise the question of the legality of such reading. *State, Weiss, v. School Dist. No. 8* (Wis.) 330

6. The violation by the insured of warranties or exceptions to the insurer's liability, which are contained in the policy, need not be negatived in the complaint in a suit on a marine 7 L. R. A.

be setup affirmatively by defendant. *Louisville Underwriters v. Durland* (Ind.) 399

7. The complaint in an action to recover the penalty provided by statute for the failure of a telegraph company to deliver a message sent to a person residing within a certain distance of its office is fatally defective if it does not state that the person to whom the telegram was addressed resided within the prescribed distance from the office. *Reese v. Western U. Tel. Co.* (Ind.) 583

8. Averments upon information and belief are insufficient in the absence of any allegation that the information is true. *Memphis & C. R. Co. v. Woods* (Ala.) 605

9. A bill to reach a trust fund, filed by a creditor of the trustee, will not be subject to demurrer for failure to contain an offer to make good to the trust estate the losses incurred by defaults for which the estate would have a claim on the trustee, even on the theory that the creditor can only reach the equity of the trustee to indemnify, since the creditor would succeed only to such rights as the trustee might be found to have. *Mason v. Pomeroy* (Mass.) 771

10. A complaint in an action to contest a will, alleging that testator's intention was different from that expressed by the will, is demurrable. *Rapp v. Reehling* (Ind.) 498

11. Averments of legal conclusions from facts stated, or of facts not well pleaded, are not admitted by a general demurrer to the pleading. *State, Weiss, v. School Dist. No. 8* (Wis.) 330

NOTES AND BRIEFS.

Statute of Limitations; defense of; how available. 67

POLICE POWER. See INTOXICATING LIQUORS, 3.

POWDER. See NUISANCES, 2, 3.

POWERS.

1. The exercise of a power of appointment by will, by one having a life interest in trust property, to confirm title to a person who had previously purchased it for a valuable consideration from the appointor and trustee under an order from court, does not make the property assets of the appointor's estate and liable in equity for her debts. *Patterson v. Lawrence* (Ga.) 143

2. Property disposed of by will, under a power of appointment, cannot be held liable for the appointor's debts, even if it otherwise might be, unless the appointor's assets are insufficient to pay such debts. *Id.*

NOTES AND BRIEFS.

Power; to appoint by will; execution of. 143

PRESUMPTIONS. See EVIDENCE, II.

PRINCIPAL AND AGENT.

1. An agent who has complete control and management of real property of a nonresident

is personally liable for injuries sustained by a third person in consequence of the dangerous condition of the premises at the time when they were leased by the agent to a tenant. *Baird v. Shipman* (Ill.) 128

2. On the embezzlement of the surplus money received on a mortgage after paying off prior incumbrances, by a person employed by the mortgagor to procure the money and pay off such incumbrances, and who was also the agent of the lender for the purpose of examining the property, title, etc., although the latter retained his own judgment as to the investment,—the mortgagor, who has left the business to the agent without even an inquiry for months, must bear the loss. *Pepper v. Cairns* (Pa.) 750

NOTES AND BRIEFS.

Principal and agent; ratification of agent's act. 405

Liability of agent to third person for negligence. 128

Authority of agent for loan of money. 751

PRINCIPAL AND SURETY. See ALTERATION OF INSTRUMENTS, 8; BILLS AND NOTES, 5; BONDS, 1; SUBROGATION.

NOTES AND BRIEFS.

Principal and surety; subrogation; relief in equity. 84

Right of surety to exoneration. 85

PRIORITIES. See MORTGAGE, 1; TRUSTS, 6.

PRIVATE ROADS. See EASEMENTS, 2

PROTECTIVE AGENCIES. See PUBLIC AGENCIES, NOTES AND BRIEFS.

PROXIMATE CAUSE. See NEGLIGENCE, 7; TRIAL, 6.

PUBLIC AGENCIES.

NOTES AND BRIEFS.

Not liable for negligence of servants. 170

PUBLIC IMPROVEMENTS. See also
Highways, 8.

Ind. Act March 9, 1889, § 2, requiring publication of a notice of the passage of a municipal resolution declaring the necessity for certain improvements, which shall state the time and place where property-owners may make objections to the necessity of the construction thereof, does not contemplate the appointment of a committee to hear the objections or the determination of the rights of the objectors, such determination being provided for in another section. Hence such notice is not rendered invalid by the facts that objections are required to be filed with the city clerk, and that no committee is appointed to hear them.

Quill v. Indianapolis (Ind.) 681

QUO WARRANTO.

NOTES AND BRIEFS.

For illegal exercise of corporate franchise.
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RAILROADS. See 10, 11; DEFINITIONS, MAIN, 11; HIGHWAYS, SERVANT, 5; NEGLIGENCE, STATUTES, 1.

1. A railroad company is not compelled to erect and maintain a crossing at its own expense for persons cut off by the railroad from a public highway when no statute requiring such crossings existed at the time of the road. *People v. M. R. Co.* (Mich.)

2. A railroad company use extraordinary care or the safety of its highway
Haute & I. R. Co. v. Cle

3. Upon the laying out of a new roadway across the track and road company, the latter is entitled to compensation for providing cattle-guards and signboards, but is not entitled to compensation for the roadway where it crosses the tracks, and for the maintenance of the same. *State, St. Paul, Minn. v. Hennepin County Dist. Ct.*

4. Independently of an agreement, a railroad company has the duty to fence its tracks with reasonable prudence and care, free from obstructions, and *Donnegan v. Erhardt* (N. H. 1892).

5. The adoption of a railroad at the time it is built from thereafter adopting ordinary use, or which any other railroad may be used under the general railroad law, without limit as to gauge in its use.

6. A railroad company under due authority for injuries inflicted by them on an agent or servant of the road. *Virginia Minton* (Va.)

7. Where a railroad company by West Virginia permits a company to operate a part of its line, under a verbal arrangement, the railroad company and the company forming a continuous line beyond the limits of that company will be liable for the same on that portion of its road as if it were a foreign company. *Ricketts v. B. Co. (W. Va.)*

8. A railroad company of this State cannot, without disapproval by the State authority, by lease or any other arrangement, turn over to another person the use and the use of its franchise, and exempt itself from responsibility for the conduct and management of the same.

NOTES AND]

See also HIGHWAYS.

Release for right of way
of land.

Liability to build private
Duty to maintain crossing

Careful exercise of rights; warning on approach of crossing; slackening speed; traveler to stop, look, and listen. 816

Lease of; liability of lessor. 844

Liability of lessor for negligence of servants of lessee. 417

Inspection of employes; power of State to compel. 267

Entitled to compensation for land taken for highway. 123

RATIFICATION. See JUDICIAL SALE.

REAL PROPERTY. See also WILLS, 8, 9.

1. A remainder over in a will is void for repugnancy where an estate is given generally or indefinitely, with an absolute power of disposition. *Powers v. Judevine* (Vt.) 517

2. A devise to testator's wife for her sole use, control, and enjoyment during her life, to use and dispose of it as she may desire, and to give the residue by will to such persons as she may desire, but giving what is left to certain other parties in case she leaves no will,—is a gift of the fee to the wife, and the remainder over is void. *Id.*

3. A life estate in one, with remainder to another, may be created by will, and at the same time power given to the life tenant to defeat the remainder by disposal of the property. *McCullough v. Anderson* (Ky.) 886

NOTES AND BRIEFS.

Real property; validity of remainder after life estate; power of disposal. 886

RECEIVERS. See CONTRACTS, 14.

NOTES AND BRIEFS

Receiver of property of trust combination; rights of. 46

RECORDS.

1. Books made up by the receiver of taxes, containing a statement of tax sales, and by him handed over to the city treasurer, are public records, within the meaning of Mich. Pub. Acts 1899, No. 205, giving all persons the right to examine them for any lawful purpose. *Burton v. Tuttle* (Mich.) 78

2. An abstract-maker cannot be deprived of the right to inspect public records, under the provisions of Mich. Pub. Acts 1899, No. 205, because he uses the records to prepare abstracts of title for other persons for a compensation. *Id.*

3. Stub receipt books in a city treasurer's office, which contain the record of canceled certificates of tax sales, the list of lots redeemed from sales for special city taxes, and also the list of lots sold to the city for delinquent taxes and afterwards assigned to individuals, are public records within the meaning of Mich. Pub. Acts 1899, No. 205, which provides for the inspection of such records, notwithstanding the fact that all data contained in such books, at the convenience of the treasurer, are to be entered in record books which are accessible to the public. *Burton v. Tuttle* (Mich.) 824

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Records; right to inspect. 78

REDEMPTION. See TIME, 2.

REGISTRATION. See VOTERS AND ELECTIONS, 7.

RELEASE.

A release to a railroad company of a right of way across certain lands, with a further release of the company from all claims for damages by reason of the taking and using of the land for said railroad, or by reason of the construction and maintenance of the said railroad on and over said land, will bar the owner of the land from subsequently recovering damages for the overflowing of his land by reason of the construction of a ditch and culvert by the railroad company in the particular manner, for drainage purposes, long after the original construction of the road. *Updegrove v. Pennsylvania S. V. R. Co.* (Pa.) 213

NOTES AND BRIEFS.

Release to railroad companies of right of way; effect of. 218

RELIGIOUS SOCIETIES. See also TAXES, 6.

1. A church organization may make rules by which the admission and expulsion of its members are to be regulated, and its members must conform to these rules. *Jones v. State* (Neb.) 825

2. If a church organization has no rules as to the expulsion of members, those of the common law prevail; and notice and opportunity to answer the charges made must be given, or an order of expulsion will be void. *Id.*

NOTES AND BRIEFS.

Religious societies; disturbing meeting of; indictment for; conclusiveness of proceedings of. 825

REMOVAL OF CAUSES.

Where Tutty, a white man, and Ward, a negro woman, were indicted in the State courts for fornication, and thereafter repaired to the District of Columbia and were married, immediately returning to Georgia, and thereupon attempted to remove into the United States court the indictments pending against them, the petition for removal was denied and the indictments remanded to the court of the State. *State v. Tutty* (C. C. S. D. Ga.) 50

RESIDENCE. See ATTACHMENT, 1.

NOTES AND BRIEFS.

Residence; how lost and acquired. 137

RESUME.

Subjects discussed and points decided. 865

REVIEW.

A bill of review for error of law apparent upon the record will lie, although the decree sought to be reviewed is a final decree, consequent upon a decree *pro confesso* for fail-

ure of the defendant to plead. *Prentiss v. Paisley* (Fla.) 640

RIPARIAN RIGHTS. See **WATERS AND WATERCOURSES.**

SALE.

1. A warranty that certain wheat purchased after inspection was spring wheat is not made where the seller said that he did not know what kind it was, but agreed to write and find out if he could do so, and, when subsequently asked if had got an answer, said "We have. It is spring wheat." *Kircher v. Conrad* (Mont.) 471

2. A contract for the sale of articles for which the purchaser's note is to be taken may be rescinded on his insolvency before delivery; and the seller cannot be compelled to accept the note of the assignee for creditors. *Rappleye v. Racine Seeder Co.* (Iowa) 189

NOTES AND BRIEFS.

Sale; requisites of a warranty; *caveat emptor.* 472

Warranty of quality. 471

SCHOOLS. See also **OFFICERS, 1; PLEADING, 5.**

1. A town or village authorized to incorporate for school purposes, under *Sayles'* (Tex.) Ann. Stat. art. 8783, cannot be extended to cover 28 square miles of territory, where the true limits of the real town do not extend from its central point more than $\frac{1}{4}$ of a mile. *State, Taylor, v. Edison* (Tex.) 738

2. The "sectarian instruction" prohibited by Wis. Const. art. 10, § 3, is instruction in religious doctrines which are believed by some religious sects and rejected by others. *State, Weiss, v. School Dist. No. 8* (Wis.) 830

3. The use of the Bible as a text book, and the stated reading thereof in the public schools, without restriction, is "sectarian instruction," within the meaning of Wis. Const. art. 10, § 3, which ordains that no such instruction shall be allowed in such schools; and the fact that children are not compelled to remain in the schoolroom during such reading does not remove the cause for complaint on the part of one feeling himself aggrieved thereby. *Id.*

4. The stated reading of the Bible in a public school renders it a place of worship, within the provision of Wis. Const. art. 1, § 18, that no man shall be compelled to support a place of worship against his will. *Hep-e* taxpayers compelled to aid in the erection and support of such schoolhouse have a legal right to object to its being put to such a use. *Id.*

5. The stated reading of the Bible in a public school renders the school a religious seminary, and is prohibited by the provision of Wis. Const. art. 1, § 18, that no money shall be drawn from the treasury for the benefit of religious seminaries. *Id.*

6. The regulation of the public schools is a state matter exclusively within the dominion of the Legislature. Hence an Act prescribing the text-books to be used therein, and regulating the method of procuring them, does not impinge in the slightest degree upon the right
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of local self-government. *State, Clark v. Haworth* (Ind.) 240

7. The legislative power over schools is not exhausted by exercise, and the fact that the Legislature has always entrusted the management of school affairs to local organizations will not preclude it from, at any time, changing the system so as to remove them from local control. *Id.*

8. As incident to its constitutional power to make the public-school system uniform, the Legislature may provide that the books shall be obtained through the medium of a contract awarded to the best or lowest bidder. *Id.*

9. The Legislature may impose upon all officers whose tenure is legislative such duties respecting school affairs as it deems proper. *Id.*

10. An Act providing for the procurement of books for the public schools, which attains the result for which it was passed, cannot be declared invalid because it requires public officers to perform duties which confer an incidental benefit upon individual book-dealers. *Id.*

11. An Act providing for the procurement of books for the public schools is not within the constitutional provisions against monopolies because it designates certain books as a standard, and requires books furnished to be equal in merit to those named, and the books adopted uniform, and permits the selection of copyrighted works, and requires the exclusive contract for furnishing them to be awarded to the lowest bidder, where there is no exclusion of persons from bidding, but competition is open to all who are prepared to supply books of the required standard. *Id.*

12. The Legislature may give one person the exclusive privilege for a certain period of time of furnishing books for the public schools of the State, and compel the officers whose duty is to procure such books to obtain them exclusively from such person, as well as require patrons of the schools to use the books prescribed. *Id.*

13. The duty imposed upon school trustees by Ind. Act March 2, 1889, § 7, "to immediately procure and take charge of the books" provided under the terms of that Act for use in the public schools, and "to furnish them on demand to the school patrons" at the price fixed therefor, is imperative and may be enforced by mandamus. *Id.*

NOTES AND BRIEFS.

Schools; adoption of text-books. 240

SET-OFF AND COUNTERCLAIM.

1. The indebtedness of a legatee to the estate, including that arising from payment by the administrator of obligations of the intestate as surety for the legatee, may be set off against his claim to the legacy. *Koons v. Mellett* (Ind.) 231

2. A debt due to the estate from an heir may be deducted from his distributive share of the proceeds of real estate which has been sold in process of administration. *Fiscus v. Moore* (Ind.) 235

3. One who takes a mortgage on real estate from an heir pending settlement of the

estate, and with knowledge of the heir's indebtedness to the estate, can acquire no greater interest than that of the heir himself; and where the real property is sold for assets, under the Indiana statutes, his claim to the proceeds is subject to a deduction or set-off of the heir's indebtedness. *Fiscus v. Moore* (Ind.) 235

4. A sole solvent surety for a hopelessly insolvent principal on a debt that is due before the appointment of a trustee in insolvency, although the insolvency is not then known, and payment by the surety is not actually made until after the trustee is appointed, is entitled to set off his claim for such payment against debts due from him to the insolvent, on which suit is brought by the trustee. *Mervin v. Austin* (Conn.) 84

NOTES AND BRIEFS.

Set-off; in equity. 84

How benefit of, to be obtained; application between surety and creditor. 85

SHIPPING.

1. The Act of Congress of June 19, 1886, extending the benefits of limited liability legislation to vessels engaged in inland navigation, is not unconstitutional, in view of the power of Congress to regulate commerce. *Lawton v. Comer* (D. C. S. D. Ga.) 55

2. The Limited Liability Law, amended, excepted from its operation inland navigation only, and not internal commerce, and extended the operation of the law, not to internal commerce, but to inland navigation. *Id.*

3. Even though the subjects of the extended limitation of liability, or the territory in which it is effective, are partially within the region of state control, yet where the subjects are separable, and are partly under the national control, the Act of Congress will be sustained by the courts wherever the power of Congress extends, and as to all those objects to which it attaches; and this rule is easily applicable in this case. *Id.*

4. The entire purpose of the limited liability enactments was to encourage investments in shipping, and they may be extended wherever the admiralty courts of the United States have jurisdiction. *Id.*

NOTES AND BRIEFS.

Shipping; Limited Liability Acts; as to loss by fire and collision; for personal injuries; surrender and transfer of ship and freight; apportionment of fund paid into court; what owners entitled to benefit of Act; proceedings; jurisdiction; injunction to restrain prosecution in state courts. 55

SPECIFIC PERFORMANCE. See also EQUITY, 1; INJUNCTION, 8.

Specific performance of contracts for personal services will not be enforced in equity. *William Rogers Mfg. Co. v. Rogers* (Conn.) 779

NOTES AND BRIEFS.

Specific performance of contract for personal service. 882, 781

Not decreed when adequate remedy at law; mutuality of contract; misrepresentation of 7 L. R. A.

vendor; certainty of contract; admissibility of parol evidence; general description of land; effect of words "more or less." 87

SPENDTHRIFT TRUST. See TRUSTS, 1, 2.

STATUTE OF FRAUDS. See CONTRACTS, 8.

STATUTE OF LIMITATIONS. See LIMITATION OF ACTIONS; PLEADING, NOTES AND BRIEFS.

STATUTES.

1. The title of an Act showing a purpose to charter a "passenger-railway company" is sufficient to support a statute which really charters a steam-railroad company for carrying both passengers and freight. *Millvale v. Evergreen R. Co.* (Pa.) 369

2. If the title fairly gives notice of the subject of the Act, so as reasonably to lead to an inquiry into the body of the bill, it is all that is necessary. It need not be an index to its contents. *Id.*

3. The title of a supplemental statute which refers to the subject matter only by reference to the principal Act is sufficient if the legislation in the supplement is germane to the subject of the original bill. *Id.*

4. A title reading, "An Act to Facilitate the Carriage of Passengers and Property by Railroad Companies," is insufficient, under a constitutional provision requiring the title of an Act to express the subject thereof, to sustain a statute which, after providing that all railroad companies having a terminus upon a navigable river shall have power to own water-craft for transportation across it, provides that no right shall exist to condemn any real estate for landings, and that the Act shall apply only to such railroad companies as own the landing for such water-craft. *Thomas v. Wabash, St. L. & P. R. Co.* (C. C. S. D. Ill.) 145

5. A statute giving to any railroad company that owns landing places the right to own water-craft for transportation across a navigable river at its terminus, but which declares that no right shall exist under the Act to condemn any real estate, and that the Act shall apply only to such companies as own the landings for such water-craft, is in violation of the constitutional provision against local or special laws for granting any special or exclusive privilege, immunity, or franchise. *Id.*

6. If constitutional and unconstitutional provisions of an Act are perfectly distinct and separable, the former may stand though the latter fall. *Id.*

7. Portions of an Act being declared unconstitutional, if it is apparent that the Legislature, had it foreseen this fact, would not have enacted the other portions of the Act, the whole Act must fall. *Attorney-General v. Detroit* (Mich.) 99

8. Where the void provisions of a statute are separable from the valid ones, the court will sustain the valid ones while rejecting the others. *Lawton v. Steele* (N. Y.) 134

9. The classification of cities for the purpose

of facilitating the convenient exercise of corporate powers necessary for the proper regulation of municipal affairs is not prohibited by the Pennsylvania Constitution; and as the several cities have different needs growing out of the differences in their size and situation, it may be upheld as a necessary means for enabling the Legislature to make provisions adapted to secure to each class of cities the corporate powers, and the number, character, powers, and duties of officers best adapted to its needs, without an infraction of the constitutional prohibition against local legislation. *Re Washington Street (Pa.)* 193

10. The legislation for the several classes into which cities are divided, which is authorized by the power of classification, must relate to the exercise of the corporate powers possessed by cities of the particular class to which the legislation relates, or to the number, character, powers, or duties of the officers employed in their management; all other legislation is unauthorized. *Id.*

11. Local or special laws relating to proceedings in road cases are prohibited by the Constitution, and cannot be upheld under the power to classify cities for purposes of legislation. Hence Pa. Act May 6, 1887, §§ 3-17, which attempt to provide a peculiar code of procedure in road cases for the city of Philadelphia, unlike that in the rest of the State, are unconstitutional and void. *Id.*

12. Pa. Act May 6, 1887, §§ 1, 2, although in form local, since they in fact repeal provisions of the road law peculiar to Philadelphia, and make such law conformable to that in force in the rest of the State, may be upheld. *Id.*

13. The fact that diverse results may flow from the execution of granted powers of local government does not render the enabling statute special or local. If the same powers are bestowed upon all municipalities of the same class, the law is general. *Dats v. Cleveland (N. J.)* 431

14. A statute authorizing the mayors of all the cities in the State to appoint the principal municipal officers, such Act to take effect in such cities as shall accept it at popular election,—declared to be constitutional. *Id.*

15. Statutes are to be construed to have a prospective operation, unless a contrary intention in the Legislature is manifest and plain. *Murdock v. Franklin Ins. Co. (W. Va.)* 572

NOTES AND BRIEFS.

Statutes; classification of cities; local and special. 193

STOCK AND STOCKHOLDERS. See CORPORATIONS, III.

STREET RAILWAYS. See also EMINENT DOMAIN, 18.

1. A provision in the charter of a street-railway company requiring publication of notice to abutters upon streets in which it proposes to lay its tracks, a certain time before their location, does not require the insertion in the notice of a designation of the motive power intended to be used; especially where 7 L. R. A.

another section of the charter requires the use of such motive power as the city council shall direct. *Taggart v. Newport Street R. Co. (R. I.)* 205-

2. A location of the tracks of a street-railway company, under authority of a city ordinance permitting the use of horse power only, is not affected by the amendment of the ordinance so as to permit the use of electricity, and the acceptance by the company of such amendment. *Id.*

3. A charter permitting a street-railway company to use horse or other power does not mean other animal power, but will permit the use of electricity as a motive power. *Id.*

4. Where authority is given to a street-railway company by one section of its charter to use electricity as a motive power, and such authority is broad enough to permit its use by means of any system of application which is approved as suitable, and the only successful way of using such power is to place poles upon the sidewalks, the placing of poles there will not be held to be prohibited by a subsequent section of the charter providing that the company shall not incur any portion of the streets not occupied by its tracks; especially where such provision is copied from the charters of companies authorized to use horse power only. *Id.*

5. The fact that a door in the side of a grip car is open is no invitation to a passenger to jump off while the car is running at full speed. *Weber v. Kansas City Cable R. Co. (Mo.)* 819

6. A passenger who alights from a grip car running at full speed, and is instantly struck by a car running in the other direction, which he could have seen if he had looked for it, is guilty of contributory negligence which will prevent any recovery for his injuries. *Id.*

7. Running grip cars at a rate of speed prohibited by ordinance is negligence *per se*. *Id.*

NOTES AND BRIEFS.

Street railways; cable line. 819
Injuries received in stepping from cable car. 819

SUBROGATION.

Although a surety may bring suit, under Manaf. (Ark.) Dig. § 6396, against his principal to obtain indemnity against the debt or liability for which he is bound, he cannot sue in the name of the creditor. *Carruth-Byrnes Hardware Co. v. Deere (Ark.)* 405-

NOTES AND BRIEFS.

Subrogation; of surety. 84

SUNDAY. See also TIME, 2.

1. The fact that a person was traveling on Sunday in violation of statute does not preclude her from maintaining an action against a carrier for injuries received in leaving the depot grounds. *Delaware, L. & W. R. Co. v. Trautwein (N. J.)* 435-

2. A verdict may lawfully be received in the early hours of Sunday, where the case was commenced, the evidence, argument, and

charge of the court concluded, and the jury retired, before the beginning of Sunday. *Henderson v. Reynolds* (Ga.) 327

8. A will is not invalid because made on Sunday, without any unusual circumstances or special necessity for its execution upon that day. The drafting and execution of the will do not constitute "common labor," or work in one's "usual avocation," within the meaning of Ind. Rev. Stat. 1881, § 2000. *Rapp v. Reehling* (Ind.) 498

NOTES AND BRIEFS.

See also TRIAL.

Sunday; contracts made on. 498
Injuries to one traveling on. 498

TAXES. See also CONSTITUTIONAL LAW, 2; CORPORATIONS, 1; INFANTS; LIFE TENANT.

1. Citizens can be taxed only for lawful public purposes. *Thorndike v. Camden* (Me.) 463

2. A town has no authority to vote a tax for reimbursement of a collector who has improperly taken a note for taxes, and, after accounting for it as money, been unable to collect it. *Id.*

3. All property of whatever description, and not merely that selected for taxation by the Legislature, must be taxed, under N. C. Const. art. 7, § 9. *Redmond v. Tarboro* (N. C.) 539

4. The word "property," in N. C. Const. art. 7, § 9, relating to taxation, includes moneys, credits, investments, and other choses in action. *Id.*

5. Although the power of a municipal corporation to tax is not conferred by the North Carolina Constitution, when such power is exercised the Constitution compels the taxation of all property therein, and that it shall be taxed according to its true value in money and by a uniform rule. *Id.*

6. A schoolhouse in the city of New York cannot be exempt from taxation as the property of a religious society, if the society is unincorporated. *Church of St. Monica v. New York* (N. Y.) 70

7. A city is not liable for a privilege tax on its waterworks, under the Tennessee Revenue Act of 1887, where the works are corporate property provided for furnishing water to extinguish fires and sprinkle the streets and to supply its citizens, either as a gratuity or for a compensation. *Smith v. Nashville* (Tenn.) 469

8. The liability of a city for a privilege tax on its waterworks, on the ground of furnishing persons and corporations outside the corporate limits, cannot be determined in a suit to recover money paid under protest for a privilege tax assessed under the Tennessee Revenue Act of 1887, for exercising the privilege of running a water company within its own limits, where there was no assessment for doing business elsewhere than in the city, and it does not appear that parties receiving the water outside of the city were in any city, town, or taxing district, or, if in any of these, what was the number of inhabitants therein, as the 7 L. R. A.

amount of the tax depends on such population. *Id.*

9. Securities in the actual possession and control of a nonresident trustee, the beneficiaries also being nonresidents, are not "due or owing to persons residing within the State," so as to be subject to taxation within the State, although two of the three trustees are residents thereof. *People, Darrow, v. Coleman* (N. Y.) 407

10. Debts due for money sent out of the State, and loaned by nonresident agents on notes and mortgages retained by them and which had never been in the State, are not subject to taxation, under Hill's (Or.) Ann. Code, § 2731, providing that personal property shall include money, notes, or mortgages, "either within or without this State; all boats and vessels, whether at home or abroad, and all capital invested therein; all debts due or to become due from solvent debtors." The debts mentioned include only domestic debts, as the section does not contain any words similar to those of the previous clause relating to property or interests out of the State. *Poppleton v. Yamhill County* (Or.) 449

11. The notice given by the board of equalization, in Oregon, or the county court sitting as such board, to a taxpayer, of a proposed increase of his assessment, need not specify the property to be added thereto. *Id.*

12. A reply is not necessary to an answer filed by a taxpayer on appearance before the board of equalization, to show cause why correction should not be made in his assessment. *Id.*

13. A provision for intervals between the times for making the successive assessments upon the various classes of property, which are different as to the respective classes, does not violate the constitutional requirement as to uniformity in the valuation of property for taxation. *St. Louis, I. M. & S. R. Co. v. Worthen* (Ark.) 374

14. The separate classification of railroad property for purposes of taxation, and a provision of a tribunal for the valuation and assessment of such property different from that provided in the case of other classes of property, is not prohibited by the constitutional provision requiring the valuation of property for purposes of taxation to be equal and uniform. *Id.*

15. That notice of the meeting of a board of commissioners for the purpose of assessing railroad property for taxation is not given to the railroad company will not render the assessment void as a taking of property without due process of law, where the time and place for the meeting of the board are fixed by statute. The notice contained in the statute is all that can be required. *Id.*

16. A mere discrepancy in judgment between the members of a board of assessment and the chancellor to whom application is made to enjoin the collection of the tax, as to the value of the property taxed, will not warrant an interference on the part of the latter. *Id.*

NOTES AND BRIEFS.

Taxes; must be uniform and uniformly as-

scused; appeal from assessment upon railroad company; separate classification of. 375
 Grants of immunity strictly construed. 70
 Property situated in another State. 449
 Upon trust property held out of the State. 407

TELEGRAPH COMPANIES. See also EMINENT DOMAIN, 12.

1. The question whether telegraph despatches are sufficient to inform the operator of their meaning and of the possible risk of loss by mistake is not to be determined solely by the despatches themselves, but all the facts and circumstances, including previous messages sent by the operator, may be considered. *Postal Telegr. Cable Co. v. Lathrop* (Ill.) 474

2. Where enough appears in a telegraph message to show that it relates to a commercial business transaction, it is sufficient to charge the company with damages resulting from its negligent transmission, although the operator may not be able to understand its meaning as to quantity, quality, price, etc., as the sender and the party to whom it is sent understand it. *Id.*

3. A message saying, "Please buy in addition to thousand August 1000 cheapest month,"—is sufficiently explicit to charge a telegraph company with the loss resulting from inexcusable mistake. *Id.*

4. Mental anguish caused by the failure to reach the bedside of a person sick unto death, before death takes place, on account of the negligence of a telegraph company in not delivering a message promptly according to its contract, is a ground for the recovery of substantial damages against the company. *Reese v. Western U. Telegr. Co.* (Ind.) 583

5. A message reading, "My wife is very ill; not expected to live,"—is sufficient to inform the company that mental anguish will probably result from its failure to deliver the message promptly. *Id.*

NOTES AND BRIEFS.

Telegraph companies; liability for failure to deliver message. 474

Failure to deliver message; mental anguish as an element of damage. 583, 584

TELEPHONE COMPANIES. See EMINENT DOMAIN, 12.

TENANT IN COMMON. See WAREHOUSEMEN, 2.

TIME.

1. The use of railroad "standard" time in all the cities and towns along the line of railroads does not authorize the use of that time in running the courts, where there is no law recognizing any other standard time in the computation of a day or the hours of a day than the meridian of the sun. *Henderson v. Reynolds* (Ga.) 327

2. Sunday is to be deemed a *dies non* in determining a creditor's right to redeem from a prior redemption creditor, under a statute requiring him to redeem within twenty-four hours after the former redeems, where his re-

demption must be made at the sheriff's office, which the law does not require to be kept open on Sunday. In such case, redemption may be made on the following Monday, if the prior redemption was made on Saturday. *Porter v. Pierce* (N. Y.) 847

TITLE. See COURTS, 5.

TOWN. See also ACTION OR SUIT, 2; EQUITY, 8; OFFICERS, 3; TAXES, 2.

1. A town council has no power to appropriate funds of the town to aid in building a county court-house therein. *Russell v. Tate* (Ark.) 180

2. A town in the State of New York has no power to borrow money. *Wells v. Salina* (N. Y.) 759

3. An action cannot be maintained against a town on notes for money loaned to the town to carry on ordinary litigation, nor does any action lie to recover the money loaned. *Id.*

4. A town has power to employ counsel to oppose before the General Assembly the division of its territory. *Farrel v. Derby* (Conn.) 776

5. The vote of the town is not necessary to authorize selectmen to employ counsel and incur expense to oppose a division of the town by the General Assembly. *Id.*

6. The gift of a fund to a town for the establishment of a public library, the fund to be held by trustees who are to invest it and expend the income therefrom for books in their best discretion, as well as control and manage the library, vests the legal title to the fund in the trustees, and the town has but the beneficial interest. *Cary Library v. Bliss* (Mass.) 765

TRESPASS. See ACTION OR SUIT, 6; HACKMEN.

NOTES AND BRIEFS.

Trespass; upon personal rights. 618

TRIAL. See also NEW TRIAL, 1.

1. A demurrer to plaintiff's evidence is not waived by defendant by putting in his evidence, where he asks the direction of a verdict against the plaintiff at the close of all the evidence. *Weber v. Kansas City Cable R. Co.* (Mo.) 819

2. Upon the trial of an action for damages it is error for the court to permit the counsel for the plaintiff, over the objection of the defendant, in argument, to read to the jury, upon the question of the measure of damages, extracts from reported cases, showing large damages held not excessive. *Ricketts v. Chesapeake & O. R. Co.* (W. Va.) 854

3. Refusing an order for a private examination, by defendant's experts, of plaintiff in an action for physical injuries, is not error when application is not made until after the close of his evidence, and no reason is shown for the delay, especially where plaintiff offers to submit to examination before the jury or in the presence of his own experts. *Hess v. Lowrey* (Ind.) 90

4. It is not negligence as a matter of law

for a passenger on a railroad train, who is familiar with the management of railroads, and who knows from his familiarity with the train schedule that a collision between the train upon which he is riding and one coming from the opposite direction is imminent and liable to occur at any moment because of the negligence of the company's employés, to go forward into the baggage car, and, just as the trains are about to collide, to jump to the ground,—so as to prevent his recovering from the company the damages thereby occasioned, even although passengers who retained their seats in the cars were not seriously injured. The question as to the existence of negligence on his part is for the jury under all the circumstances of the case. *Cody v. New York & N. E. R. Co.* (Mass.) 848

5. Whether or not alighting from a moving train constitutes negligence is a question of fact to be determined by the jury, taking into consideration all the circumstances connected therewith. *Pennsylvania Co. v. Marien* (Ind.) 687

6. Whether the proximate cause of an injury to an employé loading poles on a car was the failure of the engineer or fireman of an engine which struck the car to ring the bell, or the negligence of the assistant roadmaster in ordering him to continue the work while the engine was backing down, telling him there was plenty of time, and throwing him off his guard, leading him to believe that the roadmaster would take care that the engine did not strike the car,—is a question for the jury. *Harrison v. Detroit, L. & N. R. Co.* (Mich.) 623

7. Whether or not the failure of a railroad company to give warning of the approach of a train to a crossing on a trestle over a public highway is negligence should be left to the jury. *Rupard v. Chesapeake & O. R. Co.* (Ky.) 816

8. Whether or not a youth employed in coupling cars had, or ought to have had, knowledge or appreciation of the danger incident to the use of guard rails with no blocking between them and the main rails, is a question for the jury. *Davis v. St. Louis, I. M. & S. R. Co.* (Ark.) 283

9. Although it is the duty of counsel to present their prayers for instructions to the court, the court should embody no more than the substance of them in the charge, and should not give them *in extenso*, as requested, to the jury. *Id.*

10. An instruction to find for the plaintiff if the jury find from the evidence that plaintiff has made out her case as laid in her declaration is not erroneous where the declaration states a good cause of action. *Laffin & R. Powder Co. v. Tearney* (Ill.) 262

11. Where payment of a policy of life insurance is contested because of the falsity of certain answers made by the applicant to questions propounded to him and which he warranted to be true, the charge to the jury upon the question of falsity must be confined to such questions and answers as were put in issue by the pleadings and evidence, and not extended to all the answers made by the applicant. *Equitable L. Assur. Soc. v. Hazlewood* (Tex.) 217

12. The court may require the jury to return
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a special verdict at the request of one of the parties to the action, although he has previously requested the court to instruct the jury in writing, and has entered upon a discussion of the questions of law to be embraced in such instruction. *Lowman v. Sheets* (Ind.) 784

NOTES AND BRIEFS.

Juror; qualification of.	646
Right to read law to the jury.	354
Negligence; question for jury.	688
Question of agency one for jury.	751
Receiving verdict on Sunday.	827

TRUSTS.

1. The donor of the income of a trust fund to a person for life may qualify the gift by a provision that the right to receive the income shall be inalienable. Such qualification need not be in express terms, but it will suffice if the intention to make it can be clearly gathered from the instrument of grant when construed in the light of all the circumstances. *Slattery v. Wason* (Mass.) 393

2. When so much of the income of a trust fund is given to a person as shall be necessary for his support, his right thereto is in its nature inalienable, and the intention of the donor that it shall not be alienated is presumed. Hence such income cannot be reached by a creditor of the donee, and the court will not for his benefit fix the amounts add times of future payments, and decree that they shall be fixed sums which can be reached by him. *Id.*

3. Where a fund is given to a person absolutely, subject to a charge for the support of another during life, the court will not interfere at the suit of a third person to change the relation of the parties or the character of the fund. *Id.*

4. The signature of a majority of the members of a board of trustees, separately obtained to a paper when the board is not in session, will not constitute a valid act by the board. *Cary Library v. Bliss* (Mass.) 765

5. Where trustees are authorized to carry on a business and contract debts therein, and are given a right of indemnity from the trust estate for the personal liability incurred thereby, when the time arrives for terminating the trust a creditor of such trustees may bring suit in equity on behalf of himself and of other similar creditors to reach the trust fund for the satisfaction of his debt, without first recovering a judgment at law. *Mason v. Pomeroy* (Mass.) 771

6. If a trust to carry on a business, with power to contract debts, is given to three trustees, who carry on the business for a time and in so doing contract debts, and then two of the trustees retire from the trust, and the other trustee continues the business and contracts more debts in good faith and for the benefit of the business, upon the termination of the trust and the winding up of the business the creditors whose claims accrued during the management of the three trustees have no equity to priority in payment over the other creditors, in the absence of provisions to that effect in-

the statutes or in the instrument constituting the trust. *Id.*

7. Where a decree of court directs the taking of an account of the amount due to certain creditors of a business conducted by a trustee, and the giving of a mortgage upon the business to secure the same, the right to the mortgage will be lost if no steps are taken to secure it until long afterwards, when proceedings have been begun for the winding up of the trust, and bills have been filed by other creditors to reach the trust property. *Id.*

8. A trust estate is not chargeable with the compensation of a broker for securing a loan for the benefit of the trust, under a contract of employment by the trustee, who agreed that he should be paid from the trust fund, but did not make it a specific lien thereon, or stipulate that he should not be personally liable, where the trustee or his estate is solvent. *Johnson v. Leman* (Ill.) 656

9. The death of a trustee who has employed a broker to perform services for the trust estate will not render the estate liable, if it was not liable when the contract was made. *Id.*

NOTES AND BRIEFS.

Trusts; receiver; title to joint property; rights of creditors of; status. 46

Trustees authorized to conduct business; right of creditor to recover his claim. 771

Account of trustee; following trust property. 570

Creation of lien on trust estate. 656

Right to follow trust fund. 570

One dealing with trustee charged with notice of his authority. 826

Purchaser of property held under trust deed; title of. 67

How beneficiary's interest may be reached by creditors; discretion of trustee. 895

VENDOR AND PURCHASER. See also EXECUTORS AND ADMINISTRATORS, 5; NOTICE, 3.

1. A purchaser of land expressly assuming and agreeing by his deed to pay off certain purchase-money notes given by his vendor and secured by a vendor's lien, the deed retaining a lien for the payment of this sum as well as the balance of the purchase price to his vendor, —becomes personally responsible to the creditor holding the original lien. *O'Conner v. O'Conner* (Tenn.) 88

2. Where a deed is made to one as trustee for a certain person, without specifying the terms of the trust, the possibility that some undisclosed deed of trust may exist by which the trustee is to hold the property for the benefit of other *cestuis que trust* does not constitute a material defect in a chain of title otherwise perfect, which will warrant a refusal to accept it, where every reasonable attempt has been made to discover such deed of trust if one exists, and all have proved unavailing, and where a decree of a court of competent jurisdiction, rendered after full notice and the appointment of a guardian *ad litem* for all persons who might be interested, has terminated the trust 7 L. R. A.

and ordered a release by the trustee, —especially in view of the fact that no trust concerning the title of a purchaser for value was shown thereof. *Batt v. Mallon*

3. The grantee in a mortgage, taking it with notice of prior equities, is protected against an unrecorded mortgage for value, by Iowa Code, which provides that "no instrument is of any validity against a mortgagee . . . without notice." *Valley State Bank* (Iowa)

NOTES AND BRIEFS.

Vendor and purchaser; effect of session of third party.

Effect of taking title under

Effect of purchase during absence of title.

One obtaining title as a bona fide purchaser.

Title of bona fide purchaser against a fraudulent deed.

Personal liability for non-payment of enforcement of vendor's lien

VENUE. See ACTION, 10

VERDICT. See TRIAL, 10

VOTERS AND ELECTIONS. CORPORATIONS, 9.

1. A misrecital of some part of a statute in the proclamation called to decide upon its validity, does not make the election void, when the voters do not require their insertion, and to show that the error affected the result. *Data v. Cleveland* (N. J.)

2. The fact that a system of classing citizens to vote at a certain election was formed, consisting of the manifest intolerance towards those who refused to terminate to vote some of the influence of the church from society, and inducement of intimidation, —is not sufficient to vitiate an election. *Jones v. Glidewell*

3. The privilege of secret ballot is a constitutional guaranty, and if a plan for coercing voters to disclose the contents of their ballots is so general as to render the result doubtful, the plan whose benefit such plan was the poll of its effect, or such plan having the favorable majority excluded from his count of votes

4. The anticipation of fraud by the judges of an election is not a sufficient excuse for compelling voters to exhibit their ballots to bystanders, for the purpose of serving as a check against fraud.

5. The fact that some of the votes in an election were stolen, and counted, leaving a majority for the candidate who received a certain

thereby upon the strength of his own title; and he will not be injured by the burglary if he is permitted to prove by secondary evidence the contents of the election returns. *Jones v. Glidenell* (Ark.) 881

6. A registration law providing that for the next registration the inspectors of the last election shall act, and that they cannot act out of their own precincts, and which repeals all other registration laws, is inoperative where the Act provides for changing and increasing the number of the precincts in such a way that some would have more than their proportion of inspectors residing therein, some less, and some none at all. *Attorney-General v. Detroit* (Mich.) 99

7. A constitutional provision which requires a residence in the town or ward of ten days only as a condition of voting is violated by a law which compels registration, and fixes the last day therefor on the fourth Monday of October, which in some years will be more than ten days before election day. *Id.*

8. A law providing but five days in the whole year upon which a person can be registered to qualify himself as a voter, requiring his personal application therefor, with no exception in case of his sickness or absence on those days, is unreasonable and void. *Id.*

9. The Legislature cannot disfranchise legal voters without their own fault or negligence, in an attempt to prevent fraud. *Id.*

10. A provision that naturalized voters, in order to be registered, must produce proper certificates of naturalization, or declaration of intention, or satisfactory evidence thereof other than the oath of the applicant, and which requires the name of the court in which such proceedings were had, and also the date thereof, to be proved,—is unreasonable and void. *Id.*

11. Male inhabitants residing in the State June 27, 1835, being made citizens of Michigan by the Constitution although neither native-born nor naturalized, a law which compels registration of voters, and provides only for native-born or naturalized citizens, is not valid. *Id.*

12. No registry law is valid which deprives the elector of his constitutional right to vote, by any regulation with which it is impossible for him to comply. *Id.*

NOTES AND BRIEFS.

Voters and elections; election contests. 881

Right of voters to be registered. 99

WAREHOUSEMEN.

1. A deposit of grain for storage is a bailment, under Minn. Gen. Stat. 1878, § 18; and the depositor is the owner of grain in the warehouse to the amount of his deposit, although the identical grain deposited by him has been removed and other like grain substituted. *Hall v. Pillsbury* (Minn.) 529

2. Holders of receipts for grain deposited for storage, of the same kind and quality, are tenants in common in the grain, under Minn. Gen. Stat. 1878, § 18, each being limited to the amount called for by his receipt. *Id.*
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put his own grain, is limited to the excess above the amount necessary to meet his outstanding receipts. *Id.*

4. Depositors of grain for storage have the right, under Minn. Gen. Stat. 1878, § 18, to follow into the hands of purchasers grain sold from the warehouse by the warehouseman beyond the amount individually owned by him. *Id.*

NOTES AND BRIEFS.

Warehousemen; as bailees; legislative control over business; receipts; obligation to return the thing bailed; assignment and sale of property; tenancy in common; liability for negligence; for torts; criminal liability. 529

WARRANTS. See EQUITY, 8.

WARRANTY. See SALE, 1.

WATER COMPANIES.

1. Where a city has power under its charter to enter into a contract with another for the construction and operation of waterworks therein, the right and duty attaches to it to make the contract for the personal benefit of inhabitants within its corporate limits. *Paducah Lumber Co. v. Paducah Water Supply Co.* (Ky.) 77

2. If a city makes a contract for a water supply for the benefit of its inhabitants, and the property of one of them is destroyed by fire because of the failure of the person agreeing to furnish such supply to comply with his contract, the property owner may sue in his own name for damages for breach of the contract, he being the "real party in interest," within the provision of Ky. Civ. Code, § 18, that every action must be prosecuted in the name of such party; and the city is not a necessary party to the action. *Id.*

3. One undertaking to furnish a water supply to a city for the benefit of its inhabitants under a contract which provides that he shall not be liable for damages occasioned by the temporary shutting off of the water for purposes of repair, etc., will, in the absence of such excuse, be liable for damages to property by fire resulting from his neglect to furnish the stipulated amount of water; and such liability will not be released by the insertion in the contract of provisions relieving the city from liability for rent for hydrants, and permitting rescission of the contract, in case it is not complied with. *Id.*

4. The inquiry is, in an action to recover damages for failure of a water company to supply water, whether or not, under all the circumstances, the fire could and would have been prevented or extinguished before occasioning the damage, if defendant had performed his contract; and the question as to how or where the fire originated is immaterial, provided it was not caused by plaintiff. *Id.*

WATERS AND WATERCOURSES.

See also INJUNCTION, 3; NUISANCES, 6, 7.

1. The Savannah River is a public navigable stream. The voyages of the Katie and her cargo are interstate in character and the juris-

diction of Congress is undoubted. *Lawton v. Comer* (D. C. S. D. Ga.) 55

2. The right of a riparian proprietor upon navigable waters to improve, reclaim, and occupy the submerged lands out to the point of navigability, although originally incident to the riparian estate, may be separated therefrom and be transferred to and enjoyed by persons having no interest in the original riparian estate. *Hanford v. St. Paul & D. R. Co.* (Minn.) 722

3. A condemnation by a railroad corporation of upland abutting upon water embraces also the incidental riparian right of improvement and occupancy of the submerged land, although no specific mention is made of riparian rights. *Id.*

4. A riparian owner has no right of action for the washing away of the soil of the banks and bottom of a stream across his land, in consequence of the increased flow of water at certain times, occasioned by a dam, made with legislative authority, for the purpose of facilitating the driving of logs. *Brooks v. Cedar Brook & S. O. R. Imp. Co.* (Me.) 460

5. The grant to a lower riparian proprietor of the right to have a quantity of water come down the stream sufficient to run two paper-engines as used in the grantor's paper-mill does not include a right to the amount required to run the entire mill, including all the other machinery therein, although it is only such as is necessary for a mill running two engines, where the engines were run by a separate water-wheel with which no other machinery was connected. *Whitney v. Wheeler Cotton Mills* (Mass.) 618

6. A provision in a deed granting lower riparian rights, requiring the grantee to contribute towards the expense of maintaining the dam, flume, and gate at the outlet of the reservoir, does not alone give him the right to have the water held back for his benefit. *Id.*

7. Although an upper riparian proprietor cannot be held to hold back water for the benefit of the owners below him, yet he cannot unreasonably interfere with the natural flow of the stream, and send down a great deal more than the usual quantity at times, and by so doing leave none for a long time afterwards to maintain the stream in its usual condition. *Id.*

8. A grant to a riparian proprietor of the right to draw a certain quantity of water from the grantor's pond each day, and no more, confers no right to have the water held back so that there may at all times be enough in the pond to supply the given amount. The grantor, however, will not be permitted to unreasonably let down the water for his own convenience, and thereby render nugatory the right of his grantees to obtain water. *Id.*

9. Riparian rights are not lost by nonuser. *Id.*

10. Owners of mills on a stream flowing from a great natural pond or lake have no right to lower the outlet and draw down the water in the pond or lake below its natural low-water line. *Fernald v. Knox Woolen Co.* (Me.) 459

11. The right to divert water of a stream, 7 L. R. A.

under Me. Rev. Stat. chap. 92, § 1, does not include the right to lower the outlet of a great natural pond or lake, and lower the surface of the water. *Id.*

12. Although one may appropriate all the underground water in his soil, he has no right to poison it, however innocently, or to contaminate it, so that when it reaches his neighbor's land it will be unfit for use either by man or beast. *Kinnaird v. Standard Oil Co.* (Ky.) 451

13. The owner of oil stored in large quantities near a spring of water cannot resist a claim for damage, by its leakage, to the spring by pollution of the underground currents of water that feed the spring, because he did not know the water was affected by it, when the oil could be seen in puddles outside of the building in which it was stored. *Id.*

14. A city is not bound to make a chemical examination of the water of free public wells, for the purpose of ascertaining whether it is pure and wholesome, where it has no notice that the water is unwholesome, and furnishes a public water supply by running water, in addition to the wells. *Danaher v. Brooklyn* (N. Y.) 592

NOTES AND BRIEFS.

Waters and watercourses; navigable rivers; what are; test of; as public highways; power of State over; unlawful obstructions; action for damages. 678

Riparian rights; upper and lower mill owners. 618

Riparian rights; conveyance of bank; right to wharf; title of one having easement in bank; how far riparian rights separable from bank. 722

Restraint of depression of outlet of great pond. 460

Pollution of. 457

Contamination of underground stream. 451

WAYS. See HIGHWAYS.

NOTES AND BRIEFS.

Way; grant of respective rights of parties. 226

WELLS. See WATERS AND WATER-COURSES, 14.

WILLS. See also COURTS, 4; ESTOPPEL, 8; REAL PROPERTY, 2; SUNDAY, 3.

1. The words "nephews and nieces hereinafter named," in the residuary clause of a will, do not include grandnephews and grandnieces who have been twice previously referred to in the will as "children" of a "deceased niece." *Re Woodward* (N. Y.) 367

2. A testator must be presumed to have used words in their ordinary primary sense or meaning. *Id.*

3. The adoption of a child does not operate to revoke an antecedent will of the adopting father, although no provision is made in the will or otherwise for such adopted child, under statutes which give the adopted child all the rights and interest in the estate of the adopting father, by descent or otherwise, that



in a suit against her by the executor. *Hopkins v. Manchester* (R. I.) 387

8. The person to whom the keys are delivered, and who receives instructions as a trustee for the donee in a gift *causa mortis*, is not incompetent to testify in regard to the transaction, after the donor's death, on the ground that he is an agent of the donee. *Devol v. Dye* (Ind.) 489

4. A witness cannot be impeached by a bill of exceptions containing his testimony taken at a former trial of the same action. *Pennsylvania Co. v. Marien* (Ind.) 687
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5. A medical expert may be cross-examined by asking him whether certain statements are not made by authorities on the subject, and the statement may be read from a medical book in asking the question. *Hess v. Lourey* (Ind.) 90

WRIT AND PROCESS.

1. Filing a declaration on the part of the plaintiff, and appearance and pleading on the part of defendants, is a sufficient waiver of process, although the parties are nonresidents. *Cofrode v. Gartner* (Mich.) 511



L. R. A. CASES AS AUTHORITIES

SHOWING WHERE THE CASES IN THIS VOLUME HAVE BEEN AP-
PLIED, DEVELOPED, STRENGTHENED, LIMITED, OR IN ANY
WAY AFFECTED BY LATER DECISIONS THAT HAVE
CITED THESE CASES AS PRECEDENTS, WITH
HOLDINGS OF CITING CASES; ALSO
REFERENCES TO LATER AN-
NOTATIONS CITING
CASES OR NOTES

CORRIGENDUM, 1903.



L. R. A. CASES AS AUTHORITIES.

CASES IN 7 L. R. A.

7 L. R. A. 33, O'CONNOR v. O'CONNOR, 88 Tenn. 76, 12 S. W. 447.

Vendor's lien.

Cited in Zwingle v. Wilkinson, 94 Tenn. 250, 28 S. W. 1096, holding vendor's equitable lien for unpaid purchase price of land not affected because note for balance of purchase money was executed to third person.

Cited in footnotes to Frame v. Sliter, 34 L. R. A. 690, which denies implied equitable lien to grantor of land for unpaid purchase money; Doty v. Deposit Bldg. & L. Asso. 43 L. R. A. 551, which holds vendor's lien enforceable against land for entire amount unpaid on sale of real and personal property.

Fraudulent conveyance.

Cited in Blackmore v. Parkes, 26 C. C. A. 671, 54 U. S. App. 123, 81 Fed. 900, holding conveyance by insolvent in consideration that grantee pay debts of the insolvent not fraudulent.

Action by mortgagee.

Cited in note (6 L. R. A. 612) on personal action by mortgagee.

7 L. R. A. 44, WHITE v. CINCINNATI, N. O. & T. P. R. CO. 89 Ky. 478, 12 S. W. 936.

Effect of contributory negligence.

Cited in Union P. R. Co. v. Evans, 52 Neb. 55, 71 N. W. 1062, to point that one knowing approach to railway station unsafe may recover for injury sustained while exercising ordinary care.

Cited in note (44 L. R. A. 294) as to effect of contributory negligence on duty of carrier of live stock to furnish pens at stations.

7 L. R. A. 46, PITTSBURGH CARBON CO. v. McMILLIN, 119 N. Y. 46, 28 N. Y. S. R. 807, 23 N. E. 530.

Rights and powers of receivers.

Cited in Gray v. De Castro & D. Sugar Ref. Co. 32 N. Y. S. R. 1020, 10 N. Y. Supp. 632, sustaining injunction restraining corporation belonging to illegal trust and for which receiver has been appointed from parting with assets received under trust deed; *Re Vietor*, 20 Misc. 15, 44 N. Y. Supp. 603, to point that receiver while authorized to prosecute and defend actions is but the creature of the court as trustee or custodian of fund; *Hamor v. Taylor-Rice Engineering*

Co. 84 Fed. 399, holding receiver as representative of creditors may assert defense on their behalf which corporation could not maintain; *Peabody v. New England Water-Works Co.* 184 Ill. 628, 75 Am. St. Rep. 195, 56 N. E. 957, holding receiver represents both corporation and creditors and may in behalf of latter assert claim he could not maintain as representative of former; *Harrington v. Connor*, 51 Neb. 219, 70 N. W. 911, holding defense not good against creditors of bank and involving fraud against them not available in suit by receiver of bank; *Washington Mill Co. v. Sprague Lumber Co.* 19 Wash. 171, 52 Pac. 1067, holding receiver of insolvent corporation may disaffirm its acts and maintain suit to set aside its fraudulent conveyances; *Re Wendler Mach. Co.* 2 App. Div. 19, 37 N. Y. Supp. 444, holding receiver has power to contest validity of mortgage given to secure bonds of insolvent corporation.

Distinguished in *Gray v. Oxnard Bros. Co.* 31 N. Y. S. R. 972, 13 N. Y. Supp. 86, holding receiver of individual corporation in illegal partnership cannot maintain action for accounting or dissolution.

Monopolies.

Cited in *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 136, 29 C. C. A. 160, 54 U. S. App. 723, 85 Fed. 291, holding contract to sell property, business, or good will, or to create partnership or corporation, invalid if part of plan to establish monopoly; *National Harrow Co. v. Hench*, 76 Fed. 669, holding combination of patent owners to prevent competition and maintain price illegal; *National Harrow Co. v. Hench*, 39 L. R. A. 300, 27 C. C. A. 351, 55 U. S. App. 53, 83 Fed. 38, holding while patentees may compose their differences they cannot make the occasion an excuse for creating monopolies; *Lovejoy v. Michels*, 88 Mich. 28, 13 L. R. A. 775, 49 N. W. 901, by Champlin, Ch. J., to point that combination to control prices is odious as illegal exercise of franchises of a monopoly; *John D. Park & Sons Co. v. National Wholesale Druggists' Asso.* 175 N. Y. 36, 62 L. R. A. 647, 96 Am. St. Rep. 578, 67 N. E. 136 (dissenting opinion) majority upholding agreement between manufacturers of medicines and wholesalers made for purpose of maintaining uniform jobbing and retail prices.

Cited in footnote to *Scott v. Wiswall*, 42 L. R. A. 85, which holds contracts with tugs severally for towage not invalidated by illegal combination between owners to restrain trade.

Cited in note (12 L. R. A. 754) on restraining monopoly as public nuisance.

7 L. R. A. 48, *GRIGGS v. STONE*, 51 N. J. L. 549, 18 Atl. 1094.

Extent of implied warranty.

Approved in *Troy Laundry Co. v. Henry*, 23 Or. 236, 31 Pac. 484, holding implied warranty of pulley on line shaft does not extend to machine to which it communicates power.

7 L. R. A. 50, *STATE v. TUTTY*, 41 Fed. 753.

Validity of foreign marriage.

Cited in *Jackson v. Jackson*, 82 Md. 30, 34 L. R. A. 775, 33 Atl. 317, holding Pennsylvania marriage based on general reputation good in absence of statute declaring such marriages void.

Cited in footnotes to *Re Stull*, 39 L. R. A. 539, which holds invalid, marriage between man and paramour in other state to avoid laws of domicile; *Norman v.*

Norman, 42 L. R. A. 343, which holds marriage on high seas by parties leaving land to evade laws of residence invalid; *Jackson v. Jackson*, 34 L. R. A. 773, which sustains marriage valid in state where it was contracted.

Conflict of laws.

Cited in note (57 L. R. A. 168) on conflict of laws as to marriages as to members of different races.

Removal of cause.

Cited in note (53 L. R. A. 573) on removal to protect Federal right.

7 L. R. A. 55, *LAWTON v. COMER*, 40 Fed. 480.

Navigability.

Cited in *Mills v. United States*, 12 L. R. A. 680, 46 Fed. 745, to point that the Savannah is a navigable river.

Cited in notes (7 L. R. A. 673) on what are navigable rivers; (42 L. R. A. 325) on navigable waters.

Limitation of liability.

Cited in notes (6 L. R. A. 850) on limiting liability of carrier; (10 L. R. A. 420) on contractual limitation of carrier's liability.

7 L. R. A. 67, *GARDNER v. TERRY*, 99 Mo. 523, 12 S. W. 888.

Injunction to prevent cloud on title.

Cited in *Verdin v. St. Louis*, 131 Mo. 80, 33 S. W. 480, holding equity will enjoin or cancel void paving tax bills casting cloud on title; *Clifton v. Anderson*, 40 Mo. App. 623, holding chancery may prevent sale under invalid decree which would cast cloud on title to real estate; *Skinker v. Heman*, 64 Mo. App. 448, holding equity will restrain issuance of invalid special tax bill which would cast a cloud on title; *Sneathen v. Sneathen*, 104 Mo. 207, 24 Am. St. Rep. 326, 16 S. W. 497, holding equitable jurisdiction to remove cloud not only remedial but preventive.

Adverse possession.

Cited in *McRee v. Gardner*, 131 Mo. 606, 33 S. W. 166, holding title through adverse possession sufficient to authorize suit to remove cloud from title; *Comstock v. Eastwood*, 108 Mo. 47, 18 S. W. 39, holding adverse possession for two years of military bounty land vests title in occupant who may maintain ejectment.

Distinguished in *De Bernardi v. McElroy*, 110 Mo. 659, 19 S. W. 626, holding intent to claim entire title to land necessary to put statute of limitations in operation.

— As between mortgagee and mortgagor.

Cited in *St. Louis v. Priest*, 103 Mo. 655, 15 S. W. 988, holding foreclosure not barred by statute of limitations unless there has been adverse possession of mortgaged property for requisite period; *Combs v. Goldsworthy*, 109 Mo. 160, 18 S. W. 1130, holding although notes given to secure mortgage are barred by statute, there must be adverse possession of mortgaged premises to bar foreclosure; *Sherwood v. Baker*, 105 Mo. 477, 24 Am. St. Rep. 399, 16 S. W. 938, holding ten years' adverse possession by mortgagor necessary to bar foreclosure; *Chouteau v. Riddle*, 110 Mo. 372, 19 S. W. 814, holding mortgagor in possession

does not hold adversely to mortgagee so long as relation of mortgagor and mortgagee exists; *Ivy v. Yancey*, 129 Mo. 507, 31 S. W. 937, holding grantor in trust deed does not hold adversely to trustee unless by acts and declarations he repudiates deed of trust.

Suit involving title.

Cited in *Hanna v. South St. Joseph Land Co.* 126 Mo. 10, 28 S. W. 652, holding suit to rescind contract to purchase land and cancel deed of trust involves title to real estate within jurisdiction of supreme court; *Bryant v. Russell*, 127 Mo. 426, 30 S. W. 107, holding title involved within jurisdiction of supreme court where one party claims by purchase at execution sale and other claims right to redeem; *Kleimann v. Geiselmann*, 45 Mo. App. 498, remanded on ground that suit to declare deed of trust a subsisting lien and for its foreclosure does not involve title.

Statute of limitations.

Cited in *Menzel v. Hinton*, 132 N. C. 665, 95 Am. St. Rep. 647, 44 S. E. 385, holding power of sale in mortgage not affected by statutory bar against foreclosure.

7 L. R. A. 69, *COUDERT v. COHN*, 118 N. Y. 309, 16 Am. St. Rep. 761, 23 N. E. 298.

Tenancy under void lease.

Cited in *Phelan v. Anderson*, 118 Cal. 506, 50 Pac. 685, holding tenancy from year to year implied where entry made on agricultural land under void parol lease providing for annual rent; *Gilfoyle v. Cahill*, 18 Misc. 70, 41 N. Y. Supp. 29, holding tenancy from month to month implied from possession under void oral lease for long term, rental payable monthly; *Talamo v. Spitzmiller*, 120 N. Y. 42, 8 L. R. A. 223, 17 Am. St. Rep. 607, 23 N. E. 980, holding party in possession making no payments or promise to pay under void lease liable only for use and occupation; *Unglish v. Marvin*, 128 N. Y. 385, 23 N. E. 634, holding party in possession under void agreement for joint occupancy with owner for term of years, not entitled to damages for dispossession; *Adams v. Cohoes*, 127 N. Y. 181, 28 N. E. 25, holding tenant from year to year under void lease under no duty to give notice of termination of tenancy; *Butts v. Fox*, 96 Mo. App. 441, 70 S. W. 515, holding tenant under lease void under statute of frauds not entitled to notice to quit at end of term; *Arbenz v. Exley*, 52 W. Va. 479, 61 L. R. A. 958, 44 S. E. 149, holding written lease void under statute, admissible in evidence to show a tenancy, its terms, and conditions.

Cited in note (26 L. R. A. 800) on compensation for use of premises where lease invalid under statute of frauds.

Tenancy from year to year.

Cited in *Johnson v. Doll*, 11 Misc. 347, 32 N. Y. Supp. 132, and *Garrick v. Menut*, 41 N. Y. S. R. 470, 17 N. Y. Supp. 455, holding tenant holding over after expiration of year's lease, liable for full rent for ensuing year; *Kernochan v. Wilkens*, 3 App. Div. 600, 38 N. Y. Supp. 236, holding tenant holding over after expiration of year under void lease for longer term, liable for following year's rent.

7 L. R. A. 70, *CHURCH OF ST. MONICA v. NEW YORK*, 119 N. Y. 91, 23 N. E. 294.

Exemption from taxation.

Cited in *People ex rel. Delta Kappa Epsilon Soc. v. Lawler*, 74 App. Div. 557, 77 N. Y. Supp. 840, holding premises occupied by college society as boarding place, with exception of society room, not exempt from taxation.

Cited in footnotes to *Ramsey County v. Macalaster College*, 18 L. R. A. 278, which holds professors' residences on college grounds exempt but not unused land in college tract; *State, Singer Mfg. Co., Prosecutor, v. Heppenheimer*, 32 L. R. A. 643, which holds company exempt from taxation under exemption of its shares.

Cited in note (12 L. R. A. 852) exemption from taxation does not exempt from special assessment.

Distinguished in *Shaarai Berocho v. New York*, 28 Jones & S. 488, 46 N. Y. S. R. 235, 18 N. Y. Supp. 792, on ground that religious society was incorporated and holding its exemption not affected by fact that janitor resided on premises.

Statutory construction.

Cited in *People ex rel. Young Men's Asso. v. Sayles*, 32 App. Div. 201, 53 N. Y. Supp. 67; *People ex rel. Salvation Army v. Feitner*, 33 Misc. 714, 68 N. Y. Supp. 338, to point that statutes exempting religious and charitable corporations from general taxation must be strictly construed.

7 L. R. A. 72, *KRUEGER v. KRUEGER*, 76 Tex. 178, 12 S. W. 1004.

Acknowledgment to take debt out of statute of limitations.

Cited in *Henry v. Roe*, 83 Tex. 452, 18 S. W. 806, holding letter unqualifiedly acknowledging existence of and promising to pay debt removes bar of limitations; *Moline Plow Co. v. Webb*, 141 U. S. 627, 35 L. ed. 882, 12 Sup. Ct. Rep. 100, raising, without deciding, question whether request to stay suit constitutes new promise; *Lieberman v. Gurensky*, 27 Wash. 420, 67 Pac. 998, holding promise to pay at indefinite future time does not revive barred debt.

Cited in *Slaughter's Succession*, 108 La. 494, 58 L. R. A. 409, footnote, p. 408, 32 So. 379, holding bar of limitation not removed by expression of ability to pay debt, followed by part payment.

7 L. R. A. 73, *BURTON v. TUIITE*, 78 Mich. 363, 44 N. W. 282.

What are public records.

Cited in *Aitcheson v. Huebner*, 90 Mich. 645, 51 N. W. 634, holding state tax land book public record; *Burton v. Tuite*, 80 Mich. 219, 7 L. R. A. 825, 45 N. W. 88, holding city treasurer's stub receipt books, from which data are transferred to record books, public records; *Tryon v. Pingree*, 112 Mich. 347, 37 L. R. A. 226, 67 Am. St. Rep. 398, 70 N. W. 905, raising, without deciding, question whether books of city fire commission public records.

Distinguished in *Marriage License Docket*, 4 Pa. Dist. R. 284, holding marriage license docket not public record.

Right to examine public records.

Cited in *Barber v. West Jersey Title & Guaranty Co.* 53 N. J. Eq. 160, 32 Atl. 222, holding abstract maker has right of access to public records but not to make copies for purpose of setting up rival office; *Day v. Button*, 96 Mich. 602, 56 N. W. 3, holding abstract maker entitled to reasonable access to public records;

State *ex rel.* Colscott v. King, 154 Ind. 623, 57 N. E. 535, holding citizen and taxpayer has right to examine county auditor's records; Marriage License Docket, 4 Pa. Dist. R. 166, holding citizen may inspect marriage license docket without paying fee; *Re Chambers*, 44 Fed. 792, holding records of Federal courts open to public examination free of charge.

Cited in notes (10 L. R. A. 212; 27 L. R. A. 82) on common right to inspect public records; (64 L. R. A. 425, 426) on right of taxpayer to inspect books of municipality.

Distinguished in *Burton v. Reynolds*, 110 Mich. 355, 68 N. W. 217, holding examination by abstractor of files in action relating to land not compellable where not shown necessary to employee's interests; *Belt v. Prince George's County Abstract Co.* 73 Md. 294, 10 L. R. A. 214, 20 Atl. 982, holding title abstract company cannot copy public records without paying fees.

7 L. R. A. 77, PADUCAH LUMBER CO. v. PADUCAH WATER SUPPLY. CO.
89 Ky. 340, 25 Am. St. Rep. 536, 12 S. W. 554, 13 S. W. 249.

Liability of water companies for failure of fire protection.

Followed in *Gorrell v. Greensboro Water Supply Co.* 124 N. C. 334, 46 L. R. A. 516, 70 Am. St. Rep. 598, 32 S. E. 720; *Planters' Oil Mill v. Monroe Waterworks & Light Co.* 52 La. Ann. 1251, 27 So. 684; *Graves County Water Co. v. Ligon*, 112 Ky. 780, 66 S. W. 725,—holding water company liable to owner for burning of property through failure of water supply; *Hieronymus Bros. v. Bienville Water Supply Co.* 131 Ala. 454, 31 So. 31, assuming as unquestioned in case that damage by fire may be shown to have proximately resulted from breach of contract to supply water.

Cited in footnotes to *Eaton v. Fairbury Waterworks Co.* 21 L. R. A. 653, which denies water company's liability for destruction of property by failure of water supply; *Mott v. Cherryvale Water & Mfg. Co.* 15 L. R. A. 375, which holds water company not liable to citizen for burning of property through failure to supply water.

Cited in note (23 L. R. A. 150) on liability for loss by fire due to lack of adequate water supply.

Distinguished in *Boston Safe Deposit & T. Co. v. Salem Water Co.* 94 Fed. 240; *Stone v. Uniontown Water Co.* 16 Pa. Co. Ct. 330, 13 Lanc. L. Rev. 156, 4 Pa. Dist. R. 432; *House v. Houston Waterworks Co.* 88 Tex. 239, 28 L. R. A. 533, 31 S. W. 179; *Fitch v. Seymour Water Co.* 139 Ind. 220, 47 Am. St. Rep. 258, 37 N. E. 982; *Eaton v. Fairbury Waterworks Co.* 37 Neb. 552, 21 L. R. A. 655, 40 Am. St. Rep. 510, 56 N. W. 201; *Bush v. Artesian Hot & Cold Water Co.* 4 Idaho. 621, 95 Am. St. Rep. 161, 43 Pac. 69,—holding property owner cannot recover from water company for failure to furnish fire protection stipulated in contract or franchise; *Ukiah City v. Ukiah Water & Improv. Co.* 142 Cal. 179, 64 L. R. A. 235, 75 Pac. 773, holding water company not liable to town for loss by fire through failure of water supply.

Disapproved in *Howsmon v. Trenton Water Co.* 119 Mo. 315, 23 L. R. A. 152, 41 Am. St. Rep. 654, 24 S. W. 784, holding citizen cannot recover on water company's agreement with town to be liable for failure to supply sufficient fire protection; *Britton v. Green Bay & F. H. Waterworks Co.* 81 Wis. 58, 29 Am. St. Rep. 856, 51 N. W. 84, and *Nichol v. Huntington Water Co.* 53 W. Va. 356, 44

S. C. 290, holding failure to supply sufficient water to extinguish fires does not render company liable to individuals.

Right of third person to sue on contract made for his benefit.

Cited in *Hall v. Alford*, 105 Ky. 666, 49 S. W. 444, holding action maintainable by subcontractor upon contract of contractor for his benefit with owner; *Louisville & N. R. Co. v. Schmidt*, 112 Ky. 723, 66 S. W. 629, holding lessee liable to mortgage bondholders for breach of conditions of lease to return road in good repair; *Blakeley v. Adams*, 113 Ky. 396, 68 S. W. 393, holding lien reserved in conveyance of land for benefit of surety of grantee, enforceable by such surety; *Peters v. Jackson*, 50 W. Va. 650, 57 L. R. A. 431, 88 Am. St. Rep. 909, 41 S. E. 190, holding druggist liable to third person for injuries resulting from druggist's mistake in selling poisonous drug for harmless medicine.

Cited in notes (25 L. R. A. 267) on right of third person to sue on contract made for his benefit; (64 L. R. A. 59) on third person for whose benefit contract is made as real party in interest within the meaning of statutes defining the party by whom an action may be brought.

Distinguished in *Mott v. Cherryville Water & Mfg. Co.* 48 Kan. 16, 15 L. R. A. 376, 30 Am. St. Rep. 267, 28 Pac. 989, holding citizen cannot maintain action on water company's contract with city to pay damages to any citizen through failure to supply fire protection; *Peters v. Johnson*, 50 W. Va. 650, 57 L. R. A. 431, 88 Am. St. Rep. 909, 41 S. E. 190, holding only parties to sale of medicine can sue for damages for breach of contract.

Limited in *Weatherly v. Capital City Water Co.* 115 Ala. 174, 22 So. 140, holding citizen cannot have receiver appointed to carry out corporation's contract to supply city and its inhabitants with water.

Criticized in *Lancaster use of Penn Iron Co. v. Frescoln*, 16 Lanc. L. Rev. 76, 22 Pa. Co. Ct. 229, holding material men may recover on contractor's bond to city to pay for materials.

7 L. R. A. 81, *KENTON INS. CO. v. WIGGINTON*, 89 Ky. 330, 12 S. W. 668.

Insurance — Proof of loss.

Cited in *Caledonian Ins. Co. v. Cooke*, 101 Ky. 416, 41 S. W. 279, holding proof of loss waived by insurance company's admission of some liability, and arbitration as to amount of loss; *German-American Ins. Co. v. Norris*, 100 Ky. 36, 66 Am. St. Rep. 324, 37 S. W. 267, holding insured not required to furnish proofs of loss where general agent denies liability.

Cited in notes (8 L. R. A. 78) on waiver of proofs of loss; (11 L. R. A. 599) on waiver of conditions by refusal to pay loss; (18 L. R. A. 85) on forfeiture of insurance by failure to furnish proofs of loss within stipulated time; (8 L. R. A. 76) on objections to statement of loss.

— What are material misrepresentations.

Cited in *Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co.* 52 C. C. A. 673, 115 Fed. 79, holding misstatement of past losses in application for insurance against losses on sales, material misrepresentations avoiding policy; *Lancashire Ins. Co. v. Monroe*, 101 Ky. 20, 39 S. W. 434, holding existence of mortgage does not contradict representation of sole and unconditional ownership.

Parol evidence of mistake.

Cited in note (6 L. R. A. 838) on parol evidence in case of mistake.

Effect of insolvency on right of set-off.

Cited in *Carroll v. Weaver*, 65 Conn. 81, 31 Atl. 489, holding ship owner's payment of ship builder's order accepted before insolvency of builder, properly set off against debt to builder; *St. Paul & M. Trust Co. v. Leck*, 57 Minn. 92, 47 Am. St. Rep. 576, 58 N. W. 826, holding debtor's equitable set-off unaffected by assignment; *Salladin v. Mitchell*, 42 Neb. 863, 61 N. W. 127, holding right of set-off unaffected by assignment in insolvency; *Momsen v. Noyes*, 105 Wis. 567, 81 N. W. 860, holding liability as surety may be set off against assignor's claim against surety.

Cited in notes (9 L. R. A. 108) on set-off of unliquidated cross demand; (13 L. R. A. 233) on surety's right to set off joint indebtedness where insolvency exists; (17 L. R. A. 461) on effect of immaturity of claim at time insolvency occurs on right of set-off.

Distinguished and disapproved in *Huse v. Ames*, 104 Mo. 99, 15 S. W. 965, holding surety cannot set off payments after assignment, although on debts past due at time of assignment.

Right of insolvent's representative.

Cited in *Carroll v. Weaver*, 65 Conn. 81, 31 Atl. 489, holding as general rule trustee takes insolvent estate with its burdens and equities; *Re Wilcox & H. Co.* 70 Conn. 231, 39 Atl. 163, holding receiver of insolvent may also represent creditors; *Woodbury's Appeal*, 70 Conn. 457, 39 Atl. 791, holding trustee in insolvency to a limited extent, representative of debtor and creditors; *Newton Sav. Bank v. Lawrence*, 71 Conn. 368, 42 Atl. 225 (dissenting opinion), majority holding insolvency trustee takes insolvent's land unaffected by unrecorded mortgage; *Central Trust Co. v. Worcester Cycle Mfg. Co.* 128 Fed. 490, holding right of attaching creditor to proceeds of property surrendered to mortgage receiver under stipulation preserving rights, superior to that of subsequent trustee in insolvency.

Right to contribution.

Cited in note (9 L. R. A. 227) on subrogation of surety on payment of claim.

7 L. R. A. 87, *HODGES v. KOWING*, 58 Conn. 12, 18 Atl. 979.

Description of property.

Cited in *Moayon v. Moayon*, 114 Ky. 873, 60 L. R. A. 423, 72 S. W. 33, holding description covering all grantor's property acquired by will or otherwise and then owned by him, sufficient to uphold contract to convey.

Remedy at law as bar to equitable relief.

Cited in *Sabin v. Anderson*, 31 Or. 495, 49 Pac. 870, holding attachment or garnishment not adequate remedy precluding bill in equity to discover assets fraudulently concealed; *Lockett v. Robinson*, 31 Fla. 138, 20 L. R. A. 68, 12 So. 649, holding claimant of lien without adequate remedy in law to reach proceeds of land sold under agreement with owner.

Cited in notes (11 L. R. A. 69) on jurisdiction in equity where remedy at law exists; (8 L. R. A. 626) on right to specific performance where adequate remedy at law.

Specific performance.

Cited in *Andrews v. Babcock*, 63 Conn. 116, 26 Atl. 715, holding vendee's liability for specific performance of contract for sale of land.

Cited in footnote to *Atchison, T. & S. F. R. Co. v. Chicago & N. W. P. R. R.*, 167, which refuses to require payment of interest not p condition of specific performance of contract.

Cited in note (10 L. R. A. 127) as to when doctrine of laches voked.

7 L. R. A. 90, HESS v. LOWREY, 122 Ind. 225, 17 Am. St. Rep. 355

Liability of partners for torts of others.

Cited in notes (37 L. R. A. 834) on liability of physician or surgeon of others; (51 L. R. A. 495) on liability of partnership for torts.

Evidence of transaction with deceased partner.

Disapproved in effect in *Bay View Brewing Co. v. Grubb*, 31 Pac. 553, holding evidence of transaction between party in interest and member of partnership inadmissible.

Waiver of right of action ex contractu.

Cited in *Rauh v. Stevens*, 21 Ind. App. 651, 52 N. E. 997, holding that action *ex contractu* may be waived for remedy *ex delicto*; *Lane v. Ind.* 421, 25 Am. St. Rep. 442, 27 N. E. 1111, holding, in action against attorney for malpractice, plaintiff may waive tort.

Abatement for nonjoinder.

Cited in *Alexander v. Collins*, 2 Ind. App. 179, 28 N. E. 190, and *Chamberlain*, 160 Ind. 117, 66 N. E. 448, holding plea in abate joinder bad if it does not allege that parties are living and subject of court.

Survival of actions in tort.

Cited in *Hamilton v. Jones*, 125 Ind. 177, 25 N. E. 192, holding 1 for wrong does not survive death of wrongdoer; *Feary v. Hami* 52, 39 N. E. 516, holding action survives only where injury affects principally property rights.

Cited in footnote to Perkins v. Stein, 20 L. R. A. 862, which holds no action for negligently driving over person.

Distinguished in *Melvin ex rel. McVey v. Evans*, 48 Mo. App. 421, 12 S. W. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 91

Action quasi ex contractu for damages.

Cited in Holt Ice & Cold Storage Co. v. Arthur Jordan Co. 25 1
57 N. E. 575, holding action against storage company for dama,
ex contractu.

Exhibition of injuries to jury.

Cited in *South Bend v. Turner*, 156 Ind. 427, 54 L. R. A. 400, 83 200, 60 N. E. 271, holding weapons, clothing, and wounds may be shown to jury; *Arkansas River Packet Co. v. Hobbs*, 105 Tenn. 38, 58 S. W. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 8

Power of court to order medical or surgical examination.

Cited in *Terre Haute & I. R. Co. v. Bruncker*, 128 Ind. 554, 26 N. L. R. A. AU.—VOL. I.—57.

ing motion to compel medical examination on second trial after plaintiff had rested, properly overruled; *South Bend v. Turner*, 156 Ind. 431, 54 L. R. A. 400, 83 Am. St. Rep. 200, 60 N. E. 271, holding abuse of court's discretionary power to order physical examination of injured plaintiff, reviewable; *Cook Brewing Co. v. Ball*, 22 Ind. App. 663, 52 N. E. 1002, holding injured plaintiff may refuse to submit to medical examination without giving reasons therefor; *Graves v. Battle Creek*, 95 Mich. 270, 19 L. R. A. 642, 35 Am. St. Rep. 561, 54 N. W. 757, upholding court's power to compel injured plaintiff to submit to physical examination before the jury.

Cited in footnote to *Alabama G. S. R. Co. v. Hill*, 9 L. R. A. 442, which holds delicacy and refinement of feeling not ground for refusing to order surgical examination of plaintiff.

Cited in note (14 L. R. A. 468) on power to compel plaintiff to submit to physical examination.

Disapproved in *Pennsylvania Co. v. Newmeyer*, 129 Ind. 410, 28 N. E. 860, holding in absence of statute party not obliged to submit to physical examination; *Union P. R. Co. v. Botsford*, 141 U. S. 256, 35 L. ed. 739, 11 Sup. Ct. Rep. 1000, holding Federal court cannot order surgical examination of injured plaintiff.

Use of text-books on examination of expert witnesses.

Cited in *Byers v. Nashville, C. & St. L. R. Co.* 94 Tenn. 351, 29 S. W. 128, and *Louisville, N. A. & C. R. Co. v. Howell*, 147 Ind. 274, 45 N. E. 584, upholding reading of statements from writers of repute, on cross-examination to test expert's knowledge; *Shover v. Myrick*, 4 Ind. App. 16, 30 N. E. 207, holding scientific books may be referred to by experts to refresh their recollection; *Butler v. South Carolina & G. Extension R. Co.* 130 N. C. 20, 40 S. E. 770, holding that expert witness cannot be discredited by reading opposite opinion from text-book and asking him whether it is correct.

Cited in note (40 L. R. A. 567) on scientific books and treatises as evidence.

Instructions as to credibility of witnesses.

Cited in *Mendenhall v. Stewart*, 18 Ind. App. 271, 47 N. E. 943, holding instruction properly qualified, as to witness's interest as bearing upon credibility, not erroneous.

Conviction as bar to further prosecution.

Cited in footnote to *People v. McDaniels*, 59 L. R. A. 578, which holds prosecution for assault to commit murder barred by conviction of battery for same acts.

7 L. R. A. 93, *PICKLE v. PEOPLE'S NAT. BANK*, 88 Tenn. 380, 17 Am. St. Rep. 900, 12 S. W. 919.

Right of payee to sue drawee upon acceptance.

Cited in *Cincinnati, H. & D. R. Co. v. Metropolitan Nat. Bank*, 54 Ohio St. 68, 31 L. R. A. 655, 56 Am. St. Rep. 700, 42 N. E. 700, holding, without acceptance, holder of check cannot compel payment from drawee bank.

Disapproved in *J. N. Houston Grocer Co. v. Farmers Bank*, 71 Mo. App. 136, holding payee of checks cannot maintain action against drawee for payment on forged indorsements.

Proof of acceptance.

Cited in *Jackson v. National Bank*, 92 Tenn. 158, 18 L. R. A. 667, 36 Am. St. Rep. 81, 20 S. W. 802, holding paying to unauthorized person and charging to drawer's account sufficient proof of acceptance.

Payment to unauthorized person.

Cited in *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 164, 59 L. R. A. 663, 93 Am. St. Rep. 113, 65 N. E. 136, and *Jackson v. National Bank*, 92 Tenn. 158, 18 L. R. A. 667, 36 Am. St. Rep. 81, 20 S. W. 802, holding drawee bank responsible unless paying check to payee or upon genuine indorsement; *Western U. Teleg. Co. v. Bi-Metallic Bank*, 17 Colo. App. 233, 68 Pac. 115, holding bank not relieved from liability for payment of check to person of same name as payee by delivery of check by drawer to such person.

Receiving paper for collection.

Cited in note (7 L. R. A. 845) on ownership of paper indorsed in blank.

Power of agents to indorse negotiable paper.

Cited in note (27 L. R. A. 401) on power of agents to indorse negotiable paper.

7 L. R. A. 96, *COLE v. HAND*, 88 Tenn. 400, 12 S. W. 922.

Who entitled to benefit of statute giving wage-earners preference.

Cited in *Pullis Bros. Iron Co. v. Boemler*, 91 Mo. App. 92, holding superintendent of iron company not within statute according employees of insolvent corporations priority of payment.

Cited in note (18 L. R. A. 309) on who are laborers, employees, or servants within meaning of statutes giving them preference.

Statutes imposing director's liability — How construed.

Cited in *Tradesman Pub. Co. v. Knoxville Car Wheel Co.* 95 Tenn. 660, 31 L. R. A. 601, 49 Am. St. Rep. 943, 32 S. W. 1097, holding statutes making directors of insolvent corporations liable, strictly construed.

7 L. R. A. 99, *ATTY. GEN. v. DETROIT*, 78 Mich. 545, 18 Am. St. Rep. 458, 44 N. W. 388.

Citizenship.

Cited in *Boyd v. Nebraska*, 143 U. S. 168, 36 L. ed. 112, 12 Sup. Ct. Rep. 375, Reversing 31 Neb. 762, 48 N. W. 739, holding resident of Nebraska when taken into Union citizen of United States, although his father had not been naturalized.

Cited in note (8 L. R. A. 337) on possession of political rights not essential to citizenship.

Regulation as to registration of voters.

Cited in *Morris v. Powell*, 125 Ind. 293, 9 L. R. A. 330, 25 N. E. 221, holding law requiring certain persons to be registered in order to vote, without requiring others to be, unconstitutional.

Cited in footnote to *Barret v. Taylor*, 36 L. R. A. 129, upholding right to have name registered as voter of unnaturalized minor who becomes qualified voter before revision of registry.

Cited in notes (8 L. R. A. 338) on qualification of voters registration law;

(10 L. R. A. 226) on election law; registration; (25 L. R. A. 481, 485) on how far right to vote is absolute.

Limit of power of legislature to regulate elective franchise.

Cited in *Ferguson v. Allen*, 7 Utah, 273. 26 Pac. 570; *Detroit v. Rush*, 82 Mich. 538, 10 L. R. A. 173, 46 N. W. 951, holding legislature may regulate but not destroy enjoyment of elective franchise; *Todd v. Election Comrs.* 104 Mich. 482, 29 L. R. A. 334, 64 N. W. 496, upholding act forbidding placing of name of any candidate in more than one column on official ballot; *State ex rel. Brown v. McMillan*, 108 Mo. 163, 18 S. W. 784, holding Australian ballot law constitutional; *Mills v. Green*, 67 Fed. 831, holding registration law, abridging right to vote, unconstitutional; *Slaymaker v. Phillips*, 5 Wyo. 497, 47 L. R. A. 858, 42 Pac. 1049 (dissenting opinion) majority upholding act making void, ballots not properly indorsed by election officers; *Butler v. Ellerbe*, 44 S. C. 286, 22 S. E. 425 (dissenting opinion) as to constitutionality of act requiring registration of voters.

Cited in footnote to *Brewer v. McClelland*, 17 L. R. A. 845, which holds statute requiring notice of claim to be legal voter from persons residing less than six months in county void.

Distinguished in *Atty. Gen. ex rel. Reynolds v. May*, 99 Mich. 545, 25 L. R. A. 328, 58 N. W. 483, upholding regulations to preserve purity of elections, although resulting in some inconvenience to voters.

When whole act, void in part, must fall.

Cited in *Butler v. Ellerbe*, 44 S. C. 293, 22 S. E. 425 (dissenting opinion) as to invalidity of entire act part of which is unconstitutional.

7 L. R. A. 105, *TERRITORY ex rel. CHOTEAU COUNTY v. CASCADE COUNTY*, 8 Mont. 396, 20 Pac. 809.

Mandamus.

Cited in footnote to *State ex rel. Fleming v. Crawford*, 14 L. R. A. 253, which grants mandamus to compel secretary of state to seal appointment of United States senator.

Cited in note (11 L. R. A. 763) on mandamus to control executive discretion.

Liability of counties for torts and negligence.

Cited in note (39 L. R. A. 71) on liability of counties in actions for torts and negligence.

7 L. R. A. 111, *WALKER v. VICKSBURG, S. & P. R. CO.* 41 La. Ann. 795, 17 Am. St. Rep. 417, 6 So. 916.

Contributory negligence.

Cited in *Bemiss v. New Orleans City & Lake R. Co.* 47 La. Ann. 1675, 18 So. 711, holding passenger going from one car to another while train is moving cannot recover if thrown off.

Cited in note (8 L. R. A. 674) on contributory negligence of passenger.

Allighting from moving car.

Cited in *Odom v. St. Louis S. W. R. Co.* 45 La. Ann. 1203, 14 So. 734, 23 L. R. A. 153, holding passenger carried beyond his station, jumping from moving train, cannot recover; *Burgin v. Richmond & D. R. Co.* 115 N. C. 675, 20 S. E.

473, holding mere failure to stop does not justify passenger in leaping from moving train.

Cited in notes (11 L. R. A. 367) on duty of carrier to assist in landing passenger safely; (11 L. R. A. 396) on passenger alighting from moving train; (13 L. R. A. 95) on duty of railway conductors in stopping and starting trains; (21 L. R. A. 360) on injuries in getting on and off railroad trains.

Distinguished in *Brashear v. Houston*, C. A. & N. R. Co. 47 La. Ann. 738, 28 L. R. A. 812, 49 Am. St. Rep. 382, 17 So. 260, upholding recovery where plaintiff not thrown from train by sudden jerk; *Ober v. Crescent City R. Co.* 44 La. Ann. 1063, 32 Am. St. Rep. 366, 11 So. 819, holding it not negligence *per se* to alight from moving horse car.

Duty of carrier to furnish safe stations and platforms.

Cited in footnotes to *Delaware, L. & W. R. Co. v. Trautwein*, 7 L. R. A. 435, which holds carrier required to keep passageway at station though other passageway provided; *Redigan v. Boston & M. R. Co.* 14 L. R. A. 276, which denies recovery to licensee falling through open trap door in station platform; *Herrman v. Great Northern R. Co.* 57 L. R. A. 390, which holds railroad company liable for injury to passenger from unsafe condition of depot premises leased of union depot company or its receiver.

Cited in notes (11 L. R. A. 720) on carrier's duty of care for safety of passenger; (16 L. R. A. 449) on regulations as to admission of passenger to train house; (16 L. R. A. 593) on duty of carrier to maintain safe approach beyond its own premises; (20 L. R. A. 527) as to whom railroads owed duty of keeping station platforms safe.

7 L. R. A. 118, *ODOM v. RIDDICK*, 104 N. C. 515, 17 Am. St. Rep. 686, 10 S. E. 609.

Contracts with insane persons.

Cited in *French Lumbering Co. v. Theriault*, 107 Wis. 642, 51 L. R. A. 916, 81 Am. St. Rep. 856, 83 N. W. 927, holding deed of insane person not under guardianship voidable only; *Chamblee v. Broughton*, 120 N. C. 176, 27 S. E. 111, holding bona fide foreclosure purchaser without notice protected against mortgagor's insanity; *Creekmore v. Baxter*, 121 N. C. 33, 27 S. E. 994, holding equity will set aside contracts made with lunatics, with knowledge of lunacy; *Allred v. Smith*, 135 N. C. 445, 65 L. R. A. 926, 47 S. E. 597, holding deed by one *non compos* at time of execution to be voidable only.

Cited in notes (19 L. R. A. 492) on validity of deed made by insane person; (36 L. R. A. 721, 723, 727) on presumption and burden of proof as to sanity.

Bona fide purchaser.

Cited in *Cox v. Wall*, 132 N. C. 737, 44 S. E. 635, holding burden to be upon purchaser from fraudulent grantee to show valuable consideration and want of notice.

7 L. R. A. 120, *KELLY v. BENNETT*, 132 Pa. 218, 19 Am. St. Rep. 594, 19 Atl. 69.

Dangerous premises.

Cited in notes (7 L. R. A. 621) on dangerous premises; (26 L. R. A. 691) on liability for dangerous condition of private grounds lying open beside highway or frequented path.

Proximate and remote cause of injury.

Cited in note (7 L. R. A. 133) on remote cause of injury.

7 L. R. A. 121, *STATE ex rel. ST. PAUL, M. & M. R. CO. v. DISTRICT COURT*, 42 Minn. 247, 44 N. W. 7.

Damages for laying out highway over railroad track.

Followed in *State ex rel. Chicago, M. & St. P. R. Co. v. Shardlow*, 43 Minn. 526, 46 N. W. 74, holding railroad company not entitled to recover for maintenance of sign-boards and cattle-guards, in assessing damages for laying out highway over track.

Cited in *Albia v. Chicago, B. & Q. R. Co.* 102 Iowa, 630, 71 N. W. 541, holding, in absence of statute, railroad cannot be compelled to construct crossings over right of way to connect new streets; *Cleveland v. Augusta*, 102 Ga. 237, 43 L. R. A. 639, 29 S. E. 584, holding railroad company must bear expense of crossing alterations to conform to new street grade; *Morris & E. R. Co. v. Orange*, 63 N. J. L. 270, 43 Atl. 730, holding railroad not entitled to compensation for maintenance of gates, sign-boards, cattle-guards, and flagman; *Chicago, M. & St. P. R. Co. v. Milwaukee*, 97 Wis. 428, 72 N. W. 1118, holding duty of erecting and maintaining cattle-guards, warning posts and crossing signs imposed by police regulations must be performed without compensation.

As to duties not imposed by police regulations.

Followed in *State ex rel. Chicago, M. & St. P. R. Co. v. Shardlow*, 43 Minn. 526, 46 N. W. 74, holding railroad entitled to compensation for planking and its maintenance.

Laying highway across tracks.

Cited in footnotes to *Illinois C. R. Co. v. Chicago*, 17 L. R. A. 530, which holds city council's discretion to extend street over railroad tracks at grade or on bridge or viaduct not controllable by courts; *Chicago, M. & St. P. R. Co. v. Starkweather*, 31 L. R. A. 183, which sustains right to open street across depot grounds; *Terre Haute v. Evansville & T. H. R. Co.* 37 L. R. A. 189, which authorizes laying out streets across freight yard and tracks.

7 L. R. A. 125, *EARL v. WILSON*, 42 Minn. 361, 18 Am. St. Rep. 517, 44 N. W. 254.

Validity of marriage.

Cited in footnote to *Hilton v. Roylance*, 58 L. R. A. 723, which sustains sealing for time and eternity under Mormon marriage ceremony.

— Indian marriage.

Cited in *McBean v. McBean*, 37 Or. 202, 61 Pac. 418, to point that marriage between Indians according to tribal custom is valid in state and Federal courts.

Cited in notes (11 L. R. A. 542) on jurisdiction over Indian country; (57 L. R. A. 160) on conflict of laws as to validity of Indian marriage.

7 L. R. A. 127, *HANSON v. GRAHAM*, 82 Cal. 631, 23 Pac. 56.

Residence.

Cited in *San Diego Sav. Bank v. Goodsell*, 137 Cal. 427, 70 Pac. 299, holding affidavit for publication of summons giving defendant's "address" outside state,

is compliance with statute providing such service, when person "resides" outside the state; *Witbeck v. Marshall-Wells Hardware Co.* 88 Ill. App. 108, holding person giving up residence, and living in hotels in another state, to avoid process, and without definite intention of returning, is nonresident within attachment law; *Robinson v. Morrison*, 2 App. D. C. 128, holding fact of residence cannot be controlled by intention; *Egener v. Juch*, 101 Cal. 106, 35 Pac. 432 (distinguished in dissenting opinion), refusing to reverse order dissolving attachment against defendants as nonresidents upon conflicting affidavits as to residence.

Cited in notes (19 L. R. A. 665) on what is nonresidence for purpose of attachment; (10 L. R. A. 504) on who are nonresidents.

Distinguished in *Re Donovan*, 104 Cal. 625, 38 Pac. 456, holding three days' presence in state by one looking after settlement of brother's estate and declaration of intention to remain, insufficient to establish bona fide residence.

7 L. R. A. 128, *BAIRD v. SHIPMAN*, 132 Ill. 16, 22 Am. St. Rep. 504, 23 N. E. 384.

Liability for defective premises.

Approved in *Mayer v. Thompson-Hutchison Bldg. Co.* 104 Ala. 622, 28 L. R. A. 436, 53 Am. St. Rep. 88, 16 So. 620, holding agent of contractor jointly liable with him for injury to third person resulting from negligent construction of wall; *Lough v. John Davis & Co.* 30 Wash. 213, 59 L. R. A. 805, 94 Am. St. Rep. 848, 70 Pac. 491, holding agent having charge of building liable for injuries to tenants caused by his failure to make repairs.

Cited in *Chicago Consol. Bottling Co. v. Mitton*, 41 Ill. App. 156, holding one in control of premises responsible for known defects or for those of which he might have known by exercising reasonable care; *Gibson v. Leonard*, 37 Ill. App. 348, to point that agent having control of premises responsible for their condition when leased; *Stiewel v. Borman*, 63 Ark. 37, 37 S. W. 404, holding agent operating mine not liable to one to whom he owes no duty, injured by explosion of gas; *Cameron v. Kenyon-Connell Commercial Co.* 22 Mont. 320, 44 L. R. A. 511, 74 Am. St. Rep. 602, 56 Pac. 508, holding director who knows nothing of nuisance maintained by corporation and could not have known by ordinary diligence, not responsible; *Donk Bros. Coal & Coke Co. v. Leavitt*, 109 Ill. App. 390, holding landlord liable for drowning of child under three years of age, by falling into unguarded cistern.

Cited in note (28 L. R. A. 438) as to liability of agent to third person for negligence.

Distinguished in *Kuhnert v. Angell*, 10 N. D. 61, 88 Am. St. Rep. 675, 84 N. W. 579, holding agent for owner of unoccupied land not liable to a trespasser for its unsafe condition where his authority was limited to leasing and collecting rent.

7 L. R. A. 130, *READ v. NICHOLS*, 118 N. Y. 224, 28 N. Y. S. R. 867, 23 N. E. 468.

Proximate cause.

Cited in *Hoffman v. King*, 160 N. Y. 625, 46 L. R. A. 675, 73 Am. St. Rep. 715, 55 N. E. 401, holding negligence in starting fire not proximate cause of destruction of property to which it spreads across intervening lands; *Beetz v. Brooklyn*, 10 App. Div. 384, 41 N. Y. Supp. 1009, holding placing lime in street for building purposes not proximate cause of injury to boy who put some lime in

contact with water; *Chicago, St. P. M. & O. R. Co. v. Elliott*, 20 L. R. A. 587, 5 C. C. A. 352, 12 U. S. App. 381, 55 Fed. 954, holding conductor's statement to stockman that caboose would not be changed and he would not have time to look at sheep not proximate cause of injury where stockman while walking on top of cars fell when the caboose was changed; *Cole v. German Sav. & L. Soc.* 63 L. R. A. 424, 59 C. C. A. 602, 124 Fed. 122, holding opening of elevator well door in hallway by stranger proximate cause of injury to one who stepped into shaft.

Cited in footnotes to *Kelly v. Bennett*, 7 L. R. A. 120, which holds sharp point on iron railing around area not proximate cause of injury to person slipping on walk; *McClain v. Garden Grove*, 12 L. R. A. 482, which holds narrowness of bridge and insufficiency of railings not proximate cause of injury from horse falling from disease or choking; *Schumaker v. St. Paul & D. R. Co.* 12 L. R. A. 257, which holds master's neglect to furnish transportation proximate cause of injury in walking to find shelter; *Vallo v. United States Exp. Co.* 14 L. R. A. 743, which holds throwing trunk from delivery wagon in highway proximate cause of traveler falling over another trunk; *Southwestern Teleg. & Teleph. Co. v. Robinson*, 16 L. R. A. 545, which holds telephone company liable for injury by electricity generated by thunder storm in low-hanging telephone wire; *Herr v. Lebanon*, 16 L. R. A. 106, which holds want of barrier not proximate cause of omnibus going over wall, while horse was attempting to rise; *McKenna v. Baessler*, 17 L. R. A. 310, which holds original fire cause of destruction of property by back fire; *Chicago, St. P. M. & O. R. Co. v. Elliott*, 20 L. R. A. 582, as to proximate cause of injury to shipper while stepping from stock car to caboose; *Western R. Co. v. Mutch*, 21 L. R. A. 316, which holds excessive speed not proximate cause of death of boy attempting to catch on train; *Hoffman v. King*, 46 L. R. A. 672, which denies liability of one negligently starting fire for damage to lands of remote proprietors to which fire spreads; *Kansas City, Ft. S. & M. R. Co. v. Blaker*, 64 L. R. A. 81, which holds railroad company liable for loss due to spread of flames from buildings on its right of way negligently set on fire by it.

Cited in notes (13 L. R. A. 733) on proximate and remote cause of damage; (12 L. R. A. 283) on proximate cause of injury fixing the liability; (13 L. R. A. 193) on responsibility for proximate or direct consequences of negligence; (12 L. R. A. 280) on contributory negligence must be proximate cause of injury; (8 L. R. A. 85) as to effect of intervening cause upon liability for negligence; (17 L. R. A. 38) on effect of concurring negligence of third person on liability of one sued for negligently causing injury.

Distinguished in *Martin v. New York, O. & W. R. Co.* 62 Hun, 185, 16 N. Y. Supp. 499, holding sparks from engine which set fire along track proximate cause of burning of woodland a mile distant to which wind and intervening conditions carried fire.

Question for jury.

Cited in *Stone v. Boston & A. R. Co.* 171 Mass. 543, 41 L. R. A. 797, 51 N. E. 1, holding case need not be submitted to jury if damages are too remote.

Sufficiency of exception.

Cited in *Huerzeler v. Central Cross Town R. Co.* 139 N. Y. 493, 34 N. E. 1101, affirming 1 Misc. 138, 48 N. Y. S. R. 651, 20 N. Y. Supp. 676, holding general exception to the granting and refusal of requests to charge insufficient; *Purcell v. Lauer*, 14 App. Div. 53, 43 N. Y. Supp. 988 (dissenting opinion), majority holding question for jury where death resulted over a year after fall on side-

walk; *Southern P. R. Co. v. Yeargin*, 48 C. C. A. 504, 109 Fed. 443 (dissenting opinion), to conceded proposition that if there is evidence that defendant's negligence was proximate cause of injury question is for jury, otherwise for court; *Barker v. Cunard S. S. Co.* 91 Hun, 500, 36 N. Y. Supp. 256, holding general exception to refusal to charge requests insufficient unless each should have been granted as preferred; *McKinley v. Metropolitan Street R. Co.* 77 App. Div. 259, 79 N. Y. Supp. 213, holding "exception in due form to each request refused or modified" allowed by court after retirement of jury, sufficient; *Benedict v. Deshel*, 77 App. Div. 279, 79 N. Y. Supp. 205, holding exception to each refusal to charge to several requests, too indefinite; *Connor v. Metropolitan Street R. Co.* 77 App. Div. 388, 79 N. Y. Supp. 294, holding exception to court's charging requests "first, second," etc., sufficient.

Admissibility of evidence.

Cited in *Ives v. Ellis*, 169 N. Y. 106, 62 N. E. 138 (dissenting opinion), majority holding erroneous admission of letter incompetent as hearsay, not cured by general verdict.

7 L. R. A. 134, *LAWTON v. STEELE*, 119 N. Y. 226, 16 Am. St. Rep. 813, 23 N. E. 878.

Affirmed in 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499.

Police power.

Cited in *State v. Dow*, 70 N. H. 287, 53 L. R. A. 315, 47 Atl. 734, holding statute forbidding catching of trout in local waters with intent to sell same, constitutional; *State v. Lewis*, 134 Ind. 256, 20 L. R. A. 55, 33 N. E. 1024, holding statute declaring possession of gill nets or seine, misdemeanor, constitutional; *People v. Rosenberg*, 67 Hun, 60, 22 N. Y. Supp. 56, holding statute declaring fat rendering nuisance, and prohibiting same within municipal limits, valid; *Warner v. Stebbins*, 111 Iowa, 88, 82 N. W. 457, holding township health board may restrain establishment of municipal pest house within limits without proof of nuisance; *People v. Hawkins*, 157 N. Y. 8, 42 L. R. A. 494, 68 Am. St. Rep. 736, 51 N. E. 257, holding statute forbidding sale of convict-labor products except where labeled, void as interference with interstate commerce; *People v. Buffalo Fish Co.* 164 N. Y. 112, 52 L. R. A. 810, 79 Am. St. Rep. 622, 58 N. E. 34 (dissenting opinion), majority holding statute prohibiting possession of certain fish during close season applies only to those caught in local waters; *People v. Pierson*, 176 N. Y. 211, 63 L. R. A. 192, 98 Am. St. Rep. 666, 68 N. E. 243, holding constitutional, statute making it a misdemeanor to refuse to provide medical attendance for a minor.

Cited in footnotes to *Com. v. Manchester*, 9 L. R. A. 236, which holds state may regulate fishing in bay within its borders; *People v. Bridges*, 16 L. R. A. 684, which upholds prohibition of fishing with seine in lake on private land during part of year; *Peters v. State*, 33 L. R. A. 114, which holds valid as to private lake act regulating mode of taking fish; *Com. v. Brown*, 28 L. R. A. 110, which sustains weekly tax on sales of oysters; *State v. Harrub*, 15 L. R. A. 761, which holds statute prohibiting shipment of oysters in shells from state not interference with commerce; *State v. Mrozinski*, 27 L. R. A. 76, which holds absolute prohibition against taking fish otherwise than by hook and line with specified exceptions, valid; *State v. McGuire*, 21 L. R. A. 478, which holds having in possession during close season fish previously caught not an offense.

Cited in notes (39 L. R. A. 586, 588) on government control over right of fishery; (9 L. R. A. 807) on fishery rights; (8 L. R. A. 449) on property in *feræ naturæ*; (36 L. R. A. 593, 598) on power of municipal corporation to define, prevent, and abate nuisances.

Due process of law.

Cited in *Bittenhaus v. Johnston*, 92 Wis. 598, 32 L. R. A. 383, 66 N. W. 805, and *Osborn v. Charlevoix Circuit Judge*, 114 Mich. 665, 72 N. W. 982, holding statute authorizing summary destruction by warden of fish nets used in violation of law, constitutional; *Colon v. Lisk*, 13 App. Div. 199, 43 N. Y. Supp. 364, holding statute authorizing summary seizure of boat used in unlawfully disturbing oysters, constitutional; *Egan v. Health Department*, 20 Misc. 40, 79 N. Y. S. R. 327, 45 N. Y. Supp. 325, upholding statute authorizing health board to order vacation of unsanitary premises where such order not final; *Cartwright v. Cohoes*, 39 App. Div. 72, 56 N. Y. Supp. 731, refusing to enjoin summary destruction of privy by board of health under ordinance declaring same nuisance; *Hempstead v. Ball Electric Light Co.* 9 App. Div. 51, 41 N. Y. Supp. 124, holding village trustees authorized by statute to maintain action to compel removal of electric-wire poles constituting nuisance; *Re Kenny*, 23 Misc. 14, 49 N. Y. Supp. 1037, holding provision for penalty dependent upon decision of prison official as to identity of prisoner, without hearing, unconstitutional; *Garland Novelty Co. v. State*, 71 Ark. 142, 71 S. W. 257, upholding constitutionality of statute authorizing summary destruction of gambling devices; *People v. Booth & Co.* 42 Misc. 326, 86 N. Y. Supp. 272, holding unconstitutional, statute prohibiting possession of imported fish or game during close season; *Rockefeller v. Lamora*, 85 App. Div. 283, 83 N. Y. Supp. 289, denying right of public to fish in waters running through private park, although stocked by state.

Cited in footnotes to *Eichenlaub v. St. Joseph*, 18 L. R. A. 590, which holds no judicial proceeding necessary to authorize tearing down of wooden building within fire limits; *State v. Robbins*, 8 L. R. A. 438, which refuses to direct summary destruction of gaming devices seized.

Cited in notes (19 L. R. A. 197) on right to compensation for property destroyed in abating public nuisance; (36 L. R. A. 606) on extent of municipal right to take or destroy property in abatement of nuisance; (38 L. R. A. 167) on municipal power over buildings and other structures as nuisances; (9 L. R. A. 716) on abatement of nuisance by action.

Distinguished in *Colon v. Lisk*, 153 N. Y. 195, 60 Am. St. Rep. 609, 47 N. E. 302, Affirming 13 App. Div. 202, 43 N. Y. Supp. 364, denying power of legislature to arbitrarily provide for forfeiture to state of any boat used in interfering with oysters or other shell fish of another; *Josh v. Marshall*, 33 App. Div. 79, 53 N. Y. Supp. 419, holding seizure of 1½-inch bar nets used more than 1 mile from shore not justified under fisheries statute making use within 1 mile nuisance; *Fox v. Mohawk & H. River Humane Soc.* 25 App. Div. 29, 48 N. Y. Supp. 625, Reversing 20 Misc. 467, 46 N. Y. Supp. 232, holding statute subjecting unlicensed dog to summary destruction unconstitutional where not declared nuisance; *New York Sanitary Utilization Co. v. Health Department*, 61 App. Div. 113, 70 N. Y. Supp. 510, holding statute declaring boiling garbage within city limits unlawful, void where not actually nuisance; *People ex rel. Copcutt v. Board of Health*, 140 N. Y. 10, 23 L. R. A. 484, 37 Am. St. Rep. 522, 35 N. E. 320, holding board of health liable for destruction of dam unless same in fact nuisance; *Houston v. State*, 98

Wis. 486, 42 L. R. A. 48, 74 N. W. 111, holding destruction of healthy animals under statute against diseased does not found statutory "claim against state;" Chicago & E. R. Co. v. Keith, 87 Ohio St. 293, 60 L. R. A. 530, 65 N. E. 1020, holding unconstitutional statute requiring railroads to construct ditches by side of roadbed.

Construction of statutes.

Cited in *People ex rel. Holmes v. Lane*, 53 App. Div. 536, 65 N. Y. Supp. 1004, holding statute creating office of police justice not void *in toto* by reason of unconstitutional provision for exclusive jurisdiction; *Rathbone v. Wirth*, 150 N. Y. 479, 34 L. R. A. 416, 45 N. E. 15, holding unconstitutional provision disqualifying party for office unless member of particular political party renders statute providing for bipartisan police board, void; *Newman v. People*, 23 Colo. 308, 47 Pac. 278, holding statute authorizing seizure of gambling devices without notice constitutional, irrespective of validity of section authorizing destruction thereof; *Re Burger*, 21 Misc. 372, 47 N. Y. Supp. 292, holding provision relating to present incumbent fails where part of unconstitutional act extending term of officer; *Hennessey v. Volkening*, 30 Abb. N. C. 111, 22 N. Y. Supp. 534, construing statute providing for collection of water rents from all buildings on street supplied with distributing pipes, to authorize collection only from premises using water.

Cited in notes (10 L. R. A. 196) on partial invalidity of statutes; (11 L. R. A. 583) on construction of redelegated powers.

Lake Ontario.

Cited in *People v. Featherly*, 35 N. Y. S. R. 159, 12 N. Y. Supp. 389, holding Great Sodus bay part of Lake Ontario within exemption of statute regulating duck shooting.

7 L. R. A. 139, *RAPPLEYE v. RACINE SEEDER CO.* 79 Iowa, 220, 44 N. W. 368.

Right to assign contract.

Cited in *Worden v. Chicago & N. W. R. Co.* 82 Iowa, 735, 48 N. W. 71, holding contract to furnish coal not in law assignable; *Jackson v. Sessions*, 109 Mich. 222, 67 N. W. 315, holding assignment by subvendees of rights in contract for purchase of timber void as between assignee and original vendor; *D. C. Hardy Implement Co. v. South Bend Iron Works*, 129 Mo. 230, 31 S. W. 599, holding executory contract with partnership may be repudiated by person contracting with firm, upon one partner withdrawing therefrom.

7 L. R. A. 143, *PATTERSON v. LECKIE*, 83 Ga. 703, 10 S. E. 355.

Power of appointment.

Cited in *Stearns v. Fraleigh*, 39 Fla. 616, 39 L. R. A. 709, 23 So. 18, holding power of beneficiary in deed to appoint trustee possesses none of the elements of an estate.

Cited in footnote to *Cotting v. De Sartiges*, 16 L. R. A. 367, which holds intent to execute power of appointment not shown by will not referring to power.

7 L. R. A. 145, *THOMAS v. WABASH, ST. L. & P. R. CO.* 40 Fed. 126.

Statutes partly good and partly bad.

Cited in note (10 L. R. A. 196) on statutes valid in part and invalid in part.

Special and exclusive privileges.

Cited in note (14 L. R. A. 582) on constitutional equality of privileges, immunities, and protection.

7 L. R. A. 149, *WOOD v. ST. PAUL CITY R. CO.* 42 Minn. 411, 44 N. W. 308.

Authenticated affidavits from another state.

Cited in *Duggan v. Washougal Land & Logging Co.* 10 Wash. 85, 38 Pac. 856, holding verification of lien before notary of another state certifying to jurat sufficient; *Hickey v. Collom*, 47 Minn. 568, 50 N. W. 918, holding authentication of affidavit by clerk of court of another state incomplete; *Re Pancoast*, 129 Fed. 645, holding signature and seal sufficient proof, in first instance, of official character of notary out of state.

Cited in note (38 L. R. A. 411) on mechanic's lien under contract made or performed in another state.

7 L. R. A. 151, *MOORE v. SANFORD*, 151 Mass. 285, 24 N. E. 323.

Pendency of proceedings as affecting rights.

Cited in *Newburyport Water Co. v. Newburyport*, 85 Fed. 726, holding water company having petitioned state court for appraisal of its property for public use can apply to Federal court to test validity of statute; *Norcross v. Cambridge*, 166 Mass. 510, 33 L. R. A. 843, 44 N. E. 615, holding pendency of petition for damages for taking land does not prevent action to determine validity of act for taking; *Boston & M. R. Co. v. Graham*, 179 Mass. 87, 60 N. E. 405, holding lessee of railroad petitioning for determination of value of stock of dissenting stockholders of lessor not bound to admit right to dissent.

Legislative determination of necessity to take land for public use.

Cited in *Butte, A. & P. R. Co. v. Montana Union R. Co.* 16 Mont. 529, 31 L. R. A. 306, 50 Am. St. Rep. 508, 41 Pac. 232, holding necessity to take property for railroad follows from determination that it is for public use; *Re Kingman*, 153 Mass. 572, 12 L. R. A. 421, 27 N. E. 778, holding determination by legislature that sewage system necessary for certain territory conclusive; *Connecticut River Lumber Co. v. Olcott Falls Co.* 65 N. H. 388, 13 L. R. A. 836, 21 Atl. 1090, holding abandonment by state of public right to float logs down a stream when it grants a manufacturing company the right to use the water power thereon, not inferable from fact that the manufacturing business is the more important; *Ulmer v. Lime Rock R. Co.* 98 Me. 591, 66 L. R. A. 393, 57 Atl. 1001, upholding right of railroad company to condemn land for purpose of building branch track to quarry.

Cited in note (8 L. R. A. 58) on right of eminent domain.

7 L. R. A. 154, *RAMSDELL v. NEW YORK & N. E. R. CO.* 151 Mass. 245, 23 N. E. 1103.

Construction of Massachusetts employer's liability act.

Cited in *Clark v. New York, P. & B. R. Co.* 160 Mass. 41, 35 N. E. 104, holding administrator no right of action for instant death of intestate, without widow or dependent next of kin; *Gustafsen v. Washburn & M. Mfg. Co.* 153 Mass. 471, 27 N. E. 179, holding widow only person who could maintain action for negligent instantaneous killing of her husband; *Dacey v. Old Colony R. Co.* 153 Mass.

118, 26 N. E. 437, holding action not maintainable under statute of 1887, for death due to negligence of coemployee; *Daly v. New Jersey Steel & I. Co.* 155 Mass. 5, 28 N. E. 1056, holding action for instantaneous killing of unmarried man should be brought in name of dependent next of kin only; *Vetaloro v. Perkins*, 101 Fed. 394, holding nonresident alien widow not debarred from right of action under liability act of 1887.

Action for death.

Cited in note (17 L. R. A. 77) on measure of recovery for death caused by negligence.

7 L. R. A. 156, *BATES v. WESTBOROUGH*, 151 Mass. 174, 23 N. E. 1070.

Liability of private person for discharge of surface water upon another's land.

Cited in *Fitzpatrick v. Welch*, 174 Mass. 486, 48 L. R. A. 279, 55 N. E. 178, upholding judgment for damages for discharge of water from defendant's gutter upon plaintiff's land; *Smith v. Faxon*, 156 Mass. 596, 31 N. E. 697, holding private landowner cannot collect surface water into definite channel and discharge it on neighbor's land.

Stopping up drains of landowners.

Cited in *O'Brien v. Worcester*, 172 Mass. 353, 52 N. E. 385, upholding action for damages for backing up of water upon plaintiff's premises due to walling up of old sewer.

Surface waters.

Cited in *Champion v. Crandon*, 84 Wis. 410, 19 L. R. A. 857, 54 N. W. 775, holding action not maintainable for damages due to diversion of surface water by change of street grade; *Collins v. Waltham*, 151 Mass. 198, 24 N. E. 327, holding city not liable for overflow of surface waters from gutters upon adjacent land; *Byrne v. Farmington*, 64 Conn. 374, 30 Atl. 138, holding town not obliged to keep open surface-water sluiceway across roadway.

Statutory remedies.

Distinguished in *Woodbury v. Beverly*, 153 Mass. 247, 26 N. E. 851, holding municipality liable for affecting flow of surface water from land by change of street grade; *Holleran v. Boston*, 176 Mass. 77, 57 N. E. 220, holding remedy for changing flow of surface water by changes for park purposes, to be statutory.

Liability of city for nuisance.

Cited in *Nevins v. Fitchburg*, 174 Mass. 550, 47 L. R. A. 314, 55 N. E. 321, holding city liable for nuisance caused by ending sewer in private tailrace under culvert in road.

Cited in footnotes to *Miles v. Worcester*, 13 L. R. A. 841, which holds city liable for encroachment by retaining wall on filling school yard; *Long v. Elberton*, 46 L. R. A. 428, which denies liability of city to neighboring property owners for erection of prison within city limits unless so negligently maintained as to constitute nuisance; *Hughes v. Auburn*, 46 L. R. A. 636, which denies city's liability for disease due to neglect of proper sanitary precautions as to sewer system; *Duncan v. Lynchburg*, 48 L. R. A. 331, which denies city's liability for nuisance by pollution of water in unauthorized operation of rock quarry outside city limits.

Liability of city as to sewers.

Cited in *Roberts v. Dover*, 72 N. H. 154, 55 Atl. 895, holding city liable for injury to private property from overflow of sewer.

Cited in footnote to *Nevins v. Fitchburg*, 47 L. R. A. 312, which denies city's right to discharge sewer into tailrace.

Cited in note (61 L. R. A. 684, 698) on duty and liability of municipality with respect to drainage.

Defects in plan of construction.

Cited in *Buckley v. New Bedford*, 155 Mass. 66, 29 N. E. 201, holding land-owner draining into sewer by permit could not recover against city for sewer water backing into cellar.

Work of construction and repair.

Cited in *Melrose v. Hiland*, 163 Mass. 309, 39 N. E. 1031, holding power and duty of town to repair common drain through private land same as if in highway; *Norton v. New Bedford*, 166 Mass. 51, 43 N. E. 1034, holding city responsible for personal injury due to negligence of its officials in construction of sewer; *Allen v. Boston*, 159 Mass. 336, 38 Am. St. Rep. 423, 34 N. E. 519; *Hamlin v. Biddeford*, 95 Me. 315, 49 Atl. 1100, holding city liable for damages due to failure to keep sewer in repair; *Bryant v. Westbrook*, 86 Me. 455, 29 Atl. 1109, holding municipal officers assuming construction and repair of highways act as public officers; *Melrose v. Hiland*, 163 Mass. 309, 39 N. E. 1031, holding that care of drain is upon municipality, and that officials act as its agents.

Distinguished in *Hewett v. Canton*, 182 Mass. 224, 65 N. E. 42, holding town not liable for damages from surface water caused by construction of street railway, under permit from selectmen.

Liability for damages resulting from performance of public duty.

Cited in *Hughes v. Monroe County*, 79 Hun. 126, 20 N. Y. Supp. 495, holding county not liable for negligent injury to servant employed in insane asylum; *Workman v. New York*, 63 Fed. 302, holding city fire boat by duty to extinguish fires, not absolved from use of ordinary care to prevent collision; *Howard v. Worcester*, 153 Mass. 428, 12 L. R. A. 161, 25 Am. St. Rep. 651, 27 N. E. 11, holding city in building schoolhouse not liable for negligent injury to traveler upon adjoining highway; *Lenzen v. New Braunfels*, 13 Tex. Civ. App. 369, 35 S. W. 341, holding city liable for negligence in maintaining waterworks preventing fire from being extinguished.

Liability of municipality for negligence.

Cited in footnote to *Snider v. St. Paul*, 18 L. R. A. 151, which holds city not liable for negligence of agents in providing and maintaining city hall.

Cited in notes (9 L. R. A. 210) on liability of municipality for neglect of its officers or agents; (19 L. R. A. 454) on distinction between public and private functions of municipal corporations as to liability for negligence.

7 L. R. A. 160, *JAY COUNTY v. TAYLOR*, 123 Ind. 148, 23 N. E. 752.

Contract of employment by public officers.

Cited in *Henderson v. New York*, 65 App. Div. 183, 72 N. Y. Supp. 609, holding city not liable to attorney employed by town three days before annexation to city to test validity of annexation act; *Liggett v. Kiowa County*, 6 Colo. App.

273, 40 Pac. 475, holding contract of county board employing purchasing agent for year valid though some of board went out of office before time of contract ended; *State ex rel. Scott v. Hart*, 144 Ind. 111, 33 L. R. A. 121, 43 N. E. 7, holding county commissioners cannot rent rooms in courthouse to private use for term of years; *Taylor v. Bosworth*, 1 Ind. App. 57, 27 N. E. 115, holding demurrer to answer properly sustained where contract set out had been declared void as against public policy.

Cited in note (16 L. R. A. 257) on power of public officers to make contracts binding on their successors or for a term of years.

Distinguished in *Pulaski County v. Shields*, 130 Ind. 11, 29 N. E. 385, holding contract of employment of county superintendent for term of years, valid; *McConnell v. Arkansas Brick & Mfg. Co.* 70 Ark. 597, 69 S. W. 559, holding superintendent of penitentiary may contract for hire of convicts for ten years.

7 L. R. A. 162, *LOUISVILLE & N. R. CO. v. GILBERT*, 88 Tenn. 430, 12 S. W. 1018.

Limitation of carrier's liability.

Cited in *Missouri, K. & T. R. Co. v. Carter*, 9 Tex. Civ. App. 698, 29 S. W. 565, holding shipper under duress in signing contract releasing carrier from liability; *Bird v. Southern R. Co.* 99 Tenn. 727, 63 Am. St. Rep. 856, 42 S. W. 451, holding carrier cannot exempt itself from liability for its own negligence; *Bennitt v. Missouri P. R. Co.* 46 Mo. App. 666, holding bill of lading by which carrier attempted to release its liability for shipment of cotton invalid; *Pacific Exp. Co. v. Foley*, 46 Kan. 476, 12 L. R. A. 807, 26 Am. St. Rep. 107, 26 Pac. 665 (dissenting opinion) majority holding receipt of carrier limiting liability to certain amount proper to secure proportion between amount of responsibility and freight it receives; *Schaller v. Chicago v. N. R. Co.* 97 Wis. 36, 71 N. W. 1042, holding want of consideration for special contract of exemption must be shown by one claiming its nonexistence; *Missouri, K. & T. R. Co. v. Carter*, 9 Tex. Civ. App. 688, 29 S. W. 565, holding special contract for shipment of cattle not supported by consideration; *Lake Erie & W. R. Co. v. Holland* (Ind.) 63 L. R. A. 950, 69 N. E. 138, denying right of carrier to absolve itself from duty to furnish safe cars, by contract without consideration; *Saunders v. Southern R. Co.* 62 C. C. A. 527, 128 Fed. 19, holding that carrier may reasonably limit common-law liability for loss of freight or baggage not resulting from its own negligence.

Cited in notes (10 L. R. A. 417) on exemption from liability clause in carrier's contracts; (10 L. R. A. 419) on limitation of carrier's liability by contract; (13 L. R. A. 518) on carrier limiting responsibility by special agreement; (18 L. R. A. 528) on right of common carrier to limit common-law liability by contract in absence of negligence.

Alternative of limited and unlimited liability.

Cited in *Louisville & N. R. Co. v. Turner*, 100 Tenn. 222, 43 L. R. A. 142, 47 S. W. 223, holding passenger entitled to alternative of limited and unlimited tickets; *Illinois C. R. Co. v. Craig*, 102 Tenn. 302, 52 S. W. 164, holding carrier can only limit its liability for transportation of freight by giving shipper reasonable alternative between modes of shipment; *Little Rock & F. S. R. Co. v. Cravens*, 57 Ark. 126, 18 L. R. A. 533, 38 Am. St. Rep. 230, 20 S. W. 803, holding shipper entitled to choice between limited and unlimited liability of

carrier; *Illinois C. R. Co. v. Lancashire Ins. Co.* 79 Miss. 121, 30 So. 43, holding shipper not bound by contract limiting carrier's liability when no option or choice was given him; *Louisville & N. R. Co. v. Sowell*, 90 Tenn. 24, 15 S. W. 837, holding readiness to make contract of shipment other than that objected to might be shown by carrier.

7 L. R. A. 170, *O'LEARY v. FIRE & WATER COMRS.* 79 Mich. 281, 19 Am. St. Rep. 169, 44 N. W. 608.

Liability of municipality for servants' negligence.

Approved in *Freel v. Crawfordsville*, 142 Ind. 29, 37 L. R. A. 304, 41 N. E. 312, holding school corporation not liable for agent's negligence where no provision for payment of damages for personal injuries made; *Nicholson v. Detroit*, 129 Mich. 250, 56 L. R. A. 603, 88 N. W. 695, holding city not liable for infection of employee upon hospital building, in absence of statute.

7 L. R. A. 172, *MYHAN v. LOUISIANA ELECTRIC LIGHT & P. CO.* 41 La. Ann. 964, 17 Am. St. Rep. 436, 6 So. 799.

Master's liability for latent and patent defects.

Cited in *Townsend v. Langles*, 41 Fed. 920, holding master not liable for injury to employee brushing off cogwheels the danger of which is apparent; *Clements v. Louisiana Electric Light Co.* 44 La. Ann. 695, 16 L. R. A. 44, 32 Am. St. Rep. 348, 11 So. 51, holding contributory negligence not shown from latent defect of improperly insulated wires; *Bomar v. Louisiana North & South R. Co.* 42 La. Ann. 989, 8 So. 478, holding railroad liable for injury to conductor coupling cars with defective drawhead; *Meyers v. Illinois C. R. Co.* 49 La. App. 27, 21 So. 120, holding mere tagging of cars as defective insufficient to relieve master of liability.

Cited in footnotes to *Sweet v. Ohio Coal Co.* 9 L. R. A. 861, which holds master may conduct business in own way, though other method less hazardous; *Tennessee Coal, Iron & R. Co. v. Kyle*, 12 L. R. A. 103, which holds running freight train without cow-catcher negligence; *St. Louis, A. & T. R. Co. v. Triplett*, 11 L. R. A. 773, which holds master's duty to protect repair track not fulfilled by adopting rule sufficient if faithfully observed by employees.

Cited in notes (8 L. R. A. 819) on vice principals and agents; (32 L. R. A. 352) on liability of electric company to employee for injury caused by electric shock; (12 L. R. A. 344) on duty of master to secure safety of servant.

Master's knowledge of danger.

Cited in *Dobson v. New Orleans & W. R. Co.* 52 La. Ann. 1133, 27 S. W. 670, holding railroad liable for injury due to collision of train with cow on track contributed to by conductor's abandonment of train.

Cited in note (41 L. R. A. 46) on knowledge as element of employer's liability to injured servant.

Notification of danger of service.

Cited in *Gaulden v. Kansas City S. R. Co.* 106 La. 411, 30 So. 889, holding master liable for not informing servant of danger of service as well as defect of appliance; *Erslew v. New Orleans & N. E. R. Co.* 49 La. Ann. 102, 21 So. 153, holding railroad liable for death of brakeman on top of car struck by guy wire negligently left by company; *Myers v. Illinois R. Co.* 49 La. Ann. 27, 21 So. 120,

holding railroad liable for injury to brakeman coupling cars known by it to be defective, without informing him; *Stucke v. New Orleans R. Co.* 50 La. Ann. 198, 23 So. 342, holding it master's duty to inform servant of danger of work in pit over which electric cars ran; *James v. Rapides Lumber Co.* 50 La. Ann. 728, 44 L. R. A. 51, 23 So. 469, holding master of sawmill liable for injury to employee suddenly ordered into dangerous position without warning of danger; *Daly v. Kiel*, 106 La. 174, 30 So. 254, holding warning to keep one eye on engineer and two on bank of gravel pit not sufficient intimation of danger to new hand; *McCarthy v. Whitney Iron Works Co.* 48 La. Ann. 981, 20 So. 171, holding master not liable for injury resulting from iron falling on employee while leveling bottom of pit; *Thompson v. New Orleans & C. R. Co.* 108 La. 56, 32 So. 177, holding railroad liable for injury resulting from defectively insulated wire of which its officers had not warned all employees.

Cited in note (8 L. R. A. 636) on knowledge by servant of defective and dangerous machinery.

Contributory negligence.

Cited in *Potts v. Shreveport Belt R. Co.* 110 La. 6, 98 Am. St. Rep. 452, 34 So. 103, holding lineman not unnecessarily exposing himself not guilty of contributory negligence in stringing dangerous wires.

Measure of damages.

Cited in *Murdock v. New York & B. Despatch Exp. Co.* 167 Mass. 550, 46 N. E. 57, holding testimony of average monthly wages of employee properly admitted.

Cited in note (17 L. R. A. 78) on measure of damages for death caused by negligence.

Survival of action.

Cited in *American Sugar Ref. Co. v. Johnson*, 9 C. C. A. 120, 13 U. S. App. 681, 60 Fed. 513, holding action for damages for death due to acts of omission survives under statute.

7 L. R. A. 176, *PORTER v. POWELL*, 79 Iowa, 151, 18 Am. St. Rep. 353, 44 N. W. 295.

Parent's liability for infant's support.

Cited in *Manning v. Wells*, 8 Misc. 648, 29 N. Y. Supp. 1044, holding father liable for necessities furnished to infant driven from home and unable to provide same; *De Wane v. Hansow*, 56 Ill. App. 577, holding parent liable for medical care of child living apart with his consent, which parent refuses to furnish; *Hardy v. Eagle*, 25 Misc. 473, 54 N. Y. Supp. 1045, holding mere weekly payments of \$5 to child living apart do not exempt from liability for his necessities; *Hopkinson v. Knapp & S. Co.* 92 Iowa, 333, 60 N. W. 653, holding parent damaged by death of infant, where latter temporarily controlling income and not emancipated; *Kubic v. Zemke*, 105 Iowa, 272, 74 N. W. 748, holding verdict cannot be directed in action for minor's necessities, where evidence conflicting as to emancipation; *Cushman v. Hassler*, 82 Iowa, 297, 47 N. W. 1036, holding father not liable for support of child leaving him without cause or consent to live with divorced mother, where father denied liability thereafter; *Duzan v. Myers*, 30 Ind. App. 233, 96 Am. St. Rep. 341, 65 N. E. 1046, holding children of former marriage entitled to participate in fund received on account of death of parent.

Cited in footnote to *Fulton v. Fulton*, 29 L. R. A. 678, which denies divorced wife's right to recover from husband for necessities furnished children in her custody.

Cited in note (57 L. R. A. 729) on parent's duty to support child as affected by child's interest in trust estate or other property.

Distinguished in *Cooper v. McNamara*, 92 Iowa, 244, 60 N. W. 522, holding parent liable for infant's board and lodging notwithstanding ability to work, control of earnings, and parent's ability to keep at home, where consent to his absence not controverted.

7 L. R. A. 180, *RUSSELL v. TATE*, 52 Ark. 541, 20 Am. St. Rep. 193, 13 S. W. 130.

Remedy for illegal appropriation.

Cited in *Wiles v. McIntosh County*, 10 N. D. 599, 88 N. W. 710, holding county officer liable for over-payment made because of his over-estimate; *Frederick v. Douglas County*, 96 Wis. 425, 71 N. W. 798, refusing to require attorney rendering valuable services in good faith to county, to return payments therefor, although hiring illegal.

Cited in footnotes to *State ex rel. McCain v. Metschan*, 41 L. R. A. 692, which authorizes injunction against expending public money at place prohibited by Constitution; *Ada County v. Bullen Bridge Co.* 36 L. R. A. 367, which denies right to maintain equitable action to cancel county warrants; *State ex rel. Taylor v. Pennoyer*, 25 L. R. A. 862, which denies right to enjoin building of state institution at other place than Constitution requires.

Action by taxpayer.

Cited in *Kellogg v. School Dist. No. 10*, 13 Okla. 303, 74 Pac. 110, holding action maintainable by taxpayer to restrain school district from contracting unauthorized debt.

7 L. R. A. 183, *STATE v. FULKER*, 43 Kan. 237, 22 Pac. 1020.

State control of sale of imported intoxicants.

Cited as overruled in *State ex rel. Cochran v. Winters*, 44 Kan. 727, 10 L. R. A. 618, 25 Pac. 235, holding state cannot control sale of intoxicants in original package of importation.

Cited in footnotes to *State v. Gerhardt*, 33 L. R. A. 313, which upholds requirement for locking doors of room where liquor sold during prohibited hours; *Bennett v. Pulaski*, 47 L. R. A. 278, which sustains ordinance for closing saloons between ten and four at night and on Sundays, but not requirement for removing curtains on front doors and windows.

Cited in note (9 L. R. A. 782) concerning police power of state as to intoxicating liquors.

7 L. R. A. 189, *SCHONFIELD v. TURNER*, 75 Tex. 324, 12 S. W. 626.

Interest in benefit certificate.

Cited in *Cawthon v. Perry*, 76 Tex. 385, 13 S. W. 268, holding creditor purchasing insurance policy upon debtor's life, entitled to debt, premiums paid and interest, only; *Goldbaum v. Blum*, 79 Tex. 641, 15 S. W. 564, holding creditor collecting life insurance upon assigned policy, entitled only to amount of debt,

premiums paid and costs of collection; *Binkley v. Jarvis*, 102 Ill. App. 63, holding benefit certificate assignable to creditor to extent of debt; *Exchange Bank v. Loh*, 104 Ga. 453, 44 L. R. A. 376, 31 S. E. 459, holding creditor's insurable interest in debtor's life cannot exceed secured indebtedness; *Supreme Lodge, K. of H. v. Metcalf*, 15 Ind. App. 141, 43 N. E. 893, holding speculative purchaser of benefit certificate procured by fraud, entitled to recover money paid; *Hanna v. Hanna*, 10 Tex. Civ. App. 101, 30 S. W. 820, holding insured's mother collecting benefit certificate, trustee for wife and child, where latter of insurer's beneficiary class; *Mayher v. Manhattan L. Ins. Co.* 87 Tex. 172, 27 S. W. 124, holding insured's heirs entitled to proceeds of policy made payable to one without insurable interest; *Cheeves v. Anders*, 87 Tex. 291, 47 Am. St. Rep. 107, 28 S. W. 274, holding partner without insurable interest after partnership dissolved; *Knights & Ladies of Honor v. Burke*, 4 Tex. App. Civ. Cas. (Willson) 235, raising, without deciding, question as to equitable claim of beneficiary without insurable interest, in proceeds of policy for premiums he paid; *Cameron v. Barcus*, 31 Tex. Civ. App. 49, 71 S. W. 423, holding community debt creditor without insurable interest in life of the wife; *Supreme Lodge, K. & L. of H. v. Menkhause*n, 209 Ill. 283, 70 N. E. 567, holding insurance benefit recoverable by heirs where insured is murdered by beneficiary.

Cited in footnotes to *Mullen v. Reed*, 24 L. R. A. 664, which holds widow not an heir at law; *Schmidt v. Iowa K. of P. Ins. Asso.* 11 L. R. A. 205, which holds indorsement by third person on oral request of member sufficient change of beneficiary; *Clark v. Hirschl*, 9 L. R. A. 841, which holds beneficiary changed though letter announcing change to association not received till member dead; *Simcoke v. Grand Lodge, A. O. of U. W.* 15 L. R. A. 114, which holds granting of new beneficiary certificate precludes question as to sufficiency of attestation to signature to application for change.

Cited in notes (9 L. R. A. 661) as to assignment of life insurance policy; (25 L. R. A. 628, 630) as to right to take life insurance for benefit of stranger; (30 L. R. A. 596) as to who are heirs within meaning of life insurance policies; (50 L. R. A. 554) as to divorce as affecting wife's right to insurance upon her husband's life.

Distinguished in *Overhiser v. Overhiser*, 14 Colo. App. 9, 59 Pac. 75, holding heirs without interest in benefit certificate payable to wife or in event of her previous death, to insured's heirs, where wife divorced; *United States Mut. Acci. Asso. v. Hodgkin*, 4 App. D. C. 526, upholding recovery by beneficiary without insurable interest on nonwagering policy, where no other parties before court; *Grego v. Grego*, 78 Miss. 445, 28 N. W. 817, refusing to deprive wife of property in ordinary life policy paid for by husband who obtains divorce.

Disapproved in *Steinback v. Diepenbrock*, 158 N. Y. 26, 44 L. R. A. 418, 70 Am. St. Rep. 424, 52 N. E. 662, holding assignee without insurable interest, may recover upon full amount of assigned policy.

7 L. R. A. 191, *STANDARD OIL CO. v. LANE*, 75 Wis. 636, 44 N. W. 644.

Materials within protection of mechanic's lien laws.

Cited in *A. M. Holter Hardware Co. v. Ontario Min. Co.* 24 Mont. 201, 61 Pac. 3, holding oil, grease, and gasoline for fuel not lienable within mechanic's lien law.

7 L. R. A. 193, *Re* WASHINGTON STREET, 132 Pa. 257, 19 Atl. 219.

Object and basis of classification.

Cited in *Edmonds v. Herbrandson*, 2 N. D. 274, 14 L. R. A. 725, footnote p. 725, 50 N. W. 970, holding act arbitrarily classifying counties, for relocation of county seats, unconstitutional; *Perkins v. Philadelphia*, 156 Pa. 575, 33 W. N. C. 49, 27 Atl. 356 (dissenting opinion) majority holding act, which can apply to only one city, unconstitutional; *Re Toronto Street*, 26 Pa. Co. Ct. 97, relating to remedies open to Philadelphians to recover damages for opening of streets; *Scranton v. Whyte*, 148 Pa. 425, 30 W. N. C. 76, 23 Atl. 1043, holding laws limited to single class of cities not local, if they relate to the regulation of municipal affairs.

Distinguished in *Shaaber v. Reading*, 133 Pa. 653, 19 Atl. 419, upholding act relating to the opening of streets by cities of the third class.

— Constitutional classification.

Cited in *Safe Deposit & T. Co. v. Fricke*, 152 Pa. 240, 31 W. N. C. 328, 25 Atl. 530, holding classification unconstitutional unless relating to exercise of corporate powers; *Lehigh Valley Coal Co.'s Appeal*, 164 Pa. 50, 30 Atl. 210, holding general act permitting taxpayers to contract for making at their own expense the roads, constitutional; *Bennett v. Norton*, 171 Pa. 238, 32 Atl. 1112, Affirming 7 Kulp, 460, holding act relating to purchase of land for courthouses unconstitutional although not originally applicable to coextensive counties and cities; *Re Reading's Constables*, 8 Pa. Co. Ct. 102, holding act providing for election of constables in cities of the second and third classes constitutional; *Shenk v. McKennan*, 11 Pa. Super. Ct. 88, upholding act relating to regulation of buildings in cities of the second class; *Campbell v. Indianapolis*, 155 Ind. 204, 57 N. E. 920, holding general act concerning schools in cities of specified population, constitutional although applying to but one city when it takes effect; *Beltz v. Pittsburg*, 34 Pittsb. L. J. N. S. 198, holding constitutional, act providing for licensing plumbers in cities of second class.

Cited in footnote to *Com. ex rel. Jones v. Blackley*, 52 L. R. A. 367, which sustains classification of townships by density of population.

— Unconstitutional classification.

Cited in *Re Wyoming Street*, 137 Pa. 503, 27 W. N. C. 138, 21 Atl. 74, holding act affecting cities of one class, but not relating to any subject under municipal contract, unconstitutional; *Pittsburgh's Petition*, 138 Pa. 435, 27 W. N. C. 462, 21 Atl. 757, holding act relating to municipal lien practice in cities of second class, unconstitutional; *Philadelphia v. Westminster Cemetery Co.* 162 Pa. 107, 34 W. N. C. 363, 29 Atl. 349, holding act forbidding establishment of cemeteries within 1 mile of limits of cities of the first class, unconstitutional; *Van Loon v. Engle*, 171 Pa. 165, 37 W. N. C. 245, 33 Atl. 77, holding act relating to taxes, excepting cities of the first, second, and fourth classes, unconstitutional; *Chalfant v. Edwards*, 173 Pa. 250, 33 Atl. 1048, holding an act relating to schools in cities of the second class, unconstitutional; *Com. ex rel. Fell v. Gilligan*, 8 Kulp, 567, holding act relating to government of schools in cities of the third class, unconstitutional; *Litzenberg v. Allentown School Dist.* 6 Northampton Co. Rep. 151, holding act relating to taxation for school and building purposes in cities of the third class, unconstitutional; *Baker v. McKee*, 20 Pa. Ct. 12, 6 Pa. Dist. R. 600, holding part of act requesting school vouchers to be signed by city comptrol-

ler, unconstitutional; *Re Knox Street*, 12 Pa. Super. Ct. 538, Affirming 21 Pa. Co. Ct. 587, 7 Pa. Dist. R. 502, 43 W. N. C. 11, holding act relating to jurors in any county co-extensive in boundary with city of the first class, unconstitutional; *State ex rel. Sanderson v. Mann*, 76 Wis. 480, 45 N. W. 526, holding estate tax general in form but applicable to but one county, unconstitutional; *Wagner v. Milwaukee County*, 112 Wis. 608, 88 N. W. 577, holding act indirectly made applicable to only one county by reference to value of taxable property, unconstitutional; *Louisville v. Kuntz*, 104 Ky. 590, 47 S. W. 592, holding six months' limitation as to actions against cities of the first class, unconstitutional.

Cited in footnote to *Sutton v. State*, 33 L. R. A. 589, which holds classification of counties according to previous census without respect to actual population void.

Power of courts to declare laws unconstitutional.

Cited in *State ex rel. Atty. Gen. v. Cunningham*, 81 Wis. 478, 15 L. R. A. 566, 51 N. W. 724, holding power to declare acts of legislature unconstitutional inherent in all courts of last resort in United States.

Legislative discretion.

Cited in *Newell v. Bradford City*, 18 Pa. Co. Ct. 468, holding without abuse of discretion courts will not interfere with municipal council's choice of school site.

Law partly good and partly bad.

Cited in *Rothermel v. Meyerle*, 136 Pa. 265, 9 L. R. A. 368, 3 Inters. Com. Rep. 318, 20 Atl. 583, holding if unconstitutional part of law is vital to the whole act, the whole must fall.

Corporate powers.

Cited in *Livingston v. Wolf*, 136 Pa. 533, 27 W. N. C. 10, 20 Am. St. Rep. 936, 20 Atl. 551, holding footways under municipal control; *Com. v. Hanley*, 15 Pa. Super. Ct. 274, holding burial of the dead proper matter of municipal regulation.

Repeal of special laws.

Cited in *Reading v. Shepp*, 2 Pa. Dist. R. 139, holding in general laws' intent to repeal local laws should plainly appear.

Special legislation.

Cited in footnotes to *Stockton v. Powell*, 15 L. R. A. 42, which holds courts without power to inquire as to notice of application to legislature for local legislation; *State v. Elizabeth*, 23 L. R. A. 525, which holds invalid special statute discriminating between municipalities already having and those not having race-course; *Hamilton County v. Rasche Bros.* 19 L. R. A. 584, which holds statute as to taxes not applying to all parts of state, unconstitutional; *Milwaukee County v. Isenring*, 53 L. R. A. 635, which holds act regulating sheriff's fees for particular county, local.

7 L. R. A. 200, *AMERICAN TELEPH. & TELEG. CO. v. SMITH*, 71 Md. 535, 18 Atl. 910.

Additional servitudes.

Cited in *Phillips v. Postal Teleg. Cable Co.* 130 N. C. 524, 89 Am. St. Rep. 868, 41 S. E. 1022, and *Hodges v. Western U. Teleg. Co.* 133 N. C. 234, 45 S. E. 572, holding telegraph company's line on railroad's right of way, additional servi-

tude; *Krueger v. Wisconsin Teleph. Co.* 106 Wis. 108, 50 L. R. A. 304, 81 N. W. 1041; and *Donovan v. Allert*, 11 N. D. 296, 58 L. R. A. 779, 95 Am. St. Rep. 720, 91 N. W. 441, holding telephone poles additional servitude upon street; *Jaynes v. Omaha Street R. Co.* 53 Neb. 649, 39 L. R. A. 757, 74 N. W. 67, holding poles and wires of electric railway additional servitude upon street; *Payne v. Kansas & A. Valley R. Co.* 46 Fed. 555, holding approach for wagon and foot-passenger bridge, additional servitude upon land taken for rail and telegraph lines.

Cited in footnotes to *Miller v. Green Bay, W. & St. P. R. Co.* 26 L. R. A. 443, which holds additional burden on street not made by allowing other companies to use tracks; *Ft. Worth & R. G. R. Co. v. Southwestern Teleg. & Teleph. Co.* 60 L. R. A. 145, which sustains right to condemn telegraph line over railroad right of way; *Mobile & O. R. Co. v. Postal Teleg. Cable Co.* 41 L. R. A. 403, which holds condemnation of telegraph line over railway right of way authorized by statute.

Cited in notes (8 L. R. A. 430) concerning construction of telegraph lines as additional servitude; (17 L. R. A. 480) as to what use of a street or highway constitutes an additional burden; (10 L. R. A. 499) as to the placing of electric wires in city streets; (12 L. R. A. 864) as to rights of abutting owners upon construction of telegraph line.

Measure of damages for telegraph line.

Cited in footnotes to *Cleveland, C. C. & St. L. R. Co. v. Ohio Postal Teleg. Cable Co.* 62 L. R. A. 941, which holds measure of damages to be decrease in value of use of right of way for railroad purposes; *Mobile & O. R. Co. v. Postal Teleg. Cable Co.* 45 L. R. A. 223, which holds measure of damages for telegraph line on right of way, diminution in value of use by railroad company.

Necessity of seal to answer of corporation.

Cited in *R. Frank Williams Co. v. United States Baking Co.* 86 Md. 478, 38 Atl. 990, holding a corporation can only answer in equity, under its seal.

7 L. R. A. 205, *TAGGART v. NEWPORT STREET R. CO.* 16 R. I. 668, 19 Atl. 326.

Use of streets.

Cited in *Koch v. North Ave. R. Co.* 75 Md. 229, 15 L. R. A. 380, 23 Atl. 463; *San Antonio Rapid Transit Street R. Co. v. Limburger*, 88 Tex. 85, 53 Am. St. Rep. 730, 30 S. W. 533; *Howe v. West End Street R. Co.* 167 Mass. 51, 44 N. E. 386; *Birmingham Traction Co. v. Birmingham R. & Electric Co.* 119 Ala. 142, 43 L. R. A. 235, 24 So. 502—holding authorized electric street railway on highway not additional servitude; *Peck v. Schenectady R. Co.* 170 N. Y. 311, 63 N. E. 357 (dissenting opinion) majority holding electric railroad additional burden on street; *La Crosse City R. Co. v. Higbee*, 107 Wis. 400, 51 L. R. A. 928, 83 N. W. 701, holding trolley pole not additional burden if reasonably placed with regard to abutting owners' convenience; *Paterson R. Co. v. Grundy*, 51 N. J. Eq. 228, 26 Atl. 788, holding electric railway may enjoin interference with trolley wires where no additional burden imposed thereby; *Chicago, B. & Q. R. Co. v. West Chicago Street R. Co.* 156 Ill. 268, 29 L. R. A. 490, 40 N. E. 1008, and *West Jersey R. Co. v. Camden, G. & W. R. Co.* 52 N. J. Eq. 35, 29 Atl. 423, holding railroad cannot enjoin planting of trolley poles at highway crossing without compensation, where no interference with operation of road; *Cumberland Teleg. & Teleph. Co. v. United Electric Co.* 93 Tenn. 503, 27 L. R. A. 239, 29 S. W. 104, holding electric railway ordinary use of street within proviso of grant to telephone com-

pany prohibiting obstruction thereof; Cincinnati Inclined Plane R. Co. v. City Suburban Teleg. Asso. 48 Ohio St. 426, 12 L. R. A. 540, 29 Am. St. Rep. 559, 27 N. E. 890, refusing to enjoin construction of electric railway at suit of previously established telephone company; Central Pennsylvania Teleg. & Supply R. Co. v. Wilkesbarre W. S. R. Co. 11 Pa. Co. Ct. 423, 6 Kulp, 390, 1 Pa. Dist. Rep. 632, holding electric railway liable to telephone company having prior occupancy of street only for negligence in construction; Hershfield v. Rocky Mountain Bell Teleph. Co. 12 Mont. 118, 29 Pac. 883, holding erection of telephone poles along street, reasonable use thereof; Canandaigua v. Benedict, 24 App. Div. 353, 48 N. Y. Supp. 679, holding that municipal corporation may acquire further easement in highway for supply wires for electric pump over easement for water-pipe conduit; Vose v. Newport Street R. Co. 17 R. I. 136, 20 Atl. 267, holding no liability to abutting owners for damage resulting from use of rails already laid; Detroit City R. Co. v. Mills, 85 Mich. 655, 48 N. W. 1007, holding operation of electric railway in street not an additional burden; Halsey v. Rapid Transit Street R. Co. 47 N. J. Eq. 393, 20 Atl. 859, holding trolley poles in middle of street not an additional burden.

Cited in footnotes to State v. Jersey City, 26 L. R. A. 281, which holds authorized street car line a proper street use; Chicago General R. Co. v. Chicago City R. Co. 50 L. R. A. 734, which denies liability for collision with cars of other company because of running cable cars under authority to use animal power only.

Cited in notes (17 L. R. A. 478) on street railway as additional burden; (10 L. R. A. 176) on regulation as to motive power for street railroads.

Distinguished in Jaynes v. Omaha Street R. Co. 53 Neb. 638, 39 L. R. A. 753, 74 N. W. 67, holding adjoining property owner entitled to damages for permanent appropriation of portion of street by trolley poles; Snyder v. Fort Madison Street R. Co. 105 Iowa, 288, 41 L. R. A. 347, 75 N. W. 179, enjoining maintenance of trolley pole unnecessarily in front of dwelling; Cater v. Northwestern Teleph. Exchange Co. 60 Minn. 549, 28 L. R. A. 315, 51 Am. St. Rep. 543, 63 N. W. 111 (dissenting opinion) majority holding telephone poles along highway impose no additional burden thereon.

Measure of damages.

Cited in Stewart v. Ohio River R. Co. 38 W. Va. 450, 18 S. E. 604, holding measure of damage to abutting owner to be depreciation in market value of property by construction of railroad in street.

Validity of franchise.

Cited in Williams v. Citizens' R. Co. 130 Ind. 75, 15 L. R. A. 67, 30 Am. St. Rep. 201, 29 N. E. 408, holding not subject to attack in proceeding against individual to enjoin interference with operation of railroad.

Judicial notice.

Cited in footnote to Jamieson v. Indiana Natural Gas & Oil Co. 12 L. R. A. 652, which holds that judicial notice will be taken that natural gas is dangerous agency.

7 L. R. A. 209, FISKE v. FIRST NAT. BANK, 133 Pa. 241, 19 Atl. 554

Technical phrases.

Cited in McDonough v. Jolly Bros. 165 Pa. 548, 30 Atl. 1048, holding paving contractor may show trade meaning of provision to prepare necessary beds of

gravel, sand, or other material required for said paving; *Whorley v. Karper*, 20 Pa. Super. Ct. 349, holding tenant under ambiguous lease entitled to way-going crop; *Rastetter v. Reynolds*, 160 Ind. 136, 66 N. E. 612, holding evidence of custom admissible to show dimensions of elm strips purchased were to be taken when sawed green.

Distinguished in *Silliman v. Whitmer*, 11 Pa. Super. Ct. 261, holding evidence of local usage to regard tramway as personalty, inadmissible where not shown to exist at time of contract.

7 L. R. A. 210, *McCULLOUGH v. EXPRESSMEN'S MUT. BEN. ASSO.* 133 Pa. 142, 19 Atl. 355.

Construction of insurance term "sickness."

Cited in *Robillard v. Societe St. Jean Baptiste de Centreville*, 21 R. I. 350, 45 L. R. A. 560, 79 Am. St. Rep. 806, 43 Atl. 635, holding "sickness" under benefit association's by-laws, includes insanity and mental alienation.

7 L. R. A. 211, *ROOP v. REAL ESTATE INVEST. CO.* 132 Pa. 496, 10 Atl. 278.

Statutory rights and liability of feme covert.

Cited in *Partick v. Smith*, 165 Pa. 528, 30 Atl. 1044, holding wife not liable on draft and note indorsed by her for accommodation of husband; *Kohn v. Collison*, 1 Marv. (Del.) 113, 27 Atl. 834, holding wife not liable on indorsement of husband's note given in payment of his sole debt; *Schmidt v. Stutzbach*, 10 Kulp. 470; and *Bodine v. Keats*, 10 Kulp. 436, opening judgment by confession against wife on debt on which she was surety for husband; *Wiseman v. Fleischer* 9 Lanc. L. Rev. 375, 10 Pa. Co. Ct. 301, 6 Kulp. 274, setting aside confessed judgment on note materially altered by insertion of words asserting executions in payment of individual indebtedness; *McCrea v. Sisler*, 23 Pa. Co. Ct. 640, holding wife's judgment note as surety for husband not support judgment, in spite of subsequent agreement in behalf of separate estate to pay, on assignment of claims against husband; *Miller v. Billingsfelt*, 18 Lanc. L. Rev. 380, holding judgment for want of affidavit of defense cannot be entered on bond where one of defendants shows herself merely surety for husband; *Walter v. Jones*, 148 Pa. 590, 24 Atl. 119, holding purchase by wife from vendee at sheriff's sale of husband's property, valid against his creditors; *McCoy's Estate*, 11 Pa. Co. Ct. 11, 1 Pa. Dist. R. 61, holding husband necessary party to partition proceedings of wife's real estate; *Walter v. Kensinger*, 10 Lanc. L. Rev. 269, 11 Lanc. L. Rev. 52, 13 Pa. Co. Ct. 224, holding wife cannot name damages in personal action for injury rendering her unable to do household work; *Heacock v. Heacock*, 108 Iowa, 545, 75 Am. St. Rep. 273, 79 N. W. 353, holding wife cannot validly contract with husband for services where his disability not removed by statute; *Sweigart v. Conrad*, 16 Lanc. L. Rev. 343, striking off confessed judgment against married woman on her surety note, where record fails to show statutory liability; *Turner v. Laubagh*, 6 Kulp. 370, 11 Pa. Co. Ct. 634, holding married woman not estopped on motion for new trial, by failure to request judgment on pleadings in action on note showing coverture but not bringing case within statutory liability.

Cited in footnote to *Kitchen v. Chapin*, 57 L. R. A. 914, which holds married woman liable on her guaranty of note owned by her and payable to her order.

Cited in note (7 L. R. A. 640, 642) on wife's capacity to contract.

Distinguished in *Glassmire v. Neill*, 9 Lanc. L. Rev. 29, 10 Pa. Co. Ct. 420,

upholding judgment entered against *feme covert* on judgment note where complaint brings obligation within statutory liability, though not apparent in note; *Krumrine v. Bottorf*, 12 Pa. Co. Ct. 69, holding confessed judgment valid where statements accompanying same show statutory liability in addition to coverture; *Kuhn v. Ogilvie*, 178 Pa. 307, 35 Atl. 957, holding mortgage by wife to secure husband's debt binding; *Warder, B. & G. Co. v. Stewart*, 2 Marv. (Del.) 279, holding wife bound on note executed as surety for husband; *Packer v. Taylor*, 12 Pa. Co. Ct. 523, holding *feme covert* liable on promissory note given in purchase of land; *Bauck v. Swan*, 146 Pa. 450, 23 Atl. 242, holding broker entitled to commissions on sale of married woman's property, where ratified by her; *Latrobe Bldg. & L. Asso. v. Fritz*, 152 Pa. 229, 25 Atl. 558, holding judgment bond executed by *feme covert* to secure loan for improvements on separate property, valid; *Sterrett v. Schlotthauer*, 10 Lanc. L. Rev. 233, and *Milligan v. Phipps*, 153 Pa. 211, 25 Atl. 1121, holding mechanic's lien valid without describing owner as married woman and work essential to separate estate; *Bankard v. Shaw*, 199 Pa. 629, 49 Atl. 230, Affirming 23 Pa. Co. Ct. 566, holding judgment on note given by *feme covert* in settlement of mechanic's lien enforceable against her separate property in spite of voluntary conveyance to children; *Reed v. Stouffer*, 14 Pa. Co. Ct. 508, 11 Lanc. L. Rev. 253, holding contract for sale of land jointly owned by husband and wife specifically enforceable, without separate acknowledgment of contract by wife; *Guignon v. Covell*, 10 Pa. Co. Ct. 196, opening judgment for reception of evidence where allegation that defendant's note mere guaranty of husband's debt, controverted; *Koechling v. Henkel*, 144 Pa. 219, 22 Atl. 808, holding stranger cannot impeach judgment regular on face confessed by married woman; *Breckwoldt v. Morris*, 149 Pa. 293, 24 Atl. 300, holding married woman cannot attack prima facie valid judgment in collateral action against sheriff for trespass in levying thereunder.

Disapproved in *Swiegart v. Conrad*, 17 Lanc. L. Rev. 66, refusing to go behind record to discover defendant's coverture on motion to strike off judgment; *McIntire v. Bimber*, 8 Lanc. L. Rev. 227, 9 Pa. Co. Ct. 464, refusing to strike off judgment valid on its face for failure of record to show that defendant was a married woman where evidence establishes her liability.

7 L. R. A. 213, *UPDEGROVE v. PENNSYLVANIA SCHUYLKILL VALLEY R. CO.* 132 Pa. 540, 19 Atl. 283.

Release of damages on grant of right of way.

Cited in *McDonald v. Southern California R. Co.* 101 Cal. 215, 35 Pac. 643, holding conveyance of right of way as already operated prevents grantor from complaining of private nuisance by use of insufficient bridge then in existence; *Kemp v. Pennsylvania R. Co.* 156 Pa. 442, 32 W. N. C. 423, 26 Atl. 1074, holding railroad not liable, after release, for obstruction of plaintiff's way across tracks.

Cited in note (59 L. R. A. 868) on liability for damming back water of stream.

Distinguished in *Fremont, E. & M. Valley R. Co. v. Harlin*, 50 Neb. 703, 36 L. R. A. 420, 61 Am. St. Rep. 578, 70 N. W. 263, holding release of damages in right-of-way deed should have no greater effect than judgment in condemnation proceeding; *McMinn v. Pittsburgh, M. & Y. R. Co.* 147 Pa. 11, 23 Atl. 325, holding release does not absolve railroad from subsequent negligence in failing to make proper or sufficient drains or culverts.

7 L. R. A. 214, *ADAMS EXP. CO. v. HARRIS*, 120 Ind. 73, 16 Am. St. Rep. 315, 21 N. E. 340.

Sufficiency of pleading.

Cited in *Continental Ins. Co. v. Miller*, 4 Ind. App. 557, 30 N. E. 718, holding averments of complaint sufficient plea of tender of money due on instalment note to keep policy alive; *Smythe v. Scott*, 124 Ind. 184, 24 N. E. 685, holding trustees of commandery of Knights Templar a corporation entitled to sue its treasurer for wrongful conversion of its funds.

Distinguished in *Bascom v. Toner*, 5 Ind. App. 234, 31 N. E. 856, holding the Christian name of the plaintiff must be given in the complaint.

Disapproved in *State v. Chicago, M. & St. P. R. Co.* 4 S. D. 263, 46 Am. St. Rep. 783, 56 N. W. 894, holding incorporation of company must be alleged in the complaint.

Carrier's liability.

Cited in *Bird v. Southern R. Co.* 99 Tenn. 725, 63 Am. St. Rep. 856, 42 S. W. 451, holding intermediate carrier liable for loss of trees held for freight without notification to shipper.

Competency of employee's declaration against company.

Cited in *Missouri P. R. Co. v. Gernan*, 84 Tex. 143, 19 S. W. 461, holding declarations of freight agent of railway competent evidence against railway in action for loss of cotton.

Carrier's contract for limited liability.

Cited in *Pacific Exp. Co. v. Foley*, 46 Kan. 476, 12 L. R. A. 807, 26 Am. St. Rep. 107, 26 Pac. 665 (dissenting opinion), majority holding express company may limit its liability for all loss in excess of \$50 for property transported; *Adams Exp. Co. v. Carnahan*, 29 Ind. App. 611, 94 Am. St. Rep. 279, 63 N. E. 245, holding contract limiting liability strictly construed against carrier when value of property expressed at greater value than \$50; *Adams Exp. Co. v. Carnahan*, 29 Ind. App. 610, 94 Am. St. Rep. 279, 63 N. E. 245, holding carrier can limit its liability as to value of property transported; *Louisville, N. A. & C. R. Co. v. Nicholai*, 4 Ind. App. 124, 51 Am. St. Rep. 206, 30 N. E. 424, holding jury might infer negligence by carrier not accounting or attempting to account for failure to deliver trunk; *Pittsburg, C. C. & St. L. R. Co. v. Viers*, 113 Ky. 535, 68 S. W. 469, holding connecting carrier, which does not limit its liability, receives stock under terms of contract with initial carrier.

Cited in footnote to *Union State Bank v. Fremont, E. & M. Valley R. Co.* 59 L. R. A. 939, which sustains initial carrier's right to limit liability to own line.

7 L. R. A. 217, *EQUITABLE L. ASSUR. SOC. v. HAZLEWOOD*, 75 Tex. 338, 16 Am. St. Rep. 893, 12 S. W. 621.

Warranties.

Cited in *Phoenix Assur. Co. v. Coffman*, 10 Tex. Civ. App. 637, 32 S. W. 810, holding negative to question whether insurance had been refused does not void policy if refusal was on ground that that kind of property was not insured; *Mutual L. Ins. Co. v. Baker*, 10 Tex. Civ. App. 520, 31 S. W. 1072, holding false warranty renders policy void though untruth due to inadvertence; *Phoenix Assur. Co. v. Coffman*, 10 Tex. Civ. App. 634, 32 S. W. 810, holding warranty to keep watchman on premises not false because found asleep at time of fire; holding

materiality of warranties will not be considered; *Kansas Mut. L. Ins. Co. v. Coalson*, 22 Tex. Civ. App. 70, 54 S. W. 388, holding that warranties will be strictly limited to precise undertaking of party; *Brown v. Palatine Ins. Co.* 89 Tex. 595, 35 S. W. 1060, holding language selected by insurer will be construed most favorably to assured; *Bills v. Hibernia Ins. Co.* 87 Tex. 551, 29 L. R. A. 707, 47 Am. St. Rep. 121, 29 S. W. 1063, holding language to bring about forfeiture strictly construed.

Cited in footnotes to *Sternaman v. Metropolitan L. Ins. Co.* 57 L. R. A. 318, which denies insurer's right to rely on warranty by applicant that answers properly recorded, where medical examiner knew otherwise; *Home Ins. Co. v. Hancock*, 52 L. R. A. 665, which holds statement that life tenant has fee-simple title to insured property not avoid policy where agent knew facts; *Globe Mut. L. Ins. Asso. v. Wagner*, 52 L. R. A. 649, which holds policy not avoided by false statement that none of applicant's brothers dead.

Cited in notes (10 L. R. A. 668) on warranty of truth of representations by insured; (16 L. R. A. 37, 38) on effect of knowledge by insurer's agent of falsity of statements in application.

Wagering policy.

Cited in *Hinton v. Mutual Reserve Fund Life Asso.* 135 N. C. 324, 65 L. R. A. 166, 47 S. E. 474, holding policy taken out by one having no insurable interest in life of insured, invalid.

Cited in note (12 L. R. A. 410) on invalidity of wager policy.

When insured estopped.

Cited in *Ritzmaurice v. Mutual L. Ins. Co.* 84 Tex. 65, 19 S. W. 301, holding affirmation by insured of correctness of statements in application binding even if known to be false to agent.

When insurer estopped.

Cited in *Mutual L. Ins. Co. v. Blodgett*, 8 Tex. Civ. App. 50, 27 S. W. 286, holding company bound by answers dictated by its own medical examiner; *New York L. Ins. Co. v. Russell*, 23 C. C. A. 54, 40 U. S. App. 530, 77 Fed. 106, holding company bound by facts disclosed to agent and medical examiner though answer directed by latter wrong; *Mutual Ben. L. Ins. Co. v. Robison*, 22 L. R. A. 331, 7 C. C. A. 469, 19 U. S. App. 266, 58 Fed. 730, holding company estopped from taking advantage of either error or blunder of examiner in writing answers when correct answers given; *Providence Life Assur. Soc. v. Reutlinger*, 58 Ark. 543, 25 S. W. 835, holding company estopped from alleging falsity of answers to questions of medical examiner to whom correct answers made.

Cited in footnote to *Follott v. United States Mut. Acci. Asso.* 12 L. R. A. 315, which holds representation of freedom from infirmity waived by agent's knowledge of applicant's deafness.

Cited in notes (30 L. R. A. 636) on effect of riders or slips attached to insurance policy; (10 L. R. A. 610) on employment of clerks by insurance agent.

Insurable interest.

Cited in *Crosswell v. Connecticut Indemnity Asso.* 51 S. C. 116, 28 S. E. 200, holding son's insurable interest on mother's life supports assignment by beneficiary of policy procured by mother on own life for benefit of daughter; *Cheeves v. Anders*, 87 Tex. 291, 47 Am. St. Rep. 107, 28 S. W. 274, holding surviving partner has interest in so much of policy issued on life of deceased copartner as

was paid in premiums by partnership; *Mutual L. Ins. Co. v. Blodgett*, 8 Tex. Civ. App. 49, 27 S. W. 286, holding beneficiary without insurable interest will be treated as trustee to collect proceeds of policy for those legally entitled; *Exchange Bank v. Loh*, 104 Ga. 453, 44 L. R. A. 376, 31 S. E. 459, holding creditor's insurable interest in life of debtor does not exceed indebtedness; *Goldbaum v. Blum*, 79 Tex. 641, 15 S. W. 564, holding widow and children entitled to balance of proceeds of life insurance policy after payment of debt for which it was taken out; *Cameron v. Barcus*, 31 Tex. Civ. App. 49, 71 S. W. 423, holding community-debt creditor of deceased husband without insurable interest in life of the wife; *Farmers' & T. Bank v. Johnson*, 118 Iowa, 284, 91 N. W. 1074, denying right of daughter, as beneficiary in policy of father, to deny her insurable interest after assignment of policy.

Cited in footnotes to *Mutual Reserve Fund Life Asso. v. Hurst*, 20 L. R. A. 761, which holds assignee's insurable interest as creditor not condition of recovery on policy; *Hurd v. Doty*, 21 L. R. A. 746, which denies right of trustee receiving proceeds of insurance policy to refuse payment to beneficiaries as having no insurable interest; *Adams v. Reed*, 35 L. R. A. 692, which holds woman has insurable interest in life of son-in-law.

Cited in note (25 L. R. A. 630) on right to take life insurance for benefit of stranger.

Charge to jury.

Cited in *Phoenix Assur. Co. v. Coffman*, 10 Tex. Civ. App. 633, 32 S. W. 810, holding charge to jury properly limited to issues presented by pleadings and evidence.

Cited in note (10 L. R. A. 669) on instructions of court in action on insurance policy.

What passes by assignment of policy.

Cited in *Cawthon v. Perry*, 76 Tex. 385, 13 S. W. 268, holding creditor with assignment of policy on life of debtor takes only amount of his debt with premiums paid by him; *Crosswell v. Connecticut Indemnity Asso.* 51 S. C. 108, 28 S. E. 200, holding bona fide assignment may be made of policy with consent of parties; *New York L. Ins. Co. v. Rosenheim*, 56 Mo. App. 33, holding policy may be assigned by consent of parties as security for debt to amount of indebtedness; *Stevens v. Germania L. Ins. Co.* 26 Tex. Civ. App. 159, 62 S. W. 824, holding assignment of policy by insured and contingent beneficiary, defeated by death of latter.

Cited in note (9 L. R. A. 662) on assignability of life insurance policy.

What is insurance company.

Cited in note (38 L. R. A. 33, 57) on whether benefit association is an insurance company.

7 L. R. A. 224, *ADAMS v. SEAMAN*, 82 Cal. 636, 23 Pac. 53.

Stipulations in notes.

Cited in *Haber v. Brown*, 101 Cal. 449, 35 Pac. 1035, and *First Nat. Bank v. Babcock*, 94 Cal. 104, 28 Am. St. Rep. 94, 29 Pac. 415, holding note stipulating for attorney's fee in case of suit not negotiable; *Randolph v. Hudson*, 12 Okla. 526, 74 Pac. 946, holding not negotiable, note providing for interest, if not paid at maturity; *Prescott v. Grady*, 91 Cal. 521, 27 Pac. 755, holding demand necessary to charge maker of note with attorney's fees and legal expenses stipulated for

therein; *Mason v. Luce*, 116 Cal. 238, 48 Pac. 72, holding valid, stipulation in note for payment of attorney's fee in case of suit.

Cited in footnote to *Oppenheimer v. Farmers' & M. Bank*, 33 L. R. A. 767, which holds negotiability of note not affected by stipulation for attorneys' fees, inoperative until maturity and dishonor.

Cited in note (8 L. R. A. 394) on stipulations and agreements which destroy negotiability.

7 L. R. A. 226, *HERRMAN v. ROBERTS*, 119 N. Y. 37, 28 N. Y. S. R. 843, 16 Am. St. Rep. 801, 23 N. E. 442.

Rights and duties incident to easement.

Cited in *Harvey v. Crane*, 85 Mich. 332, 12 L. R. A. 603, 48 N. W. 582, holding owner of private road may fence it as incident to the reasonable enjoyment of it; *Abbott v. Jackson*, 84 Me. 457, 24 Atl. 900, holding lessee, and not lessor, of shed bound to keep in repair crossing over railroad leading to shed and exclusively used by lessee; *O'Shaughnessey v. O'Rourke*, 36 Misc. 519, 73 N. Y. Supp. 1070, holding owner of dominant estate has no right to remove trees growing in right of way without notifying owner of soil; *Rotch v. Livingston*, 91 Me. 472, 40 Atl. 426, holding grantee of right of way is entitled to its use for entire width that it is laid out by deed; *Weed v. McKeg*, 37 Misc. 109, 74 N. Y. Supp. 250, holding owner of servient estate may build such arch over passageway as will not interfere with its reasonable use; *Woodworth v. Genesee Paper Co.* 18 App. Div. 512, 46 N. Y. Supp. 99, holding riparian owner cannot, after using water of stream, discharge it as incident to the right, upon land of adjoining owner; *Wells v. Tolman*, 88 Hun, 441, 34 N. Y. Supp. 840, holding that owner of soil has no right to sow to grain a permanent road the use of which is granted to another, and that dominant estate can repair roadway over right of way; *Townsend v. Bell*, 70 Hun, 559, 24 N. Y. Supp. 193, holding reasonableness of use of water by riparian proprietor must be determined by jury or trial court.

Construction of easement.

Cited in *Wells v. Tolman*, 156 N. Y. 639, 51 N. E. 271, holding reservation of right of way so qualified as to apply only to winter months; *Whitney v. Richardson*, 59 Hun, 605, 13 N. Y. Supp. 861, holding omission of words "heirs and assigns" in instrument to let grantee have use of water so long as it is used for running cheese factory, does not limit grant; *Kinney v. Hooker*, 65 Vt. 336, 36 Am. St. Rep. 864, 26 Atl. 690, holding right of way as located by agreement of owner of dominant and servient estates only way belonging to subsequent grantee; *Immaculate Conception Church v. Sheffer*, 88 Hun, 339, 34 N. Y. Supp. 724, holding circumstances surrounding situation of property when easement of way created properly admitted; *Hotchkiss v. Young*, 42 Or. 452, 71 Pac. 324, holding grant of right of way does not authorize construction of roadway so as to obstruct existing irrigation ditch.

7 L. R. A. 229, *KURSHEEDT v. UNION DIME SAV. INST.* 118 N. Y. 358, 28 N. Y. S. R. 933, 23 N. E. 473.

Right to redeem by reason of dower right.

Cited in *Campbell v. Ellwanger*, 81 Hun, 262, 30 N. Y. Supp. 792, holding wife, by reason of inchoate right of dower, can redeem from mortgagee in possession under purchase-money mortgage given by husband.

Effect of *lis pendens*.

Cited in *Webster v. Pierce*, 108 Wis. 414, 83 N. W. 938, holding *lis pendens* in ejectment action does not bind purchaser of defendant in that action prior to filing notice; *Jaycox v. Smith*, 17 App. Div. 150, 45 N. Y. Supp. 299, holding notice of *lis pendens* in action to foreclose equitable lien not notice to one claiming under foreclosure of recorded mortgage.

7 L. R. A. 231, *KOONS v. MELLETT*, 121 Ind. 585, 23 N. E. 95.

Notice of appeal to coparties of record.

Approved in *Alexander v. Gill*, 130 Ind. 488, 30 N. E. 525; *Lowe v. Turpie*, 147 Ind. 692, 37 L. R. A. 245, 47 N. E. 150; *Anderson Glass Co. v. Brakeman*, 20 Ind. App. 237, 47 N. E. 937, — each refusing to dismiss appeal because of lack of notice to parties to record who are not parties to judgment; *Bliss v. Grayson*, 25 Nev. 340, 59 Pac. 888, holding notice of appeal need not be served upon the co-defendants not appealing as to whom action dismissed over appellant's objection before judgment; *Brown v. Trexler*, 132 Ind. 109, 30 N. E. 418, dismissing appeal where notice not given to coparty to judgment; *Cooper v. Peterson*, 7 Ind. App. 416, 34 N. E. 746, dismissing appeal in action on benefit certificate against insurer, administrator, etc., because notice not given to administrator; *Holloran v. Midland R. Co.* 129 Ind. 276, 28 N. E. 549, holding appeal by part of several coparties without notice to others not validated by filing written appearance of party not appealing after expiration of time limited for appeals.

Appeals in proceedings for settlement of estates.

Approved in *Simmons v. Beazel*, 125 Ind. 363, 25 N. E. 344, holding appeal in action by executrix to have will construed, not in proceeding for settlement of estates; *Rogers v. State*, 26 Ind. App. 147, 59 N. E. 334, and *Swindle v. State*, 15 Ind. App. 416, 44 N. E. 60, both holding appeal in action upon bond, not in matter growing out of decedents' estates; *Mark v. North*, 155 Ind. 577, 57 N. E. 902, holding action by administrator to recover assets taken from decedent by wrongful act, not connected with settlement of estate; *Roach v. Clark*, 150 Ind. 96, 65 Am. St. Rep. 353, 48 N. E. 796, and *Mason v. Roll*, 130 Ind. 262, 29 N. E. 1135, both holding appeal in action to quiet title, not in matter connected with decedent's estates; *Galetine v. Wood*, 137 Ind. 535, 35 N. E. 901, holding appeal in administrator's action to sell land and set aside fraudulent conveyances, is governed by decedent's act; *Paxton v. Tyler*, 20 Ind. App. 459, 50 N. E. 45, dismissing appeal in proceeding by widow to obtain moneys paid on claims against estate, to which administrator is not party; *Merritt v. Straw*, 6 Ind. App. 361, 33 N. E. 657, holding appeal in action by administrator on decedent's note, not concerning settlement of estate; *Harrison Nat. Bank v. Culbertson*, 147 Ind. 615, 45 N. E. 657, holding action to recover from residuary devisees upon testator's liability, within decedent's act as to appeal; *Bollenbacher v. Whisnand*, 148 Ind. 379, 47 N. E. 706, dismissing appeal in proceeding by administrator to sell real estate, because not brought under statute regulating settlement of decedent's estates; *Louisville, N. A. & C. R. Co. v. Etzler*, 4 Ind. App. 32, 34 N. E. 669, holding appeal in action for injuring animals, not within statute concerning decedent's estates where plaintiff dies pending action; *Walker v. Steele*, 121 Ind. 446, 23 N. E. 271, holding action by administrator to recover note and mortgage assigned by decedent, within statute governing appeals in civil actions.

Liens upon distributive shares.

Approved in *Armiger v. Reitz*, 91 Md. 343, 46 Atl. 990, holding creditors of legatee indebted to estate in excess of distributive share, not entitled to sale of legatee's interest or a receiver therefor; *Fiscus v. Moore*, 121 Ind. 555, 7 L. R. A. 237, footnote p. 235, 23 N. E. 362 (distinguished in dissenting opinion), holding mortgage on undivided interest in land, taken pending settlement of estate with knowledge of heir's indebtedness to estate, subject to deduction of heir's debt from distributive share; *Dimmick v. Rosenfeld*, 34 Or. 104, 55 Pac. 100, holding lands not subject to execution on prior judgment against agent taking title in himself without principal's knowledge, and then conveying to principal; *Whiperman v. Dunn*, 124 Ind. 356, 24 N. E. 166, holding lien of judgment creditor subject to equities at rendition of judgment; *Huffman v. Copeland*, 139 Ind. 231, 38 N. E. 861, holding agreement by husband with wife to take specified sum of money in lieu of interest in her land which would descend to him by law, binding on his judgment creditors; *Clapp v. Hadley*, 141 Ind. 32, 50 Am. St. Rep. 308, 39 N. E. 504, holding mortgagor not entitled to surplus over amount of decree on senior mortgage where same not in excess of both mortgages; *Taylor v. McGrew*, 29 Ind. App. 327, 64 N. E. 651, holding that judgment lien upon legatee's interest in land attached to proceeds of sale thereof in hands of executor.

Cited in footnote to *Oxsheer v. Nave*, 37 L. R. A. 98, which sustains right to set off indebtedness of distributee against distributive share although purchased by creditor.

Set-off of legatee's indebtedness to estate.

Approved in *Holmes v. McPheeters*, 149 Ind. 590, 49 N. E. 452, and *New v. New*, 127 Ind. 588, 27 N. E. 154, both holding distributee not entitled to distributive share while indebted to the estate; *Neely v. Boyce*, 128 Ind. 12, 27 N. E. 169, holding will creating life estate with remainder over creates rights devested only in case sale necessary to pay debts, costs, or sum provided by the will to be paid; *Fiscus v. Fiscus*, 127 Ind. 285, 26 N. E. 831, directing deduction from distributive share of judgment debt within distributee's exemptions.

Cited in footnotes to *Ainsworth v. Bank of California*, 39 L. R. A. 686, which authorizes setting off against claim due estate debt due from deceased though immature at time of death; *Gosnell v. Flack*, 18 L. R. A. 158, which authorizes set-off against distributive share of debt due from insolvent; *Webb v. Fuller*, 22 L. R. A. 177, which authorizes set-off of amount due by legatee against distributive share; *Re Bailly*, 22 L. R. A. 444, which holds legacy to cosurety subject to deduction for proportionate share of amount paid by testator.

7 L. R. A. 235, *FISCUS v. MOORE*, 121 Ind. 547, 23 N. E. 362.

Deduction of debt from distributive share.

Approved in *Re Lietman*, 149 Mo. 119, 73 Am. St. Rep. 374, 50 S. W. 307, holding that debts of insolvent legatee should be deducted from distributive share; *Fiscus v. Fiscus*, 127 Ind. 284, 26 N. E. 831, directing deduction from distributive share, of judgment debt within distributee's exemptions; *Holmes v. McPheeters*, 149 Ind. 590, 49 N. E. 452, and *New v. New*, 127 Ind. 588, 27 N. E. 154, both holding distributee not entitled to receive distributive share while indebted to estate; *Hopkins v. Thompson*, 73 Mo. App. 405, holding administrator may apply distributive share from sale of real estate on debt due from devisee.

Cited in footnotes to *Re Baily*, 22 L. R. A. 444, which holds legacy to cosurety subject to deduction for proportionate share of amount paid by testator; *Ainsworth v. Bank of California*, 39 L. R. A. 686, which authorizes setting off against claim due estate debt due from deceased though immature at time of death; *Gosnell v. Flack*, 18 L. R. A. 158, which authorizes set-off against distributive share of debt due from insolvent; *Webb v. Fuller*, 22 L. R. A. 177, which authorizes set-off of amount due by legatee against distributive share.

Set-off of heir's indebtedness against mortgagee.

Approved in *Moore v. Moore*, 155 Ind. 264, 57 N. E. 242, holding vendee under agreement of sale with administrator and heirs, without lien for value of improvements on proceeds of sale of real estate to pay debts; *Green v. Brown*, 146 Ind. 10, 44 N. E. 805, holding decree in partition pending settlement of decedent's estate, does not preclude administrator from asserting estate's liens against realty partitioned; *Oxsheer v. Nave*, 90 Tex. 572, 37 L. R. A. 101, footnote p. 98, 40 S. W. 7, which sustains right to set off indebtedness of distributee against distributive share although purchased by creditor.

Real estate is subject to decedent's debts.

Approved in *Moore v. Moore*, 155 Ind. 263, 57 N. E. 242, holding decedent's real and personal estate equally chargeable with payment of debts although personal estate must be first exhausted; *Rowland v. Swope*, 39 Ill. App. 517, holding that real estate cannot be here sold for payment of debts of decedent where personalty is sufficient if not wasted.

Cited in note (21 L. R. A. 323) as to set-off on mortgage foreclosure.

7 L. R. A. 240, *STATE ex rel. CLARK v. HAWORTH*, 122 Ind. 462, 23 N. E. 946.

Followed without discussion in *Knox County v. Johnson*, 124 Ind. 148, 7 L. R. A. 685, 19 Am. St. Rep. 88, 24 N. E. 148; *State ex rel. Snoke v. Blue*, 122 Ind. 600, 23 N. E. 963; *State ex rel. Spears v. Taylor*, 122 Ind. 600, 23 N. E. 963.

Judicial control of legislative discretion.

Approved in *Forsyth v. Hammond*, 18 C. C. A. 179, 34 U. S. App. 552, 71 Fed. 446, holding that courts cannot exercise legislative power to establish municipal corporations; *Jamieson v. Indiana Natural Gas & Oil Co.* 128 Ind. 562, 12 L. R. A. 654, 3 Inters. Com. Rep. 615, 28 N. E. 76, holding regulation of pressure of natural gas transported in pipes, within police power of legislature exercisable in discretion if without oppression; *State ex rel. Terre Haute v. Kolsem*, 130 Ind. 442, 14 L. R. A. 570, 29 N. E. 595, upholding right of legislature to determine whether or not a general law is applicable to subject on which special laws are not prohibited; *Blue v. Beach*, 155 Ind. 133, 50 L. R. A. 70, 80 Am. St. Rep. 195, 56 N. E. 89, holding power in administrative boards to adopt reasonable rules and regulations, not improper delegation of authority; *Morris v. Powell*, 125 Ind. 302, 9 L. R. A. 335, 25 N. E. 221 (dissenting opinion), majority holding law imposing extra burdens and hardships upon voters absent from state or changing residence, invalid; *Carr v. State*, 127 Ind. 209, 11 L. R. A. 372, 22 Am. St. Rep. 624, 26 N. E. 778, holding right to compel auditing and payment of claim against state, dependent upon existence of appropriation therefor.

Cited in note (13 L. R. A. 169) as to appropriation of state revenues.

Effect of exercise of legislative power.

Approved in *State ex rel. Harrison v. Menaugh*, 151 Ind. 270, 43 L. R. A. 412, 51 N. E. 117, holding reasonable change in time of holding township elections from that fixed by previous statute, legitimate exercise of legislative power.

Public-school system.

Approved in *Campana v. Calderhead*, 17 Mont. 551, 36 L. R. A. 281, 44 Pac. 83, holding legislature not required to adopt uniform text-books, by constitutional requirement of general, uniform, and thorough system of public free common schools; *State ex rel. Warren v. Ogan*, 159 Ind. 123, 63 N. E. 227, holding office of school trustees not vacated by incorporation of town as city.

Synopsised in *Leeper v. State*, 103 Tenn. 533, 48 L. R. A. 174, 53 S. W. 962, upholding validity of statute prescribing uniform text-books.

Cited in note (36 L. R. A. 277) as to adoption of text-books for public schools.

Imposition of duties upon public officers.

Approved in *Chambers v. State*, 127 Ind. 367, 11 L. R. A. 614, 26 N. E. 893, holding office of school trustee of incorporated town within constitutional prohibition against holding two lucrative offices.

Monopolies.

Approved in *Patterson v. Wollmann*, 5 N. D. 619, 33 L. R. A. 540, 67 N. W. 1040, holding that granting of exclusive ferry franchises not within constitutional prohibition of monopoly although monopoly results incidentally; *Rand, M. & Co. v. Hartranft*, 29 Wash. 598, 70 Pac. 77, upholding validity of contract between school board and publishers for certain text-books for five years.

Cited in note (9 L. R. A. 38) as to monopolies.

Construction of statutes.

Approved in *People's Nat. Bank v. Ayer*, 24 Ind. App. 219, 56 N. E. 267, holding act providing that sewer assessments "may" be made to run twenty years and that bonds to anticipate same "may also" be issued payable during like period, not mandatory; *State ex rel. Stephens v. Moore*, 96 Mo. App. 434, 70 S. W. 512, construing marriage-license act to require recording of licenses, although recording not specified in direct words.

7 L. R. A. 257, *WHITE v. CHICAGO, ST. L. & P. R. CO.* 122 Ind. 317, 23 N. E. 782.

Easement in streets.

Approved in *Chicago & I. C. R. Co. v. Hunter*, 128 Ind. 220, 27 N. E. 477, and *Porter v. Midland R. Co.* 125 Ind. 479, 25 N. E. 556, both holding all injuries resulting from appropriation of land for right of way should be included in one assessment; *Burkam v. Ohio & M. R. Co.* 122 Ind. 346, 23 N. E. 799, holding that abutting owner not damaged by construction of railroad in street, has no action therefor; *New Castle v. Lake Erie & W. R. Co.* 155 Ind. 25, 57 N. E. 516, holding that municipalities may authorize reasonable use of highway for steam railroad laid longitudinally; *Noblesville v. Lake Erie & W. R. Co.* 130 Ind. 5, 29 N. E. 484, holding right to lay tracks in street not lost although second track not laid until more than twenty years after grant; *Haus v. Jeffersonville, M. & I. R. Co.* 138 Ind. 311, 37 N. E. 805, holding all damages from appropriation or use of alley for railway, within release of all claims and demands past or present for damages by granting of right of way; *Cleveland, C. C. & St. L. R. Co. v. Huddleston*, 21 Ind. App. 627, 69 Am. St. Rep. 385, 52 N. E. 1008, holding that compensation for all injuries from construction and operation of railroad includes necessary

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changes in roadbed and culverts; *Hileman v. Chicago G. W. R. Co.* 113 Iowa, 594, 85 N. W. 800, holding abutter's grant of right to construct and maintain railroad in highway covers any legitimate increase in use therefor, including sidetrack; *Chicago, St. L. & P. R. Co. v. Eisert*, 127 Ind. 162, 26 N. E. 759, holding authorization to construct railway in street, so that "line of the railroad" not near curb, includes one or more tracks; *Rehman v. New Albany Belt & Terminal R. Co.* 8 Ind. App. 213, 35 N. E. 292, holding present and prospective damages presumed assessed in proceeding under writ of assessment.

Cited in note (17 L. R. A. 475, 481) as to what use of a street or highway constitutes an additional burden.

Reversal for erroneous conclusion of law.

Approved in *Smiley v. Barker*, 28 C. C. A. 13, 55 U. S. App. 125, 83 Fed. 687, holding that a just judgment, warranted by record and facts, will not be overthrown because based on wrong reason; *Nelson v. Cottingham*, 152 Ind. 138, 52 N. E. 702, holding that motion for judgment upon general finding will furnish grounds for reversal.

Street as a "highway."

Approved in *Indianapolis v. Higgins*, 141 Ind. 11, 40 N. E. 671, holding "highway" in criminal statute includes sidewalk.

7 L. R. A. 262, *LAFLIN & R. POWDER CO. v. TEARNEY*, 131 Ill. 322, 19 Am. St. Rep. 34, 23 N. E. 389.

Sufficiency of declaration.

Cited in *Chicago, W. & V. Coal Co. v. Glass*, 34 Ill. App. 370, holding plea of general issue after demurrer waiver of right to question sufficiency of declaration.

Instruction referring to pleadings.

Cited in *Chicago, R. I. & P. R. Co. v. Cleveland*, 92 Ill. App. 318, holding that an instruction to find for plaintiff if he had made out his case as laid down in his declaration, erroneous; *Chicago & A. R. Co. v. Harrington*, 192 Ill. 26, 61 N. E. 622, holding instructions based on theory in plaintiff's declaration not erroneous if summarizing all essential facts; *Suburban R. Co. v. Balkwill*, 195 Ill. 539, 63 N. E. 389, and *Central R. Co. v. Bannister*, 195 Ill. 50, 62 N. E. 864, upholding instructions for recovery if facts are found as laid in declaration.

Liability for nuisances.

Cited in *John Morris Co. v. Burgess*, 44 Ill. App. 40, holding boiler owner only required to use ordinary care with reference to its safety, and competency of servants managing it; *Belvidere Gaslight & Fuel Co. v. Jackson*, 81 Ill. App. 429, holding reasonable care in erection of gas plant not of itself sufficient to relieve proprietor of responsibility for injury therefrom; *Rudder v. Koopman*, 116 Ala. 354, 37 L. R. A. 499, 22 So. 601, holding storage of gunpowder and dynamite in wooden building, in thickly settled part of town, a nuisance; *Frost v. Berkeley Phosphate Co.* 42 S. C. 413, 26 L. R. A. 698, 46 Am. St. Rep. 736, 20 S. E. 280, holding defendant liable for damages caused by generation of deleterious gases from phosphate factory; *McDonough v. Roat*, 8 Kulp, 446, holding storing and handling dynamite, a nuisance or not, according to locality and surroundings; *Wilson v. Phoenix Powder Mfg. Co.* 40 W. Va. 417, 52 Am. St. Rep. 890, 21 S. E. 1035, holding no care can prevent powder mill situated where it may endanger

lives, from being a public nuisance; *Hazard Powder Co. v. Volger*, 7 C. C. A. 134, 12 U. S. App. 665, 58 Fed. 156, holding explosion of powder magazine located in violation of city ordinance, renders owners liable for resulting injuries; *Weston Paper Co. v. Pope*, 155 Ind. 402, 56 L. R. A. 902, 57 N. E. 719, holding injurious pollution of stream, not excused by magnitude of investment or freedom from malice; *Milligan v. Nelson*, 51 Ill. App. 446 (dissenting opinion), majority holding injunction restraining defendant from permitting dense smoke to be emitted from his chimneys should not be granted; *Mathews v. St. Louis & S. F. R. Co.* 121 Mo. 328, 25 L. R. A. 172, 24 S. W. 591, upholding law making railroads absolutely liable for damages caused by fires from locomotives; *Lowe v. Prospect Hill Cemetery Asso.* 58 Neb. 106, 46 L. R. A. 241, 78 N. W. 488, holding burial of the dead so as to endanger life or health will be enjoined; *Kleebauer v. Western Fuse & Explosives Co. (Cal.)* 60 L. R. A. 379, 69 Pac. 246, holding manufacturer storing gunpowder with due care, not liable for wilful explosion of same by employee.

Cited in footnote to *Bly v. Edison Electric Illuminating Co.* 58 L. R. A. 500, which sustains right of tenant to maintain action to abate nuisance created by third person's method of conducting business before lease renewed.

Cited in notes (9 L. R. A. 715) on municipal authority to abate nuisance; (29 L. R. A. 718) on negligence in manufacture and storage of gunpowder, nitroglycerine, dynamite, and other explosives; (38 L. R. A. 309) on municipal power over nuisances affecting safety, health, and personal comfort.

Proximate cause of injury.

Cited in note (8 L. R. A. 83) on loss of injury or attributing loss or injury to proximate cause.

Distinguished in *Kinney v. Koopman*, 116 Ala. 321, 37 L. R. A. 504, 67 Am. St. Rep. 119, 22 So. 593, holding large storage of gunpowder and other explosives, in thickly settled part of town not negligence *per se*.

Absence of vested right to commit a nuisance.

Cited in *Standard Oil Co. v. Danville*, 199 Ill. 54, 64 N. E. 1110, holding dangerous plants that become nuisances may be made to move, although established before city was built up around them.

Cited in footnote to *Van Fossen v. Clark*, 52 L. R. A. 279, which holds purchaser's knowledge of existence of nuisance by discharge from drain does not estop him from suing to abate same.

7 L. R. A. 264, *SMITHERS v. JUNKER*, 41 Fed. 101.

Obligation to pay on uncertain condition.

Cited in *Getto v. Binkert*, 55 Kan. 620, 40 Pac. 925, holding note payable after sale of certain lots, due after lapse of reasonable time; *Hood v. Hampton Plains Exploration Co.* 106 Fed. 412, holding wages payable when employer should resume operation of mine due after lapse of four years; *Johnston v. Schenck*, 15 Utah, 494, 50 Pac. 921, construing instrument reciting receipt of money payable on demand on sale of mine in year but not payable in case of no sale, payable at expiration of year no sale having been made.

Cited in footnotes to *Page v. Cook*, 28 L. R. A. 759, which holds note on demand with provision for payment when parties mutually agree, due within reasonable time; *Pistel v. Imperial Mut. L. Ins. Co.* 43 L. R. A. 219, which holds promise to pay when debtor feels able, creates moral obligation to pay when debtor is able.

Distinguished in *Pistel v. Imperial Mut. L. Ins. Co.* 88 Md. 558, 43 L. R. A. 221, 42 Atl. 210, holding complaint on promise to pay when "feel able" demurrable, where no allegation that debtor felt able, though ability alleged.

7 L. R. A. 265, *LORENZ'S SUCCESSION*, 41 La. Ann. 1091, 6 So. 886.

Effect of *ex parte* proceedings as to heirs.

Cited in *Barber's Succession*, 52 La. Ann. 963, 27 So. 363, holding *ex parte* order of recognition of heir a nullity.

7 L. R. A. 266, *BALDWIN v. LOUISVILLE & N. R. CO.* 85 Ala. 619, 5 So. 311.

Extent of legislative regulations.

Cited in *Youngblood v. Birmingham Trust & Sav. Co.* 95 Ala. 526, 20 L. R. A. 61, 36 Am. St. Rep. 245, 12 So. 579, upholding constitutionality of statute making discount of commercial paper at more than certain rate per cent misdemeanor; *Brooks v. State*, 88 Ala. 124, 6 So. 902, holding statute appointing board of examiners to determine qualifications of applicants for licenses to practise medicine, constitutional; *Birmingham Mineral R. Co. v. Parsons*, 100 Ala. 665, 27 L. R. A. 264, 46 Am. St. Rep. 92, 13 So. 602, holding act requiring railroads to place cattle-guards, on demand of adjoining owners, constitutional.

Cited in note (4 L. R. A. 724) on due process of law.

Distinguished in *Randolph v. Builders & Painters Supply Co.* 106 Ala. 511, 17 So. 721, giving material men lien for "attorney's fees" unconstitutional.

7 L. R. A. 272, *STATE USE OF BASHE v. BOYCE*, 72 Md. 140, 20 Am. St. Rep. 458, 19 Atl. 366.

Pendency of another action, as abatement.

Cited in note (58 L. R. A. 430) on effect of judgment against one joint tortfeasor upon liability of the other.

7 L. R. A. 273, *COOK v. COOPER*, 18 Or. 142, 17 Am. St. Rep. 709, 22 Pac. 945.

Possession by mortgagee.

Cited in *Jewett v. Tomlinson*, 137 Ind. 332, 36 N. E. 1106, holding purchaser at sheriff's judgment sale cannot eject mortgagee in possession under senior mortgage; *Spect v. Spect*, 88 Cal. 443, 13 L. R. A. 139, footnote p. 137, 22 Am. St. Rep. 314, 26 Pac. 203, holding mortgagee in possession by consent of mortgagor cannot be ejected by grantee of mortgagor though mortgage debt barred by limitations.

Cited in footnote to *Whiting v. Adams*, 25 L. R. A. 598, which holds mortgagee's seizure of crops after filing bill for foreclosure a conversion.

Cited in notes (8 L. R. A. 569) on rights of mortgagee in possession; (7 L. R. A. 631) on protection of mortgagee; (7 L. R. A. 630) on rights of mortgagor.

Void foreclosure.

Cited in *Jordan v. Sayre*, 29 Fla. 115, 10 So. 823, holding warranty deed by mortgagee to third party, of premises purchased by him on void foreclosure, subrogates purchaser in equity to mortgagee's rights in premises; *Bryan v. Pinney*, 3 Ariz. 422, 31 Pac. 548, holding that purchaser of certificate of sale under void foreclosure becomes assignee of mortgage debt; *Bryan v. Brasius*, 3 Ariz. 439, 31 Pac. 519, holding that grantee of purchaser under void foreclosure sale will be subrogated to rights of mortgagee; *Kelso v. Norton*, 65 Kan. 785, 93 Am. St. Rep.

308, 70 Pac. 896, holding ejectment not maintainable by heirs of deceased mortgagor against purchaser in possession under void foreclosure sale, debt being unpaid; *Stouffer v. Harlan* (Kan.) 64 L. R. A. 322, footnote p. 320, 74 Pac. 610, holding ejectment not maintainable against mortgagee in possession under invalid foreclosure, debt remaining unpaid; *Coughanour v. Hutchinson*, 41 Or. 423, 69 Pac. 68, holding foreclosure purchaser entitled to retain possession as against mortgagor and those claiming under him, until debt is paid.

Redemption by mortgagor.

Cited in *Rigney v. De Graw*, 100 Fed. 217, holding limitation does not run against mortgagor's right to redeem from void foreclosure sale under which mortgagee in possession; *Hicklin v. Marco*, 46 Fed. 425, holding purchaser at void foreclosure sale entitled to value of improvements in suit by mortgagor to redeem.

7 L. R. A. 280, *BEARD v. ILLINOIS C. R. CO.* 79 Iowa, 518, 18 Am. St. Rep. 381, 44 N. W. 800.

Carrier — Duty to provide suitable cars.

Cited in *Beard v. St. Louis, A. & T. H. R. Co.* 79 Iowa, 534, 44 N. W. 803, holding carrier impliedly agrees to supply suitably cool cars for transportation of butter in absence of special contract to contrary; *Chicago & A. R. Co. v. Davis*, 54 Ill. App. 134, holding carrier liable to consignee for spoiling of hams through defect in refrigerator car, although consignor's duty to discover same; *Shea v. Chicago, R. I. & P. R. Co.* 66 Minn. 107, 68 N. W. 608, holding carrier receiving lemons in common box car without ice, from initial carrier liable for injury by heat.

Cited in footnotes to *Mathis v. Southern R. Co.* 61 L. R. A. 824, which holds carrier liable for refusal to receive for transportation fruit, not in properly iced refrigerator car; *New York, P. & N. R. Co. v. Cromwell*, 49 L. R. A. 462, which holds carrier leasing cars from other company liable for loss of freight not properly refrigerated.

Cited in notes (10 L. R. A. 417) on measure of care required of carrier; (10 L. R. A. 419) on limitation of carrier's liability by contract.

Presumption as to loss or injury.

Cited in *Moore v. New York, N. H. & H. R. Co.* 173 Mass. 337, 73 Am. St. Rep. 298, 53 N. E. 816, holding injury to baggage checked "through" presumed to have occurred with last connecting carrier; *Myerson v. Woolverton*, 9 Misc. 188, 29 N. Y. Supp. 737, holding transfer company to whose agent baggage check was delivered on train, presumptively negligent where baggage checked in good condition was injured when delivered; *Lamb v. Chicago, M. & St. P. R. Co.* 101 Wis 144, 76 N. W. 1123, holding loss occurred presumptively with connecting carrier where berries were in good condition at time of shipment in iced car.

Custom as affecting negligence.

Cited in *Martin v. Chicago, R. I. & P. R. Co.* 118 Iowa, 150, 59 L. R. A. 700, 96 Am. St. Rep. 380, 91 N. W. 1034, holding custom for express trains to exceed speed prescribed by ordinance does not affect question of negligence.

Through contracts.

Cited in *Peterson v. Chicago, R. I. & P. R. Co.* 80 Iowa, 100, 45 N. W. 573, holding connecting carriers jointly liable for loss of baggage on contract exempting only initial carrier for loss beyond its own terminals; *Taffe v. Oregon R. Co.* 41

Or. 72, 58 L. R. A. 192, 67 Pac. 1015, holding initial carrier not liable where losses beyond terminal expressly excepted, though "fastest passenger train service" stipulated for on bill of lading.

Cited in note (10 L. R. A. 418) on liability of connecting carrier.

7 L. R. A. 283, DAVIS v. ST. LOUIS, I. M. & S. R. CO. 53 Ark. 117, 13 S. W. 801.

Right of action for negligently causing death.

Cited in *St. Louis, I. M. & S. R. Co. v. Dawson*, 68 Ark. 3, 56 S. W. 46, holding right of action survives if deceased lived after tort, though unconscious till death; *Brown v. Chicago & N. W. R. Co.* 102 Wis. 163, 44 L. R. A. 589, 78 N. W. 771, holding statutory actions by surviving relations supplementary to action surviving to personal representative; *Ohnmacht v. Mt. Morris Electric Light Co.* 66 App. Div. 485, 73 N. Y. Supp. 296, holding father not entitled to damages for loss of services of infant child where latter's death instantaneous; *Texarkana Gas & Electric Light Co. v. Orr*, 59 Ark. 222, 43 Am. St. Rep. 30, 27 S. W. 66, holding complaint deemed on appeal amended to conform to proof where ambiguous whether for benefit of estate or of wife and kin; *Schleiger v. Northern Terminal Co.* 43 Or. 10, 72 Pac. 324, holding action for wrongful killing of minor maintainable by his father as administrator; *United States Electric Lighting Co. v. Sullivan*, 22 App. D. C. 130, holding action for damages for negligent killing of intestate properly brought by latter's administratrix; *Davis v. Nichols*, 54 Ark. 360, 15 S. W. 880, holding that action for wrongful killing, for benefit of decedent's estate, survives death of wrongdoer.

Cited in footnotes to *Hennessey v. Bavarian Brewing Co.* 41 L. R. A. 385, which sustains mother's right of action for wrongful death of child, notwithstanding remarriage and stepfather's assumption of parental obligations; *Brink v. Wabash R. Co.* 53 L. R. A. 811, which denies right of action for rendering performance of contract to support parent impossible through negligent killing of son.

Cited in notes (41 L. R. A. 810) on parent's common-law right of action for loss of services of child killed; (34 L. R. A. 796, 799, 800, 801) on how many distinct causes of action arise from injuries resulting in death.

Distinguished in *Southern Bell Teleph. & Teleg. Co. v. Cassin*, 111 Ga. 580, 50 L. R. A. 697, 36 S. E. 881, holding statutory action does not survive to wife and children where deceased settled with and released tortfeasor.

Disapproved in *Sweetland v. Chicago & G. T. R. Co.* 117 Mich. 344, 43 L. R. A. 573, 75 N. W. 1066 (concurring opinion) majority holding damages not recoverable for pain and suffering of passenger negligently killed in collision where there is nothing to show that death was not instantaneous.

Measure of damages for causing death.

Cited in *St. Louis, I. M. & S. R. Co. v. Dawson*, 68 Ark. 3, 56 S. W. 46, setting aside verdict of \$4,000 for pain and suffering where deceased unconscious and survived accident for only moment.

Cited in note (17 L. R. A. 73, 80) on measure of recovery for death caused by negligence.

Contributory negligence of infant.

Cited in *St. Louis, I. M. & S. R. Co. v. Higgins*, 53 Ark. 466, 14 S. W. 653, holding brakeman's youth and inexperience properly considered in action for

damages received while coupling in emergency; *Emma Cotton Seed Oil Co. v. Hale*, 56 Ark. 238, 19 S. W. 600, holding infancy of plaintiff cannot excuse negligence if aware of danger of position.

Assumption of risk.

Reaffirmed on later appeal in 55 Ark. 466, 18 S. W. 628.

Cited in *Missouri, K. & T. R. Co. v. Thompson*, 11 Tex. Civ. App. 667, 33 S. W. 718, and *St. Louis, I. M. & S. R. Co. v. Davis*, 54 Ark. 394, 26 Am. St. Rep. 48, 15 S. W. 895, holding brakeman entering service of railway using unblocked frog assumes risk of injury; *Brinkley Car Works & Mfg. Co. v. Lewis*, 68 Ark. 320, 57 S. W. 1108, holding laborer in lumber yard long acquainted with piling lumber assumes risk of falling piles; *King-Ryder Lumber Co. v. Cochran*, 71 Ark. 58, 70 S. W. 606, holding it question for jury whether eighteen-year-old servant understood danger of operating defective saw; *Bowers v. Star Logging Co.* 41 Or. 309, 68 Pac. 516, holding it question for jury whether servant assumed risk of setting defective brake.

Cited in footnotes to *Cudahy Packing Co. v. Marcan*, 54 L. R. A. 258, which holds risk of block on which minor employee works slipping on greasy floor assumed; *Marino v. Lehmaier*, 61 L. R. A. 811, which holds risk of employment not assumed *per se*, by child whose employment was forbidden by statute because of his immature age.

Cited in notes (8 L. R. A. 636) on servant's knowledge of defective and dangerous machinery; (44 L. R. A. 42) on master's duty to instruct and warn servants as to perils of employment.

Distinguished in *Galveston, H. & S. A. R. Co. v. Hughes*, 22 Tex. Civ. App. 138, 54 S. W. 264, holding inexperienced brakeman not guilty of contributory negligence if ignorant of danger though aware switches not blocked; *Graham v. Newburg Orrel Coal & Coke Co.* 38 W. Va. 278, 18 S. E. 584, holding miner may work in dangerous mine without contributory negligence where prudent man would not quit, or where lulled to security by assurances of safety.

Charge to jury.

Cited in *White v. McCracken*, 60 Ark. 619, 31 S. W. 882, condemning charge composed of counsel's submitted instructions, for incompleteness, lack of clarity, and uniformity; *Southern Exp. Co. v. Texarkana Water Co.* 54 Ark. 132, 15 S. W. 361, condemning charge for inconsistency and inharmoniousness; *Morrison v. McAtee*, 23 Or. 534, 32 Pac. 400, reversing for irreconcilable conflict in attorney's instructions given by court; *Conlon v. Oregon Short Line R. Co.* 23 Or. 507, 32 Pac. 397, holding failure to give submitted instructions, no error, though correct; *North Arkansas & W. R. Co. v. Cole*, 71 Ark. 43, 70 S. W. 312, holding it error for court to assume as undisputed that construction of road subjected land to overflow and buildings to increased exposure to fire.

Distinguished in *Little Rock Traction & Electric Co. v. Morrison*, 69 Ark. 292, 62 S. W. 1045, refusing to reverse where instruction simple, not misleading, and inconsistent only as to fact.

7 L. R. A. 286, *PIERCE v. WHITTLESEY*, 58 Conn. 104, 19 Atl. 513.

7 L. R. A. 288, *TERRITORY v. EVANS*, 2 Idaho, 658, 23 Pac. 115.

State prohibition of exportation of game and fish.

Followed, without discussion, in *Territory v. Nelson*, 2 Idaho, 651, 23 Pac. 116.

Approved in *Geer v. Connecticut*, 161 U. S. 528, 40 L. ed. 797, 16 Sup. Ct. Rep. 600, Affirming *State v. Geer*, 61 Conn. 152, 13 L. R. A. 806, 3 Inters. Com. Rep. 734, 22 Atl. 1012, holding prohibition of killing certain fowl for conveying beyond state, valid; *Organ v. State*, 56 Ark. 271, 19 S. W. 840, holding act prohibiting exportation from state of game and fish, not violative of commerce clause.

Cited in footnotes to *Smith v. State*, 51 L. R. A. 404, which sustains statute prohibiting possession of quail during closed season; *State v. Schuman*, 47 L. R. A. 153, which sustains statute prohibiting sale, or keeping for sale, of trout; *State v. Snowman*, 50 L. R. A. 544, which sustains statute requiring license for business of guiding in inland fishing and forest hunting; *State v. McGuire*, 21 L. R. A. 478, which holds having in possession during closed season fish previously caught not an offense.

Cited in note (39 L. R. A. 591) as to governmental control over right of fishery.

7 L. R. A. 289, *NEWMAN v. METROPOLITAN ELEV. R. CO.* 118 N. Y. 618, 23 N. E. 901.

Damages for taking property for right of way.

Cited in *South Buffalo R. Co. v. Kirkover*, 176 N. Y. 305, 68 N. E. 366, Affirming 86 App. Div. 60, 83 N. Y. Supp. 613; *Rome, W. & O. R. Co. v. Gleason*, 42 App. Div. 533, 59 N. Y. Supp. 647; *Syracuse v. Stacey*, 45 App. Div. 254, 61 N. Y. Supp. 165; *Re Grade Crossing*, 6 App. Div. 335, 40 N. Y. Supp. 520—holding compensation should be for actual value of land taken and adequate compensation for injury to the rest; *Metropolitan West Side Elev. R. Co. v. Stickney*, 150 Ill. 384, 26 L. R. A. 779, 37 N. E. 1098, holding measure of damages for land not taken for right of way difference between value with and without improvement; *Struthers v. New York Elev. R. Co.* 5 Misc. 240, 25 N. Y. Supp. 81, holding measure of damages for taking of easement is difference in value of land with and without easement; *Bohm v. Metropolitan Elev. R. Co.* 129 N. Y. 585, 590, 14 L. R. A. 348, 29 N. E. 802, holding depreciation in value of land not taken by use of property taken, measure of damages.

— Injury to easement.

Cited in *Sperb v. Metropolitan Elev. R. Co.* 137 N. Y. 598, 33 N. E. 319; *Bookman v. New York Elev. R. Co.* 137 N. Y. 305, 33 N. E. 333, holding lot easements interfered with by erection of elevated road, aside from consequential damages, are of nominal value; *Cook v. New York Elev. R. Co.* 144 N. Y. 118, 39 N. E. 2, holding erroneous finding as to nominal value of easement harmless, where no substantial benefits resulted to plaintiff's land from building of railroad; *Sixth Ave. R. Co. v. Metropolitan Elev. R. Co.* 138 N. Y. 551, 34 N. E. 400, holding abstract error in refusal to find as to value of easement taken by elevated road, harmless where correct rule as to damages was adopted; *Mattlage v. New York Elev. R. Co.* 1 Misc. 340, 48 N. Y. S. R. 684, 20 N. Y. Supp. 624, holding plaintiff entitled to mere nominal damages for taking of street easement; *Hoffman v. Manhattan Elev. R. Co.* 1 Misc. 150, 48 N. Y. S. R. 712, 20 N. Y. Supp. 625, refusing injunction for mere taking of easement; *Macy v. Metropolitan Elev. R. Co.* 59 Hun, 367, 12 N. Y. Supp. 804, upholding action for damages by lessor, lessee having released his interest in street easements appropriated by elevated road; *Cunard v. Manhattan R. Co.* 1 Misc. 153, 20 N. Y. Supp. 724, holding refusal to limit injury to fee through taking of street easement, to nominal damages, excluding depreciation of remaining property thereby, proper; *Hadden v. Metropoli-*

tan Elev. R. Co. 75 Hun, 66, 26 N. Y. Supp. 995, reversing judgment for referee's erroneous refusal to find plaintiff's only property in street consisted of easements of light, air, and access; Moore v. New York Elev. R. Co. 4 Misc. 135, 23 N. Y. Supp. 863, holding abutting owner at least entitled to nominal damages by reason of construction of elevated railroad.

Cited in footnotes to Metropolitan West Side Elev. R. Co. v. Stickney, 26 L. R. A. 773, which denies right to compensation in eminent domain where value of property not depreciated; Aldrich v. Metropolitan West Side Elev. R. Co. 57 L. R. A. 237, which denies right to recover for injury to apartment house from elevated road crossing highway 19 feet away; De Geofroy v. Merchants' Bridge Terminal R. Co. 64 L. R. A. 959, which holds abutting owner entitled to compensation for damages resulting from building of elevated railroad in street.

— Character of fund paid as damages.

Cited in Ford v. Livingston, 140 N. Y. 166, 35 N. E. 437, holding money paid for consequential damages to lot easements by erection of elevated road, retains character of real estate upon lunatic owner's death.

Offsetting benefits against consequential damages.

Cited in Mattlage v. New York Elev. R. Co. 14 Misc. 294, 35 N. Y. Supp. 704; Nette v. New York Elev. R. Co. 1 Misc. 342, 48 N. Y. S. R. 724, 20 N. Y. Supp. 627; Huggins v. Manhattan R. Co. 1 Misc. 112, 20 N. Y. Supp. 648; Purdy v. Manhattan Elev. R. Co. 36 N. Y. S. R. 44, 13 N. Y. Supp. 295; Rich v. New York Elev. R. Co. 16 Daly, 519, 14 N. Y. Supp. 167; Welsh v. New York Elev. R. Co. 16 Daly, 516, 12 N. Y. Supp. 545; Sutro v. Manhattan R. Co. 137 N. Y. 593, 33 N. E. 334; Kearney v. Metropolitan Elev. R. Co. 27 Jones & S. 564, 13 N. Y. Supp. 608; Gray v. Manhattan R. Co. 16 Daly, 511, 12 N. Y. Supp. 542; Odell v. New York Elev. R. Co. 130 N. Y. 691, 3 Silv. Ct. App. 668, 29 N. E. 998; Odell v. Metropolitan Elev. R. Co. 3 Misc. 337, 22 N. Y. Supp. 737—holding that benefits must be taken into consideration in fixing amount of consequential damages; Buek v. Metropolitan R. Co. 73 Hun, 254, 25 N. Y. Supp. 1048, holding refusal to charge that plaintiff could only recover damages for building of road to extent disadvantages exceeded advantages, erroneous; Werfelman v. Manhattan R. Co. 16 Daly, 359, 11 N. Y. Supp. 66, holding not error to refuse to find as abstract proposition that benefits should be set off against damages; Brush v. Manhattan R. Co. 26 Abb. N. C. 80, 13 N. Y. Supp. 908, holding plaintiff cannot recover for damages to easement by elevated road without showing substantial damages; Pratt v. New York C. & H. R. R. Co. 90 Hun, 88, 35 N. Y. Supp. 557, holding injunction will not be issued without proof of substantial damages; Doyle v. Manhattan R. Co. 32 N. Y. S. R. 72, 11 N. Y. Supp. 65, granting re-argument, after reversal for exclusion of evidence of enhanced value of property, when similar evidence was admitted without objection; Sixth Ave. R. Co. v. Manhattan R. Co. 14 N. Y. Supp. 97, refusing to find property in front of which elevated road station had been built, had been benefited thereby; Struthers v. New York Elev. R. Co. 5 Misc. 241, 25 N. Y. Supp. 81, holding referee's finding on conflicting evidence of no benefits resulting from building of road, conclusive unless clearly wrong; Cheney v. Syracuse, O. & N. Y. R. Co. 8 App. Div. 620, 40 N. Y. Supp. 1103, awarding damages to abutting landowner for injury by railroad, following rule as to consideration of benefits; Re Grade Crossing, 154 N. Y. 557, 49 N. E. 127, holding under grade-crossing act abutting owners entitled to compensation for consequential damages through change in street grade; Skelly v. New York

Elev. R. Co. 7 Misc. 92, 27 N. Y. Supp. 304, upholding refusal to find special benefits should be offset against consequential damages, after previous finding of no special benefit.

Cited in footnotes to *Schroeder v. Joliet*, 52 L. R. A. 634, which authorizes consideration of benefit from improvement in assessing damages from cutting down street; *Beveridge v. Lewis*, 59 L. R. A. 581, which denies right to deduct benefits from damages in exercise of eminent domain by individual.

Distinguished in *Korn v. New York Elev. R. Co.* 39 N. Y. S. R. 323, 15 N. Y. Supp. 10, holding not error to refuse to recognize special benefits by building of road, where proof was not sufficient to justify such finding; *Re Brooklyn Elev. R. Co.* 87 Hun, 105, 33 N. Y. Supp. 974, holding depreciation in value of one piece of property in condemnation proceedings should not be set off against advantage to others; *Lewiston & Y. F. R. Co. v. Ayer*, 27 App. Div. 575, 50 N. Y. Supp. 502, holding damages awarded for taking strip of land for right of way cannot be offset by plaintiff's right of transportation on road.

7 L. R. A. 293, *BAXTER v. BROOKLYN L. INS. CO.* 119 N. Y. 450, 23 N. E. 1048.

Forfeiture of life insurance policy by default after notice.

Cited in *Stokes v. Amerman*, 121 N. Y. 343, 24 N. E. 819, holding no policy forfeited until after statutory thirty-day notice given; *Osborne v. Home L. Ins. Co.* 123 Cal. 612, 56 Pac. 616, holding no forfeiture for nonpayment of premium without thirty-day statutory notice; *Kentucky Life & Acci. Ins. Co. v. Kaufman*, 102 Ky. 12, 42 S. W. 1104, holding policy to remain in effect for thirty days after notice of nonpayment; *Rosenplanter v. Provident Sav. L. Ins. Co.* 46 L. R. A. 475, 37 C. C. A. 570, 96 Fed. 725, holding life of policy dependent upon payment within thirty days after notice, stipulations to contrary notwithstanding; *Mutual L. Ins. Co. v. Hill*, 55 C. C. A. 540, 118 Fed. 712, holding stipulation in policy providing for construction as if contract were made in New York, binding on company on question of forfeiture.

Cited in footnote to *McQuillan v. Mutual Reserve Fund Life Asso.* 56 L. R. A. 233, which holds forfeiture of policy waived by retaining payment made after default without notice of any condition affixed.

Cited in note (63 L. R. A. 848) on conflict of laws as to contracts of insurance.

Distinguished in *Mutual L. Ins. Co. v. Cohen*, 179 U. S. 268, 45 L. ed. 185, 21 Sup. Ct. Rep. 106, holding New York statutes do not apply to or control policy issued to citizen of Montana by New York company.

Notice of nonpayment condition precedent to attacking policy.

Cited in *Knight v. Supreme Court, O. of C. F.* 2 Silv. Sup. Ct. 456, 24 N. Y. S. R. 847, 6 N. Y. Supp. 427, holding nonpayment of assessment unavailable as defense when insured was not given notice required by by-laws; *Mullen v. Mutual L. Ins. Co.* 89 Tex. 262, 34 S. W. 605; *Equitable Life Assur. Soc. v. Nixon*, 26 C. C. A. 624, 26 U. S. App. 482, 81 Fed. 800 and *Hicks v. National L. Ins. Co.* 9 C. C. A. 218, 20 U. S. App. 410, 60 Fed. 692; *McMaster v. New York L. Ins. Co.* 40 C. C. A. 148, 99 Fed. 886; *New York L. Ins. Co. v. Dingley*, 35 C. C. A. 248, 93 Fed. 157,—holding failure to give statutory notice of default in payments prohibits forfeiture of policy by company.

Cited in footnote to *Mutual L. Ins. Co. v. Hill*, 49 L. R. A. 127, which requires notice of accrual of premium before forfeiting policy for nonpayment.

Cited in note (14 L. R. A. 283) on payment of premium after death to keep insurance in force.

Distinguished in *Johnson v. New York L. Ins. Co.* 109 Iowa, 710, 50 L. R. A. 100, footnote p. 99, 78 N. W. 905, holding change of policy into nonforfeitable paid-up policy for fixed period makes statutory notice unnecessary after default.

Questioned in *Griesemer v. Mutual L. Ins. Co.* 10 Wash. 211, 38 Pac. 1034, holding till statutory notice no advantage to company derived from nonpayment of premium.

When tender of premium unnecessary.

Cited in *Mutual L. Ins. Co. v. Hill*, 49 L. R. A. 132, 38 C. C. A. 159, 97 Fed. 270, holding tender unnecessary before action, as no forfeiture unless company prove nonpayment after notice; *Fischer v. Metropolitan L. Ins. Co.* 167 N. Y. 183, 60 N. E. 431, Affirming 37 App. Div. 581, 56 N. Y. Supp. 260, holding one not required to show payment on day fixed, policy remaining valid till end of notice of default.

7 L. R. A. 295, *STATE v. CREEDEN*, 78 Iowa, 556, 43 N. W. 673.

Manufacture and sale of intoxicating liquors.

Cited in footnotes to *Com. v. Fowler*, 33 L. R. A. 839, which sustains restraint of sales of liquor by druggists for medicinal purposes except on physician's prescription; *Bennett v. Pulaski*, 47 L. R. A. 278, which sustains ordinance for closing saloons between ten and four at night and on Sundays, but not requirement for removing curtains on front doors and windows; *Landry v. New Iberia*, 56 L. R. A. 285, which denies city's power to arbitrarily declare particular licensed saloon a nuisance; *State v. Gerhardt*, 33 L. R. A. 313, which upholds requirement for locking doors of room where liquor sold during prohibited hours; *Gage v. Harvey*, 43 L. R. A. 143, which holds loss of money taken from intoxicated person's pocket not included in damages from sale of liquor to him; *Laugel v. Bushnell*, 58 L. R. A. 266, which sustains ordinance declaring places where hop ale, hop and malt read, and cider sold, nuisances.

Cited in notes (9 L. R. A. 782, 10 L. R. A. 82) on laws prohibiting manufacture and sale of intoxicating liquors; (46 L. R. A. 417) on liability of carrier for transporting liquors.

7 L. R. A. 302, *GRISWOLD v. WEBB*, 16 R. I. 649, 19 Atl. 143.

Control of carriers and innkeepers over their premises.

Cited in *Godbout v. St. Paul Union Depot Co.* 79 Minn. 197, 47 L. R. A. 536, 81 N. W. 835; *Philadelphia & R. R. Co. v. Godfrey*, 19 Montg. Co. L. Rep. 130, 28 Pa. Co. Ct. 328; *Donovan v. Pennsylvania Co.* 61 L. R. A. 143, 57 C. C. A. 364, 120 Fed. 217—upholding right of railroad company to grant exclusive privilege to one hackman to solicit passengers on its premises; *Hedding v. Gallagher*, 72 N. H. 393, 64 L. R. A. 821, 57 Atl. 225, upholding right of railroad company to grant exclusive privilege of entering upon its premises for purpose of carrying baggage of passengers; *Lucas v. Herbert*, 148 Ind. 66, 37 L. R. A. 377, 47 N. E. 146, upholding right of railroad company to designate where hacks and omnibuses shall stand on its premises; *New York, N. H. & H. R. Co. v. Bork*, 23 R. I. 222, 49 Atl. 965, upholding right of carrier to exclude hackmen from soliciting passengers on its premises; *Cosgrove v. Augusta*, 103 Ga. 839, 42 L. R. A. 714, 68

Am. St. Rep. 149, 31 S. E. 445, denying right of city to exclude omnibus drivers from soliciting passengers in railroad station; *State v. Steele*, 106 N. C. 783, 8 L. R. A. 523, 19 Am. St. Rep. 573, 11 S. E. 478, upholding right of innkeeper to exclude liverymen from soliciting business in his hotel.

7 L. R. A. 304, *WOOD v. BULLARD*, 151 Mass. 324, 25 N. E. 67.

Action after distribution to charge heir with share of claim, in *Bullard v. Moor*, 158 Mass. 422, 33 N. E. 928, and *Bullard v. Perry*, 66 Vt. 481, 29 Atl. 787.

Gifts to heirs surviving at happening of event.

Followed in *Peck v. Carlton*, 154 Mass. 234, 28 N. E. 166, holding members of class to whom gift given means those living at event occurring after decease of testator.

Cited in *Proctor v. Clark*, 154 Mass. 48, 12 L. R. A. 724, 27 N. E. 673, holding terms "then heirs" of devisee refer to those surviving at happening of event subsequent to testator's death; *Wason v. Ranney*, 167 Mass. 160, 45 N. E. 85, holding in deed to life tenant, then to heirs, heirs take as of tenant's decease; *Codman v. Brooks*, 167 Mass. 504, 46 N. E. 102, holding next of kin determined as of fixed date without reference to death of testator; *Bigelow v. Clap*, 166 Mass. 91, 43 N. E. 1037, holding words "who may then be living" refer to those surviving occurrence of certain event; *Welch v. Brimmer*, 169 Mass. 212, 47 N. E. 699, holding heirs of testator those determined upon death of sole devisee without issue; *Heard v. Read*, 169 Mass. 223, 47 N. E. 778, holding testator's heirs living at life tenant's death, meant by provision in will that at "her decease" that remainder shall be divided among testator's heirs at law as though he died intestate; *Pulse v. Osborn*, 30 Ind. App. 633, 64 N. E. 59, holding devise to daughter, conditioned that in case of her death before grandchildren of testatrix it should go to grandchildren, determinable fee.

Creation of contingent remainder.

Cited in *Eager v. Whitney*, 163 Mass. 466, 40 N. E. 1046, holding will providing for distribution in future to "then heirs" as in intestacy creates contingent remainder; *Pollock v. Farnham*, 156 Mass. 391, 31 N. E. 298, holding gift to legatee after death of life tenant falls into residuum upon death before life tenant.

Estoppel.

Cited in *Girard F. & M. Ins. Co. v. Canan*, 195 Pa. 592, 46 Atl. 115, holding one setting up estoppel must show grounds therefor.

Distinguished in *Dole Bros. Co. v. Cosmopolitan Preserving Co.* 167 Mass. 493, 57 Am. St. Rep. 477, 46 N. E. 105, holding sureties, having reasonable cause to believe that agent had no power to execute bond but not actually knowing it, not estopped to set up lack of power as defense.

7 L. R. A. 309, *RANDALL v. EVENING NEWS ASSO.* 79 Mich. 266, 44 N. W. 783.

Second appeal in 97 Mich. 137, 56 N. W. 361.

Libel per se.

Cited in *Thibault v. Sessions*, 101 Mich. 283, 59 N. W. 624, holding an article commonly understood to charge teacher with indecent and criminal liberties with pupils' persons, in which plaintiff has assisted, actionable *per se*; *Field v. Magee*,

122 Mich. 558, 81 N. W. 354, holding publication pending election imputing remark by politician of ability to buy all votes of certain class, and that this indicates how election to be carried, libelous *per se*; Owen v. Dewey, 107 Mich. 72, 65 N. W. 8, holding newspaper's publication of accusation of criminal offense in attempting to bribe legislator, not privileged although in good faith.

Cited in footnotes to *Augusta Evening News v. Radford*, 20 L. R. A. 533, which holds newspaper article charging constable with soliciting business for magistrates' courts libelous; *Upton v. Hume*, 21 L. R. A. 493, which holds false imputation of crime to candidate not privileged; *Coffin v. Brown*, 55 L. R. A. 732, which denies right to falsely attack character of appointee of governor to prevent latter's re-election; *Wofford v. Meeks*, 55 L. R. A. 214, which holds libelous, publication imputing to county officials prostitution of county finances by awarding contracts to persons of same political faith; *Eikhoff v. Gilbert*, 51 L. R. A. 451, which denies privilege to circular addressed to voters announcing that candidate for re-election has championed legislation opposed to moral interests of community; *State v. Hoskins*, 47 L. R. A. 233, holding publication of charges against candidate for office of judge, not privileged although published outside the judicial district.

Cited in note (8 L. R. A. 193) as to what constitutes libel or slander.

Allegation of special damage.

Distinguished in *Smedley v. Soule*, 125 Mich. 197, 84 N. W. 63, holding plaintiff for libel cannot recover for damage in his profession unless alleged.

Necessity of innuendo where libel plain.

Cited in *Sanford v. Rowley*, 93 Mich. 123, 52 N. W. 1119, holding innuendo surplusage where meaning of language charged as libelous, plain.

7 L. R. A. 313, *FARMERS & M. NAT. BANK v. LOFTUS*, 133 Pa. 97, 19 Atl. 347.

Capacity of married woman to contract.

Cited in *Lewis v. Linton*, 24 Pa. Co. Ct. 189 holding contract made and executed in foreign country between subjects thereof, enforceable according to *lex loci contractus*; *Harrar v. Cronney*, 13 Pa. Co. Ct. 194, 2 Pa. Dist. R. 375, 32 W. N. C. 91, 10 Lanc. L. Rev. 359, holding wife's note for husband's debt valid as not within inhibition of accommodation indorsement or guaranty by married woman.

Cited in note (57 L. R. A. 523) as to conflict of laws as to capacity of married woman to contract.

Conflict of laws as to pledges and sales.

Cited in *Swedish-American Nat. Bank v. First Nat. Bank*, 89 Minn. 115, 99 Am. St. Rep. 549, 94 N. W. 218, holding that validity of pledge is to be determined according to law of state where pledged property is situated.

Cited in note (64 L. R. A. 829) on conflict of laws as to sales of personal property.

7 L. R. A. 316, *RUPARD v. CHESAPEAKE & O. R. CO.* 88 Ky. 280, 11 S. W. 70.

Warnings at railway crossings.

Cited in *Cowen v. Watson*, 91 Md. 353, 46 Atl. 996, holding question for jury whether blowing of whistle directly over highway crossing was negligent.

Cited in notes (9 L. R. A. 159, 11 L. R. A. 385) on duty of railroad to warn travelers on approach to highway crossings.

Contributory negligence.

Cited in *Cowen v. Watson*, 91 Md. 355, 46 Atl. 996, holding at dangerous crossing care and caution is mutual and reciprocal.

Cited in footnotes to *Louisville & N. R. Co. v. Webb*, 11 L. R. A. 674, which holds failure to use senses before crossing track not excused by unlawful speed of train and watchman's failure to do duty; *Oleson v. Lake Shore & M. S. R. Co.* 32 L. R. A. 149, which holds it negligent to attempt to cross track immediately after passage of train whose smoke obstructs view; *Woehrle v. Minnesota Transfer R. Co.* 52 L. R. A. 349, which holds traveler's failure to look and listen when watchman absent not negligence *per se*; *Lorenz v. Burlington, C. R. & N. R. Co.* 56 L. R. A. 753, which holds negligence of one pursuing cow in not looking and listening before crossing railroad track for jury; *Keenan v. Union Traction Co.* 58 L. R. A. 217, which holds failure to look for train within 35 feet of track, negligence; *Passman v. West Jersey & Seashore R. Co.* 61 L. R. A. 609, which holds cutting of train on side track at highway crossing not invitation to cross without using ordinary precaution.

Cited in note (13 L. R. A. 75) on liability of street car company for injury to pedestrians.

Duty of carrier at crossings.

Cited in footnote to *Birmingham Mineral R. Co. v. Jacobs*, 12 L. R. A. 830, which holds failure to stop train before crossing track of other railroad not excused by fact that rear of train would be left standing across other track.

Duty of carrier as to speed of trains.

Cited in note (11 L. R. A. 435) on rate of speed of railway trains.

Duty of owner to keep building safe.

Cited in note (11 L. R. A. 361) on duty of owner of building to keep it in safe condition.

7 L. R. A. 319, *STATE ex rel. KOHLER v. CINCINNATI, W. & B. R. CO.* 47 Ohio St. 130, 23 N. E. 928.

Interstate commerce.

Cited in *Lake Shore & M. S. R. Co. v. State*, 8 Ohio C. C. 224, holding state law requiring at least three passenger trains each way to stop at all places of over 3,000 inhabitants to receive and let off passengers, not regulation of interstate commerce.

Franchise rights.

Cited in *State ex rel. Snyder v. Portland Natural Gas & Oil Co.* 153 Ind. 487, 53 L. R. A. 415, 74 Am. St. Rep. 314, 53 N. E. 1089, holding corporation for production of oil and gas may forfeit franchise by contract with competitor fixing prices and binding it to supply latter's customers.

Cited in footnote to *State ex rel. Sheets v. Mt. Hope College Co.* 52 L. R. A. 365, which authorizes dissolution of education institution for sale of diplomas without regard to merit.

Cited in note (9 L. R. A. 37) as to forfeiture of franchise.

Oppressive discrimination in freights.

Cited in *Murray v. Chicago & N. W. R. Co.* 35 C. C. A. 66, 92 Fed. 872, holding shipper has action at common law to recover freights unjustly discriminating against him.

Cited in note (18 L. R. A. 105) as to right of carrier at common law to discriminate between passengers or shippers.

Distinguished in *Cleveland, C. C. & I. R. Co. v. Closser*, 126 Ind. 353, 9 L. R. A. 757, 3 Inters. Com. Rep. 391, 22 Am. St. Rep. 593, 26 N. E. 159, holding mere fact of discrimination will not invalidate contract with carrier.

Illegal combinations and charges.

Cited in *State ex rel. Crow v. Armour Packing Co.* 173 Mo. 393, 61 L. R. A. 474, 96 Am. St. Rep. 515, 73 S. W. 645, imposing fine of \$5,000 upon corporations guilty of entering into illegal pool.

Cited in note (63 L. R. A. 762, 764) on quo warranto against corporations for making illegal charges in the course of authorized business.

7 L. R. A. 323, *SMITH v. GEORGIA P. R. CO.* 88 Ala. 538, 16 Am. St. Rep. 63, 7 So. 119.

Negligence toward passenger.

Cited in *St. Louis & S. W. R. Co. v. Johnson*, 59 Ark. 130, 26 S. W. 593, holding passenger may rely upon carrier's invitation to alight by calling station and stopping train thereat, at night; *Alabama G. S. R. Co. v. Hill*, 93 Ala. 521, 30 Am. St. Rep. 65, 9 So. 722, requiring strict diligence of carrier in providing for safety of passengers; *Southern R. Co. v. Lollar*, 135 Ala. 379, 33 So. 32, holding passenger entitled to recovery for injury from starting train while he is alighting at destination; *Smitson v. Southern P. R. Co.* 37 Or. 80, 60 Pac. 907, holding passenger may recover for injury in attempting to alight at night at brakeman's suggestion, by train started after stop of fifteen seconds.

Cited in notes (8 L. R. A. 674) as to carrier's duty to use care for safety of passengers; (15 L. R. A. 348) as to announcement of stations by carriers.

Distinguished in *Richmond & D. R. Co. v. Smith*, 92 Ala. 238, 9 So. 223, holding carrier liable for injuries to passenger in alighting at 5 o'clock on dark morning when, after station twice called, train stopped 75 feet from station; *St. Louis, I. M. & S. R. Co. v. Farr*, 70 Ark. 271, 68 So. 243, allowing recovery for injury to passenger alighting when train stopped after station called, where surroundings give no warning that station not reached.

7 L. R. A. 325, *JONES v. STATE*, 28 Neb. 495, 44 N. W. 658.

Expulsion of members by church society.

Cited in *Von Hoven v. Immanuel Presby. Church*, 108 La. 276, 32 So. 389, holding *ex parte* proceedings to get rid of members of a church society, void; *Hatfield v. De Long*, 156 Ind. 211, 51 L. R. A. 753, 83 Am. St. Rep. 194, 59 N. E. 483, holding courts may enjoin church tribunal from expelling member in violation of laws of the church.

Cited in notes (15 L. R. A. 801) on civil power to review excommunication of church member; (49 L. R. A. 396) as to conclusiveness of decisions of tribunals of associations or corporations, as to regularity of procedure.

7 L. R. A. 327, *HENDERSON v. REYNOLDS*, 84 Ga. 159, 10 S. E. 734.

Validity of verdict on Sunday.

Cited in *Bernstein v. Myers*, 90 Ga. 90, 24 S. E. 854, holding that verdict may be made up and returned on Sunday, where jury sent out before; *Weaver v. Car-*

ter, 101 Ga. 207, 28 So. 869, holding court may receive verdict on Sunday; *State v. Atkinson*, 104 La. 572, 29 So. 279, holding verdict may be returned morning of Thanksgiving day.

Cited in footnotes to *Sullivan v. Maine C. R. Co.* 8 L. R. A. 427, which holds riding for exercise on Sunday not violation of statute; *Porter v. Pierce*, 7 L. R. A. 847, which excludes Sunday in determining time to redeem.

Standard of time.

Cited in *Ex parte Parker*, 35 Tex. Crim. Rep. 15, 29 S. W. 480, holding sun time the standard of time for courts; *Jones v. German Ins. Co.* 110 Iowa, 78, 46 L. R. A. 861, 81 N. W. 188, holding sun time determines hour of expiration of insurance.

7 L. R. A. 330, *STATE ex rel. WEISS v. DISTRICT BOARD*, 76 Wis. 177, 20 Am. St. Rep. 41, 44 N. W. 967.

Judicial notice.

Cited in *North Hempstead v. Gregory*, 53 App. Div. 354, 65 N. Y. Supp. 867, holding court will take judicial notice of contents of Bible; *Pfeiffer v. Board of Education*, 118 Mich. 560, 42 L. R. A. 541, 77 N. W. 250, holding courts will judicially notice custom of opening schools with selections from Bible and other devotional exercises; *Hilton v. Roylance*, 25 Utah, 144, 58 L. R. A. 729, 95 Am. St. Rep. 821, 69 Pac. 660, holding court will take judicial notice of meaning of "sealed" and "sealing ordinance" as used in Mormon church.

Sectarian instruction.

Cited in *Hysong v. School District*, 164 Pa. 642, 26 L. R. A. 206, 44 Am. St. Rep. 632, 30 Atl. 482, to point that the principles of Christian morality are not excluded from public schools but only sectarian instruction; *Stevenson v. Hanyon*, 9 Kulp, 266, 4 Lack. Legal News, 226, 7 Pa. Dist. R. 591, holding reading of Bible in public schools not sectarian instruction, and not unconstitutional; *State ex rel. Jones v. Froehlich*, 115 Wis. 42, 58 L. R. A. 764, 95 Am. St. Rep. 894, 91 N. W. 115, holding value of laws will not justify their enactment in violation of constitutional provisions.

Cited in note (14 L. R. A. 419) on public aid to sectarian institution.

Distinguished in *North v. University of Illinois*, 137 Ill. 307, 27 N. E. 54, holding rule requiring students of university to attend chapel unless excused not unconstitutional or unreasonable.

Reading Bible in school.

Cited in *State ex rel. Freeman v. Scheve*, 65 Neb. 871, 59 L. R. A. 930, footnote p. 927, 91 N. W. 346, holding Bible reading, hymn singing, and prayer in public schools forbidden by Constitution.

Cited in note (36 L. R. A. 278) on adoption of text-books for public schools.

Disapproved in *Pfeiffer v. Board of Education*, 118 Mich. 569, 42 L. R. A. 539, 77 N. W. 250, holding reading extracts from Bible without comment, in public schools, constitutional.

Practical construction of statute.

Cited in *Travelers' Ins. Co. v. Fricke*, 94 Wis. 266, 68 N. W. 958, holding there is no room for practical construction unless statute is doubtful; *State ex rel. Lamb v. Cunningham*, 83 Wis. 142, 17 L. R. A. 168, 35 Am. St. Rep. 27, 53 N. W. 35, holding former acts immaterial in construing constitutionality of later stat-

ute unless language of Constitution is doubtful and a long-continued legislative construction has been given to it.

Qualification of witness.

Cited in note (42 L. R. A. 566) on religious belief as qualification of witness.

7 L. R. A. 344, *VIRGINIA MIDLAND R. CO. v. WASHINGTON*, 86 Va. 629, 10 S. E. 927.

Liability of lessor or lessee of railroad for other's negligence.

Cited in *Murray v. Lehigh Valley R. Co.* 66 Conn. 520, 32 L. R. A. 540, 34 Atl. 506, holding railroad operating train on leased track subject to orders of latter's servants, liable for their negligence; *Arrowsmith v. Nashville & D. R. Co.* 57 Fed. 179, holding authorized lessor railroad company not liable for injury to mail clerk from crane erected under lessee's permission; *Buckner v. Richmond & D. R. Co.* 72 Miss. 880, 18 So. 449, holding authorized lessor railroad company not liable for injury from defective appliance leased; *Hurlbut v. Wabash R. Co.* 130 Mo. 665, 31 S. W. 1051, holding railway hiring employees and furnishing engines used on connecting lines, liable to employee for injury while on other line due to defect in engine; *McCabe v. Maysville & B. S. R. Co.* 112 Ky. 875, 66 S. W. 1054, holding lessor railroad liable for negligence of lessee in killing pedestrian; *Chicago & G. T. R. Co. v. Hart*, 209 Ill. 425, 66 L. R. A. 81, 70 N. E. 654 (dissenting opinion), majority holding lessor road liable for negligent injury by lessee of employee of latter; *Muntz v. Algiers & G. R. Co.* 111 La. 427, 64 L. R. A. 225, 35 So. 624, holding lessor road liable for injury due to negligence of lessee.

Cited in footnote to *Harden v. North Carolina R. Co.* 55 L. R. A. 784, which denies power of lessor of railroad to exempt itself from liability to employees of lessee.

Cited in notes (37 L. R. A. 83) as to which of two or more persons is the master of another who is conceded to be the servant of one of them; (44 L. R. A. 745) as to liability of lessor of railroad for injuries caused by negligence of another company using the road under a lease, license, or other contract.

7 L. R. A. 348, *PEOPLE ex rel. MORGAN v. HAYNE*, 83 Cal. 111, 17 Am. St. Rep. 217, 23 Pac. 1.

Encroachment upon judicial powers.

Cited in *State v. Le Clair*, 86 Me. 532, 30 Atl. 7, holding act investing clerk of municipal court with authority to hear complaints and issue warrants no encroachment upon judicial power; *De Votie v. McGerr*, 14 Colo. 581, 23 Pac. 980, raising without passing upon question of constitutionality of act providing for supreme court commission.

Cited in footnote to *Herndon v. Imperial Fire Ins. Co.* 18 L. R. A. 547, which denies legislative power to give right to rehearing contrary to court rule.

7 L. R. A. 352, *CITIZENS STREET R. CO. v. TWINAME*, 121 Ind. 375, 23 N. E. 159.

Action to recover for loss of services.

Cited in *Hensley v. Tuttle*, 17 Ind. App. 255, 46 N. E. 594, holding husband entitled to recover for joint services of himself and wife in nursing and caring for decedent; *Bloomington v. Rogers*, 13 Ind. App. 124, 41 N. E. 395, holding married L. R. A. AU.—VOL. I.—60.

woman not supported by husband and doing business on own account can recover value of own services; *Tipton County v. Brown*, 4 Ind. App. 292, 30 N. E. 925, holding husband entitled to wife's services in household work; *Louisville, N. A. & C. R. Co. v. Rush*, 127 Ind. 548, 26 N. E. 1010, holding condition of one's family may be considered in estimating father's damages for loss of child's services.

Cited in footnote to *Harmon v. Old Colony R. Co.* 30 L. R. A. 658, which holds impairment of capacity to labor element of damages for injury to married woman.

Liability of husband for tort of wife.

Cited in *Radke v. Schlundt*, 30 Ind. App. 222, 65 N. E. 770, holding husband not liable for injury caused by negligence of wife while selling or delivering produce raised on his farm.

7 L. R. A. 354, *RICKETTS v. CHESAPEAKE & O. R. CO.* 33 Wa. Va. 433, 25 Am. St. Rep. 901, 10 S. E. 801.

Lease of railroad.

Cited in *Fisher v. West Virginia & P. R. Co.* 39 W. Va. 370, 23 L. R. A. 759, 19 S. E. 578, holding railroad cannot turn over its road to another company and by lease or contract exempt itself from responsibility for management of road.

Cited in footnote to *Van Steuben v. Central R. Co.* 34 L. R. A. 577, which holds unauthorized lease of railroad, void.

Cited in notes (44 L. R. A. 742) as to company's authority to lease railroad; (52 L. R. A. 371) necessity of legislative permission to consolidate.

Liability of lessor and lessee of railroad.

Cited in *Moundsville v. Ohio River R. Co.* 37 W. Va. 99, 20 L. R. A. 167, 16 S. E. 514, to point that railroad company's duty to restore streets which it crosses rests on successor by lease, assignment, or consolidation; *Chesapeake & O. R. Co. v. Howard*, 14 App. D. C. 284, holding lessee liable for injury on leased road though lease was *ultra vires*.

Cited in notes (37 L. R. A. 85) as to liability of lessor of railroad while lessee is in possession; (44 L. R. A. 739, 740) as to liability of lessor of railroad for negligence of lessee.

Distinguished in *Arrowsmith v. Nashville & D. R. Co.* 57 Fed. 173, holding authorized lease without exemption clause absolves lessor from torts of lessee resulting from negligent operation of road.

Reading from reported cases to jury.

Cited in *State v. Wait*, 44 Kan. 323, 24 Pac. 354, holding reading to jury from opinion of Supreme Court in another case, not permissible.

Distinguished in *Gregory v. Ohio River R. Co.* 37 W. Va. 623, 16 S. E. 819, holding counsel may read from reported cases if law read is correct and relevant.

Exemplary or punitive damages.

Cited in *Mayer v. Frobe*, 40 W. Va. 262, 22 S. E. 58, holding exemplary damages may be assessed upon wrongdoer by way of punishment in civil suit; *Turner v. Norfolk & W. R. Co.* 40 W. Va. 688, 22 S. E. 83, holding exemplary damages recoverable within statutory limit against railroad company for death of employee due to its negligence; *Gillingham v. Ohio River R. Co.* 35 W. Va. 604, 14 L. R.

A. 804, 29 Am. St. Rep. 827, 14 S. E. 243, holding one falsely imprisoned by railway conductor may recover exemplary damages restricted to what would be a fair and just compensation; *Talbott v. West Virginia C. & P. R. Co.* 42 W. Va. 563, 26 S. E. 311, to point that exemplary damages not recoverable against railroad company for wanton and malicious act of servant unless expressly or impliedly authorized or ratified; *Donivan v. Manhattan R. Co.* 1 Misc. 371, 21 N. Y. Supp. 457, holding punitive damages not recoverable for wilful injury by servant unless master authorizes or ratifies the act; *Claiborne v. Chesapeake & O. R. Co.* 46 W. Va. 366, 33 S. E. 262, holding master not liable in punitive damages for injury due to malicious act of servant unless he authorized or ratified it; *Couch v. Chesapeake & O. R. Co.* 45 W. Va. 56, 30 S. E. 147 (divided court), to proposition that doctrine as to punitive damages is same whether death ensues as result of the negligent act or not; *Turner v. Norfolk & W. R. Co.* 40 W. Va. 693, 22 S. E. 83, as to circumstances under which corporations are liable to infliction of punitive damages; *Scott v. Chesapeake & O. R. Co.* 43 W. Va. 490, 27 S. E. 211 (dissenting opinion), majority holding that punitive damages can be awarded against a corporation.

Liability of carrier for assault by employee.

Cited in note (14 L. R. A. 738) on liability of carrier for assault on passenger by employee during transportation.

7 L. R. A. 357, *DETWILLER v. COM.* 131 Pa. 614, 18 Atl. 990, 992.

Eligibility of directors or stockholders.

Cited in *Com. ex rel. Laufer v. Stevenson*, 200 Pa. 510, 50 Atl. 91, to point that president of board of directors cannot decide as to eligibility of directors and fill vacancy thus created.

Cited in notes (24 L. R. A. 252) on right of nonresidents to become stockholders; (46 L. R. A. 620) on charter restrictions on eligibility to become shareholder.

Voting by proxy.

Cited in *Walker v. Johnson*, 17 App. D. C. 163, holding trading corporation has implied power to enact by-law conferring right to vote by proxy; *McKee v. Home Sav. & T. Co.* 122 Iowa, 736, 98 N. W. 609, holding voting on question of liquidation not authorized by general proxy; *Worth Mfg. Co. v. Bingham*, 54 C. C. A. 125, 116 Fed. 791, holding voting by proxy under provision of charter, legal.

Cited in note (29 L. R. A. 845) on right to vote by proxy in private corporations.

7 L. R. A. 360, *COM. ex rel. ROBINSON v. HEMINGWAY*, 131 Pa. 636, 18 Atl. 990, 992.

Ownership of stock by foreign corporation.

Cited in *Shepp v. Schuylkill Valley Traction Co.* 17 Montg. Co. L. Rep. 60, holding foreign corporation which owns and votes upon stock of Pennsylvania corporation does not thereby assume possession and control of the latter.

Alien widow's right to dower.

Cited in *Ondis v. Banta*, 7 Kulp, 391, holding alien widow entitled to dower in lands of alien husband.

7 L. R. A. 361, *Re* CHAUNCEY, 119 N. Y. 77, 23 N. E. 448.

Abatement of legacy.

Cited in *Re* Hinman, 32 Misc. 538, 67 N. Y. Supp. 459, holding legacy for the support of a brother during life abates with other general legacies.

Making up deficiency from surplus.

Cited in *Spencer v. Spencer*, 38 App. Div. 410, 56 N. Y. Supp. 460, holding deficiency in any year of amount of income provided by will should be made good out of surplus of succeeding years.

7 L. R. A. 363, *STREISSGUTH v. NATIONAL GERMAN-AMERICAN BANK*, 43 Minn. 50, 19 Am. St. Rep. 213, 44 N. W. 797.

Liability for default of agent.

Cited in *Ft. Dearborn Nat. Bank v. Security Bank*, 87 Minn. 84, 91 N. W. 257, holding bank which transmits check to another for collection makes latter bank its agent and is liable for its neglect; *Bailie v. Augusta Sav. Bank*, 95 Ga. 282, 51 Am. St. Rep. 74, 21 S. E. 717, holding bank liable for negligent failure of its correspondent to collect; *Commercial Bank v. Red River Valley Nat. Bank*, 8 N. D. 387, 79 N. W. 859, holding under Dak. Code subagent bank not responsible to principal for negligent failure to collect but that agent may sue; *Johnson v. Dun*, 75 Minn. 538, 78 N. W. 98, holding mercantile agency accepting notes for collection without limitation as to liability, responsible for wrongful acts of its attorney; *Irwin v. Reeves Pulley Co.* 20 Ind. App. 128, 48 N. E. 601 (dissenting opinion) to point correspondent bank agent of home bank, majority holding latter liable only if negligent in selecting correspondent.

Cited in footnotes to *Wilson v. Carlinville Nat. Bank*, 52 L. R. A. 632, which holds depositor of check for collection estopped to object sending check directly to drawee bank in accordance with custom known to him; *Second Nat. Bank v. Merchants' Nat. Bank*, 55 L. R. A. 273, which holds bank negligent in sending note for collection to bank whose cashier is treasurer of corporation maker without hearing from similar note previously sent.

7 L. R. A. 365, *LEAVITT v. GOODWIN*, 79 Iowa, 348, 44 N. W. 567.

Provision maturing debt on default.

Cited in *Horn v. Bennett*, 135 Ind. 163, 24 L. R. A. 804, 34 N. E. 321, holding priority of notes given to secure mortgage not changed where all the notes become due in consequence of mortgagor's default; *Watts v. Creighton*, 85 Iowa, 160, 52 N. W. 12, holding mortgagee's option to declare entire debt due on default may be waived so that such default will not set statute of limitations in operation.

Questioned in *San Antonio Real Estate Bldg. & Loan Assn. v. Stewart*, 94 Tex. 446, 86 Am. St. Rep. 864, 61 S. W. 386, on proposition that provision maturing entire debt on default is a penalty or forfeiture.

Priority of notes.

Cited in note (24 L. R. A. 802) on priority of notes as regulated by maturity.

7 L. R. A. 367, *Re* WOODWARD, 117 N. Y. 522, 23 N. E. 120.

Construction of word "nephew."

Cited in *Nicholson v. Nicholson*, 115 Iowa, 495, 91 Am. St. Rep. 175, 88 N. W.

1064, and Willard v. Darrah, 168 Mo. 672, 90 Am. St. Rep. 468, 68 S. W. 1023, holding word "nephew" does not include grandnephews.

Cited in note (9 L. R. A. 200) on legacy to nephews and nieces.

Construction of will.

Cited in note (8 L. R. A. 742) on rule of construing wills.

Vesting of legacy.

Cited in footnote to Wengerd's Appeal, 13 L. R. A. 360, which holds legacies vest at testator's death under will converting estate into money and directing distribution between children of son.

7 L. R. A. 369, MILLVALE v. EVERGREEN R. CO. 131 Pa. 1, 18 Atl. 993.

Sufficiency of title of statute.

Cited in Com. v. Moore, 2 Pa. Super. Ct. 166, and Com v. Curry, 4 Pa. Super. Ct. 360, holding title sufficient which fairly gives notice of subject of act so as to lead to inquiry into body of bill; Luzerne Water Co. v. Toby's Creek Water Co. 6 Kulp, 239, holding title of supplemental act sufficient which indicates an amendment of original followed by specification of changes, where latter not apparently explanatory of former; Lehigh Valley Coal Co. v. United States Pipe Line Co. 3 Pa. Dist. R. 72, 7 Kulp, 79, holding title to act of June 2, 1883, sufficiently indicates its purpose to provide for taking of lands for transportation of petroleum.

— Title of supplemental act.

Cited in Forty Fort v. Forty Fort Water Co. 9 Kulp, 251; Com. v. Edgerton Coal Co. 164 Pa. 305, 30 Atl. 129; Philadelphia v. Ridge Ave. R. Co. 142 Pa. 491, 24 Am. St. Rep. 512, 21 Atl. 982—holding supplemental act germane to original covered by title referring to original act; Washington v. McGeorge, 146 Pa. 254, 29 W. N. C. 252, 23 Atl. 222, holding supplemental act constitutional where its provisions are germane to subject expressed in title; Luzerne Water Co. v. Toby Creek Water Co. 148 Pa. 571, 24 Atl. 117, holding title of supplementary act sufficient if germane to subject of original act; Com. *ex rel.* Smathers v. Taylor, 159 Pa. 457, 34 W. N. C. 33, 28 Atl. 348, to point that supplemental act may contain anything germane to original act; Wilson v. Downing, 4 Pa. Super. Ct. 492, holding title to supplemental act sufficient where its subject-matter is within title and also germane to subject of original act.

Construction of terms "railroad" and "railway."

Cited in Massachusetts Loan & T. Co. v. Hamilton, 32 C. C. A. 50, 59 U. S. App. 403, 88 Fed. 592; Rafferty v. Central Traction Co. 147 Pa. 589, 29 W. N. C. 542, 30 Am. St. Rep. 763, 23 Atl. 884; Old Colony Trust Co. v. Allentown & B. Rapid Transit Co. 192 Pa. 603, 44 Atl. 319, holding the words "railroad" and "railway" synonymous.

— Street railroads.

Cited in Cheetham v. McCormick, 178 Pa. 191, 35 Atl. 631, holding street railroads are within term "railroad corporations" as used in statute; Sams v. St. Louis & M. River R. Co. 174 Mo. 89, 61 L. R. A. 485, 73 S. W. 686, and Com. v. McCaully, 2 Pa. Dist. R. 63, holding word "railroad" includes street railroads;

Bammel v. Kirby, 19 Tex. Civ. App. 200, 47 S. W. 392, holding statutory term "any railroad" includes street railroads; **Pennsylvania R. Co. v. Inland Traction Co.** 18 Montg. Co. L. Rep. 137, holding consolidating street railways under act of May 16, 1861, lawful.

Cited in note (52 L. R. A. 380) on right of street railways to consolidate under statute authorizing consolidation of railroads.

Change of gauge or motive power.

Cited in **Western N. Y. & P. R. Co. v. Buffalo, R. & P. R. Co.** 193 Pa. 135, 44 Atl. 242, as sustaining right of railroad company to widen its gauge; **Watkin v. West Philadelphia Pass. R. Co.** 11 Pa. Co. Ct. 653, 31 W. N. C. 271, 1 Pa. Dist. R. 467, holding passenger railway limited by charter to horse power without authority to make use of trolley system of electricity.

Right of railway in and municipal control over street.

Cited in **New Castle v. Lake Erie & W. R. Co.** 155 Ind. 23, 57 N. E. 516, holding city may grant railway the right to lay tracks longitudinally along the street; *Re Johnston*, 137 Cal. 121, 69 Pac. 973, holding void, ordinance requiring permit from city to lay gas and water pipes in streets.

Cited in footnote to **Chicago G. W. R. Co. v. First M. E. Church**, 50 L. R. A. 488, which holds water tank in street and station at which bells constantly rung and whistles blown within few rods of church, a nuisance.

7 L. R. A. 374, **ST. LOUIS, I. M. & S. R. CO. v. WORTHEN**, 52 Ark. 529, 13 S. W. 254.

Classification of property for taxation.

Cited in **Sawyer v. Dooley**, 21 Nev. 400, 32 Pac. 437, holding act classifying property for taxation, applying to all railroads, general law; **Wells, F. & Co.'s Express v. Crawford County**, 63 Ark. 589, 37 L. R. A. 375, 40 S. W. 710, holding separate classification for taxation of express company's property within legislative power; **St. Louis & S. F. R. Co. v. Williams**, 53 Ark. 64, 13 S. W. 796, holding bridge, the use of which only has been acquired by railway, not taxable by state board.

Cited in footnotes to **State v. Virginia & T. R. Co.** 35 L. R. A. 759, which holds earning capacity of railroad main consideration in determining taxable value; **Knoxville & O. R. Co. v. Harris**, 53 L. R. A. 921, which holds exemption from privilege tax not included in exemption from *ad valorem* tax.

Cited in notes (14 L. R. A. 585) on constitutional equality of privileges, immunities, and protection; (60 L. R. A. 340, 374), on constitutional equality in the United States in relation to corporate taxation.

Notice of taxation.

Cited in **State ex rel. Jennings Bros. Invest. Co. v. Armstrong**, 19 Utah, 127, 56 Pac. 1076, holding notice need not be given by county board of equalization in raising or lowering taxation on entire class of property in district; **Carroll v. Alsop**, 107 Tenn. 278, 64 S. W. 193, holding only notice required for increase of taxation by state board afforded by statute fixing date of biennial session; **State ex rel. Harrison County Bank v. Springer**, 134 Mo. 226, 35 S. W. 589, holding

notice not required when statute fixes date when parties may show cause against increase of assessment.

Practice.

Cited in footnotes to *McClain v. Williams*, 43 L. R. A. 287, which holds right of appeal subject to legislative restriction; *Johnson v. State*, 51 L. R. A. 272, which sustains provision against reversal for error in charge not excepted to.

7 L. R. A. 377, *BENNETT v. CHAPIN*, 77 Mich. 526, 43 N. W. 893.

Property obtained under will.

Cited in *Webb v. Hayden*, 106 Mo. 49, 65 S. W. 760, holding possession of executor assuming to act as trustee cannot be disturbed by one without title; *Green v. Russell*, 103 Mich. 642, 61 N. W. 885, holding purchaser justified in refusing title to property purchased from administrator with will annexed unless order of court obtained; *Parkhurst v. Trumbull*, 130 Mich. 412, 90 N. W. 25, holding executor not authorized to mortgage property under power of sale.

7 L. R. A. 381, *METROPOLITAN EXHIBITION CO. v. EWING*, 42 Fed. 198.

Enforcement of contracts.

Cited in footnote to *Philadelphia Ball Club v. Lajoie*, 58 L. R. A. 227, which authorizes injunction against base ball player violating contract to play for certain organization, for specified time, and meanwhile not play for other club.

Cited in notes (7 L. R. A. 780) on unenforceable contracts; (11 L. R. A. 550) on special services for professional labor; (20 L. R. A. 168) on power of equity to grant mandatory injunction.

7 L. R. A. 385, *CHURCH v. CHURCH*, 16 R. I. 667, 19 Atl. 244.

Defense to action for divorce.

Cited in *Mathewson v. Mathewson*, 18 R. I. 459, 49 Am. St. Rep. 782, 28 Atl. 801, holding divorce will not be granted to woman continuing to live with second husband after first husband's return from presumptive death.

7 L. R. A. 386, *BUFFUM v. TIVERTON*, 16 R. I. 643, 19 Atl. 112.

Trust estate passing under general devise.

Cited in *Re Higgins*, 15 Mont. 483, 28 L. R. A. 119, 39 Pac. 506, holding that trust estate does not always pass under general devise.

Devise to wife.

Cited in note (10 L. R. A. 757) on devise to wife for life with power to sell or dispose of estate.

7 L. R. A. 387, *HOPKINS v. MANCHESTER*, 16 R. I. 663, 19 Atl. 243.

When gift created.

Cited in *Blazo v. Cochrane*, 71 N. H. 587, 53 Atl. 1026, holding gift *causa mortis* not established when donor died subsequently from another cause; *Mathews v. Hoagland*, 48 N. J. Eq. 487, 21 Atl. 1054, holding delivery of certificate of stock without written assignment or power does not constitute gift *inter vivos*.

7 L. R. A. 388, SPAIGHT v. MCGOVERN, 16 R. I. 658, 19 Atl. 246.

When killing of dogs permitted.

Cited in Harris v. Eaton, 20 R. I. 84, 37 Atl. 308, holding licensed dog cannot be killed while trespassing unless he is doing the damage for which he may be killed by statute.

Cited in notes (15 L. R. A. 250, 40 L. R. A. 510) on right to kill dogs.

7 L. R. A. 390, UNITARIAN SOC. v. TUFTS, 151 Mass. 76, 23 N. E. 1006.

Specific legacies; ademption.

Cited in Tolman v. Tolman, 85 Me. 321, 27 Atl. 184, holding bequest of notes adeemed by testator surrendering them and taking reconveyance of property for which they were given; New Albany Trust Co. v. Powell, 29 Ind. App. 502, 64 N. E. 640, holding legatee not entitled to larger number of shares of stock than owned by testator at death; *Re Frahm*, 120 Iowa, 91, 94 N. W. 444, holding bequest of stock not adeemed by acceptance of note in lieu thereof; *Drake v. True*, 72 N. H. 323, 56 Atl. 749, holding legatees of exact amount of stock owned by testator at time will executed entitled only to amount owned at his death, where some had been disposed of.

Distinguished in Slade v. Talbot, 182 Mass. 259, 94 Am. St. Rep. 653, 65 N. E. 374, holding that executor must purchase shares sufficient to make up number bequeathed.

Cited in footnote to Evans v. Hunter, 17 L. R. A. 308, which holds bequests of certain amounts in unidentified United States bonds general.

7 L. R. A. 392, GAY v. ROOKE, 151 Mass. 115, 21 Am. St. Rep. 434, 23 N. E. 835.

When interest runs.

Cited in Horn v. Hansen, 56 Minn. 48, 22 L. R. A. 619, 57 N. W. 315, holding interest on "wheat ticket" runs from its date, the wheat having been delivered; Gould v. Emerson, 160 Mass. 441, 39 Am. St. Rep. 501, 35 N. E. 1065, holding interest on note not bearing interest not allowable until demand.

Cited in note (8 L. R. A. 393) on negotiable instruments.

7 L. R. A. 393, SLATTERY v. WASON, 151 Mass. 266, 21 Am. St. Rep. 448, 23 N. E. 843.

When income of trust fund subject to debts of beneficiary.

Cited in Reynolds v. Hanna, 55 Fed. 791, holding share of beneficiary in income of trust estate which it was in discretion of trustee to apply to his use is subject to his debts; Thornton v. Stanley, 55 Ohio St. 209, 45 N. E. 318, holding bequest of income of estate in trust for education and support of beneficiary for life without limitation can be reached by creditors; Roberts v. Stevens, 84 Me. 327, 17 L. R. A. 268, 24 Atl. 873, holding creditors cannot reach income of trust fund which testator has directed shall not be assigned or transferred except to beneficiary; Billings v. Marsh, 153 Mass. 313, 10 L. R. A. 766, 25 Am. St. Rep. 635, 26 N. E. 1000, holding trust fund under will providing it shall not be assignable or taken for any debt of legatee does not pass to assignee in insolvency; Wemyss v. White, 159 Mass. 485, 34 N. E. 718, holding income of

trust fund, with discretion in trustee to discontinue payment, cannot be reached by mortgage of beneficiary; *Evans v. Wall*, 159 Mass. 169, 38 Am. St. Rep. 410, 34 N. E. 183, holding income of fund under will payable absolutely is subject to rights of creditors; *Patten v. Herring*, 9 Tex. Civ. App. 646, 29 S. W. 388, holding will left real estate to executor in trust for beneficiaries so that creditors could not reach it.

Cited in footnotes to *Morgan v. Halsey*, 36 L. R. A. 716, which holds power of appointment of property to testatrix's daughter in any manner she may deem proper limited by subsequent clauses of will; *Requa v. Graham*, 52 L. R. A. 641, which holds annuity in wife's will in lieu of other interests accepted by husband, not trust beyond reach of creditors; *Hutchinson v. Maxwell*, 57 L. R. A. 384, which denies power to create equitable life estate free from debts of beneficiary; *Jewell v. Louisville Trust Co.* 53 L. R. A. 377, which denies creation of precatory trust by will of merchant expressing desire for retention on liberal terms of specified person in employ of firm of which testator a partner; *Leigh v. Harrison*, 18 L. R. A. 49, which denies creditor's right to reach debtor's interest under spendthrift trust; *Murphy v. Delano*, 55 L. R. A. 727, which holds income of spendthrift trust not within reach of creditors by void agreement of trustee to pay certain portion of income absolutely to beneficiary; *Bull v. Kentucky Nat. Bank*, 12 L. R. A. 37, which determines liability of spendthrift trust to payment of beneficiary's debts; *Roberts v. Stevens*, 17 L. R. A. 266, which authorizes establishment of spendthrift trust free from rights of creditors; *Williams v. Baptist Church*, 54 L. R. A. 427, which holds absolute gift, not trust, created by bequest to church and "suggesting" as to application.

Cited in notes (11 L. R. A. 565) on spendthrift trusts; (13 L. R. A. 563) on precatory words in will; (13 L. R. A. 212) on creator of estate may qualify its enjoyment by annexing conditions and limitations.

Distinguished in *Levi v. Bergman*, 94 Md. 212, 50 Atl. 515, holding trustee cannot exercise discretion under will by giving extra allowance in favor of creditor of beneficiary in whom is no right to demand it.

7 L. R. A. 396, *MOORE v. VALDA*, 151 Mass. 363, 23 N. E. 1102.

Ne exeat writ.

Cited in footnotes to *Midland Co. v. Broat*, 17 L. R. A. 312, which holds *lex loci* governs action for breach of bond given on issuance of ne exeat writ; *Miller v. Miller*, 24 L. R. A. 137, which holds requirement of two years' residence to give jurisdiction of suit for divorce not applicable to suit for alimony.

7 L. R. A. 399, *LOUISVILLE UNDERWRITERS v. DURLAND*, 123 Ind. 544, 24 N. E. 221.

Conditions precedent.

Cited in *Burlington Ins. Co. v. Rivers*, 9 Tex. Civ. App. 180, 28 S. W. 453, holding provisos creating exceptions to general liability for loss need not be negated with general averment of performance of conditions; *Hanover F. Ins. Co. v. Johnson*, 26 Ind. App. 126, 57 N. E. 277, holding general averment of performance of conditions of policy sufficient though coupled with allegations

of particular facts; *Ft. Wayne Ins. Co. v. Irwin*, 23 Ind. App. 56, 54 N. E. 817, holding complaint sufficiently alleges condition precedent by averring performance of all conditions in policy; *Darnell v. Keller*, 18 Ind. App. 105, 45 N. E. 676, holding allegation of performance of conditions precedent need not be in exact words of statute; *Voluntary Relief Department v. Spencer*, 17 Ind. App. 125, 46 N. E. 477, holding allegation in complaint that member had fully complied with conditions of membership negated idea of violation of condition precedent in rules; *Milwaukee Mechanics' Ins. Co. v. Stewart*, 13 Ind. App. 645, 42 N. E. 290, holding waiver of condition precedent need not be specifically alleged in complaint; *Moffitt v. Phenix Ins. Co.* 11 Ind. App. 240, 38 N. E. 835, holding conditions precedent are sufficiently pleaded by averment that all conditions have been performed.

Liability on insurance policy.

Cited in *Vorse v. Jersey Plate Glass Ins. Co.* 119 Iowa, 561, 60 L. R. A. 840, 97 Am. St. Rep. 330, 93 N. W. 569, holding breaking of windows by explosion preceding fire, not "damage by fire," within terms of policy; *Wertheimer-Swarts Shoe Co. v. United States Casualty Co.* 172 Mo. 150, 61 L. R. A. 769, 95 Am. St. Rep. 500, 72 S. W. 635, holding policy not avoided by fact that loss was result of negligence of employee of insured.

Cited in note (19 L. R. A. 598) on liability of insurer for loss caused by explosion.

7 L. R. A. 403, *GILKESON-SLOSS COMMISSION CO. v. LONDON*, 53 Ark. 83, 13 S. W. 513.

Assignment for benefit of creditors, when invalid.

Followed in *Smith v. Patterson*, 57 Ark. 540, 22 S. W. 343, holding assignment avoided by assignee's taking possession before completion of inventory and bond.

Cited in *Baker v. Baer*, 59 Ark. 510, 28 S. W. 28, holding assignee's possession before bond and inventory filed vitiates assignment; *Badgett v. Johnson-Fife Hat Co.* 29 C. C. A. 232, 56 U. S. App. 416, 85 Fed. 410, and *Fowler v. Blosser*, 1 Ind. Terr. 39, 35 S. W. 247, holding oral agreement to give assignee possession before filing inventory and bond invalidates assignment; *Pace v. J. S. Merrill Drug Co.* 2 Ind. Terr. 224, 48 S. W. 1061, and *Churchill v. Hill*, 59 Ark. 64, 26 S. W. 378, holding deed of assignment directing disposition of property different from that prescribed by statute, fraudulent; *Phelps v. Wyler*, 67 Ark. 103, 56 S. W. 632, holding deed of assignment providing possession not to be given to assignee until filing of inventory and bond, valid.

7 L. R. A. 405, *CARRUTH-BYRNES HARDWARE CO. v. DEERE*, 53 Ark. 140, 13 S. W. 517.

Attachment; right to sue necessary to validity.

Cited in *Davis v. H. B. Claffin Co.* 63 Ark. 173, 35 L. R. A. 786, 58 Am. St. Rep. 102, 38 S. W. 1117, holding right of attachment is incident to and dependent upon right to sue, and have judgment, for the debt.

Right to question validity of lien.

Cited in *Glaser v. First Nat. Bank*, 62 Ark. 179, 35 L. R. A. 771, 34 S. W. 1061,

holding junior attaching creditor cannot controvert existence of grounds of prior attachment; *Rice v. Dorrian*, 57 Ark. 546, 22 S. W. 213, holding junior attaching creditor may intervene in prior attachment suit for purpose of showing same issued without authority in law or in fact; *Moody v. McRimmon*, 7 Tex. Civ. App. 583, 27 S. W. 780, conceding for purpose of argument that junior attaching creditor may enjoin sale under prior attachment issued by justice of peace without citation.

Cited in note (35 L. R. A. 776) on right of creditors to question validity of attachment.

Priority of liens.

Cited in *Lowenstein v. Caruth*, 50 Ark. 592, 28 S. W. 421, holding confession of judgment without knowledge or consent of creditor cannot affect rights acquired by third parties before ratification.

7 L. R. A. 407, *PEOPLE ex rel. DARROW v. COLEMAN*, 119 N. Y. 137, 23 N. E. 488.

Where property is taxable.

Cited in *People ex rel. Day v. Barker*, 135 N. Y. 656, 48 N. Y. S. R. 538, 4 Silv. Ct. App. 649, 32 N. E. 252, holding securities in possession of three trustees in another state, for nonresident beneficiary, not taxable although one of the trustees resided in New York; *People ex rel. Beaman v. Feitner*, 168 N. Y. 363, 61 N. E. 280, holding under laws of 1896 trustees assessable in tax district of residence for his proportionate share of trust estate; *People ex rel. Lorillard v. Barker*, 70 Hun, 398, 24 N. Y. Supp. 63, holding resident of Rhode Island, wintering in New York, not taxable in New York; *People ex rel. Beaman v. Feitner*, 63 App. Div. 176, 71 N. Y. Supp. 261, holding securities for nonresident beneficiaries deposited outside state, where one trustee resided, not taxable in New York; *People ex rel. Day v. Tax Comrs.* 42 N. Y. S. R. 449, 17 N. Y. Supp. 923, holding personal property forming part of trust fund actually deposited outside of state not taxable in New York; *People ex rel. Day v. Barker*, 44 N. Y. S. R. 574, 17 N. Y. Supp. 944, holding trust securities outside state, although liens on property within state, not taxable in New York; *Augusta v. Kimball*, 91 Me. 609, 41 L. R. A. 477, 40 Atl. 666, holding nonresident trustees of estate of Maine decedent not taxable, after removal of property from state.

Cited in notes (16 L. R. A. 732) on situs for purpose of taxation of debts evidenced by notes and mortgages; (20 L. R. A. 153) on place of taxation of trust property.

Distinguished in *People ex rel. Brewster v. Barker*, 8 Misc. 34, 28 N. Y. Supp. 651, holding property of estate taxable in county where physically held under executor's agreement.

7 L. R. A. 409, *SCHUYLKILL RIVER E. S. R. CO. v. KERSEY*, 133 Pa. 234, 19 Am. St. Rep. 632, 19 Atl. 553.

Eminent domain; consequential damages.

Cited in *Ehret v. Schuylkill River E. S. R. Co.* 151 Pa. 167, 30 W. N. C. 566, 24 Atl. 1068, holding damages for taking leasehold under power of eminent

domain may include value of lease for special purpose of lessee, and consequent expense incurred by lessee from land being taken.

Cited in footnote to *Jacksonville, T. & K. W. R. Co. v. Adams*, 14 L. R. A. 533, which holds value of improvements put upon land by railroad unlawfully taking possession, cannot be considered in estimating damage on subsequent condemnation.

Cited in note (11 L. R. A. 605) on market price an element of damage.

Distinguished in *Re Evergreen Street*, 1 Dauphin Co. Rep. 70, holding lease of land from month to month, without privilege of removing improvements, does not entitle lessee to damages upon land being taken for street.

7 L. R. A. 411, *ROYAL INS. CO. v. HELLER*, 133 Pa. 152, 19 Atl. 349.

Defenses in actions ex contractu.

Cited in *Bradly v. Potts*, 33 W. N. C. 572, 2 Pa. Dist. R. 799, holding affidavit of defense necessary in all actions based on contract, although damages unliquidated.

— Insurance cases.

Cited on later appeal in 177 Pa. 265, 34 L. R. A. 601, 39 W. N. C. 62, 35 Atl. 726, Affirming 17 Pa. Co. Ct. 22, 4 Pa. Dist. R. 433, holding company not relieved from any part of liability by tenant's receiving from landlord sum received by latter under policy taken out by him.

Distinguished on later appeal in 151 Pa. 105, 30 W. N. C. 546, 25 Atl. 83, holding insurance company not relieved from liability to indemnify tenant for loss from payment of rent while premises uninhabitable, by agreement that landlord might enter and rebuild.

7 L. R. A. 412, *DUNCAN v. FLANAGAN*, 133 Pa. 373, 19 Atl. 405.

Right to relief in equity.

Cited in note (11 L. R. A. 458) on necessity for suitor coming into equity with clean hands.

7 L. R. A. 414, *ATCHISON, T. & S. F. R. CO. v. COCHRAN*, 43 Kan. 225, 19 Am. St. Rep. 129, 23 Pac. 151.

Identity of corporations.

Cited in *White v. Pecos Land & Water Co.* 18 Tex. Civ. App. 637, 45 S. W. 207, holding corporations composed of same persons, and operated in same interest, not necessarily identical; *State v. Morgan's L. & T. R. & S. Co.* 106 La. 526, 31 So. 115, and *Exchange Bank v. Macon Constr. Co.* 97 Ga. 7, 33 L. R. A. 803, 25 S. E. 326, holding ownership by corporation of capital stock of another corporation does not give title to property, nor make corporations identical; *Chase v. Michigan Teleph. Co.* 121 Mich. 634, 80 N. W. 717, holding transfer of property of corporation to another corporation owning nearly all of former company's stock, not conclusive of consolidation.

Railroad may purchase stock of another railway corporation.

Cited in *Kimball v. Atchison, T. & S. F. R. Co.* 46 Fed. 889, holding, under

law of Kansas, purchase by railroad of that state of stock of parallel road in another state, not invalid.

Cited in note (9 L. R. A. 651) on power of corporation to purchase stock of other corporations.

Liability for acts of agent representing several railroads.

Cited in *Scott v. Cleveland, C. C. & St. L. R. Co.* 144 Ind. 133, 32 L. R. A. 156, 43 N. E. 133, holding railroad not liable for mistake of its agent in sale of ticket, while acting as agent for another railroad.

7 L. R. A. 419, *PECKHAM v. LEGO*, 57 Conn. 553, 14 Am. St. Rep. 130, 19 Atl. 392.

Effect of power of sale in will to enlarge estate.

Cited in *Sill v. White*, 62 Conn. 434, 20 L. R. A. 322, 26 Atl. 396, holding that coupling power of sale with devise of life estate does not convert life estate into greater estate; *Security Co. v. Pratt*, 65 Conn. 181, 32 Atl. 396, holding that unexecuted power of sale with right to appropriate proceeds for benefit of life estate does not clothe life tenant with equitable fee; *Mansfield v. Shelton*, 67 Conn. 394, 52 Am. St. Rep. 285, 35 Atl. 271, holding devise to use devisee "without any restrictions or limitations whatever," with attempted disposition of remainder, gives first taker life estate only; *Little v. Geer*, 69 Conn. 415, 37 Atl. 1056, holding devise of use and income of estate, with power to sell as devisee "may desire for her comfort and maintenance," does not give absolute estate; *Hull v. Holloway*, 58 Conn. 217, 20 Atl. 445, holding devise of income for life, with authority to use so much of principal as beneficiary may "require" for personal use, gives life estate only, unless personal needs of beneficiary require principal.

Cited in footnotes to *Cornwell v. Wulff*, 45 L. R. A. 53, which holds absolute power of disposition in instrument conveying land carries full power in land itself; *Roth v. Rauschenbusch*, 61 L. R. A. 455, which holds fee simple by devise to one absolutely and forever, not cut down by subsequent provision as to disposition of any remainder on devisee's death.

Cited in note (9 L. R. A. 168) on devise of life estate to wife.

Construction which disposes of whole estate favored.

Cited in *Weed v. Scofield*, 73 Conn. 677, 49 Atl. 22, holding construction of will which would result in partial intestacy should be avoided; *Tarrant v. Backus*, 63 Conn. 281, 28 Atl. 46, holding intention of testator to make full disposition of estate, and avoid intestacy as to any portion, presumed; *Mallory v. Mallory*, 72 Conn. 500, 45 Atl. 164, holding devise to trustees for use of beneficiary for life, with power of sale and appropriation if necessary for comfort and maintenance, gives residuary devisee equitable remainder in fee; *Beers v. Narramore*, 61 Conn. 18, 22 Atl. 1061, holding devise of life estate in "Old Mill Quarry property" included entire tract of which quarry was part.

7 L. R. A. 423, *SPAULDING v. BERNHARD*, 76 Wis. 368, 20 Am. St. Rep. 75, 44 N. W. 643.

Holidays.

Cited in *Deere v. Hodges*, 59 Neb. 292, 80 N. W. 897, holding approval of

appeal bond not within statute prohibiting transaction of "judicial business" on Sunday or legal holiday.

Cited in note (19 L. R. A. 320) on how far law of holidays extends to matters other than those relating to negotiable paper.

7 L. R. A. 425, ANONYMOUS, 89 Ala. 291, 18 Am. St. Rep. 116, 7 So. 100.

Evidence; physical examination of person.

Cited in Alabama G. S. R. Co. v. Hill, 90 Ala. 77, 9 L. R. A. 444, 24 Am. St. Rep. 764, 8 So. 90, holding claimant for personal injuries of internal nature may be required to submit to physical examination by physicians under direction of court.

Cited in footnote to Alabama G. S. R. Co. v. Hill, 9 L. R. A. 442, which holds delicacy and refinement of feeling not ground for refusing to order surgical examination of plaintiff.

Cited in note (14 L. R. A. 466) on power to compel plaintiff to submit to physical examination.

7 L. R. A. 426, STATE *ex rel.* ATTY. GEN. v. SAVAGE, 89 Ala. 1, 7 So. 183.

Intoxication.

Cited in State *ex rel.* Atty. Gen. v. Robinson, 111 Ala. 485, 20 So. 30, holding only occasional intoxication, and not habitual drunkenness, of probate judge shown; People v. Radley, 127 Mich. 630, 86 N. W. 1029, holding charge proper that habitual drunkenness produced a disorderly person; Roden v. State, 136 Ala. 90, 34 So. 351, holding intoxication under statute to mean condition produced by drink in which mental or physical faculties are interfered with or disturbed.

Cited in notes (28 L. R. A. 326) on sufficiency of evidence before grand jury to sustain indictment; (28 L. R. A. 35) on concurrence by twelve grand jurors.

7 L. R. A. 428, GARRETTSON v. NORTH ATCHISON BANK, 39 Fed. 163.

Certification of check by telegram.

Reaffirmed on hearing on merits without special discussion.

Negotiable paper; estoppel to deny liability.

Second appeal in 2 C. C. A. 145, 4 U. S. App. 557, 51 Fed. 168, Affirming 47 Fed. 871, holding certification of bill as "good" amounts to appropriation of fund for drawer, and obligation of drawee to parties acting thereon is irrevocably fixed.

Cited in note (23 L. R. A. 836) on liability of bank as accommodation indorser.

Distinguished in Hollins v. Hubbard, 165 N. Y. 544, 59 N. E. 317, holding commission merchants promising to deliver bills of lading "next week" without disclosing lien thereon, does not estop them claiming lien as against bank paying draft in reliance upon promise.

Statute of frauds; telegrams.

Cited in note (50 L. R. A. 247) on telegrams as writings to make contract within statute of frauds.

7 L. R. A. 431, *DATZ v. CLEVELAND*, 52 N. J. L. 188, 19 Atl. 17, 20 Atl. 317.

Constitutional law — Local or special legislation.

Cited in *State, McLaughlin, Prosecutor, v. Newark*, 57 N. J. L. 300, 30 Atl. 543, holding act "providing for establishment of wards in cities of first class" constitutional; *State, Johnson, Prosecutor, v. Asbury Park*, 58 N. J. L. 608, 33 Atl. 850, holding act providing for licenses, relating only to boroughs, constitutional.

Cited in footnotes to *State v. Elizabeth*, 23 L. R. A. 525, which holds invalid special statute discriminating between municipalities already having and those not having racecourse; *Hamilton County v. Rasche Bros.* 19 L. R. A. 584, which holds statute as to taxes not applying to all parts of state unconstitutional; *Milwaukee County v. Isenring*, 53 L. R. A. 635, which holds act regulating sheriff's fees for particular county, local.

Option legislation.

Cited in *Landis v. Ashworth*, 57 N. J. L. 512, 31 Atl. 1017, holding act delegating power to each district to determine amount to be raised by tax for school purposes, constitutional; *Kennedy v. Belmar*, 61 N. J. L. 21, 38 Atl. 756, holding act not operative in any borough unless accepted by majority vote, constitutional; *State, Lowthrop, Prosecutor, v. Trenton*, 61 N. J. L. 487, 40 Atl. 442, holding law of which local operation depends on voters' consent, constitutional; *State v. Clayton*, 53 N. J. L. 280, 21 Atl. 1026, holding act providing for incorporation of any township or part thereof, having certain area and population, at option of electors, constitutional; *State, Morris, Prosecutor, v. Bayonne*, 53 N. J. L. 303, 21 Atl. 453, holding act granting powers to be exercised at option of municipality, constitutional; *Allison v. Corker*, 67 N. J. L. 603, 60 L. R. A. 568, 52 Atl. 362, holding act providing for division of townships into road districts, imposing condition of local acceptance, constitutional; *Adams v. Beloit*, 105 Wis. 373, 47 L. R. A. 446, 81 N. W. 869, upholding statute giving cities incorporated under special charters option to adopt provisions of general statute; *State ex rel. Fire Comrs. v. Trenton*, 53 N. J. L. 570, 22 Atl. 731, holding diversity of government flowing from grant of powers exercisable at option of locality does not invalidate act; *State, Noonan, Prosecutor, v. Hudson County*, 52 N. J. L. 402, 20 Atl. 255, holding act providing for exercise at discretionary power in laying out highways, occasioning diversities in application, constitutional; *Albright v. Sussex County Lake & Park Commission*, 68 N. J. L. 531, 53 Atl. 612, holding act providing for adoption of benefits by referendum not unconstitutional because one county may adopt and another reject; *State ex rel. Herrick v. Hoos*, 61 N. J. L. 464, 39 Atl. 656, to point that act providing for contract of water department had been accepted by voters of city.

Distinguished in *De Hart v. Atlantic City*, 63 N. J. L. 227, 43 Atl. 742, Reversing 62 N. J. L. 587, 41 Atl. 687, holding act providing for establishment of district courts in cities with 20,000 population or less which adopt act within three months, unconstitutional; *State ex rel. Childs v. Copeland*, 66 Minn. 320, 34 L. R. A. 780, 61 Am. St. Rep. 410, 69 N. W. 27, holding law granting charter powers to cities of certain class, to take effect only upon adoption by each city, unconstitutional; *Robt. J. Boyd Paving & Contracting Co. v. Ward*, 28 C. C. A.

672, 55 U. S. App. 730, 85 Fed. 32, holding act conferring certain powers on such cities, not possessing them under general laws, as should adopt its provisions, unconstitutional; *State ex rel. Renner v. Holmes*, 68 N. J. L. 194, 53 Atl. 76, holding act to reorganize boards of freeholders rendered unconstitutional by provision requiring proceedings for adoption to be initiated before certain date.

Effect of non-optional general law.

Distinguished in *State v. Bayonne*, 56 N. J. L. 299, 28 Atl. 713, holding act directing mode of making sewer assessments in cities without provision for optional acceptance supersedes charter provisions.

Validity of action of absent mayor's representative.

Cited in *State, Williams, Prosecutor, v. Bayonne*, 55 N. J. L. 64, 25 Atl. 407, holding officer upon whom absent mayor's duties devolve may sign licenses.

Legislative power to remedy defective act by amendment.

Cited in *State, Glen Ridge, Prosecutor, v. Stout*, 58 N. J. L. 602, 33 Atl. 858; *State ex rel. Wheeler v. Stuht*, 52 Neb. 220, 71 N. W. 941, holding inadequate grant to city of powers of government may be remedied by subsequent legislation.

Constitutional prohibition against incorporating existing law in subsequent act by reference thereto.

Cited in *Re Haynes*, 54 N. J. L. 26, 22 Atl. 923, holding act providing commissioners "shall have powers and capacities theretofore vested by existing legislation" in certain other officers, constitutional.

7 L. R. A. 435, *DELAWARE, L. & W. R. CO. v. TRAUTWEIN*, 52 N. J. L. 169, 19 Am. St. Rep. 442, 19 Atl. 178.

Carrier's duties to passengers independent of contract.

Cited in *New York, L. E. & W. R. Co. v. Ball*, 53 N. J. L. 286, 21 Atl. 1052, holding independent of contract, railroad under obligation to take due and reasonable care for safe carriage of passenger; *Pennsylvania R. Co. v. Knight*, 58 N. J. L. 288, 33 Atl. 845, holding duty of safe carriage arising from relation of passenger and carrier, independent of contract, applicable to both passenger and baggage; *Exton v. Central R. Co.* 62 N. J. L. 13, 56 L. R. A. 511, 42 Atl. 486, holding person entering waiting room for ferry boat of railroad is passenger; *Newbury v. Luke*, 68 N. J. L. 190, 52 Atl. 625, holding Sunday hiring no defense to action for damages for overdriving horse; *McNeill v. Durham & C. R. Co.* 135 N. C. 690, 47 S. E. 765, holding railroad company liable to one injured through its negligence while unlawfully riding on a pass.

Cited in note (13 L. R. A. 95) on duty of railway conductor in stopping and starting trains.

Safety of ingress and egress to and from depots and trains.

Cited in *Girton v. Lehigh Valley R. Co.* 17 Pa. Super. Ct. 149, holding passengers have right to assume that way provided for passage from train to depot reasonably safe; *Exton v. Central R. Co.* 62 N. J. L. 13, 56 L. R. A. 511, 42 Atl. 486, holding railroad must use reasonable care to prevent injury to passenger using usual passageway to baggage room; *Collins v. Toledo, A. A. & N. M. R. Co.* 80 Mich. 395, 45 N. W. 178, holding where depot platform not provided with

steps, railroad liable for injury arising from use of plank provided by public; *Falk v. New York, S. & W. R. Co.* 56 N. J. L. 383, 29 Atl. 157, holding stopping train on trestle in night time without lights, and without warning to passengers or offer of assistance in alighting, is negligence.

Cited in footnote to *Herrman v. Great Northern R. Co.* 57 L. R. A. 390, which holds railroad company liable for injury to passenger from unsafe condition of depot premises leased of union depot company or its receiver.

Cited in notes (20 L. R. A. 520) on measure of care carrier must exercise to keep platforms and approaches safe; (16 L. R. A. 593) on duty of carrier to maintain safe approaches beyond premises; (11 L. R. A. 721) on liability of railroad for injuries from defective platform.

Distinguished in *Devoe v. New York, O. & W. R. Co.* 63 N. J. L. 280, 43 Atl. 899, holding acquiescence of railroad in use of way made by passengers across tracks to railroad creates no duty except to refrain from wilful injuries.

Invitation to use way.

Cited in *Furey v. New York C. & H. R. R. Co.* 67 N. J. L. 276, 51 Atl. 505, holding opening left between cars as convenience for loading and unloading, not invitation to use same as passageway; *Haselton v. Portsmouth, K. & Y. Street R. Co.* 71 N. H. 591, 53 Atl. 1016, holding practice of street railway to receive and discharge passengers at platform not constructed by it, invitation to use it in getting on and off cars.

Use of unsafe way when another provided.

Cited in *Phillips v. Burlington Library Co.* 55 N. J. L. 318, 27 Atl. 478, holding person using exit made unsafe by owner not precluded from recovering for injury because of existence of another and safer way.

Contributory negligence.

Cited in *Atlantic City R. Co. v. Goodin*, 62 N. J. L. 396, 45 L. R. A. 673, 72 Am. St. Rep. 652, 42 Atl. 333, holding passenger alighting from train not under obligation to look and listen before crossing track leading to station.

Sunday laws.

Cited in footnotes to *Gross v. Miller*, 26 L. R. A. 605, which holds violation of Sunday law by hunting no defense to action for negligent injury; *Dugan v. State*, 9 L. R. A. 321, which holds pilot on boat carrying pleasure parties on Sunday, punishable; *Van Auken v. Chicago & W. M. R. Co.* 22 L. R. A. 33, which holds riding home from station quietly on Sunday evening not labor.

7 L. R. A. 439, *DEVOL v. DYE*, 123 Ind. 321, 24 N. E. 246.

Gifts; delivery essential to.

Cited in *Gammon Theological Seminary v. Robbins*, 128 Ind. 93, 12 L. R. A. 508, footnote p. 506, 27 N. E. 341, which holds instrument declaring that holder gives note which he retains insufficient as gift; *Anderson v. Anderson*, 126 Ind. 67, 24 N. E. 1036, holding signed and acknowledged deeds retained by grantor, without effort to deliver, pass no title.

Cited in notes (11 L. R. A. 684) on delivery and retention essential to validity of gift; (21 L. R. A. 695) on undelivered written transfer or assignment of property as a gift.

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What delivery sufficient.

Cited in *Martin v. McCullough*, 136 Ind. 338, 34 N. E. 819, holding delivery to one of several beneficiaries in behalf of all constitutes him trustee for donees; *Bickford v. Mattocks*, 95 Me. 551, 50 Atl. 894, holding delivery of note, subsequently returned to agent, to send to donee, does not constitute valid gift; *Caylor v. Caylor*, 22 Ind. App. 672, 72 Am. St. Rep. 331, 52 N. E. 465, holding direction to third person to deliver property in his possession to donee constitutes valid gift; *Hogan v. Sullivan*, 114 Iowa, 460, 87 N. W. 447, holding bank deposit in third person's name, followed by directions as to distribution just before donor's death, constitutes valid gift; *Goelz v. People's Sav. Bank*, 31 Ind. App. 73, 67 N. E. 232, holding deposit in bank for and in name of donee, passbook in donee's name being retained by donor until death, valid gift *inter vivos*; *Deneff v. Helms*, 42 Or. 165, 70 Pac. 390, holding direction that deposits be delivered to certain person, complied with same day, donor dying next day, valid gift *causa mortis*; *Waite v. Grubbe*, 43 Or. 411, 73 Pac. 206, holding taking of donee to whereabouts of buried money indicating definitely where concealed, sufficient delivery; *Johnson v. Colley*, 101 Va. 420, 99 Am. St. Rep. 884, 44 S. E. 721, holding third person receiving gift *causa mortis* for donee trustee of latter.

Cited in footnotes to *Porter v. Woodhouse*, 13 L. R. A. 64, which holds warranty deeds not delivered by donor giving to third person; *Peck v. Rees*, 13 L. R. A. 714, which holds delivery of deed by donor to own agent insufficient.

Cited in note (18 L. R. A. 170, 171) on sufficiency of constructive delivery to sustain gift *causa mortis*.

Distinguished in *Stokes v. Sprague*, 110 Iowa, 97, 81 N. W. 195, holding statement of intention to give, and promise of third person to deliver, without surrendering possession of notes, not valid gift; *Telford v. Patton*, 144 Ill. 621, 33 N. E. 1119, holding taking certificate of deposit in another's name, unaccompanied by declaration of trust, retained by depositor, no gift.

Disapproved in effect in *Bieber v. Borekman*, 70 Mo. App. 508, holding delivery by sick person to agent, with instructions to deliver only in case of death, not valid gift.

7 L. R. A. 442, *BORN v. FIRST NAT. BANK*, 123 Ind. 78, 18 Am. St. Rep. 312, 24 N. E. 173.

Checks, effect of certification on drawer's liability.

Cited in *Minot v. Russ*, 156 Mass. 461, 16 L. R. A. 512, 32 Am. St. Rep. 472, 31 N. E. 489, and *Oyster & Fish Co. v. National Lafayette Bank*, 51 Ohio St. 111, 46 Am. St. Rep. 560, 36 N. E. 833, holding acceptance of certified check does not release drawer; *Head v. Hornblower*, 156 Mass. 461, 16 L. R. A. 512, 31 N. E. 489; *Continental Nat. Bank v. Cornhauser*, 37 Ill. App. 480; *Meridan Nat. Bank v. First Nat. Bank*, 7 Ind. App. 327, 52 Am. St. Rep. 450, 33 N. E. 247,—holding certification of check in holder's hands releases drawer.

Cited in notes (12 L. R. A. 492) on effect of certification of checks; (16 L. R. A. 511) on effect of certification of check on liability of drawer; (10 L. R. A. 369) on substituted obligation.

What constitutes payment.

Cited in *Cox v. Hayes*, 18 Ind. App. 223, 47 N. E. 844, holding delivery of check,

in absence of agreement, does not extinguish debt; *National L. Ins. Co. v. Goble*, 51 Neb. 8, 70 N. W. 503, holding in absence of agreement, remittance of bank draft not payment; *Williams v. Costello*, 95 Ala. 593, 11 So. 9, holding order of third person, in absence of agreement, not payment for goods sold; *Combs v. Bays*, 19 Ind. App. 263, 49 N. E. 358, holding giving of new note, in absence of agreement, does not discharge prior note; *Baumgardner v. Henry*, 131 Mich. 243, 91 N. W. 169, holding mere mailing of check not payment under agreement that payment may be made by check.

Cited in footnotes to *State Bank v. Byrne*, 21 L. R. A. 753, which holds drawee's acceptance of draft presented by collecting bank not payment; *Bank of Antigo v. Union Trust Co.* 23 L. R. A. 611, which holds bank takes risk of accepting check in payment of note received for collection.

Cited in note (9 L. R. A. 263) on acceptance of check not *ipso facto* payment.

7 L. R. A. 445, *EXCHANGE BANK v. TUTTLE*, 5 N. M. 427, 23 Pac. 241.

Effect on note of provision for attorney's fees.

Cited in *Sylvester Bleckley Co. v. Alewine*, 48 S. C. 311, 37 L. R. A. 88, footnote p. 86, 26 S. E. 609, holding promissory note with provision for attorney's fees non-negotiable.

Cited in footnotes to *Dorsey v. Wolff*, 18 L. R. A. 428, which holds negotiability not destroyed by stipulation for 10 per cent attorney's fees; *Levens v. Briggs*, 14 L. R. A. 188, which holds agreement for a specified percentage, if note collected by suit, invalid; *Oppenheimer v. Farmers' & M. Bank*, 33 L. R. A. 767, which holds negotiability of note not affected by stipulation for attorneys' fees inoperative until maturity and dishonor; *Pattillo v. Alexander*, 29 L. R. A. 616, which sustains payee's guaranty of attorney's fees if note has to be collected by law; *Farmers Nat. Bank v. Sutton Mfg. Co.* 17 L. R. A. 595, which holds negotiability of bill of exchange not defeated by stipulation for attorneys' fees becoming operative after dishonor; *Bank of Commerce v. Fuqua*, 14 L. R. A. 588, which holds provision in note for attorney's fees valid; but reasonableness of same for court.

Cited in note (12 L. R. A. 140) on effect on note of stipulation for attorney's fees.

7 L. R. A. 448, *EVANS v. EVANS*, 43 Minn. 31, 44 N. W. 524.

7 L. R. A. 449, *POPPLETON v. YAMHILL COUNTY*, 18 Or. 377, 23 Pac. 253.

Taxation of nonresident's property.

Approved in *Savings & Loan Soc. v. Multnomah County*, 169 U. S. 426, 42 L. ed. 805, 18 Sup. Ct. Rep. 392, upholding, as to nonresident mortgagee, statute for taxing mortgage and debt secured thereby to mortgagee as real estate and authorizing mortgagor to deduct same; *New Orleans v. Stempel*, 175 U. S. 319, 44 L. ed. 189, 20 Sup. Ct. Rep. 110, holding proceeds of nonresident's securities kept within state for use, subject to taxation as credits arising from business within state, at business domicile.

Cited in note (16 L. R. A. 731, 732) as to situs for purpose of taxation of debts evidenced by notes and mortgages.

7 L. R. A. 451, KINNAIRD v. STANDARD OIL CO. 89 Ky. 468, 25 Am. St. Rep. 545, 12 S. W. 937.

Liability for injury by nuisance.

Cited in Brady v. Detroit Steel & Spring Co. 102 Mich. 280, 26 L. R. A. 176, 60 N. W. 687, holding one keeping fuel oil liable for damage produced by leakage and foul gases; Beatrice Gas Co. v. Thomas, 41 Neb. 669, 43 Am. St. Rep. 711, 59 N. W. 925, holding one liable for collecting on premises matter producing damage to neighbor's well by percolation; Cumberland Teleg. & Teleph. Co. v. United Electric R. Co. 93 Tenn. 516, 27 L. R. A. 242, 29 S. W. 104, holding electric railway company liable for producing unnatural electric condition in earth by "leakage," damaging contiguous telephone plant; Cork v. Blossom, 162 Mass. 334, 26 L. R. A. 259, 44 Am. St. Rep. 362, 38 N. E. 495, holding one maintaining on premises chimney in danger of falling on adjoining lands liable for improper construction.

Cited in notes (8 L. R. A. 787) on *damnum absque injuria*; (19 L. R. A. 96) on rights in subterranean waters as to fouling subterranean water.

Distinguished in Letts v. Kessler, 54 Ohio St. 84, 40 L. R. A. 185, 42 N. E. 765, sustaining right to erect high fence shutting off light and air from house of neighbor.

Injury from natural causes.

Distinguished in Livezey v. Schmidt, 96 Ky. 443, 29 S. W. 25, denying liability for injury to health occasioned by drainage into cellar from natural causes; Barnard v. Sherley, 135 Ind. 564, 24 L. R. A. 574, 41 Am. St. Rep. 454, 34 N. E. 600, holding one using water from artesian well not liable for allowing it to flow into natural watercourse.

Proof required for abatement.

Distinguished in Columbia Ave. Sav. Fund, S. D. Title & T. Co. v. Prison Commission, 92 Fed. 803, holding reasonable certainty of pollution of stream must be shown before injunction will issue.

Liability of oil-land lessee for negligence.

Cited in footnote to Langenbaugh v. Anderson, 62 L. R. A. 948, which holds that question of negligence in permitting escape of oil, which caught fire, causing destruction of building, should have been submitted to jury.

7 L. R. A. 454, McQUERRY v. GILLILAND, 89 Ky. 434, 12 S. W. 1037.

Election to take under will.

Cited in Cooke v. Fidelity Trust & Safety Vault Co. 104 Ky. 483, 47 S. W. 325, holding widow accepting provisions of husband's will relinquishes claim to rest of estate.

Cited in note (12 L. R. A. 227) on election to take under will where rights inconsistent.

7 L. R. A. 457, BARTON v. UNION CATTLE CO. 28 Neb. 350, 26 Am. St. Rep. 340, 44 N. W. 454.

Remedies against nuisances.

Cited in Love v. Prospect Hill Cemetery Asso. 58 Neb. 107, 46 L. R. A. 242, 78 N. W. 488, holding private nuisance preventing use of property may be enjoined.

Distinguished in *Hill v. Pierson*, 45 Neb. 507, 63 N. W. 835, holding right of private person to enjoin public nuisance dependent upon proof of special damage.

Pollution of stream.

Cited in *Weston Paper Co. v. Pope*, 155 Ind. 401, 56 L. R. A. 902, 57 N. E. 719, holding pollution of stream by discharge of waste therein may be enjoined by one damaged; *Abraham v. Fremont*, 54 Neb. 395, 74 N. W. 834, upholding right of owner to enjoin continuance of acts causing pollution of stream; *Kewanee v. Otley*, 204 Ill. 408, 68 N. E. 388, holding judgment at law for damages not bar to relief in equity for pollution of stream.

Cited in footnotes to *Strobel v. Kerr Salt Co.* 51 L. R. A. 687, which authorizes injunction against diversion of stream for use in salt works, and pollution of stream by return of part; *Barrett v. Mt. Greenwood Cemetery Asso.* 31 L. R. A. 109, which authorizes injunction against connecting city drain with spring brook; *Barnard v. Shirley*, 24 L. R. A. 568, which refuses to enjoin flow of water from artesian well into natural watercourse; *Weston Paper Co. v. Pope*, 56 L. R. A. 899, which sustains liability for pollution of stream by discharge from straw-board works though business skilfully conducted.

Cited in notes (12 L. R. A. 577, 13 L. R. A. 117) on damages for pollution of water of stream.

7 L. R. A. 459, *FERNALD v. KNOX WOOLEN CO.* 82 Me. 48, 19 Atl. 93.

Riparian rights.

Cited in footnotes to *Concord Mfg. Co. v. Robertson*, 18 L. R. A. 679, as to abutter's rights in public water and land under same; *Auburn v. Union Water-power Co.* 38 L. R. A. 188, which holds taking 1/15 water supply of great pond for city not unreasonable as to owners of mill privileges; *Watuppa Reservoir Co. v. Fall River*, 13 L. R. A. 255, which holds right of private persons in great pond not affected by ordinance of 1647.

Cited in notes (9 L. R. A. 812, 50 L. R. A. 746) on right of state and riparian owners to divert water of stream.

Distinguished in *Heald v. Kennard*, 180 Mass. 522, 63 N. E. 4, holding waters of great pond may be used by parties not exceeding rights as riparian owners.

7 L. R. A. 460, *BROOKS v. CEDAR BROOK & S. C. RIVER IMPROV. CO.* 82 Me. 17, 17 Am. St. Rep. 459, 19 Atl. 87.

Obstruction of navigable stream under legislative authority.

Cited in *Mullen v. Penobscot Log-Driving Co.* 90 Me. 567, 38 Atl. 557, holding log company acting under legislative authority not liable for depressing level of navigable stream; *Frost v. Washington County R. Co.* 96 Me. 86, 59 L. R. A. 79, 51 Atl. 806, holding railroad company may under legislative authority close navigable cove by erection of trestle.

Cited in footnote to *Payne v. Kansas City, J. & C. B. R. Co.* 17 L. R. A. 628, which holds dam to protect land built by legislative authority in abandoned river bed a lawful public improvement.

Cited in notes (8 L. R. A. 92) on right to soil below high-water mark subject to control; (41 L. R. A. 490) on liability to riparian owner for injuries.

Damages allowable for taking of property.

Cited in *Kennebec Water District v. Waterville*, 97 Me. 214, 60 L. R. A. 866, 54 Atl. 6, holding incidental damages to other property of water company distinct from that taken, not allowable.

7 L. R. A. 463, *THORNDIKE v. CAMDEN*, 82 Me. 39, 19 Atl. 95.

For what purpose taxes assessed.

Followed in *Clark v. Tremont*, 83 Me. 429, 22 Atl. 378, holding town without authority to vote tax to pay claim for which it is not liable.

Cited in *McClelland v. State*, 138 Ind. 333, 37 N. E. 1089, holding reimbursement of trustee by tax for money advanced to cover loss of school funds without authority; *Lovejoy v. Foxcroft*, 91 Me. 371, 40 Atl. 141, holding towns cannot assess or borrow money except for public purposes.

Cited in note (14 L. R. A. 478) on taxation to pay moral obligations.

Tax collector's liability for taxes.

Cited in *Topsham v. Blondell*, 82 Me. 155, 19 Atl. 93, holding collector chargeable with all taxes committed to him.

Mistake in name.

Cited in *Stevenson v. Henkle*, 100 Va. 595, 42 S. E. 672, holding immaterial, mistake in name of landowner assessed, not calculated to mislead.

7 L. R. A. 465, *NASHVILLE v. COMER*, 88 Tenn. 415, 12 S. W. 1027.

Measure of damages for nuisance affecting realty.

Approved in *Doss v. Billington*, 98 Tenn. 378, 39 S. W. 717, holding measure of damages for cutting ditches on another's land cost of restoring premises; *Chattanooga v. Dowling*, 101 Tenn. 346, 47 S. W. 700, upholding right to successive actions in damages for nuisance caused by discharge of sewage from temporary sewer, as there cannot be an entire recovery in one action; *Phelps v. Detroit*, 120 Mich. 453, 79 N. W. 640, upholding right to successive actions against city constructing bridge, over railroad tracks to injury of abutting owner; *Doran v. Seattle*, 24 Wash. 189, 54 L. R. A. 535, 85 Am. St. Rep. 948, 64 Pac. 230, holding one damaged by erection of bulkhead entitled to recover for injury by continuous nuisance; *Kansas City Ft. S. & M. R. Co. v. King*, 63 Ark. 253, 38 S. W. 13, holding one damaged by fence entitled to recover for injury to commencement of suit only; *Oldenburg v. Oregon Sugar Co.* 39 Or. 573, 65 Pac. 869, holding damage sustained from diversion of river by dam limited to injury suffered at time dam washed away; *Cleveland, C. C. & St. L. R. Co. v. King*, 23 Ind. App. 576, 55 N. E. 875, holding that law will not presume that continuous nuisance is caused by pollution of pond; *Cleveland, C. C. & St. L. R. Co. v. Kline*, 29 Ind. App. 394, 63 N. E. 483, holding permanent damage not recoverable for overflowing land where cause is removable; *Pettit v. Grand Junction*, 119 Iowa. 356, 93 N. W. 381, holding action for abatement of continuing nuisance consisting of location of public buildings in street not barred by statute of limitations.

Cited in footnote to *Schlitz Brewing Co. v. Compton*, 18 L. R. A. 390, which denies right to include damage for injuries, after suit commenced, from continuing nuisance.

— **When nuisance temporary and permanent.**

Cited in *Swift v. Broyles*, 115 Ga. 887, 58 L. R. A. 391, 42 S. E. 277, upholding right of recovery for temporary and permanent injuries to freehold caused by escape of acids and gases.

Cited in note (59 L. R. A. 893) on damages for erection of temporary structure.

— **Liability of municipality for nuisance.**

Cited in footnotes to *Nevins v. Fitchburg*, 47 L. R. A. 312, which denies city's right to discharge sewer into tail race; *Hughes v. Auburn*, 46 L. R. A. 636, which denies city's liability for disease due to neglect of proper sanitary precautions as to sewer system; *Uppington v. New York*, 53 L. R. A. 550, which denies city's liability for failure to select best possible route or adopt best possible plan for sewer; *Williams v. Greenville*, 57 L. R. A. 207, which denies city's liability for sickness, etc., from permitting filth from drainage ditch to flow on adjoining land; *Huffmire v. Brooklyn*, 48 L. R. A. 421, which sustains city's liability for destruction of oysters by sewage cast on beds.

Cited in note (61 L. R. A. 712) on duty and liability of municipality with respect to drainage.

Sufficiency of remedy.

City in *Dennis v. Mobile & M. R. Co.* 137 Ala. 657, 97 Am. St. Rep. 69, 35 So. 30, holding remedy at law adequate for permanent damages to real estate, sustained by erection of freight house.

7 L. R. A. 469, *SMITH v. NASHVILLE*, 88 Tenn. 464, 12 S. W. 924.

City's power to supply citizens with water and light.

Approved in *Christensen v. Fremont*, 45 Neb. 166, 63 N. W. 364, and *Jacksonville Electric Light Co. v. Jacksonville*, 36 Fla. 256, 30 L. R. A. 544, 51 Am. St. Rep. 24, 18 So. 677, both holding power to supply private lights within authorization to provide for lighting city; *Crawfordsville v. Braden*, 130 Ind. 161, 14 L. R. A. 273, 30 Am. St. Rep. 214, 28 N. E. 849, holding that private lights may be furnished by city empowered to establish electric light plant; *Mayo v. Washington*, 122 N. C. 25, 40 L. R. A. 169, 29 S. E. 343 (dissenting opinion) majority holding debt for purchase of electric light plant not "necessary expense" of town; *Avery v. Job*, 25 Or. 523, 36 Pac. 293, holding that construction and operation of waterworks, general municipal purpose; *Huron Waterworks Co. v. Huron*, 7 S. D. 27, 30 L. R. A. 857, 58 Am. St. Rep. 817, 62 N. W. 975, holding city cannot dispose of waterworks except under legislative authorization; *Lake County Water & Light Co. v. Walsh*, 160 Ind. 44, 98 Am. St. Rep. 264, 65 N. E. 530, denying right of city to sell waterworks and electric light plant to private corporation.

Exemption from tax.

Cited in *Methodist Episcopal Church, South, Book Agents v. Hinton*, 92 Tenn. 196, 19 L. R. A. 293, 21 S. W. 321, holding church's publishing plant a charitable institution although sometimes doing secular printing, where total proceeds devoted to charitable use.

Cited in note (60 L. R. A. 852, 853) as to taxation of municipal waterworks.

7 L. R. A. 471, *KIRCHER v. CONRAD*, 9 Mont. 191, 18 Am. St. Rep. 731, 23 Pac. 74.

Review of order granting or refusing new trial.

Cited in *Kilby v. Baker*, 9 Mont. 399, 24 Pac. 22, and *Murray v. Heinze*, 17 Mont. 359, 42 Pac. 1057, holding order granting or refusing new trial on ground of insufficiency of evidence not reviewable on appeal, when evidence conflicting, unless abuse of discretion shown.

7 L. R. A. 474, *POSTAL TELEG. CABLE CO. v. LATHROP*, 131 Ill. 575, 19 Am. St. Rep. 55, 23 N. E. 583.

Appeal; review of findings of fact.

Cited in *La Salle County v. Milligan*, 143 Ill. 329, 32 N. E. 196, holding controverted questions of fact, in cases coming to supreme court through appellate court, not subject to review; *Chicago, B. & Q. R. Co. v. Haselwood*, 194 Ill. 70, 62 N. E. 315, holding judgment of affirmance by appellate court implies finding of facts same as trial court, and is conclusive as to such findings; *Bernstein v. Roth*, 145 Ill. 191, 34 N. E. 37, holding opinions of appellate court cannot be resorted to for purpose of ascertaining its findings of fact; *Chemical Nat. Bank v. City Bank*, 160 U. S. 653, 40 L. ed. 570, 16 Sup. Ct. Rep. 417, holding under Illinois practice act, supreme court will examine evidence to ascertain principles of law involved in controversy; *Hahn v. Billings Bros.* 18 R. I. 554, 28 Atl. 1027, holding finding of fact by court of common pleas conclusive upon supreme court, if there is any evidence to support it.

Telegrams; extrinsic evidence to show notice of importance.

Cited in *McPeck v. Western U. Teleg. Co.* 107 Iowa, 362, 43 L. R. A. 218, 70 Am. St. Rep. 205, 78 N. W. 63, holding where probability of damage not apparent on face of message, extrinsic evidence admissible to show telegraph company had notice of importance; *Western U. Teleg. Co. v. Nagle*, 11 Tex. Civ. App. 542, 32 S. W. 707, holding telegraph company chargeable with notice of character and importance of message partly in cipher, when received from cotton buyer, with request to "rush it" and get answer by wire soon as possible.

Cited in footnote to *Western U. Teleg. Co. v. Short*, 9 L. R. A. 744, which holds company prima facie liable for failure to deliver telegram.

Cited in note (10 L. R. A. 515) on interpretation of telegraph messages.

Measure of damages for negligent transmission of message.

Cited in *Western U. Teleg. Co. v. Hart*, 62 Ill. App. 123, holding telegraph company liable for consequences that may be reasonably anticipated from face of message; *Fererro v. Western U. Teleg. Co.* 9 App. D. C. 471, 35 L. R. A. 552, holding telegraph company liable for consequential damages if message shows business transaction on face; *Bierhaus v. Western U. Teleg. Co.* 8 Ind. App. 253, 34 N. E. 581, holding it unnecessary that telegraph company be apprised of loss that may result from negligent transmission, if message shows it relates to business transaction; *Western U. Teleg. Co. v. Church* (Neb.) 57 L. R. A. 909, 90 N. W. 878, holding substantial damages may be recovered for failure to promptly transmit message summoning physician to "come at once;" *Western U. Teleg. Co. v. North Packing & Provision Co.* 188 Ill. 370, 52 L. R. A. 277, 58 N.

E. 958, holding failure of sender's agent to reduce damage, from delay in delivery of message, by doing unauthorized act, not available to telegraph company in mitigation.

Cited in footnotes to *McPeck v. Western U. Teleg. Co.* 43 L. R. A. 214, which holds loss of reward offered for capture of criminal within damages recoverable for failure to deliver telegram; *Fererro v. Western U. Teleg. Co.* 35 L. R. A. 548, which limits damage for mistake in telegram as to price in offer to sell goods, to difference in price; *Western U. Teleg. Co. v. North Packing & Provision Co.* 52 L. R. A. 275, which holds agent purchasing live stock through delay in delivering telegram, not required to resell before communicating with principal, to reduce damages.

7 L. R. A. 478, *DWYER v. GULF, C. & S. F. R. CO.* 75 Tex. 572, 16 Am. St. Rep. 926, 12 S. W. 1001.

Adhered to on third appeal of case reported in 84 Tex. 198, 19 S. W. 470.

Penalty imposed on carrier.

Cited in *Dillingham v. Fischl*, 1 Tex. Civ. App. 551, 21 S. W. 554, and *Gulf, C. & S. F. R. Co. v. Nelson*, 4 Tex. Civ. App. 347, 23 S. W. 732, holding statute imposing penalty on carrier refusing to deliver freight upon tender of charges not invalid as regulation of commerce; *Ft. Worth & D. C. R. Co. v. Lillard*, 4 Tex. App. Civ. Cas. (Willson) 124, holding statute imposing penalty on railroad company for overcharge on interstate shipment not unconstitutional; *S. A. & A. P. R. Co. v. Wilson*, 4 Tex. App. Civ. Cas. (Willson) 570, holding legislature without power to impose penalty upon railroad companies only, for failure to pay servants within specified time; *Gulf, C. & S. F. R. Co. v. Nelson*, 4 Tex. Civ. App. 349, 23 S. W. 732, holding in suit to recover statutory penalty plaintiff must prove a case clearly within terms of the law; *Gulf, C. & S. F. R. Co. v. Loonie*, 84 Tex. 261, 19 S. W. 385, raising but not deciding question whether suit for statutory penalty for withholding freight and overcharge, applicable to interstate shipment.

Police regulations.

Cited in *Texas & P. R. Co. v. Clark*, 4 Tex. Civ. App. 614, 23 S. W. 698, holding states may make police regulations relative to commerce within proper limitations; *Missouri, K. & T. R. Co. v. Simonson*, 64 Kan. 810, 57 L. R. A. 768, 91 Am. St. Rep. 248, 68 Pac. 653, holding statute making specification of weights in bills of lading conclusive evidence against carrier a police regulation.

Ratification by carrier.

Cited in *Gulf, C. & S. F. R. Co. v. Nelson*, 4 Tex. Civ. App. 348, 23 S. W. 732, and *Dillingham v. Fischl*, 1 Tex. Civ. App. 552, 21 S. W. 554, holding penalty for refusal to deliver freight on payment or tender not recoverable unless carrier executed bill of lading or ratified it; *Miller v. Texas & N. O. R. Co.* 83 Tex. 521, 18 S. W. 954, holding ratification not presumed as against connecting carrier from fact that it received and hauled car and collected charges; *Pittsburg, C. C. & St. L. R. Co. v. Viers*, 113 Ky. 535, 68 S. W. 469, holding connecting carrier, not limiting liability, receives shipment under terms of contract with initial carrier.

Cited in note (10 L. R. A. 418) on liability of connecting carrier.

Limitation of liability by contract.

Cited in *Armstrong v. Galveston, H. & S. A. R. Co.* 92 Tex. 121, 46 S. W. 33, and *Gulf, C. & S. F. R. Co. v. Eddins*, 7 Tex. Civ. App. 125, 26 S. W. 161, holding statute forbidding contracts limiting time to present claim or sue does not regulate interstate commerce; *Pittmann v. Pacific Exp. Co.* 24 Tex. Civ. App. 598, 59 S. W. 949, holding statute prohibiting common carriers from limiting their liability in bill of lading applicable to contracts for interstate carriage; *Ohio & M. R. Co. v. Tabor*, 98 Ky. 510, 34 L. R. A. 689, 36 S. W. 18, holding constitutional provision that carrier shall not contract for relief from common-law liability not in conflict with Federal Constitution.

Production of bill of lading.

Cited in note (38 L. R. A. 361) on necessity of production of bill of lading.

7 L. R. A. 481, *WALLING v. BURGESS*, 122 Ind. 299, 22 N. E. 419, 23 N. E. 1076.

Power of surviving partner.

Cited in *Riley v. Carter*, 76 Md. 594, 19 L. R. A. 494, 35 Am. St. Rep. 443, 25 Atl. 667, holding surviving partner may execute assignment for benefit of creditors in conformity with insolvent laws; *Holladay v. Land & River Improv. Co.* 6 C. C. A. 571, 18 U. S. App. 308, 57 Fed. 785, to point that conveyance by surviving partner passes equitable title.

Cited in notes (7 L. R. A. 791) on duty of surviving partner; (28 L. R. A. 133) on disposition of real estate by surviving partner.

Rights of heirs.

Cited in *Bollenbacher v. First Nat. Bank*, 8 Ind. App. 18, 35 N. E. 403, and *Valentine v. Wysor*, 123 Ind. 52, 7 L. R. A. 794, 23 N. E. 1076, holding rights of heirs of deceased partner attach only to the surplus remaining after payment of partnership debts.

Cited in note (27 L. R. A. 345) on claims of heirs must yield to partnership claims.

Estoppel from claiming interest.

Cited in *Wilmore v. Stetler*, 137 Ind. 137, 45 Am. St. Rep. 169, 36 N. E. 856, holding acceptance by heirs of proceeds of land sold as belonging to the decedent estops them from claiming their two-thirds interest therein; *Axton v. Carter*, 141 Ind. 676, 39 N. E. 546, holding heirs accepting proceeds of sale of land made to administrator through third party ratify sale and cannot avoid it.

Error in overruling demurrers.

Cited in *Bradshaw v. Van Winkle*, 133 Ind. 136, 32 N. E. 877; *Schmidt v. Draper*, 137 Ind. 253, 36 N. E. 709; *Louisville, N. A. & C. R. Co. v. Bodenschatz-Bedford Stone Co.* 141 Ind. 258, 39 N. E. 703,—holding error in overruling demurrer to answer immaterial where record shows ruling was harmless; *Haas v. Evansville*, 20 Ind. App. 490, 50 N. E. 46, holding erroneous overruling of demurrer to answer immaterial where appellant failed to prove his complaint in court below; *Indianapolis, D. & W. R. Co. v. Center Twp.* 143 Ind. 74, 40 N. E. 134, holding error in overruling demurrer to answer setting up statute of limitations immaterial where record shows final judgment correct, and not based on any finding as to such statute.

Special finding or special verdict.

Cited in *Louisville, N. A. & C. R. Co. v. Downey*, 18 Ind. App. 145, 47 N. E. 494, and *Tulley v. Citizens' State Bank*, 18 Ind. App. 242, 47 N. E. 850, holding erroneous overruling of demurrer harmless where there was special verdict or special finding; *Runner v. Scott*, 150 Ind. 442, 50 N. E. 479, holding error in overruling demurrer immaterial when there is special finding; *Smith v. Wells Mfg. Co.* 148 Ind. 335, 46 N. E. 1000, holding error in overruling demurrer to answer harmless where special finding is in accordance with facts alleged in subsequent answer; *Watson v. Tindall*, 150 Ind. 488, 50 N. E. 468, holding erroneous ruling on demurrer to answer harmless where there is special finding, and facts found could have been proved under the general denial; *Terre Haute Brewing Co. v. Hartman*, 19 Ind. App. 600, 49 N. E. 864, holding sufficiency of answer will not be considered where correct statement of the law may be made on facts specially found; *Beasley v. Phillips*, 20 Ind. App. 188, 50 N. E. 488, holding court may look to special finding or special verdict to determine whether ruling on demurrer was prejudicial; *Gilliland v. Jones*, 144 Ind. 670, 55 Am. St. Rep. 210, 43 N. E. 939, holding court may look to special finding to ascertain if ruling on demurrer to answer is harmless.

7 L. R. A. 485, *DAVIS v. FOGLE*, 124 Ind. 41, 23 N. E. 860.

Wills; effect of subsequent adoption of child.

Cited in *Hilpire v. Claude*, 109 Iowa. 166, 46 L. R. A. 174, 77 Am. St. Rep. 524, 80 N. W. 332, holding under statute making birth of child to testator operate as revocation of prior will, subsequent adoption of child does not have such effect; *Re Comassi*, 107 Cal. 7, 28 L. R. A. 416, 40 Pac. 15, holding subsequent remarriage and adoption of stranger in blood do not operate to revoke will of married woman.

Cited in footnotes to *Flannigan v. Howard*, 59 L. R. A. 664, which holds devises and legacies in will ratably abated by adoption of child after its execution; *Re Comassi*, 28 L. R. A. 414, which holds will not revoked by adopting stranger in blood; *Glascott v. Bragg*, 56 L. R. A. 258, which holds will in favor of third person revoked by marriage and adoption of child.

Revocation by subsequent marriage.

Cited in footnotes to *Re Hulett*, 34 L. R. A. 384, which holds will not revoked by marriage alone; *Ingersoll v. Hopkins*, 40 L. R. A. 191, which holds will giving testator's property to woman made executrix revoked by testator's subsequent marriage to her; *Re Kelly*, 56 L. R. A. 754, which holds woman's will not revoked by subsequent marriage; *Roane v. Hollingshead*, 17 L. R. A. 592, which holds rule that will of *feme sole* revoked by marriage not in force where incapacity removed by statute; *Re Comassi*, 28 L. R. A. 414, which holds married woman's will not revoked by subsequent marriage after becoming widow.

Cited in notes (10 L. R. A. 57) on presumptive revocation of will; (10 L. R. A. 94) on revocation of joint will.

Manner of effecting revocation.

Cited in footnotes to *Billington v. Jones*, 56 L. R. A. 654, which holds will revoked by writing on it statement that it is void, stating that it is killed, and

filing it away; *Cutler v. Cutler*, 57 L. R. A. 209, which holds will revoked by adopting mutilations by vermin.

Right of adopted child to take by descent or will.

Cited in *Re Gregory*, 15 Misc. 409, 37 N. Y. Supp. 925, holding inheritance of adopted child subject to testamentary power of adopting parent.

Distinguished in *Markover v. Krauss*, 132 Ind. 304, 17 L. R. A. 810, 31 N. E. 1047, holding children jointly adopted take by descent from deceased parent same property rights as natural children; *Bray v. Miles*, 23 Ind. App. 443, 54 N. E. 440, holding under will providing share of deceased devisee shall go to children, if there be any, adopted child takes share of adopted parent.

Estoppel to contest will.

Cited in footnote to *Hudnall v. Ham*, 48 L. R. A. 557, which holds widow precluded from contesting husband's will by antenuptial contract agreeing to release all interest in his estate.

7 L. R. A. 489, *CULVER v. MARKS*, 122 Ind. 554, 17 Am. St. Rep. 377, 23 N. E. 1086.

Checks and drafts; when presentment necessary.

Cited in *Industrial Trust, Title & Sav. Co. v. Weakley*, 103 Ala. 464, 49 Am. St. Rep. 45, 15 So. 854, holding unreasonable delay in presentment of check covered by deposit releases drawer.

Distinguished in *Industrial Trust, Title & Sav. Co. v. Weakley*, 103 Ala. 465, 49 Am. St. Rep. 45, 15 So. 854, holding insufficiency of deposit does not excuse prompt presentment of check where drawer has arranged for overdraft; *Citizens Nat. Bank v. Third Nat. Bank*, 19 Ind. App. 75, 49 N. E. 171, holding failure of bona fide indorsee of draft to inquire into drawer's right does not excuse collecting bank's failure to present.

Checks; statute of limitations.

Cited in note (22 L. R. A. 110) on statute of limitation as applicable to bank checks.

Certified check; drawer's liability.

Cited in *Born v. First Nat. Bank*, 123 Ind. 84, 7 L. R. A. 445, 18 Am. St. Rep. 312, 24 N. E. 173, holding drawer of certified check remains liable until payment.

Books of account as evidence.

Cited in *Bastrop State Bank v. Levy*, 106 La. 589, 31 So. 164, holding book entries of bank deposits, accompanied by proof of handwriting and death of bookkeeper, competent; *Cleland v. Applegate*, 8 Ind. App. 501, 35 N. E. 1108, holding entries made by disinterested person in course of business competent evidence of transactions; *Wilber v. Scherer*, 13 Ind. App. 430, 41 N. E. 837, holding permitting witness to read from account book items to which he had previously testified, not reversible error; *Harmon v. Decker*, 41 Or. 595, 93 Am. St. Rep. 748, 68 Pac. 11, holding merchant's account books not evidence of loans to others; *Place v. Baugher*, 159 Ind. 235, 64 N. E. 852, holding book into which measurements of saw logs were transcribed the same day on which received admissible.

Cited in note (53 L. R. A. 529) on use of person's books of account as evidence on issues between other parties.

Distinguished in *Fleming v. Yost*, 137 Ind. 97, 36 N. E. 705, holding book entries of payments, contemporaneously made, admissible to show consideration for conveyance.

— **When transcript admissible.**

Cited in *Texas & P. Coal Co. v. Lawson*, 10 Tex. Civ. App. 501, 31 S. W. 843, holding where originals in court, transcript of account made by competent book-keeper, admissible.

Evidence of expert as to conclusions deduced from intricate accounts or calculations.

Cited in *Guarantee Co. of N. A. v. Mutual Bldg. & L. Asso.* 57 Ill. App. 263; *Chicago, St. L. & P. R. Co. v. Wolcott*, 141 Ind. 278, 50 Am. St. Rep. 320, 39 N. E. 451, holding accountant may testify as to contents of voluminous and complicated books from abstract made from originals; *Bee Pub. Co. v. World Pub. Co.* 59 Neb. 722, 82 N. W. 28, holding testimony of decrease of business based on examination of books, improper without their production; *Shover v. Myrick*, 4 Ind. App. 16, 30 N. E. 207, holding expert may testify as to expectancy, using standard mortality tables.

Secondary evidence.

Cited in *New La Junta & L. Canal Co. v. Kreybill*, 17 Colo. App. 36, 67 Pac. 1026, holding oral testimony as to contents of voluminous documents admissible, where documents open to inspection affording ample opportunity for cross-examination of witness.

7 L. R. A. 495, *THOMPSON v. REASONER*, 122 Ind. 454, 24 N. E. 223.

Enforceability of judgment until reversed.

Cited in *Lake Erie & W. R. Co. v. Smith*, 61 Fed. 887, to point judgment rendered by court in exercise of its jurisdiction justifies acts enforcing it until it is reversed or set aside; *Boos v. Morgan*, 140 Ind. 207, 39 N. E. 919, holding enforcement of judgment rendered by court in exercise of its jurisdiction will not be enjoined unless reversed or set aside.

Cited in note (45 L. R. A. 801) on liability for tort in doing acts authorized by judgment afterwards reversed.

Restitution.

Cited in *Chicago & S. E. R. Co. v. Adams*, 26 Ind. App. 445, 59 N. E. 1087, holding law raises obligation against one benefited by judgment thereafter reversed to make restitution.

Drains and sewers.

Cited in note (60 L. R. A. 223) on procedure for the establishment of drains and sewers, as to wrongful acts.

7 L. R. A. 498, *RAPP v. REEHLING*, 124 Ind. 36, 23 N. E. 777.

Contracts made on Sunday.

Cited in *Bryan v. Watson*, 127 Ind. 44, 11 L. R. A. 64, 26 N. E. 666, holding

subscription to liquidate church indebtedness, made on Sunday, valid; *Donovan v. McCarty*, 155 Mass. 546, 30 N. E. 221, holding assignment of property in trust by severely injured woman, made on Sunday, not illegal.

Cited in footnote to *First M. E. Church v. Donnell*, 46 L. R. A. 858, which sustains subscription to church indebtedness made on Sunday.

Cited in note (14 L. R. A. 195) on Sunday labor.

Wills; construction.

Cited in *Hawes v. Kepley*, 28 Ind. App. 311, 62 N. E. 720, holding words cannot be supplied to make will conform with testator's supposed intention.

7 L. R. A. 500, *HUNN v. MICHIGAN C. R. CO.* 78 Mich. 513, 44 N. W. 502.

Duty of master in management of business.

Cited in *Doyle v. Toledo S. & M. R. Co.* 127 Mich. 98, 54 L. R. A. 463, 89 Am. St. Rep. 456, 86 N. W. 524, holding railroad company liable for defective condition of another's roof over spur track where brakemen required to go for cars; *Card v. Eddy*, 129 Mo. 529, 36 L. R. A. 812, 28 S. W. 979 (dissenting opinion), majority holding manner of delivering messages to railroad employees not part of master's duty.

Cited in footnote to *St. Louis, A. & T. R. Co. v. Triplett*, 11 L. R. A. 773, which holds master's duty to protect repair track not fulfilled by adopting rule sufficient if faithfully observed by employees.

Cited in notes (8 L. R. A. 819) as to duty of master to instruct servant in use of dangerous machinery; (12 L. R. A. 97) as to master's liability for negligence of servant acting under authority; (54 L. R. A. 92, 94, 173) on vice principalship as determined with reference to the character of the act which caused the injury.

Who are fellow servants.

Cited in *Missouri, K. & T. R. Co. v. Elliott*, 42 C. C. A. 201, 102 Fed. 108; *Clyde v. Richmond & D. R. Co.* 69 Fed. 678; *Baltimore & O. R. Co. v. Camp*, 13 C. C. A. 240, 31 U. S. App. 213, 65 Fed. 960; *Louisville, N. A. & C. R. Co. v. Heck*, 151 Ind. 314, 50 N. E. 988,—all holding train despatcher not fellow servant with trainman; *Bloyd v. St. Louis & S. F. R. Co.* 58 Ark. 71, 41 Am. St. Rep. 88, 22 S. W. 1089, holding foreman of bridge gang not fellow servant with workmen under him; *Lellis v. Michigan C. R. Co.* 124 Mich. 42, 82 N. W. 828, holding inspector of car loads of lumber received from other roads fellow servant with switchman; *Anderson v. Michigan C. R. Co.* 107 Mich. 612, 65 N. W. 585 (dissenting opinion), majority holding brakeman not fellow servant with section man; *Wallace v. Boston & M. R. Co.* 72 N. H. 516, 57 Atl. 913, holding train despatcher not fellow servant of brakeman.

Cited in footnotes to *Baltimore & O. R. Co. v. Andrews*, 17 L. R. A. 190, which holds conductor and engineer fellow servants of brakeman on other train; *Clark v. Pennsylvania Co.* 17 L. R. A. 811, which holds section boss of one gang and member of another gang fellow servants; *Palmer v. Michigan C. R. Co.* 17 L. R. A. 637, which holds assistant road master not fellow servant of gang of men working under him; *Fisher v. Oregon Short Line & U. N. R. Co.* 16 L. R. A. 519, which holds section foreman and conductor not fellow servants; *Daniel v.*

Cheasapeake & O. R. Co. 16 L. R. A. 383, which holds conductor and brakeman on different trains not fellow servants; Wischam v. Rickards, 10 L. R. A. 97, which holds factory employee assisting servants of one delivering flywheel, servant of latter.

Cited in notes (51 L. R. A. 521, 578, 606, 613) as to vice principalship considered with reference to the superior rank of a negligent servant; (25 L. R. A. 388, 390, 392) as to train despatcher and telegraph operator as fellow servants of trainmen; (18 L. R. A. 828) as to superior employees.

Distinguished in Beesley v. F. W. Wheeler & Co. 103 Mich. 210, 27 L. R. A. 270, 61 N. W. 658, holding riveter and carpenters under same superintendent to be fellow servants; Schroeder v. Flint & P. M. R. Co. 103 Mich. 217, 29 L. R. A. 323, 50 Am. St. Rep. 354, 61 N. W. 663, holding foreman of gang unloading and leveling dirt on railroad, a fellow servant of member thereof.

Effect of contributory negligence of fellow servant.

Cited in Noble v. Bessemer S. S. Co. 127 Mich. 113, 54 L. R. A. 460, footnote p. 456, 89 Am. St. Rep. 461, 86 N. W. 520, holding master's liability from defective tool not defeated by fellow servant's knowledge of the defect; McGinn v. McCormick, 109 La. 402, 33 So. 382, holding master liable for injury due to combined negligence of master and fellow servant; Lutz v. Atlantic & P. R. Co. 6 N. M. 520, 16 L. R. A. 833, 30 Pac. 912 (dissenting opinion), majority holding; master not liable for injury proximately caused by negligence of fellow servant, although itself negligent in part.

Cited in note (16 L. R. A. 819, 822) as to relation of proximate cause doctrine to rule of liability of master for injuries to his servant caused by combined negligence of himself and a fellow servant.

Effect of customary violation of rules.

Cited in Fluhrrer v. Lake Shore & M. S. R. Co. 121 Mich. 217, 80 N. W. 24, and Nichols v. Chicago & W. M. R. Co. 125 Mich. 397, 84 N. W. 470, both holding violation of employer's rules defeats recovery, unless its violation is so universal and notorious that an inference of employer's approval of such violation arises; Fluhrrer v. Lake Shore & M. S. R. Co. 124 Mich. 483, 83 N. W. 149, holding violation of employer's rule no bar to recovery for injuries received thereby, where rule is customarily violated; Wright v. Southern P. Co. 14 Utah, 397, 46 Pac. 374, holding evidence of custom to uncouple cars while in motion admissible to rebut claim of negligence in disregarding rules forbidding same; Ashman v. Flint & P. M. R. Co. 90 Mich. 576, 51 N. W. 645, and Eastman v. Lake Shore & M. S. R. Co. 101 Mich. 602, 60 N. W. 309, both holding negligent nature of stepping between cars to uncouple them while in motion question for jury; Grand v. Michigan C. R. Co. 83 Mich. 576, 11 L. R. A. 407, 47 N. W. 837 (dissenting opinion), majority holding railroad not liable under statutes requiring blocked switches, for death of brakeman entering between cars in motion to uncouple them knowing that they are passing over unblocked "split" switch.

Cited in note (43 L. R. A. 367) as to duties of master and servant with regard to rules promulgated for the safe conduct of a business.

Distinguished in Ball v. Hauser, 129 Mich. 399, 89 N. W. 49, holding peril assumed by employee voluntarily riding on elevator after warning that he did so at his own risk though employees were occasionally permitted to ride.

Mortuary tables and scientific books as evidence.

Cited in *Crouse v. Chicago & N. W. R. Co.* 102 Wis. 208, 78 N. W. 446, and *Joliet v. Blower*, 155 Ill. 417, 40 N. E. 619, holding mortuary tables admissible as tending to show life expectancy; *Nelson v. Lake Shore & M. S. R. Co.* 104 Mich. 589, 62 N. W. 993, holding mortality tables conclusive of life expectancy in absence of evidence to show greater or less probability of life.

Cited in note (40 L. R. A. 555) as to scientific books and treatises as evidence.

Appellate jurisdiction over damages.

Cited in *Retan v. Lake Shore & M. S. R. Co.* 94 Mich. 157, 53 N. W. 1094, refusing to disturb verdict for excessive damages, where nothing tending to prejudice defendant's rights or to inflame jury, is shown; *Bogges v. Metropolitan Street R. Co.* 118 Mo. 341, 24 S. W. 210 (concurring opinion), refusing reversal for inadequacy of damages, where evidence conflicting and prejudice not apparent from inadequacy; *Burdick v. Missouri P. R. Co.* 123 Mo. 250, 26 L. R. A. 400, 45 Am. St. Rep. 528, 27 S. W. 453 (dissenting opinion), majority holding that party should remit excess of damages, and take affirmance for residue or submit to new trial.

Cited in note (26 L. R. A. 395) as to power of appellate court to interfere with verdict or excessive damages.

Evidence of plaintiff's property.

Distinguished in *Arndt v. Bourke*, 120 Mich. 266, 79 N. W. 191, holding admission of evidence of plaintiff's lack of means harmless, where admitted solely in rebuttal of evidence of counsel's contingent fee, and not considered in estimating damages.

Damages recoverable.

Cited in *Richmond v. Chicago & W. M. R. Co.* 87 Mich. 391, 49 N. W. 621, holding that mother and sister may recover for the negligent killing of decedent according to pecuniary injury suffered.

Effect upon action of survival after injury.

Cited in *Sweetland v. Chicago & G. T. R. Co.* 117 Mich. 348, 43 L. R. A. 575, 75 N. W. 1066 (concurring opinion), holding action for decedent's pain and suffering not within act for survival of actions for negligent injuries to person.

7 L. R. A. 507, *PINKERTON v. VERBERG*, 78 Mich. 573, 18 Am. St. Rep. 473, 44 N. W. 579.

Arrest without warrant.

Cited in *Re Kellan*, 55 Kan. 702, 41 Pac. 960, holding officer cannot arrest for minor offenses not committed in his presence or view.

Cited in note (51 L. R. A. 210) arrest without warrant not made on view.

Distinguished in *North v. People*, 139 Ill. 105, 28 N. E. 966, holding officer may arrest for misdemeanor committed in his presence if only remedy of stopping or redressing offense.

Infringing right of locomotion.

Cited in *St. Louis v. Roche*, 128 Mo. 547, 31 S. W. 915, holding ordinance forbidding one to knowingly associate with reputed thieves, burglars, or gamblers invalid.

Powers of municipal corporations.

Distinguished in *Re Stegenga* (Mich.) 61 L. R. A. 765, 94 N. W. 385, holding that municipal corporation under charter authority to punish disorderly persons, may provide for punishment of loiterers in streets and barrooms.

7 L. R. A. 511, *COFRODE v. GARTNER*, 79 Mich. 332, 44 N. W. 623.

Jurisdiction in case of nonresidents.

Cited in *Eingartner v. Illinois Steel Co.* 94 Wis. 77, 34 L. R. A. 506, 59 Am. St. Rep. 859, 68 N. W. 664, holding resident of one state may sue resident of same state on transitory cause of action arising therein, in courts of other state; *Sleight v. Swanson*, 127 Mich. 439, 86 N. W. 1010, holding foreign plaintiff may sue foreign defendant before justice of peace; *State Bank v. Maxson*, 123 Mich. 253, 81 Am. St. Rep. 196, 82 N. W. 32, holding nonresident may sue personally served nonresident, on foreign contract, in county where debtor's property found.

Attachment suits.

Cited in *Newland v. Reilly*, 85 Mich. 154, 48 N. W. 544, holding foreign plaintiff in action against foreign defendant may garnishee resident debtor of latter; *Tootle v. Coleman*, 57 L. R. A. 124, 46 C. C. A. 136, 107 Fed. 45, holding creditor may garnish resident debtor of foreign defendant, though garnished claim payable out of state.

Distinguished in *Reimers v. Seatco Mfg. Co.* 30 L. R. A. 367, 17 C. C. A. 232, 37 U. S. App. 426, 70 Fed. 577, holding foreign creditor cannot garnish claim of foreign debtor against foreign garnishee, such claim being payable out of state.

Appearance of defendant.

Cited in *Ferguson v. Oliver*, 99 Mich. 162, 41 Am. St. Rep. 593, 58 N. W. 43, holding jurisdiction of Canadian court on general appearance of defendant not lost by dismissing defense for insufficiency of pleading.

Privilege; service of process.

Cited in *Hoffman v. Bay County Circuit Judge*, 113 Mich. 110, 38 L. R. A. 664, 67 Am. St. Rep. 458, 71 N. W. 480, holding attorney exempt from service of process while attending court in another county.

Equal privileges.

Cited in note (14 L. R. A. 583) on constitutional equality of privileges, immunities, and protection.

7 L. R. A. 517, *POWERS v. JEDEVINE*, 61 Vt. 587, 18 Atl. 778.

Devise, when absolute.

Cited in *Meacham v. Graham*, 98 Tenn. 206, 39 S. W. 12, holding where expression in will doubtful, devise deemed absolute; *Podaril v. Clark*, 118 Iowa, 274, 91 N. W. 1091 (dissenting opinion), majority holding estate for life with privilege of sale or conveyance during lifetime not a fee.

Cited in footnotes to *Williams v. Baptist Church*, 54 L. R. A. 427, which holds absolute gift, not trust, created by bequest to church and "suggesting" as to application; *Jewell v. Louisville Trust Co.* 53 L. R. A. 377, which denies creation of precatory trust by will of merchant expressing desire for retention on liberal terms of specified person in employ of firm of which testator a partner.

Cited in note (10 L. R. A. 757) as to when absolute estate vests under devise.

Absolute devise, when cut down by subsequent terms.

Cited in *Mulvane v. Rude*, 146 Ind. 482, 45 N. E. 659, holding gift over of portion of absolute devise remaining at first taker's death, void for repugnancy; *Meacham v. Graham*, 98 Tenn. 208, 39 S. W. 12, holding limitation inconsistent with absolute power of disposition previously given in will void.

Cited in footnotes to *Snider v. Baer*, 13 L. R. A. 359, which holds fee not cut down to life estate by clause giving legatee sole control during lifetime; *Morgan v. Halsey*, 36 L. R. A. 716, which holds power of appointment of property to testatrix's daughter in any manner she may deem proper limited by subsequent clauses of will.

7 L. R. A. 524, *STEELE v. SIOUX VALLEY STATE BANK*, 79 Iowa, 339, 18 Am. St. Rep. 370, 44 N. W. 564.

Grantee in quitclaim as affected by equities.

Cited in *Hannan v. Seidentopf*, 113 Iowa, 662, 86 N. W. 44; *Knapp v. Paine*, 95 Iowa, 67, 63 N. W. 575; *Young v. Charnquist*, 114 Iowa, 125, 86 N. W. 205, — holding grantee under quitclaim deed not entitled to protection against prior equities; *Parker v. Randolph*, 5 S. D. 553, 29 L. R. A. 35, 59 N. W. 722, holding grantee in a quitclaim deed not a bona fide purchaser; *United States v. California & O. Land Co.* 1 C. C. A. 337, 7 U. S. App. 128, 49 Fed. 503, to point grantee under quitclaim deed chargeable with constructive notice of actual right and title of his grantor, and may not rely on visible possession or recorded muniments of title; *Wickham v. Henthorn*, 91 Iowa, 244, 59 N. W. 276, holding unrecorded conveyance takes precedence over subsequent quitclaim deed duly recorded; *Minneapolis & St. L. R. Co. v. Chicago, M. & St. P. R. Co.* 116 Iowa, 688, 88 N. W. 1082, holding corporation taking quitclaim deed not protected against prior deed.

Cited in note (29 L. R. A. 46) on protection of quitclaim purchaser.

Disapproved in *Schott v. Dosh*, 49 Neb. 194, 59 Am. St. Rep. 531, 68 N. W. 346, holding purchaser in good faith and without notice under recorded quitclaim deed takes precedence of grantee under prior unrecorded conveyance.

Dower designates widow's interest.

Cited in *Ditson v. Ditson*, 85 Iowa, 282, 52 N. W. 203, to point word "dower" still used in Iowa to designate interest which law gives widow in lands of husband.

7 L. R. A. 527, *DONNEGAN v. EARHARDT*, 119 N. Y. 468, 23 N. E. 1051.

Liability of railroad to fence.

Cited in *Terre Haute & I. R. Co. v. Williams*, 172 Ill. 382, 64 Am. St. Rep. 44, 50 N. E. 116, holding railroad liable for death of engineer caused by collision with cattle straying on track through defective fence; *Atchison, T. & S. F. R. Co. v. Reesman*, 23 L. R. A. 771, 9 C. C. A. 24, 19 U. S. 596, 60 Fed. 375, holding employee injured by derailment of train caused by failure of statutory duty to fence can recover of railroad; *Dickson v. Omaha & St. L. R. Co.* 124 Mo. 149, 25 L. R. A. 324, 46 Am. St. Rep. 429, 27 S. W. 476, holding railroad liable for death of engineer due to collision with bull straying onto track through defective fence; *Robertson v. New York*, 7 Misc. 646, 28 N. Y. Supp. 13, holding railroad company not obliged to fence track to keep people from falling from embankment upon it; *Mendizabal v. New York C. & H. R. R. Co.* 89 App. Div. 388, 85

N. Y. Supp. 896, holding railroad company liable for injury of employee by derailment of car caused by cow on track; *International & G. N. R. Co. v. Richmond*, 28 Tex. Civ. App. 516, 87 S. W. 1029, holding railroad liable for killing stock of third person straying through opening in fence left by agreement with landowner.

Cited in footnote to *Atchison, T. & S. F. R. Co. v. Reesman*, 23 L. R. A. 768, which holds company liable for injury to brakeman from derailment of train due to failure to maintain fences.

Cited in notes (8 L. R. A. 139) on liability of railroad company for death or injury to cattle by failure to fence; (25 L. R. A. 320) on obligation of railroad company to employees as to fencing track; (12 L. R. A. 181) on duty of railroad company to fence its tracks.

Distinguished in *Carper v. Kimball*, 35 L. R. A. 141, 23 C. C. A. 675, 42 U. S. App. 282, 78 Fed. 100, holding recovery not allowable for death of employee due to collision with cattle on track, when statute did not require whole line to be fenced.

Liability for faulty construction and repair.

Cited in *Mulvaney v. Brooklyn City R. Co.* 1 Misc. 426, 21 N. Y. Supp. 427, holding railroad liable for injury to brakeman due to improperly constructed curve of track; *True v. Lehigh Valley R. Co.* 22 App. Div. 591, 48 N. Y. Supp. 86, holding duty of railroad to inspect bluff from side of which shale was known to slide upon track; *Lynch v. New York C. & H. R. Co.* 8 App. Div. 462, 40 N. Y. Supp. 775, holding railroad liable for injury to passenger due to loaded stone car running down gravity road built partly on quarry and partly on railroad; *Terre Haute & I. R. Co. v. Williams*, 69 Ill. App. 394, holding railroad liable for death of engineer wrecked by cattle coming on track, where there was no cattle guard; *Pitcher v. Lennon*, 16 Misc. 610, 38 N. Y. Supp. 1007, holding owner of building liable for death due to its collapse by reason of construction in violation of statute.

Distinguished in *Hebert v. Delaware & H. Canal Co.* 41 N. Y. S. R. 863, 16 N. Y. Supp. 561, holding railroad not liable for death of yard man on engine colliding with loaded wagon in yard; *Richmond v. New York C. & H. R. R. Co.* 8 App. Div. 386, 40 N. Y. Supp. 812, holding railroad not liable for injury to employee due to wire stretched across its track without its consent.

7 L. R. A. 529, *HALL v. PILLSBURY*, 43 Minn. 33, 19 Am. St. Rep. 209, 44 N. W. 673.

Title to grain in warehouse.

Cited in *Herrick v. Barnes*, 78 Minn. 478, 81 N. W. 526, holding bank has title to grain for which storage tickets were issued to it, and which was withdrawn with other wheat by warehousemen and sold; *Jackson v. Sevaton*, 79 Minn. 278, 82 N. W. 634, holding depositors of wheat in warehouse may maintain action against third person for conversion; *Rice v. Madelia Farmers Warehouse Co.* 78 Minn. 126, 80 N. W. 853, to point relation between depositor of grain and warehousemen that of bailor and bailee, and title to grain whether kept separate or commingled remains in depositor.

Right to store grain in own warehouse.

Cited in footnote to *Central Elevator Co. v. People*, 43 L. R. A. 658, which

denies right of licensed warehouseman to deal in and store grain in own licensed warehouse.

Liability of warehouseman.

Cited in footnotes to *Moses v. Teetors*, 57 L. R. A. 267, which denies warehouseman's liability to owner for destruction by fire of wheat stored at owner's risk; *State v. Cowdery*, 48 L. R. A. 92, which holds flax stored in warehouse "grain" within statute regulating warehousemen.

Public warehouseman.

Cited in footnote to *State v. Chicago, M. & St. P. R. Co.* 38 L. R. A. 672, which holds void statute requiring carriers to turn over to public warehouseman all property not called for within twenty days.

7 L. R. A. 533, *ROCHE v. WATERS*, 72 Md. 284, 19 Atl. 535.

Payment of taxes by life tenant.

Cited in note (32 L. R. A. 745) on duty of life tenant to pay taxes.

Jurisdiction of chancery.

Cited in footnotes to *Sloane v. Martin*, 28 L. R. A. 347, which denies necessity of actual service on infants in suit for sale of land in which they have interest; *Warren v. Union Bank*, 43 L. R. A. 256, which holds void, mortgage of infant's property under order of court for sole purpose of paying unauthorized debt incurred by guardian; *Richards v. East Tennessee, V. & G. R. Co.* 45 L. R. A. 712, which sustains power of court of chancery to order sale of entire interest of minors in land on *ex parte* petition in term time; *Pitts v. Rhode Island Hospital Trust Co.* 48 L. R. A. 783, which authorizes allowance necessary for infant's maintenance out of trust fund provided for his education.

Validating void judgment.

Cited in *Willis v. Hodson*, 79 Md. 331, 29 Atl. 604, holding legislature without power to make a judgment rendered without jurisdiction valid and binding; *Re Christiansen*, 17 Utah, 428, 41 L. R. A. 509, 70 Am. St. Rep. 794, 53 Pac. 1003, holding legislature cannot validate void judgments.

7 L. R. A. 537, *SIEGEL v. CHICAGO TRUST & SAV. BANK*, 131 Ill. 569, 19 Am. St. Rep. 51, 23 N. E. 417.

Negotiability of note.

Cited in *Biegler v. Merchants' Loan & T. Co.* 164 Ill. 203, 45 N. E. 512, affirming 62 Ill. App. 569, holding recital to destroy negotiability of note must make promise uncertain or conditional; *Buchanan v. Wren*, 10 Tex. Civ. App. 566, 30 S. W. 1077, holding statement of consideration not disclosing fraud or illegality does not affect validity or negotiability of note; *Buchanan v. Wren*, 10 Tex. Civ. App. 568, 30 S. W. 1077, holding note given for rent for unexpired term negotiable; *Brooke v. Struthers*, 110 Mich. 576, 35 L. R. A. 543, 68 N. W. 272, holding note secured by mortgage not negotiable, where mortgage provides whole debt becomes due on mortgagor's failure to pay taxes and assessments.

Cited in footnote to *Gordon v. Anderson*, 12 L. R. A. 483, which holds note payable to certain person, "et al. or order" non-negotiable.

Cited in note (6 L. R. A. 394) as to requisites to negotiability.

Distinguished in *Hovorka v. Hemmer*, 108 Ill. App. 445, holding instrument payable upon publication of an advertisement, not negotiable.

Notice as letting in defenses.

Cited in *Fox v. Citizens' Bank & T. Co.* (Tenn. Ch. App.) 35 L. R. A. 681, 37 S. W. 1102, holding note taken before maturity or failure of consideration free from equities, although recitals show consideration was future and contingent; *Weber v. Rosenheim*, 37 Ill. App. 73, holding notice that consideration of note is executory does not prevent indorsee for value before maturity from taking it free from defenses because consideration afterward fails; *United States Nat. Bank v. Floss*, 38 Or. 72, 84 Am. St. Rep. 752, 62 Pac. 751, holding breach of executory contract forming consideration for note not a defense against indorsee for value before maturity with notice of contract, but not of its breach; *Webber v. Indiana Nat. Bank*, 49 Ill. App. 343, holding notice of fact exciting inquiry not notice of ultimate fact to assignee of note before maturity.

7 L. R. A. 539, *REDMOND v. TARBORO*, 106 N. C. 122, 10 S. E. 845.

Equality of taxation.

Cited in *Wiley v. Salisbury*, 111 N. C. 400, 16 S. E. 542, holding all taxes must be laid by one uniform rule; *United Brethren v. Forsyth County*, 115 N. C. 493, 20 S. E. 626, holding credits and secured notes belonging to religious society whose income is used exclusively for educational, religious, and charitable purposes, exempt.

Cited in note (8 L. R. A. 271) on taxation ad valorem.

Taxable property.

Cited in *Wood v. Edenton*, 106 N. C. 153, 10 S. E. 854, holding notes, bonds, and solvent credits owned by a resident against residents and nonresidents taxable by municipality; *Wiley v. Salisbury*, 111 N. C. 404, 16 S. E. 542, holding stock in corporation doing business outside of town, though owned by its residents, is taxable only at its principal place of business; *Winston v. Beeson*, 135 N. C. 277, 65 L. R. A. 170, 47 S. E. 457, holding dealing in trading stamps not taxable as a gift enterprise.

Cited in footnote to *Hamilton v. Wilson*, 48 L. R. A. 238, which holds void, statute for taxation of personal judgments with specified exceptions.

Adopted construction of statute.

Cited in *Harper v. Pinkston*, 112 N. C. 301, 17 S. E. 161, holding statute adopted from that of another state presumed to have been enacted with knowledge of judicial construction there given it.

Meaning of "property."

Cited in *Worth v. Wright*, 122 N. C. 336, 29 S. E. 361, holding license tax on sale of pianos, property which may be collected by state treasurer.

7 L. R. A. 548, *MOOSE v. CARSON*, 104 N. C. 431, 17 Am. St. Rep. 681, 10 S. E. 689.

Dedication of street.

Cited in *McClellan v. Weston*, 49 W. Va. 679, 55 L. R. A. 906, 39 S. E. 670, holding adverse possession cannot be maintained against city of any portion of street duly laid out and platted under statute; *State v. Higgs*, 126 N. C. 1022, 48 L. R. A. 449, 35 S. E. 473, holding indictment of abutting owner under ordinance requiring removal of signs, not sustained, if sign does not obstruct passage on street; *Smith v. Goldsboro*, 121 N. C. 354, 28 S. E. 479, holding vendor of lots on street subsequently taken into city, estopped from denying to

city right to furnish purchasers light and water; *State v. Fisher*, 117 N. C. 740, 23 S. E. 158, holding entry on street in addition to city under license by city. does not operate as acceptance of street by city; *Hughes v. Clark*, 134 N. C. 460, 46 S. E. 956, and *Davis v. Morris*, 132 N. C. 436, 43 S. E. 950, holding sale of lots with reference to street, dedication thereof as between parties.

Distinguished in *Milliken v. Denny*, 135 N. C. 22, 47 S. E. 132, holding mere bounding of land conveyed on alley not sufficient to support action for obstruction of such alley.

When statute of limitations runs against municipality.

Cited in *Turner v. Hillsboro*, 127 N. C. 155, 37 S. E. 191, holding statute of limitations runs against a municipality giving power to alienate streets and other public lands.

Power of alienation of public property.

Cited in *Southport v. Stanly*, 125 N. C. 467, 34 S. E. 641, holding lease by town officials of property devoted to use of town, *ultra vires*.

Abutting owner's proprietary rights.

Cited in *Tate v. Greensboro*, 114 N. C. 404, 24 L. R. A. 674, 19 S. E. 767 (dissenting opinion), majority holding city can cut down shade trees in sidewalk in front of lot without compensating owner; *White v. Northwestern North Carolina R. Co.* 113 N. C. 621, 22 L. R. A. 631, 37 Am. St. Rep. 639, 18 S. E. 330, holding steam railroad cannot be maintained in street without compensating abutting owner for loss of proprietary rights; *Kray v. Muggli*, 84 Minn. 99, 54 L. R. A. 480, 87 Am. St. Rep. 332, 86 N. W. 882, holding riparian owner with prescriptive right to maintain water in stream as obstructed by dam can bring action to prevent removal of dam; *Long v. Wilson*, 119 Iowa, 272, 60 L. R. A. 722, 97 Am. St. Rep. 315, 93 N. W. 282, holding abutting owner not bound by decree to which he was not a party, changing boundaries of street.

Cited in footnote to *Lostutter v. Aurora*, 12 L. R. A. 259, which authorizes city to fit up abandoned well in street without abutting owner's consent.

Cited in notes (10 L. R. A. 268) on damages for obstruction of street by street railroad; (10 L. R. A. 276) on rights of abutting lot owners in street; (11 L. R. A. 636) on servitude of light and air; (11 L. R. A. 750) on right of commissioners to close highway; (14 L. R. A. 372) on injury to abutters' easements of light, air, and access by vacating street, changing grade, etc.; (26 L. R. A. 459) on abandonment of highway by nonuser or otherwise than by act of public authorities; (26 L. R. A. 663) on effect of abandonment of highway; (26 L. R. A. 822) on discontinuance or vacation of highway by public authorities.

7 L. R. A. 551, *SHATTUCK v. WATSON*, 53 Ark. 147, 13 S. W. 516.

Contract to compound crime.

Cited in *Kirkland v. Benjamin*, 67 Ark. 480, 55 S. W. 840, holding notes executed to procure dismissal of criminal prosecution void.

Cited in footnote to *William Deering & Co. v. Cunningham*, 54 L. R. A. 410, which holds void, contract to withdraw opposition to granting of pardon.

Duress.

Cited in footnotes to *First Nat. Bank v. Sargent*, 59 L. R. A. 296, which sustains right to recover back money paid under duress; *Flack v. National Bank of Commerce*, 17 L. R. A. 583, which holds threat by bank to institute proceed-

ings to collect unmatured note not duress; *Springfield F. & M. Ins. Co. v. Hull*, 25 L. R. A. 37, which upholds right to maintain suit for balance due on policy without tendering back less sum accepted under threats of groundless prosecution; *Galusha v. Sherman*, 47 L. R. A. 417, which holds threats rendering person incapable of exercising free will in contracting, duress.

Cited in notes (9 L. R. A. 633) on what constitutes duress; (16 L. R. A. 376) on duress by lien on real property; (26 L. R. A. 52) on contracts procured by threats on prosecution of relative.

7 L. R. A. 553, *COCHRAN v. MATTHIESSEN*, 119 N. Y. 399, 23 N. E. 803.

Stockholders' liability for corporate debts.

Cited in *Marshall v. Sherman*, 148 N. Y. 28, 34 L. R. A. 767, 51 Am. St. Rep. 654, 42 N. E. 419, refusing to locally enforce stockholder's liability under statute of another state; *Seaton v. Grimm*, 110 Iowa, 151, 81 N. W. 225, holding stockholder not liable for debt of corporation because notice required upon incorporation not given; *Matteson v. Dent*, 176-U. S. 528, 44 L. ed. 575, 20 Sup. Ct. Rep. 419, holding heirs of stockholder in whose name corporate shares stood at death properly assessed for debt of corporation; *Thompson v. Nicolai*, 21 Misc. 708, 49 N. Y. Supp. 422, holding assignee of creditor can maintain action against a single stockholder for debt of corporation; *Close v. Brady*, 4 Misc. 479, 24 N. Y. Supp. 567 (dissenting opinion), majority holding that stockholder may show date when corporation note was actually issued to escape liability; *Berwind-White Coal Min. Co. v. Ewart*, 11 Misc. 492, 32 N. Y. Supp. 716, holding liability of stockholder of corporation organized under Laws 1875, chap. 611, for debts incurred, until filing of certificate that increased capital is paid in, preserved by saving clause of repealing acts of 1890 and 1892; *Close v. Potter*, 155 N. Y. 151, 49 N. E. 686; *Re Remington Automobile & Motor Co.* 119 Fed. 444, holding obligation of stockholder to creditors of corporation until stock subscribed for and paid in, contractual; *Barnes v. Arnold*, 23 Misc. 207, 51 N. Y. Supp. 1109, holding liability of stockholders to creditors under banking law is contractual, not penal; *Bauer v. Parker*, 82 App. Div. 297, 81 N. Y. Supp. 995, holding individual liability of directors limited by statute to \$5,000 enforceable in equity for benefit of creditors.

What actions survive.

Cited in footnotes to *Aylsworth v. Curtis*, 33 L. R. A. 110, which holds survivable, action for value of property stolen; *Perkins v. Stein*, 20 L. R. A. 862, which holds survivable action for negligently driving over person.

7 L. R. A. 555, *STROUGH v. WILDER*, 119 N. Y. 530, 23 N. E. 1057.

Possession of deed.

Cited in *Halladay v. Gass*, 51 App. Div. 540, 64 N. Y. Supp. 825, holding possession of deed evidence not only of delivery, but that possessor is grantee named in it.

Declarations of grantor.

Cited in *Hoffman v. Hoffman*, 6 App. Div. 85, 39 N. Y. Supp. 494, holding declaration of grantor made at time of executing deed to characterize act he was then doing, admissible evidence.

Unacknowledged or unrecorded instrument.

Cited in *Hill v. Bartholomew*, 71 Hun, 455, 24 N. Y. Supp. 944, holding unattested and unacknowledged agreement as to gate on right of way valid as to purchaser from heirs of one of the parties thereto; Concurring opinion in *McNally v. Fitzsimmons*, 70 App. Div. 186, 75 N. Y. Supp. 331, to point after voluntary partition each heir becomes purchaser from other and is protected against unrecorded deed of which he had no knowledge where grantee not in possession.

7 L. R. A. 557, *YATES COUNTY NAT. BANK v. CARPENTER*, 119 N. Y. 550, 18 Am. St. Rep. 855, 23 N. E. 1108.

Exemptions.

Cited in *People ex rel. Young Men's Asso. v. Sayles*, 23 Misc. 6, 50 N. Y. Supp. 8, holding maintenance of theatre and public hall in part of building does not deprive corporation devoted to moral and intellectual purposes of exemption; *Reiff v. Mack*, 160 Pa. 268, 40 Am. St. Rep. 720, 28 Atl. 699, and *Price v. Society for Savings*, 64 Conn. 366, 42 Am. St. Rep. 198, 30 Atl. 139, holding savings bank account covered by statute exempting "pension moneys;" *Puget Sound Dressed Beef & Packing Co. v. Jeffs*, 11 Wash. 473, 27 L. R. A. 811, 48 Am. St. Rep. 885, 39 Pac. 962, holding insurance money for exempt furniture destroyed, exempt for reasonable time; *McIntosh v. Aubrey*, 185 U. S. 124, 46 L. ed. 837, 22 Sup. Ct. Rep. 561, holding statutory exemptions of pension money from attachment, etc., protect it only until received by pensioner; *St. Lawrence State Hospital v. Fowler*, 15 Misc. 163, 37 N. Y. Supp. 12, holding statutory obligation of father to support son not enforceable where pension father's only income; *United States v. Frizzell*, 19 App. D. C. 58, holding proceeds of pension not chargeable with payment of pensioner's board and medical attendance while in government hospital after discharge from Army; *Cook v. Allee*, 119 Iowa, 229, 93 N. W. 93, holding property purchased with proceeds of policy, exempt from liability for debts of beneficiary contracted prior to death of assured.

— Property purchased with pension money.

Cited in *People ex rel. Scott v. Williams*, 6 Misc. 186, 27 N. Y. Supp. 23, holding realty purchased with widow's pension exempt from taxation; *People ex rel. Canaday v. Williams*, 90 Hun, 503, 36 N. Y. Supp. 65, striking property held by committee for discharged insane sailor from tax rolls, when purchased with pension money; *Tyler v. Ballard*, 31 Misc. 542, 65 N. Y. Supp. 557, holding judgment lien does not attach to land purchased with pension money after judgment; *Buffum v. Forster*, 77 Hun, 28, 28 N. Y. Supp. 285, enjoining execution against realty purchased with pension money; *Lapolt v. Maltby*, 10 Misc. 331, 31 N. Y. Supp. 686, holding assessors personally liable for assessing pensioners exempt realty; *Countryman v. Countryman*, 23 N. Y. Civ. Proc. Rep. 165, 28 N. Y. Supp. 260, holding mortgage of realty does not extinguish pension exemption; *Strong v. Walton*, 47 App. Div. 115, 62 N. Y. Supp. 353, Affirming on this point 27 Misc. 305, 57 N. Y. Supp. 761, holding coal purchased with pension money exempt from seizure for nonpayment of school taxes; *Toole v. Oneida County*, 13 App. Div. 473, 37 N. Y. Supp. 9, holding land purchased with pension money not liable to sale for nonpayment of taxes; *People ex rel. Kenny v. Reilly*, 41 App. Div. 380, 58 N. Y. Supp. 558, holding statutory exemption of property purchased with soldier's pay and bounty money, no greater than pension exemption; *Van Hise v. Rensselaer County*, 21 Misc. 573, 48 N. Y. Supp. 874.

allowing recovery of taxes paid on exempt realty to period of limitation; *Re Ellithorpe*, 111 Fed. 163, holding real estate partly purchased with pension money not exempt where mortgaged for larger amount for investment in other ventures.

Cited in footnote to *Johnson v. Elkins*, 8 L. R. A. 552, which holds land purchased with pension money and conveyed to wife liable for debts.

Cited in note (19 L. R. A. 35) on exemption of property purchased with pension money.

Distinguished in *Re Murphy*, 9 Misc. 649, 30 N. Y. Supp. 511, holding realty taxable to extent purchase price not pension money; *Fritz v. Worden*, 20 App. Div. 244, 46 N. Y. Supp. 1040, holding pension exemption lost by conveyance to wife under secret agreement, where rights of innocent third party thereby affected; *People ex rel. Jones v. Feitner*, 157 N. Y. 365, 51 N. E. 1002, Affirming 32 App. Div. 25, 52 N. Y. Supp. 622, holding realty conveyed to wife on purchase by pensioner, subject to taxation; *Toole v. Oneida County*, 16 Misc. 655, 37 N. Y. Supp. 9, holding interest of wife taxable on conveyance of realty through third party to pensioner and wife; *Broderick v. Yonkers*, 22 App. Div. 448, 48 N. Y. Supp. 265 (dissenting opinion), majority holding taxes paid on exempt realty not recoverable before assessment set aside; *Worden v. Oneida County*, 35 App. Div. 208, 54 N. Y. Supp. 952, holding tax on realty valid where exemption not claimed on grievance day; *Re Liddle*, 35 Misc. 174, 71 N. Y. Supp. 474, holding decedent's exempt realty subject to execution in payment of debts; *Re King*, 24 App. Div. 606, 49 N. Y. Supp. 1, holding exemption not determinable on *ex parte* affidavit in support of motion to restrain execution against realty.

Proceeds of exempt property generally.

Cited in *Bull v. Case*, 41 App. Div. 392, 58 N. Y. Supp. 774, holding exemption of insurance benefits does not extend to securities purchased with insurance money.

7 L. R. A. 559, *CORN EXCH. BANK v. FARMERS NAT. BANK*, 118 N. Y. 443, 23 N. E. 923.

Liability of banks receiving paper for collection.

Cited in *Irwin v. Reeves Pulley Co.* 20 Ind. App. 128, 48 N. E. 601 (dissenting opinion), majority holding bank accepting draft for collection not liable for default of correspondent.

Cited in footnotes to *Wilson v. Carlinville Nat. Bank*, 52 L. R. A. 632, which holds depositor of check for collection estopped to object to sending check directly to drawee bank in accordance with custom known to him; *Second Nat. Bank v. Merchants' Nat. Bank*, 55 L. R. A. 273, which holds bank negligent in sending note for collection to bank whose cashier is treasurer of corporation maker without hearing from similar note previously sent.

Cited in notes (7 L. R. A. 597) on banking check; (7 L. R. A. 845) on ownership of paper indorsed in blank.

Of correspondent banks.

Reaffirmed in *Castle v. Corn Exch. Bank*, 148 N. Y. 128, 42 N. E. 518, Affirming 75 Hun, 91, 26 N. Y. Supp. 1035, holding bank, receiving for collection check sent by other bank holding it only for collection, liable as agent of latter bank.

Cited in *Bank of Clarke County v. Gilman*, 81 Hun, 490, 30 N. Y. Supp. 1111, holding correspondent bank liable to owner for proceeds of commercial paper indorsed for collection.

Distinguished in *Kelley v. Phenix Nat. Bank*, 17 App. Div. 499, 45 N. Y. Supp. 533, holding subagent liable to owners for neglect in collecting bonds transmitted for collection for owners.

7 L. R. A. 563, *DANIELS v. NEW LONDON*, 58 Conn. 156, 19 Atl. 573.

Power of attorney to bind client.

Disapproved in effect *Beliveau v. Amoskeag Mfg. Co.* 68 N. H. 226, 44 L. R. A. 169, 73 Am. St. Rep. 577, 40 Atl. 734, upholding right of discharged attorney to bind client by receiving damages and giving satisfaction of judgment.

7 L. R. A. 566, *BECK v. GERMAN KLINIK*, 78 Iowa, 696, 43 N. E. 617.

Special interrogations.

Cited in *Decatur v. Simpson*, 115 Iowa, 352, 88 N. W. 839, holding special interrogations calling for ultimate facts necessary in reaching verdict should be submitted.

Liability of physicians.

Cited in notes (11 L. R. A. 701, 37 L. R. A. 835) on liability of physicians for negligent treatment.

7 L. R. A. 568, *GAFFORD v. STROUSE*, 89 Ala. 283, 18 Am. St. Rep. 111, 7 So. 248.

When statute of limitations begins to run.

Cited in *Stiff v. Cobb*, 126 Ala. 386, 85 Am. St. Rep. 38, 28 So. 402, holding possession by real estate by husband and wife residing together not adverse to each other; *Washington v. Norwood*, 128 Ala. 389, 30 So. 405, holding statute of limitations begins to run when cause of action arises.

7 L. R. A. 570, *LITTLE v. CHADWICK*, 151 Mass. 109, 23 N. E. 1005.

Following trust property.

Cited in *O'Brien v. New England Trust Co.* 183 Mass. 189, 66 N. E. 794, holding administratrix of sheriff entitled for administration to fund deposited by him, although composed partly of moneys belonging to others.

Cited in footnotes to *Central Stock & Grain Exchange v. Bendinger*, 56 L. R. A. 875, which holds broker liable to refund to principal, money illegally taken from agent as margins on gambling transaction; *Indiana, I. & I. R. Co. v. Swannell*, 30 L. R. A. 290, which holds that property purchased by trustee for bondholders under reorganization arrangement may be followed into hands of purchaser from him with knowledge of the trust.

— When funds capable of identification.

Cited in *York v. York Market Co.* 68 N. H. 420, 37 Atl. 1038, holding checks mingled with funds of insolvent company create no charge when indistinguishable; *Holden v. Piper*, 5 Colo. App. 74, 37 Pac. 34, holding trust property misapplied recoverable if traceable; *Ferchen v. Arndt*, 28 Or. 129, 29 L. R. A. 666, footnote p. 664, 46 Am. St. Rep. 603, 37 Pac. 161, holding consignor cannot impress funds of consignee in hands of receiver when not traceable; *Re Marsh*, 116 Fed. 397, holding right to impress lien on assets of bankrupt fails when trust fund not traceable; *Metropolitan Nat. Bank v. Campbell Commission Co.* 77 Fed. 703, holding right of company advancing money for purchase of cattle to establish trust dependent on ability to locate property.

Cited in notes (30 L. R. A. 290, 56 L. R. A. 875) on following trust funds; (8 L. R. A. 789) on comingling trust funds.

— **Dissipation of public funds.**

Cited in *Fire & Water Comrs. v. Wilkinson*, 119 Mich. 665, 44 L. R. A. 498, 78 N. W. 893; *Spokane County v. First Nat. Bank*, 16 C. C. A. 84, 29 U. S. App. 707, 68 Fed. 982; *State v. Foster*, 5 Wyo. 215, 29 L. R. A. 250, 63 Am. St. Rep. 47, 38 Pac. 926, — holding public moneys deposited in insolvent bank establish no trust unless traceable.

— **When funds remain in insolvent estate and swell it.**

Cited in *Standard Oil Co. v. Hawkins*, 33 L. R. A. 743, 20 C. C. A. 475, 46 U. S. App. 115, 74 Fed. 402, holding one not precluded from impressing with trust lien funds in hands of receiver when assets exceeding claim remain; *Ferchen v. Arndt*, 26 Or. 129, 29 L. R. A. 666, 46 Am. St. Rep. 603, 37 Pac. 161, holding it must appear funds on hand to impress insolvent estate with lien for trust funds; *Independent Dist. v. Beard*, 83 Fed. 11, holding proof of increase of property sufficient to fasten special trust upon funds in hands of receiver; *Van Ingen v. Feldt*, 86 Wis. 348, 56 N. W. 923, holding funds of lodge deposited with insolvent member after assignment impressed with trust.

— **Effect on beneficiary of dissipation of trust funds.**

Cited in *Burnham v. Barth*, 89 Wis. 370, 62 N. W. 96, holding claim of infant to funds dissipated by insolvent bank on same basis as general creditors; *Slater v. Oriental Mills*, 18 R. I. 356, 27 Atl. 443, holding right to follow property appropriated by insolvent company lost when funds dissipated; *State v. Bank of Commerce*, 54 Neb. 729, 75 N. W. 28, holding beneficiary of trust funds dissipated by bank not preferred to others; *Drovers' & M. Nat. Bank v. Roller*, 85 Md. 500, 36 L. R. A. 769, 60 Am. St. Rep. 344, 37 Atl. 30, holding assets not chargeable with lien in favor of one for whom bankrupt sold sheep, where proceeds have been dissipated; *Morrison v. Lincoln Sav. Bank & S. D. Co.* 57 Neb. 228, 77 N. W. 655, and *Bank of Florence v. United States Sav. & Loan Co.* 104 Ala. 301, 16 So. 110, holding *cestui que trust* shares with general creditors when trust fund misapplied; *Paul v. Draper*, 158 Mo. 201, 81 Am. St. Rep. 296, 59 S. W. 77, holding deposit of infant's money in insolvent bank creates relation of debtor and creditor, not trustee and *cestui que trust*; *Bank Comrs. v. Security Trust Co.* 70 N. H. 548, 49 Atl. 113, holding beneficial owner of trust funds not entitled to preference over general creditors of insolvent trustee when moneys dissipated; *Re Mulligan*, 116 Fed. 718, holding mere misapplication of proceeds of sales gives defrauded consignors no lien superior to general creditors.

— **Collections made by insolvent bank.**

Cited in *Nonotuck Silk Co. v. Flanders*, 87 Wis. 242, 58 N. W. 383; *Hallam v. Tillinghast*, 19 Wash. 27, 52 Pac. 329; *Thuemmler v. Barth*, 89 Wis. 389, 62 N. W. 94, — holding one for whom bank collected draft before assignment can only share with general creditors.

— **Power of equity court over trusts.**

Cited in *Hudson v. J. B. Parker Mach. Co.* 173 Mass. 248, 53 N. E. 867, holding equity court has power over trusts and will determine rights of persons interested therein.

7 L. R. A. 572, *MURDOCK v. FRANKLIN INS. CO.* 33 W. Va. 407, 10 S. E. 777.

Limitation clause in insurance policy — Fire insurance.

Cited in *Steel v. Phenix Ins. Co.* 2 C. C. A. 469, 7 U. S. App. 325, 51 Fed. 721, holding limitation of time to sue for insurance operates from expiration of 60 days from proofs of loss; *Sample v. London & L. F. Ins. Co.* 46 S. C. 497, 47 L. R. A. 707, 57 Am. St. Rep. 701, 24 S. E. 334, holding stipulation that suit can be brought on policy within 12 months after fire, means 12 months from accrual of right; *State Ins. Co. v. Meesman*, 2 Wash. 468, 26 Am. St. Rep. 870, 27 Pac. 77 (dissenting opinion), majority holding limitation to action on policy begins from date of fire, notwithstanding stipulation in proof of loss clause.

Cited in notes (11 L. R. A. 599) on waiver of conditions in fire policy by refusal to pay loss; (8 L. R. A. 769; 47 L. R. A. 708) on limitation of actions for fixed period on marine and miscellaneous policies.

Disapproved in *Egan v. Oakland Ins. Co.* 29 Or. 405, 54 Am. St. Rep. 798, 42 Pac. 990, holding action upon policy must commence within 6 months after fire, though loss not payable for 60 days after proofs of loss.

— Life insurance.

Disapproved in effect, *McFarland v. Railway Officials & E. Acci. Asso.* 5 Wyo. 133, 27 L. R. A. 51, 63 Am. St. Rep. 29, 38 Pac. 347, holding provision in life insurance policy limiting time to sue begins at death.

Insurable interest.

Cited in *Home Ins. Co. v. Mendenhall*, 164 Ill. 465, 36 L. R. A. 377, 45 N. E. 1078, holding heir expectant in possession has insurable interest in property though deed undelivered to father.

Effect of statute on rate of interest.

Cited in *Seton v. Hoyt*, 34 Or. 281, 43 L. R. A. 638, 75 Am. St. Rep. 641, 55 Pac. 967, holding unpaid county warrants, bearing interest, contracts upon which rate of interest not reduceable by statute.

Interest on judgments.

Cited in *Baer's Sons Grocer Co. v. Cutting Fruit-Packing Co.* 42 W. Va. 365, 26 S. E. 191, holding judgments on contracts bear interest from date of verdict; *Talbott v. West Virginia C. & P. R. Co.* 42 W. Va. 563, 26 S. E. 311, holding interest computed from date of judgment in actions in tort.

7 L. R. A. 576, *STARCK v. UNION CENT. L. INS. CO.* 134 Pa. 45, 19 Am. St. Rep. 674, 19 Atl. 703.

Construction of life insurance policies.

Cited in *Hall v. Mutual Reserve Fund Life Asso.* 19 Pa. Super. Ct. 34, holding death by suicide avoids policy, regardless of motive or insanity; *Doll v. Prudential Ins. Co.* 21 Pa. Super. Ct. 437, holding clause as to incontestability not violated by correction of misstated age of insured.

Cited in note (42 L. R. A. 249, 261) on incontestability of life insurance policy.

7 L. R. A. 577, *WIESE v. SAN FRANCISCO MUSICAL FUND SOC.* 82 Cal. 645, 23 Pac. 212.

Conclusiveness of judgments.

Cited in *Reed v. Cross*, 116 Cal. 484, 48 Pac. 491, holding right to contribution

established in one action, conclusive upon parties in later action based on same transaction.

Cited in footnotes to *Wilkes v. Davies*, 23 L. R. A. 103, which holds conclusive refusal of injunction against consummating sale of school lands till improvements paid for; *Reich v. Cochran*, 37 L. R. A. 805, which holds judgment by default in summary proceedings by landlord not bar to pending action to have lease adjudged a mortgage.

Cited in notes (8 L. R. A. 268; 11 L. R. A. 159, 311) on attacking judgments collaterally.

7 L. R. A. 583, *REESE v. WESTERN U. TELEG. CO.* 123 Ind. 294, 24 N. E. 163.
Sufficiency of complaint to show negligence.

Cited in *South Florida Teleg. Co. v. Maloney*, 34 Fla. 345, 16 So. 280, holding complaint in action for negligence in transmitting message should state facts showing liability.

Strict construction of penal statutes.

* Cited in *Southern Indiana Loan & Sav. Inst. v. Doyle*, 26 Ind. App. 105, 59 N. E. 179, holding penal statutes governing actions to recover penalty for refusal to satisfy mortgage strictly construed; *Osborn v. Hocker*, 160 Ind. 3, 66 N. E. 42, holding penalty for refusal to discharge mortgage not recoverable without payment of full amount of debt.

Remedy for violation of duty.

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Russ*, 6 C. C. A. 600, 18 U. S. App. 279, 57 Fed. 825, holding passenger wrongfully ejected from train may sue company in tort or for breach of contract.

Mental suffering as element of damage.

Cited in *Young v. Western U. Teleg. Co.* 107 N. C. 376, 9 L. R. A. 671, footnote, p. 669, 22 Am. St. Rep. 883, 11 S. E. 1044, holding neglect for 8 days to deliver message "come in haste, wife near death" renders company liable for mental anguish; *Western U. Teleg. Co. v. Cain*, 14 Ind. App. 117, 42 N. E. 655, authorizing recovery for mental anguish from delay in announcing brother's illness preventing attendance at funeral; *Cashion v. Western U. Teleg. Co.* 123 N. C. 272, 31 S. E. 493, holding failure to deliver message makes company liable for mental anguish not as breach of contract, but of public duty; *Cashion v. Western U. Teleg. Co.* 124 N. C. 466, 45 L. R. A. 162, 32 S. E. 746, holding damages for mental pain caused by failure to deliver message recoverable, though relationship of parties not disclosed; *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 756, 28 L. R. A. 73, 57 Am. St. Rep. 294, 62 N. W. 1, and *Western U. Teleg. Co. v. Cline*, 8 Ind. App. 365, 35 N. E. 564, holding right to damages for mental suffering for non-delivery of message announcing death, though no pecuniary loss result; *Western U. Teleg. Co. v. Newhouse*, 6 Ind. App. 434, 33 N. E. 800; *Western U. Teleg. Co. v. Bryant*, 17 Ind. App. 74, 46 N. E. 358; *Western U. Teleg. Co. v. Stratemeier*, 6 Ind. App. 132, 32 N. E. 871; *Cowan v. Western U. Teleg. Co.* 122 Iowa, 381, 64 L. R. A. 548, 98 N. W. 281,—authorizing recovery for mental anguish from delay in delivery of telegram; *Renihan v. Wright*, 125 Ind. 545, 9 L. R. A. 517, 21 Am. St. Rep. 249, 25 N. E. 822, holding in assessment of damages for undertaker's breach of contract to retain corpse, mental pain should be considered.

Cited in footnotes to *Connell v. Western U. Teleg. Co.* 20 L. R. A. 172, which denies recovery for mental distress for failure to deliver telegram; *International Ocean Teleg. Co. v. Saunders*, 21 L. R. A. 810, which holds mental suffering not element of damage for failure to promptly deliver telegram; *Western U. Teleg. Co. v. Wood*, 21 L. R. A. 706, which denies recovery for mental anguish from delay in delivering telegram; *Chapman v. Western U. Teleg. Co.* 17 L. R. A. 430, which denies recovery to addressee for mental suffering from failure to deliver telegram; *Getty v. Peters*, 10 L. R. A. 464, which holds damages for mental anguish alone from delay in delivering telegram not recoverable.

Cited in note (13 L. R. A. 860) on opinions favoring damages for mental suffering alone.

Criticized in *Western U. Teleg. Co. v. Ferguson*, 26 Ind. App. 220, 59 N. E. 416, expressing opinion that damages for distress of mind without bodily injury not recoverable for nondelivery of message announcing death.

Questioned in *Western U. Teleg. Co. v. Briscoe*, 18 Ind. App. 25, 47 N. E. 473, stating that in Indiana recovery is allowed for mental damages without pecuniary loss from delay in delivery of telegram announcing mother's death.

Disapproved in effect in *Kester v. Western U. Teleg. Co.* 55 Fed. 604; *Western U. Teleg. Co. v. Wood*, 21 L. R. A. 712, 6 C. C. A. 450, 13 U. S. App. 317, 57 Fed. 477; *Newman v. Western U. Teleg. Co.* 54 Mo. App. 440,—holding no damages recoverable for mental anguish for nondelivery of telegram; *Curtin v. Western U. Teleg. Co.* 13 App. Div. 255, 42 N. Y. Supp. 1109, and *Connelly v. Western U. Teleg. Co.* 100 Va. 57, 56 L. R. A. 667, 93 Am. St. Rep. 919, 40 S. E. 618, holding damages for mental suffering for negligent transmission of message not recoverable at common law or under statute; *Connell v. Western U. Teleg. Co.* 116 Mo. 50, 20 L. R. A. 178, 38 Am. St. Rep. 575, 22 S. W. 345, holding no damages recoverable for nondelivery of message, although company knew mental pain would result; *Western U. Teleg. Co. v. Rogers*, 68 Miss. 756, 13 L. R. A. 862, 24 Am. St. Rep. 300, 9 So. 823; *Chapman v. Western U. Teleg. Co.* 88 Ga. 765, 17 L. R. A. 431, 30 Am. St. Rep. 183, 15 S. E. 901; *Peay v. Western U. Teleg. Co.* 64 Ark. 543, 39 L. R. A. 463, 43 S. W. 965; *Crawson v. Western U. Teleg. Co.* 47 Fed. 546,—holding right of recovery for mental pain from nondelivery of message dependent upon element of physical suffering; *International Ocean Teleg. Co. v. Saunders*, 32 Fla. 442, 21 L. R. A. 814, 14 So. 148, holding nominal damages only recoverable for delay in delivery of telegram, mental pain alone resulting.

Overruled in *Western U. Teleg. Co. v. Ferguson*, 157 Ind. 64, 54 L. R. A. 851, 60 N. E. 674, holding mental pain resulting from negligence in delivery of message not actionable.

Notice from contents of telegram.

Cited in *Western U. Teleg. Co. v. Griffin*, 1 Ind. App. 50, 27 N. E. 113, holding message calling doctor for child shows necessity for prompt service; *Western U. Teleg. Co. v. Nations*, 82 Tex. 541, 27 Am. St. Rep. 914, 18 S. W. 709, holding message announcing death sufficient to inform company mental pain will result from nondelivery; *Western U. Teleg. Co. v. Newhouse*, 6 Ind. App. 431, 33 N. E. 800, and *Western U. Teleg. Co. v. Eskridge*, 7 Ind. App. 213, 33 N. E. 238, holding message announcing serious illness sufficient notice for immediate transmission and delivery; *Western U. Teleg. Co. v. Coffin*, 88 Tex. 96, 30 S. W. 896, holding action for damages not supported in absence of notice that great mental pain may result from nondelivery.

Liability for negligence in delivery of telegram.

Cited in *Cogdell v. Western U. Teleg. Co.* 135 N. C. 435, 47 S. E. 490, holding that telegraph company owes duty to public promptly to deliver telegram, irrespective of contract; *Western U. Teleg. Co. v. Moore*, 12 Ind. App. 140, 54 Am. St. Rep. 515, 39 N. E. 874, holding prepayment for delivery beyond free delivery limits not essential to recovery of damages for failure to diligently deliver message.

Cited in footnote to *Western U. Teleg. Co. v. Short*, 9 L. R. A. 744, which holds company *prima facie* liable for failure to deliver telegram.

Cited in note (10 L. R. A. 516) on liability for failure to transmit telegraphic message.

7 L. R. A. 588, *TERRE HAUTE & I. R. CO. v. CLEM*, 123 Ind. 15, 18 Am. St. Rep. 303, 23 N. E. 965.

Duty of railroad companies to maintain safe crossings.

Cited in *Lake Shore & M. S. R. Co. v. McIntosh*, 140 Ind. 278, 38 N. E. 476, holding duty of railroad company to maintain crossing in good condition and safe; *Seybold v. Terre Haute & I. R. Co.* 18 Ind. App. 379, 46 N. E. 1054, holding failure of railroad company to observe statutory duty of mending highway actionable negligence; *Indiana ex rel. Muncie v. Lake Erie & W. R. Co.* 83 Fed. 287, holding statutory duty devolves upon company to maintain safe crossing convenient for increased use by public; *Ohio & M. R. Co. v. Trowbridge*, 126 Ind. 394, 26 N. E. 64, holding railroad liable for injury resulting from horse taking fright at car left at crossing.

Cited in footnote to *Jeffrey v. Detroit, L. & N. R. Co.* 31 L. R. A. 170, which holds railroad company liable for defect in sidewalk across track.

Probable results as test of negligence.

Cited in *Louisville, N. A. & C. R. Co. v. Nitsche*, 126 Ind. 233, 9 L. R. A. 752, 22 Am. St. Rep. 582, 26 N. E. 51, holding railroad company liable for setting fires on right of way when damage by spreading probable; *Cleveland, C. C. & St. L. R. Co. v. Berry*, 152 Ind. 618, 46 L. R. A. 56, 53 N. E. 415, holding lack of care not shown by placing coupling pin on tender where it would not reasonably be expected to fall; *Barman v. Spencer (Ind.)*, 44 L. R. A. 817, 49 N. E. 9, holding persons going out at night not required to anticipate dangers they are ignorant of to exempt from negligence.

Precautions after accident as proof of negligence.

Cited in *Wabash County v. Pearson*, 129 Ind. 457, 28 N. E. 1120, holding admission of evidence of repairs after injury incompetent to show negligence; *Columbia & P. S. R. Co. v. Hawthorne*, 144 U. S. 207, 36 L. ed. 407, 12 Sup. Ct. Rep. 591, holding evidence incompetent showing change in hanging pulley after injury, tending to create prejudice and shift real issue; *Motey v. Pickle Marble & Granite Co.* 20 C. C. A. 371, 36 U. S. App. 682, 74 Fed. 157, and *Muncie Pulp Co. v. Jones*, 11 Ind. App. 117, 38 N. E. 547, holding improper to show repairs of hole in floor after accident; *Green v. Ashland Water Co.* 101 Wis. 269, 43 L. R. A. 121, 70 Am. St. Rep. 722, 77 N. W. 722, holding in action for damage for death by failing to provide pure water, recovery dependent on condition previous thereto. *Baran v. Reading Iron Co.* 202 Pa. 286, 51 Atl. 979, holding evidence showing change in support and operation of boilers after accident incompetent to prove prior negligence; *Anson v. Evans*, 19 Colo. 279, 35 Pac. 47, holding error

to admit evidence in negligence action that new ropes replaced old ones after accident; *Sievers v. Peters Box & Lumber Co.* 151 Ind. 658, 50 N. E. 877, holding court did not err in refusing to admit evidence that elevator gearing fastened differently after accident; *Bell v. Washington Cedar Shingle Co.* 8 Wash. 29, 35 Pac. 405, holding in action for damages for injury from imperfect machinery, evidence of change thereafter improper; *Shelby County v. Blair*, 8 Ind. App. 589, 36 N. E. 216, holding improper to show construction of new bridge after injury, in place of defective one; *Standard Oil Co. v. Tierney*, 92 Ky. 378, 14 L. R. A. 683, 36 Am. St. Rep. 595, 17 S. W. 1025, holding evidence of subsequent change in mode of branding barrels of naphtha inadmissible in action for negligence in shipping it improperly branded; *Shinners v. Locks & Canals*, 154 Mass. 170, 12 L. R. A. 558, 26 Am. St. Rep. 226, 28 N. E. 10, holding evidence improper showing precautionary acts in shoring up bank subsequent to injury by falling of earth; *Holt v. Spokane & P. R. Co.* 3 Idaho, 716, 35 Pac. 39, holding evidence of filling up of well in which child was drowned, after accident, inadmissible.

— In actions against railroads.

Cited in *Southern P. Co. v. Hall*, 100 Fed. 768, holding repair of railroad water box after injury does not effect question of previous negligence; *Georgia Southern & F. R. Co. v. Cartledge*, 116 Ga. 166, 59 L. R. A. 120, footnote p. 118, 42 S. E. 405, holding additional precaution taken after injury caused by mail grab striking post not admission of negligence; *Atchison, T. & S. F. R. Co. v. Parker*, 5 C. C. A. 222, 12 U. S. App. 132, 55 Fed. 597, holding not proper to show repairs made on switch engine subsequent to accident; *Prescott & N. R. Co. v. Smith*, 70 Ark. 183, 67 S. W. 865, holding change of method in making up train cannot be used as evidence of previous wrong; *Aldrich v. Concord & M. R. Co.* 67 N. H. 253, 29 Atl. 408, holding evidence incompetent that switch causing derailment replaced by different kind after accident; *Chicago & E. R. Co. v. Lee*, 17 Ind. App. 223, 46 N. E. 543, holding proof improper showing signal wires which caused injury afterwards covered; *Illinois C. R. Co. v. Wyatt*, 104 Tenn. 434, 78 Am. St. Rep. 926, 58 S. W. 308, holding evidence of repairs to platform after injury cannot be admitted to prove antecedent negligence; *Denver & R. G. R. Co. v. Morton*, 3 Colo. App. 158, 32 Pac. 345, holding error to show railroad employees helped extinguish fire, on question of origin; *Pennsylvania Co. v. Witte*, 15 Ind. App. 593, 43 N. E. 319, *Isaacs v. Southern P. Co.* 49 Fed. 798; *Kentucky & I. Bridge Co. v. McKinney*, 9 Ind. App. 220, 36 N. E. 448, — holding evidence of extension of platform after injury of one falling from elevated train not admissible to prove negligence.

Distinguished in *Skottowe v. Oregon Short Line & U. N. R. Co.* 22 Or. 439, 16 L. R. A. 596, 30 Pac. 222, holding evidence of repairs after injury competent to show ownership, but not negligence; *Chicago & E. R. Co. v. Barnes*, 10 Ind. App. 462, 38 N. E. 428, holding evidence of repairs on bridge after injury competent in rebuttal, not to show negligence.

Evidence of subsequent condition.

Distinguished in *Creamery Package Mfg. Co. v. Hotsenpiller*, 159 Ind. 105, 64 N. E. 600, holding evidence of subsequent condition of machine causing injury admissible, where same as at time of accident.

7 L. R. A. 590, *DICK v. FLANAGAN*, 122 Ind. 277, 23 N. E. 765.

Payment of pre-existing debt with third person's note.

Cited in *Zimmerman v. Adee*, 126 Ind. 18, 25 N. E. 828, holding in absence of agreement taking note of third person for pre-existing debt no payment.

7 L. R. A. 591, *COPPAGE v. HUTTON*, 124 Ind. 401, 24 N. E. 112.

Signing and acknowledging articles of association.

Cited in *Greenbrier Industrial Exposition v. Rodes*, 37 W. Va. 741, 17 S. E. 305, holding each subscriber to articles of association must acknowledge signature to make a subscription binding.

Distinguished in *Shick v. Citizens' Enterprise Co.* 15 Ind. App. 334, 57 Am. St. Rep. 230, 44 N. E. 48, holding subscriber to capital stock of existing corporation need not sign and acknowledge articles of association.

7 L. R. A. 592, *DANAHER v. BROOKLYN*, 119 N. Y. 241, 23 N. E. 745.

City's liability for injury.

Cited in *Lenzen v. Braunfels*, 13 Tex. Civ. App. 358, 35 S. W. 341, holding city liable for negligent failure to supply water to extinguish fire; *Springfield F. & M. Ins. Co. v. Keeseville*, 80 Hun, 169, 29 N. Y. Supp. 1130, holding city liable for damage due to its wilful misconduct or culpable neglect to maintain waterworks and fire appliances; *Spier v. Brooklyn*, 45 N. Y. S. R. 263, 18 N. Y. Supp. 170, holding city liable for injury due to display of fireworks licensed by it; *McGarey v. New York*, 89 App. Div. 501, 85 N. Y. Supp. 861, holding city liable for injury to pedestrian by falling of rotten limb of tree into street.

Cited in footnotes to *Green v. Ashland Water Co.* 43 L. R. A. 117, which holds water company not liable for injury due to unwholesome water when consumer knew of its condition; *Hughes v. Auburn*, 46 L. R. A. 636, which denies city's liability for disease due to neglect of proper sanitary precautions as to sewer system; *Duncan v. Lynchburg*, 48 L. R. A. 331, which denies city's liability for nuisance by pollution of water in unauthorized operation of rock quarry outside city limits.

Cited in note (61 L. R. A. 88) on establishment and regulation of municipal water supply.

Distinguished in *Springfield F. & M. Ins. Co. v. Keeseville*, 80 Hun, 169, 29 N. Y. Supp. 1130, holding village maintaining by taxation system of waterworks liable for loss by fire from lack of water due to employment of incompetent men, and letting works get out of repair.

7 L. R. A. 595, *GOSHEN NAT. BANK v. BINGHAM*, 118 N. Y. 349, 16 Am. St. Rep. 765, 23 N. E. 180.

Lack of indorsement as subjecting instrument to defenses.

Cited in *Graboski v. Gewertz*, 44 N. Y. S. R. 128, 17 N. Y. Supp. 528, holding note not indorsed by payee subject in hands of holders to all defenses which might have prevailed between original parties; *Meade v. Sandidge*, 9 Tex. Civ. App. 365, 30 S. W. 245, holding transferee of note without indorsement occupies no better position than assignor; *Lebecher v. Lambert*, 23 Utah, 11, 63 Pac. 628, holding holder of note not indorsed by payee takes subject to existing equities; *First Nat. Bank v. Henry*, 156 Ind. 11, 58 N. E. 1057, holding no consideration

good defense to note transferred before maturity without indorsement; *Pavey v. Stauffer*, 45 La. Ann. 361, 19 L. R. A. 721, 12 So. 512, holding if indorsement accidentally omitted subsequent indorsement relates back to time of transfer and shuts off equities; *Meridian Nat. Bank v. First Nat. Bank*, 7 Ind. App. 337, 52 Am. St. Rep. 450, 34 N. E. 608, holding indorsement with fictitious name, of check payable to person under such assumed name, valid, making indorsee holder for value; *Pitkin v. Clayton*, 41 App. Div. 365, 58 N. Y. Supp. 483, holding transferee of note by assignment instead of indorsement takes subject to all equities that might be urged against assignor; *Wangner v. Grimm*, 169 N. Y. 428, 62 N. E. 569, holding assigned note subject to defense of payment to payee without notice of assignment; *Gray Tie & Lumber Co. v. Farmers' Bank*, 109 Ky. 699, 60 S. W. 537, holding transferee of draft without indorsement takes it subject to defenses.

Cited in footnote to *Mayer v. Heidelberg*, 9 L. R. A. 850, which holds one taking check in absolute payment of debt a bona fide purchaser.

Cited in note (26 L. R. A. 570) on indorsement as affecting negotiability of check.

Necessity or effect of indorsement.

Cited in *Eichner v. Bowery Sav. Bank*, 78 N. Y. S. R. 333, 44 N. Y. Supp. 332, holding bank not liable for refusal to pay check until it is indorsed by payees; *McCarville v. Lynch*, 14 Misc. 176, 35 N. Y. Supp. 383, holding possession of unindorsed certificate of deposit does not show ownership or power of disposition.

Cited in note (12 L. R. A. 493) check must be indorsed by payee.

Replevin as remedy.

Cited in *Haas v. Altieri*, 2 Misc. 253, 21 N. Y. Supp. 950, to point replevin lies for possession of check; *Hower v. Weiss Malting & Elevator Co.* 5 C. C. A. 133, 14 U. S. App. 210, 55 Fed. 359 (dissenting opinion), majority holding injunction to restrain sale of stock representing controlling interest in corporation will be granted, and that remedy at law by replevin is inadequate.

Certification of check.

Cited in *People v. Saint Nicholas Bank*, 77 Hun, 169, 28 N. Y. Supp. 407, holding bank by certification of check becomes debtor to holder, and not obliged to set apart particular fund for payment; *Meuer v. Phenix Nat. Bank*, 94 App. Div. 338, 88 N. Y. Supp. 83, Affirming 42 Misc. 345, 86 N. Y. Supp. 701, holding bank certifying check upon request of holder liable thereon.

Deposit slips.

Cited in note (17 L. R. A. 580) on deposit slips given by banks.

Payment of forged paper.

Cited in note (7 L. R. A. 849) on payment by bank of forged paper.

7 L. R. A. 599. **YELLOWSTONE KIT v. STATE**, 88 Ala. 196, 16 Am. St. Rep. 38, 7 So. 338.

Lottery, what constitutes.

Cited in *Reeves v. State*, 105 Ala. 123, 17 So. 104, holding device consisting of board and arrow indicating prizes, for privilege of spinning which charge is made, lottery; *Loiseau v. State*, 114 Ala. 38, 62 Am. St. Rep. 84, 22 So. 138, holding slot machine operated under agreement that person making highest

score have cigars to value of money put in, lottery; *Paulk v. Jasper Land Co.* 116 Ala. 183, 22 So. 495, holding apportionment of building lots of different values by drawing numbers, lottery; *Chaney Park Land Co. v. Hart*, 104 Iowa, 595, 73 N. W. 1053, holding apportionment of building lots of equal value among subscribers by drawing numbers, not lottery; *State v. Shugart*, 138 Ala. 91, 35 So. 28, holding issuance of trading stamps not a lottery or gift enterprise; *State v. Hawkins*, 95 Md. 146, 93 Am. St. Rep. 328, 51 Atl. 850, upholding statute prohibiting trading stamps, so far as involving element of chance.

Cited in footnotes to *Equitable Loan & Security Co. v. Waring*, 62 L. R. A. 93, which holds determination by chance of time of payment of fixed amount due certificate holder in investment association, not illegal; *Lynch v. Rosenthal*, 31 L. R. A. 835, which holds sale of lots to be drawn by lot, with one prize lot to be given to one of purchasers as result of chance, void; *State ex rel. Prout v. Nebraska Home Co.* 60 L. R. A. 448, which holds scheme by which common fund is to be distributed among contributors, a valuable preference in distribution of which depends on chance, a lottery; *State ex rel. Sheets v. Interstate Sav. Invest. Co.* 52 L. R. A. 531, which holds investment securities, etc., which by certain device may be redeemed before maturity, and otherwise give unequal advantages to certificate holders, a lottery; *Meyer v. State*, 51 L. R. A. 496, which holds giving customers chance to operate slot machine and secure, in addition to purchase, article whose value determined by place where revolving wheel stops, a lottery; *State ex rel. Kellogg v. Kansas Mercantile Asso.* 11 L. R. A. 430, which holds scheme for distribution of prizes by chance, a lottery; *Thornhill v. O'Rear*, 31 L. R. A. 792, which holds agreement by one person to take all chances of raffle, not unlawful.

Cited in notes (8 L. R. A. 671) on what constitutes lottery schemes; (10 L. R. A. 60) on lotteries and lottery tickets.

— Gift enterprises.

Cited in *Cross v. People*, 18 Colo. 324, 36 Am. St. Rep. 292, 32 Pac. 821, holding gratuitous distribution of property by chance for which no consideration is received, directly or indirectly, no lottery; *Long v. State*, 74 Md. 570, 12 L. R. A. 427, 28 Am. St. Rep. 268, 22 Atl. 4, holding gift enterprise not involving chance, not prohibitable by legislature.

Cited in note (12 L. R. A. 89) on gift enterprise as lottery.

Distinguished in *Lansburgh v. District of Columbia*, 11 App. D. C. 529, holding trading stamps given to purchasers of goods, entitling holders to premiums, within act prohibiting gift enterprises.

Rights arising out of illegal transaction.

Cited in footnote to *Martin v. Richardson*, 19 L. R. A. 692, which holds unlawful purchaser of lottery ticket entitled to proceeds from one fraudulently obtained after prize drawn.

Cited in note (7 L. R. A. 705) on when promissory note invalid.

7 L. R. A. 605, *MEMPHIS & C. R. CO. v. WOODS*, 88 Ala. 630, 16 Am. St. Rep. 81, 7 So. 108.

Power of corporation to own another's stock.

Cited in *Hamilton v. Savannah, F. & W. R. Co.* 49 Fed. 424, holding in absence of statutory authority corporation cannot acquire another's stock; *Tompkins*

v. Compton, 93 Ga. 523, 21 S. E. 79, holding attempted sale of majority stock to effect consolidation against objection of minority stockholders, illegal.

Cited in note (8 L. R. A. 493) on corporate franchises as public grants.

Power of corporation to vote stock.

Cited in *George v. Central R. & Bkg. Co.* 101 Ala. 621, 14 So. 752, holding voting of majority stock by rival railroad may be enjoined; *State ex rel. Jackson v. Newman*, 51 La. Ann. 839, 72 Am. St. Rep. 476, 25 So. 408, holding that corporation cannot, in absence of statutory authority, vote stock of another.

Cited in note (29 L. R. A. 849) on right to vote by proxy in private corporations.

Distinguished in *American Refrigerating & Constr. Co. v. Linn*, 93 Ala. 612, 7 So. 191, holding voting of majority stock of domestic by foreign corporation may not be enjoined unless interests clearly shown antagonistic.

Transactions between corporations under same control.

Cited in *O'Conner Min. & Mfg. Co. v. Coosa Furnace Co.* 95 Ala. 617, 36 Am. St. Rep. 251, 10 So. 290, holding transactions between corporations having same directors voidable by either corporation, or its stockholders.

Cited in note (33 L. R. A. 793) on contracts between corporations having common directors or officers.

When stockholder may maintain action to protect corporate rights.

Cited in *Steiner v. Parsons*, 103 Ala. 221, 13 So. 771, holding stockholder filing bill to compel president to account for corporate funds must show redress not obtainable through corporation; *Mack v. De Bardeleben Coal & I. Co.* 90 Ala. 400, 9 L. R. A. 654, 8 So. 150, holding voting majority stock by rival corporation may not be enjoined by stockholder without previous request to directors, or showing request useless; *George v. Central R. & Bkg. Co.* 101 Ala. 624, 14 So. 752, holding stockholders showing that demand upon officers to prevent illegal voting of stock would be fruitless, entitled to maintain action.

Cited in note (9 L. R. A. 655) on neglect or refusal to comply with request of corporation to sue.

Pleading — What averment sufficient.

Cited in *Christian v. American Freehold Land Mortg. Co.* 92 Ala. 131, 9 So. 219, holding averment of fact not impaired by needless recital of complainant's grounds of belief.

7 L. R. A. 613, *WHITNEY v. WHEELER COTTON MILLS*, 151 Mass. 396, 24 N. E. 774.

Grants of water rights construed.

Cited in *Gray v. Saco Water Power Co.* 85 Me. 531, 27 Atl. 455, holding grant of water passing through certain aperture in dam does not include right to have usual head maintained.

Distinguished in *Whittenton Mfg. Co. v. Staples*, 164 Mass. 326, 29 L. R. A. 503, 41 N. E. 441, holding right to use of reservoir included in grant of "all streams, dam, water power, and privileges, head and fall of water . . . with rights . . . thereto belonging."

— Where appurtenant to grant of land.

Cited in *Showhegan Water Power Co. v. Weston*, 94 Me. 293, 47 Atl. 515.

holding grantee of land on both sides of channel acquires ordinary riparian rights.

Cited in note (58 L. R. A. 488) on how far grant of mill includes water rights.

Right to store water.

Cited in *Wamesit Power Co. v. Sterling Mills*, 158 Mass. 448, 33 N. E. 503, holding accumulation of water in mill ponds outside of working hours, legal.

Cited in notes (12 L. R. A. 639) on riparian rights; (9 L. R. A. 812) on riparian right to use waters of stream; (8 L. R. A. 277) on prescriptive right to flow of water; (8 L. R. A. 202) on right of lower owner to flow of water; (41 L. R. A. 749) on correlative rights of upper and lower proprietors as to use and flow of water in stream.

Right to divert water.

Cited in footnote to *Gould v. Eaton*, 38 L. R. A. 181, which denies riparian owner's power to transfer right to divert water from stream to use on nonriparian land.

Prescriptive right to use of reservoir.

Cited in *Horne v. Hutchins*, 71 N. H. 123, 51 Atl. 651, holding clear evidence required to establish prescriptive right to use of reservoir.

7 L. R. A. 618, *HILL v. KIMBELL*, 76 Tex. 210, 13 S. W. 59.

Recovery for damages caused by fright.

Cited in *Gulf, C. & S. F. R. Co. v. Hayter*, 93 Tex. 241, 47 L. R. A. 326, 77 Am. St. Rep. 856, 54 S. W. 944, holding damages recoverable by passenger on wrecked train for physical injuries proximately resulting from fright; *Watson v. Dilts*, 116 Iowa, 252, 57 L. R. A. 561, 93 Am. St. Rep. 239, 89 N. W. 1068, holding damages recoverable for nervous prostration proximately resulting from fright occasioned by nocturnal trespasser.

Cited in notes (14 L. R. A. 666) on fright as basis for cause of action; (32 L. R. A. 142) on recovery of damages for miscarriage; (16 L. R. A. 268) on effect of previous disease on person injured, on liability for causing injuries; (53 L. R. A. 633) on extent of trespasser's liability for consequential injuries resulting from trespass.

Distinguished in *Nelson v. Crawford*, 122 Mich. 470, 80 Am. St. Rep. 577, 81 N. W. 335, holding one frightening woman without malicious intent not liable for miscarriage six weeks later.

Damages for mental suffering.

Cited in *Cowan v. Western U. Teleg. Co.* 122 Iowa, 382, 64 L. R. A. 549, 98 N. W. 281, holding recoverable, damages for mental anguish resulting from negligence in transmission of telegram.

What are actions for trespass.

Cited in *Ft. Worth & D. C. R. Co. v. McAnulty*, 7 Tex. Civ. App. 327, 26 S. W. 414, holding negligence in transportation of cattle by railroad, trespass.

— Within statute regulating venue.

Cited in *Connor v. Saunders*, 9 Tex. Civ. App. 63, 29 S. W. 1140, holding injuries to employee from negligence of employer's superintendent, trespass; *Rotan v. Maedgen*, 24 Tex. Civ. App. 559, 59 S. W. 585, holding conversion of note

by conspiracy, trespass; *Wettermark v. Campbell*, 93 Tex. 523, 56 S. W. 331, holding wrongful levy of execution, trespass.

Limited in *Connor v. Saunders*, 81 Tex. 637, 17 S. W. 236; *Austin v. Cameron*, 83 Tex. 353, 18 S. W. 437; *Ricker v. Shoemaker*, 81 Tex. 25, 16 S. W. 645, — holding negligence in failure to act not trespass within meaning of statute.

7 L. R. A. 620, *PEREZ v. RAYBAUD*, 76 Tex. 191, 13 S. W. 177.

Landlord's liability for injuries due to defective premises.

Cited in *Oriental Investment Co. v. Sline*, 17 Tex. Civ. App. 695, 41 S. W. 130, holding landlord not liable for dangerous condition at time of lease, in absence of fraud, deceit, or covenant; *Thompson v. Clemens*, 96 Md. 206, 60 L. R. A. 583, 53 Atl. 919, holding landlord not liable for injury to one falling through floor of porch, because of breach of agreement to repair.

Cited in notes (34 L. R. A. 611) on liability of landlord for injuries to tenant's guests and servants from defects in premises; (46 L. R. A. 84, 86, 87) on liability of owner of premises not in possession; (33 L. R. A. 451) on implied covenant in lease as to fitness of property for purpose intended; (9 L. R. A. 641) on basis of liability for negligence.

7 L. R. A. 622, *RILEY v. SIMPSON*, 83 Cal. 217, 23 Pac. 293.

Liability for maintaining dangerous structure.

Cited in *Willcox v. Hines*, 100 Tenn. 553, 41 L. R. A. 281, 66 Am. St. Rep. 770, 46 S. W. 297, holding landlord liable to tenant for defective porch of which he knows at time of lease.

Cited in footnote to *Cork v. Blossom*, 26 L. R. A. 256, which holds one maintaining high chimney liable for fall on adjoining building.

Cited in notes (26 L. R. A. 200) on liability of landlord to third persons for condition of premises in tenant's possession; (34 L. R. A. 558) on individual liability for falling walls or buildings; (26 L. R. A. 340) on right to maintain awnings in street.

7 L. R. A. 623, *HARRISON v. DETROIT, L. & N. R. CO.* 79 Mich. 409, 19 Am. St. Rep. 180, 44 N. W. 1034.

Fellow servants.

Cited in *Jackson v. Norfolk & W. R. Co.* 43 W. Va. 395, 46 L. R. A. 350, 27 S. E. 278, and *Norfolk & W. R. Co. v. Houchins*, 95 Va. 411, 46 L. R. A. 367, 64 Am. St. Rep. 802, 28 S. E. 578, both holding conductor fellow servant with brakeman; *Lytle v. Chicago & W. M. R. Co.* 84 Mich. 295, 47 N. W. 571, holding yard master and switchman fellow servants; *Erickson v. Milwaukee, L. S. & W. R. Co.* 93 Mich. 417, 53 N. W. 393, holding foreman on gravel train and shoveler fellow servants; *Gann v. Nashville, C. & St. L. R. Co.* 101 Tenn. 384, 70 Am. St. Rep. 690, 47 S. W. 493, holding section boss and section hand fellow servants in operation of hand car; *McLaine v. Head & D. Co.* 71 N. H. 307, 58 L. R. A. 469, 93 Am. St. Rep. 522, 52 Atl. 545 (dissenting opinion), majority holding foreman fellow servant of laborer in trench, as to foreman's promise to warn latter when dirt is to be dumped; *Anderson v. Michigan C. R. Co.* 107 Mich. 612, 65 N. W. 585 (dissenting opinion), majority holding brakeman not fellow servant with section men; *Bloyd v. St. Louis & S. F. R. Co.* 58 Ark. 78, 41 Am.

St. Rep. 93, 22 S. W. 1089, holding bridge foreman not fellow servant with pile driver; *Palmer v. Michigan C. R. Co.* 93 Mich. 367, 17 L. R. A. 639, 32 Am. St. Rep. 507, 53 N. W. 397, holding assistant road master not fellow servant of laborer loading rails; *Shumway v. Walworth & N. Mfg. Co.* 98 Mich. 414, 57 N. W. 251, holding superintendent of planing mill not fellow servant of employee by his act of starting planer; *Saner v. Lake Shore & M. S. R. Co.* 108 Mich. 33, 65 N. W. 624 (dissenting opinion), majority holding conductor of construction train not fellow servant of extra section gang thereon; *Mikolojezak v. North American Chemical Co.* 129 Mich. 86, 88 N. W. 75, holding department foreman and servant working under him breaking down salt, fellow servants; *McLaine v. Head & D. Co.* 71 N. H. 307, 52 Atl. 545 (dissenting opinion), majority holding master not liable for injury of servant in trench through negligence of foreman.

Cited in notes (18 L. R. A. 796) as to fellow servants; (18 L. R. A. 824) as to negligent superiors; (50 L. R. A. 433) as to what servants are deemed to be in the same common employment, apart from statutes, where no questions as to vice principalship arise; (51 L. R. A. 521, 550, 576, 580, 612, 613) as to vice principalship considered with reference to the superior rank of a negligent servant; (54 L. R. A. 39, 42, 43, 72) on vice principalship as determined with reference to the character of the act which caused the injury.

Distinguished in *Balhoff v. Michigan C. R. Co.* 106 Mich. 614, 65 N. W. 592, holding section men not fellow servants of brakemen with respect to duty to remove ice from track; *Schroeder v. Flint & P. M. R. Co.* 103 Mich. 216, 29 L. R. A. 323, 50 Am. St. Rep. 354, 61 N. W. 663, holding foreman of gang unloading and leveling dirt on a railroad is a fellow servant of member of gang; *Beesley v. F. W. Wheeler & Co.* 103 Mich. 210, 27 L. R. A. 270, 61 N. W. 658, holding riveter and carpenters under same superintendent engaged in ship building are fellow servants; *Morch v. Toledo, S. & M. R. Co.* 113 Mich. 157, 71 N. W. 464, holding section foreman temporarily in charge of work train in place of road master, fellow servant of workman thereon.

Master's liability to injured servant.

Cited in *Doyle v. Toledo, S. & N. R. Co.* 127 Mich. 98, 54 L. R. A. 463, 89 Am. St. Rep. 456, 86 N. W. 524, holding railroad company running spur track under another's shed liable for injury to brakeman by roof falling when required to go there for cars; *Brown v. Ann Arbor R. Co.* 118 Mich. 208, 76 N. W. 407, and *Louisville, E. & St. L. Consol. R. Co. v. Hanning*, 131 Ind. 534, 31 Am. St. Rep. 447, 31 N. E. 187, both holding servant taken from regular employment for work of another kind in strange place, may assume same not dangerous; *Norfolk Beet-Sugar Co. v. Hight*, 56 Neb. 168, 76 N. W. 566, holding master liable for injury to servant ordered to perform work not known by servant to be dangerous; *Ashman v. Flint & P. M. R. Co.* 90 Mich. 571, 51 N. W. 645, holding it to be master's duty to keep track frogs properly blocked; *Hayes v. Frederick Stearns & Co.* 130 Mich. 202, 89 N. W. 947, holding master liable for injury to unwarned servant caused by falling through open trap in floor.

Cited in footnote to *Missouri P. R. Co. v. Columbia*, 59 L. R. A. 399, which holds placing on platform heavy doors blown on track by severe gale not proximate cause of derailment of engine.

Cited in notes (48 L. R. A. 798) as to liability for injuries received by servant in performance of duties outside the scope of his original contract; (51 L. R.

A. 559, 563, 577, 592) as to vice principalship considered with reference to the superior rank of a negligent servant; (54 L. R. A. 39, 42, 43, 72) on vice principalship as determined with reference to the character of the act which caused the injury.

Duties of section men.

Cited in *Roepecke v. Michigan C. R. Co.* 100 Mich. 546, 59 N. W. 243, holding that arranging of logs being unloaded from car regular duty of section men.

Duty of court as to special questions for jury.

Cited in *Sherwood v. Chicago & W. M. R. Co.* 82 Mich. 379, 46 N. W. 773, holding that court cannot refuse to submit special questions presented in unambiguous form and relating to questions of fact at issue; *Hemenway v. Burnham*, 90 Mich. 230, 51 N. W. 276, holding court must submit special questions, answers to which would have been inconsistent with general verdict for plaintiff, if in harmony with defendant's evidence.

7 L. R. A. 629, *FISHER v. NORTHRUP*, 79 Mich. 287, 44 N. W. 610.

Suit not maintainable by initial of plaintiff's first name.

Cited in *Stever v. Brown*, 119 Mich. 199, 77 N. W. 705, holding Christian name of plaintiff must be given.

Cited in note (14 L. R. A. 693) on acquisition and use by individual of a name.

Question of misnomer, how raised in justice's court.

Cited in *Stever v. Brown*, 119 Mich. 200, 77 N. W. 706, holding motion in justice's court to dismiss for misnomer of plaintiff suing under initial, equivalent to plea in abatement.

7 L. R. A. 630, *BETZ v. VERNER*, 46 N. J. Eq. 256, 19 Am. St. Rep. 387, 19 Atl. 206.

Rights of mortgagor or mortgagee.

Cited in *Mellick v. Mellick*, 47 N. J. Eq. 94, 19 Atl. 870, holding mortgagor before forfeiture has "interest," within statute of frauds, in mortgaged premises; *Waterman v. Mackenzie*, 138 U. S. 259, 34 L. ed. 927, 11 Sup. Ct. Rep. 334, holding mortgagee of patent may maintain suit against infringement; *McCaleb v. Goodwin*, 114 Ala. 623, 21 So. 967, holding bondholder may enjoin impairment of security.

Cited in note (7 L. R. A. 279) on removal of fixtures takes them out of lien of mortgage.

7 L. R. A. 634, *COM. ex rel. ATTY. GEN. v. NEW YORK, L. E. & W. R. CO.* 132 Pa. 591, 19 Atl. 291.

Reaffirmed on reargument in *Com. v. New York, L. E. & W. R. Co.* 139 Pa. 459, 21 Atl. 528, without special discussion.

Effect of violating constitutional provision against corporate ownership of real estate.

Cited in *People ex rel. Atty. Gen. v. Stockton Sav. v. Loan Soc.* 133 Cal. 612, 85 Am. St. Rep. 225, 65 Pac. 1078, holding constitutional restriction of ownership of real estate by corporations prescribing no penalty, does not work escheat.

Cited in notes (12 L. R. A. 531) on lands held by foreign corporations subject to escheat; (24 L. R. A. 326, 330) on right of foreign corporations to own real estate; (9 L. R. A. 35) on forfeiture of corporate franchise.

Effect of ownership of stock in domestic by foreign corporation.

Cited in *White v. Ryan*, 15 Pa. Co. Ct. 176, holding act forbidding foreign corporations to own real estate does not prohibit holding stock of domestic corporations owning real estate; *Postal Teleg. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah, 482, 90 Am. St. Rep. 705, 65 Pac. 735, holding ownership of stock of domestic by foreign corporation does not affect former's rights to maintain condemnation proceedings.

Constitutional provision against common carrier's engaging in other business.

Cited in *Hartwell v. Buffalo, R. & P. R. Co.* 19 Pa. Co. Ct. 236, 6 Pa. Dist. 215, holding railroad's ownership of mining stock does not constitute engaging in mining.

7 L. R. A. 638, *KILLINGSWORTH v. PORTLAND TRUST CO.* 18 Or. 351, 17 Am. St. Rep. 737, 23 Pac. 66.

7 L. R. A. 640, *PRENTISS v. PAISLEY*, 25 Fla. 927, 7 So. 56.

Marriage relation as affecting liability of parties.

Cited in *Trapnell v. Conklyn*, 37 W. Va. 252, 38 Am. St. Rep. 30, 16 S. E. 570, holding husband may act as agent for wife.

Cited in footnotes to *Henley v. Wilson*, 58 L. R. A. 941, which sustains husband's common-law liability for wife's torts; *Harrisburg Nat. Bank v. Bradshaw*, 34 L. R. A. 597, which sustains renewal by married woman of accommodation indorsement made before marriage.

Cited in note (30 L. R. A. 521) on liability of husband and wife for wife's libel and slander.

7 L. R. A. 646, *TERRITORY v. EVANS*, 2 Idaho, 651, 23 Pac. 232.

Using testimony on second trial.

Cited in footnote to *People v. Elliott*, 60 L. R. A. 318, which sustains right to read on second trial testimony of witness dying after first trial.

Depositions.

Overruled in *State v. Potter*, 6 Idaho, 585, 57 Pac. 431, holding depositions taken upon preliminary examination, inadmissible on trial of one accused of assault with intent to commit rape.

7 L. R. A. 649, *FOWLER v. SAKS*, 7 Mackey, 570.

Rights in party wall.

Cited in footnotes to *Harber v. Evans*, 10 L. R. A. 41, which authorizes injunction against making openings in party wall; *Burr v. Lamaster*, 9 L. R. A. 637, which holds party wall, and agreement to pay for same on using it, an encumbrance; *Clemens v. Speed*, 19 L. R. A. 240, which denies to party-wall owners reciprocal easement from support of buildings; *Nalle v. Paggi*, 13 L. R. A. 50, which holds sale of lot a use of party wall; *Putzell v. Drovers & M. Nat.*

Bank, 22 L. R. A. 632, which upholds right to remove boundary wall for erection of better wall; *Lincoln v. Burrage*, 52 L. R. A. 110, which holds that grantee's promise to pay part of cost of party wall when used, does not run with land.

Doubted in *Arrick v. Fry*, 8 App. D. C. 135, questioning whether under pleading alleging negligence in removal and reconstruction of party wall plaintiff was entitled to recover damages under covenant to make good.

Responsibility for servant's act.

Cited in note (8 L. R. A. 464) on master's liability for injuries caused through servant's negligence.

Estoppel by receiving benefit.

Cited in *Carpenter v. Reliance Realty Co.* 103 Mo. App. 501, 77 S. W. 1004, holding construction company not estopped by giving notice of intention to excavate under ordinance, from asserting its invalidity.

7 L. R. A. 656, *JOHNSON v. LEMAN*, 131 Ill. 609, 19 Am. St. Rep. 63, 23 N. E. 435.

Trust estate not bound by trustee's contracts.

Cited in *Goodman v. Lee*, 40 Ill. App. 230, holding trust estate not chargeable with services rendered under contract with trustee; *Dinsmoor v. Bressler*, 56 Ill. App. 213, holding person employed by solvent trustee not stipulating against personal liability without court order cannot recover from estate; *Rand, McN. & Co. v. Francis*, 67 Ill. App. 226, holding neither court nor assignee for creditors can bind estate for future rent; *Chicago Fire Place Co. v. Tait*, 58 Ill. App. 295, holding acceptance of lease by receiver does not affect liability of estate; *Rickel v. Chicago, R. I. & P. R. Co.* 112 Iowa, 152, 83 N. W. 957, holding administrator's contract for attorney's services not binding on estate; *McAuley v. O'Connor*, 92 Ill. App. 593, holding executor's contract for attorney's services not binding on estate; *Valley Nat. Bank v. Crosby*, 108 Iowa, 654, 79 N. W. 383, holding administrator cannot bind estate for money borrowed, but not used, for repairs.

— Trustee personally liable.

Cited in *Bradner, S. & Co. v. Williams*, 178 Ill. 425, 53 N. E. 358, holding assignee for creditors personally liable, in absence of contrary agreement, on contract for estate; *Truesdale v. Philadelphia Trust, S. D. & Ins. Co.* 63 Minn. 52, 65 N. W. 133, holding solvent trustee of bond holders not stipulating against personal liability, liable for attorney's services; *Briggs v. Breen*, 123 Cal. 660, 56 Pac. 633, holding in absence of contrary agreement executors liable for services of attorneys; *Meyers v. Cohn*, 4 Misc. 186, 23 N. Y. Supp. 996, holding guardian personally liable for commissions of broker employed in purchase of real estate for infants.

Trustee's lien on trust estate.

Cited in *Sherman v. Leman*, 137 Ill. 98, 27 N. E. 57, holding trustee has lien on trust estate for expenses of litigation determining appointment invalid.

7 L. R. A. 658, *WINTERS v. DE TURK*, 133 Pa. 359, 19 Atl. 354.

When statute of limitations begins to run.

Cited in *Matlack v. Mutual L. Ins. Co.* 37 W. N. C. 528, holding statute of

limitations does not run on beneficiary's right of action to avoid forfeiture of life insurance until insured's death.

Dower right.

Cited in note (18 L. R. A. 79) on power of husband or his creditors to defeat wife's dower.

7 L. R. A. 661, *CREW v. BRADSTREET CO.* 134 Pa. 161, 19 Am. St. Rep. 681, 19 Atl. 500.

Liability of mercantile agency for false report.

Cited in footnote to *Dun v. City Nat. Bank*, 23 L. R. A. 667, which holds mercantile agency not liable for false report by subagent.

7 L. R. A. 663, *REHFUSS v. MOORE*, 134 Pa. 462, 19 Atl. 756.

Sufficiency of schedule in limited partnership.

Cited in *Haslet v. Kent*, 160 Pa. 88, 34 W. N. C. 58, 28 Atl. 501, holding schedule of property of limited partnership including items of notes and accounts payable and bills receivable, insufficient; *Lafin & R. Powder Co. v. Steytler*, 146 Pa. 443, 14 L. R. A. 695, 29 W. N. C. 233, 14 Atl. 215, holding description of several parcels of land as one tract, and buildings, engines, etc., as one entire plant, sufficient.

Taxability of capital invested in patents.

Cited in *Com. v. Westinghouse Electric & Mfg. Co.* 151 Pa. 267, 24 Atl. 1107, holding capital of company invested in patent rights not taxable by state.

7 L. R. A. 666, *COM. v. GARDNER*, 133 Pa. 284, 19 Am. St. Rep. 645, 19 Atl. 550.

What constitutes "peddling."

Approved in *Leighton v. Smith*, 7 Northampton Co. Rep. 193, 6 Lack. L. News, 196, 9 Pa. Dist. R. 430, and *South Easton v. Moser*, 14 Lanc. L. Rev. 238, holding milkman delivering milk to regular customers, not hawker or peddler; *Irwin v. Douglass*, 8 Pa. Dist. R. 506, 30 Pittsb. L. J. N. S. 108; *Lansford v. Wertman*, 18 Pa. Co. Ct. 470, both holding farmer selling his own products, not hawker or peddler; *Com. v. Roenick*, 31 Pittsb. L. J. N. S. 192, holding butcher incidentally selling meats from the wagon, not peddler; *Com. v. Hepner*, 22 Pa. Co. Ct. 632, holding butcher selling meat to customers not within ordinance against hawking, peddling or selling merchandise; *Com. v. Deinno*, 20 Pa. Co. Ct. 371, holding fruit dealer selling purchased products by outcry through streets and calling at houses, hawker or peddler; *Re Wilson*, 8 Mackey, 348, 12 L. R. A. 625, holding peddler need not be personally interested in sales, to be within legislative description; *State v. Hoffman*, 50 Mo. App. 589 (dissenting opinion), majority holding one going from house to house taking orders from samples which are filled by employer if approved, not peddler; *Stamford v. Fisher*, 63 Hun, 127, 17 N. Y. Supp. 609, holding one carrying goods for filling prior orders, not peddler; *Horn v. Com.* 2 Pa. Dist. R. 176, 10 Lanc. L. Rev. 24, 12 Pa. Co. Ct. 285, holding resident merchant selling by sample or receiving and filling orders in other counties, not hawker or peddler; *New Castle v. Cutler*, 15 Pa. Super. Ct. 625, holding uniformity of taxation clause not violated by exemption of farmers, gardeners, or others raising, marketing, and selling their own produce, from opera-

tion of peddling law; *Com. v. Morgan*, 10 Pa. Co. Ct. 292, holding agent within proviso of peddling act excepting sales by manufacturers of their own goods; *South Easton v. Moser*, 14 Lanc. L. Rev. 238, holding farmer delivering milk in borough not subject to ordinance requiring license fee from peddlers.

Cited in footnotes to *Hewson v. Englewood*, 21 L. R. A. 736, which holds agent delivering from wagon goods previously ordered, and taking other orders, not a peddler; *Emmons v. Lewistown*, 8 L. R. A. 328, which holds book canvassers not peddlers; *State v. Wells*, 48 L. R. A. 99, which holds one soliciting orders for goods, and carrying goods to fill previous sales, not a peddler; *Stuart v. Cunningham*, 20 L. R. A. 430, which holds one delivering goods previously sold by another not a peddler.

Cited in note (8 L. R. A. 873) as to hawking and peddling.

Distinguished in *Com. v. Feinberg*, 3 Pa. Dist. R. 362, 13 Pa. Co. Ct. 528, 24 Pittsb. L. J. N. S. 132, holding exemption of manufacturers from penalties for hawking and peddling, extends to their agents.

Right to peddle.

Approved in *Titusville v. Brennan*, 143 Pa. 646, 14 L. R. A. 101, 3 Inters. Com. Rep. 736, 24 Am. St. Rep. 580, 28 W. N. C. 538, 22 Atl. 893, holding law regulating peddling, valid; *Com. v. Deinno*, 20 Pa. Co. Ct. 371, sustaining validity of special statute forbidding hawking or peddling of purchased products; *Sayre v. Phillips*, 30 W. N. C. 197, holding ordinance prohibiting unlicensed peddling proper police regulation; *Brownback v. North Wales* (omitted from official report in 194 Pa. 609), 49 L. R. A. 446, footnote, p. 446, 45 Atl. 660, Affirming 10 Pa. Super. Ct. 229, 44 W. N. C. 259, holding ordinance for licensing of persons selling in streets or soliciting orders, not invalid as to residents because discriminating in favor of nonresidents; *Sayre v. Phillips*, 148 Pa. 488, 16 L. R. A. 50, 33 Am. St. Rep. 842, 24 Atl. 76, holding peddling ordinance which establishes a prohibitory license fee except as to residents, void; *Port Clinton v. Shafer*, 18 Pa. Co. Ct. 69, 14 Lanc. L. Rev. 29, 5 Pa. Dist. R. 585, denying validity of regulation by borough of occupation prohibited by statute.

Cited in *People v. Thomson*, 103 Mich. 83, 61 N. W. 345, raising but not deciding questions as to validity of peddling ordinance; *Com. ex rel. Adderton v. Gombert*, 26 Pa. Co. Ct. 408, holding special statutes relating to hawking and peddling, unrepealed.

Cited in footnote to *Rosenbloom v. State*, 57 L. R. A. 923, which sustains license tax on peddlers, though vendors of own products exempt; *West Easton v. Zuck*, 8 Northampton Co. Rep. 119, upholding validity of ordinance providing for license fee for sale of food products; *Mt. Carmel v. Fisher*, 21 Pa. Super. Ct. 646, upholding validity of ordinance providing for curbstome market on certain days of the week only; *Saulsbury v. State*, 43 Tex. Crim. Rep. 95, 96 Am. St. Rep. 837, 63 S. W. 568, holding statute requiring peddlers to take out license not a violation of Federal Constitution.

Prohibition of peddling as regulation of commerce.

Approved in *Com. v. Dunham*, 191 Pa. 74, 44 W. N. C. 101, 43 Atl. 84, Affirming 4 Pa. Super. Ct. 76, holding that legislation regulating hawking and peddling, proper exercise of police power; *Emert v. Missouri*, 156 U. S. 309, 39 L. ed. 433, 5 Inters. Com. Rep. 76, 15 Sup. Ct. Rep. 367, Affirming *State v. Emert*, 103 Mo. 250, 11 L. R. A. 221, 3 Inters. Com. Rep. 529, 23 Am. St. Rep. 874, 15 S. W. 81,

holding indiscriminating statute for licensing of peddlers, not regulation of commerce as to goods previously sent by foreign manufacturers; *Bloomington v. Bourland*, 137 Ill. 537, 3 Inters. Com. Rep. 669, 31 Am. St. Rep. 382, 27 N. E. 692, holding ordinance prohibiting unlicensed soliciting of orders for books by agent of foreign wholesaler, void; *People v. Sawyer*, 106 Mich. 431, 64 N. W. 333, holding sale by resident from general stock, and not in original package, does not involve interstate commerce; *Re Wilson*, 8 Mackey, 358, 12 L. R. A. 628, holding license tax on peddlers not necessarily regulation of interstate commerce; *State v. Hoffman*, 50 Mo. App. 590 (dissenting opinion), raising without deciding question of regulation of peddling as exercise of police power.

Cited in notes (12 L. R. A. 624) as to power of Congress to regulate interstate commerce; (14 L. R. A. 98), as to peddlers and drummers as related to interstate commerce; (60 L. R. A. 692) as to corporate taxation and the commerce clause.

Distinguished in *McLaughlin v. South Bend*, 126 Ind. 473, 10 L. R. A. 358, footnote, p. 357, 26 N. E. 185, which holds requirement of peddling license unenforceable against person negotiating for sale of property in other state.

7 L. R. A. 669, *CITIZENS' LOAN, FUND & SAV. ASSO. v. FRIEDLEY*, 123 Ind. 143, 18 Am. St. Rep. 320, 23 N. E. 1075.

Professional responsibility — Of attorney.

Cited in *Kepler v. Jessup*, 11 Ind. App. 255, 37 N. E. 655, holding attorney responsible only for ordinary care and skill, with reference to business undertaken; *Hill v. Mynatt* (Tenn. Ch. App.), 52 L. R. A. 894, 59 S. W. 163, holding attorney not liable to client for determination to proceed in pending state action, instead of abandoning and proceeding in Federal court; *Nickless v. Pearson*, 126 Ind. 490, 26 N. E. 478, by Coffey, J., dissenting, on point that attorney is liable to client for ignorance or unskilfulness in managing business.

Cited in note (52 L. R. A. 933, 889) on liability of attorney to client for mistake.

— Of physician.

Cited in *Logan v. Field*, 75 Mo. App. 601, holding liability of physicians for professional error governed by same rule as that applying to attorneys.

Presumption of knowledge of law.

Cited in *State ex rel. Worrell v. Peelle*, 124 Ind. 521, 8 L. R. A. 231, 24 N. E. 440, holding that presumption of governor's knowledge of law does not change into appointment to office within his sole power of appointment, a commission reciting an election by legislature.

7 L. R. A. 671, *JELLETT v. RHODE*, 43 Minn. 166, 45 N. W. 13.

Lease; statute of frauds.

Followed in *Wickson v. Monarch Cycle Mfg. Co.* 128 Cal. 160, 79 Am. St. Rep. 36, 60 Pac. 764, and *Engler v. Schneider*, 66 Minn. 389, 69 N. W. 139, holding oral contract for lease of land for one year to commence in the future, void.

Cited in *Cram v. Thompson*, 87 Minn. 174, 91 N. W. 483, holding void agreement to execute lease for one year commencing *in futuro*, void; *Johnson v. Albertson*, 51 Minn. 335, 53 N. W. 642, holding oral lease, void under statute of frauds, not evidence of duration of term.

Cited in notes (10 L. R. A. 727) on lease within statute of frauds; (8 L. R. A. 221) on tenancy from year to year; how created.

7 L. R. A. 673, SWANSON v. MISSISSIPPI & R. RIVER BOOM CO. 42 Minn. 532, 44 N. W. 986.

Public nuisance; private right of action.

Cited in *Lammers v. Brennan*, 46 Minn. 211, 48 N. W. 766, holding action will not lie for damages sustained in performing contract to drive logs down stream, because of obstruction existing before contract was made; *Aldrich v. Wetmore*, 52 Minn. 169, 53 N. W. 1072, holding action for obstructing street may be maintained by adjacent proprietor, although access to premises not entirely cut off; *Lakkie v. Chicago*, St. P. M. & O. R. Co. 44 Minn. 440, 46 N. W. 912, holding laying railroad track in street does not give adjacent proprietor right of action for obstructing street, when access to premises not impaired; *Webster v. Harris* (Tenn.) 59 L. R. A. 330, 69 S. W. 782, holding lake 20 miles long, with no proper channels to make navigation available, not navigable.

Cited in footnote to *South Carolina S. B. Co. v. Wilmington, C. & A. R. Co.* 33 L. R. A. 541, which denies steamboat owner's right of action for obstructing navigation of river.

Cited in notes (39 L. R. A. 493) on private right of action against boom owner; (13 L. R. A. 828) on enforcement of rights of riparian proprietor in navigable stream in equity; (59 L. R. A. 85, 90) on injury to riparian rights from obstruction to navigable stream.

Overruled in effect in *Page v. Mille Lacs Lumber Co.* 53 Minn. 498, 55 N. W. 608, holding person suffering special damage from obstruction of navigable stream has right of action, although injury same in kind as that suffered by public.

Right to abate public nuisance.

Cited in footnotes to *Griffith v. Holman*, 54 L. R. A. 178, which denies private individual's right to abate public nuisance consisting of fence across navigable stream; *State v. Stark*, 54 L. R. A. 910, which denies right of private person to abate liquor nuisance without process of law.

Relation of state to navigable waters.

Cited in footnote to *St. Louis, I. M. & S. R. Co. v. Ramsey*, 8 L. R. A. 559, which holds title to land under navigable river in state.

Cited in notes (12 L. R. A. 673) on state sovereignty over inland navigable rivers; (12 L. R. A. 632) on navigable waters as public highways.

Test of navigability of rivers.

Cited in footnote to *Heyward v. Farmers' Min. Co.* 28 L. R. A. 42, which holds navigable capacity test of navigability.

7 L. R. A. 678, EVANS v. ADAMS EXP. CO. 122 Ind. 362, 23 N. E. 1039.

Contributory negligence.

Cited in *Cincinnati, I. St. L. & C. R. Co. v. Grames*, 8 Ind. App. 136, 34 N. E. 613, holding injured man driving slowly upon track, after listening and looking, with view partly obstructed, exercised care commensurate with danger; *Indiana, I. & I. R. Co. v. Bundy*, 152 Ind. 597, 53 N. E. 175, holding jury should determine whether brakeman coupling cars assumed risk of uncovered signal wires close to ground and unknown to him; *Krenzer v. Pittsburg, C. C. & St.*

L. R. Co. 151 Ind. 616, 68 Am. St. Rep. 252, 52 N. E. 220 (dissenting opinion), majority holding that child seven and one half years old, asleep in street on railway track, contributed to his injury; DeLon v. Kokomo City Street R. Co. 22 Ind. App. 380, 53 N. E. 847, holding plaintiff's negligence in crossing track ahead of car proximate cause of injury; Summit Coal Co. v. Shaw, 16 Ind. App. 16, 44 N. E. 676, holding employer's negligence excusing contributory negligence of employee must be committed after knowledge of employee's danger; Louisville & N. R. Co. v. Cronbach, 12 Ind. App. 675, 41 N. E. 15, holding intestate's negligence in walking on track without looking or heeding, contributed to his death; Citizens' Street R. Co. v. Stoddard, 10 Ind. App. 285, 37 N. E. 723, holding sick mother not necessarily at fault in sending small child across street on necessary errand; Indiana Stone Co. v. Stewart, 7 Ind. App. 566, 34 N. E. 1019, holding instruction that contributory negligence would not exonerate defendant is so radically wrong that it cannot be cured by withdrawal; Citizens' Street R. Co. v. Spahr, 7 Ind. App. 29, 33 N. E. 446, holding not negligence *per se* to board a moving car; Levey v. Bigelow, 6 Ind. App. 693, 34 N. E. 128, holding danger in removing ink roller from press was obvious, and employee guilty of contributory negligence; Mann v. Belt R. & Stock Yard Co. 128 Ind. 141, 26 N. E. 819, holding driver of vehicle struck by train approaching from direction in which view unobstructed for quarter of mile, guilty of contributory negligence; Conner v. Citizens' Street R. Co. 146 Ind. 440, 45 N. E. 662, holding instruction not objectionable as asking jury to decide law where negligence had been defined; Citizens Street R. Co. v. Haner, 29 Ind. App. 432, 62 N. E. 658, holding that contributory negligence of child will not defeat recovery, where motorman could have prevented injury after discovery of child's peril.

Cited in footnote to State v. Lauer, 20 L. R. A. 61, which holds it contributory negligence to leave surveyor's transit set up in street.

Cited in notes (17 L. R. A. 125) on contributory negligence of traveler in deviating from usual thoroughfare; (11 L. R. A. 130; 12 L. R. A. 280) on contributory negligence of passenger defeating recovery for injury; (8 L. R. A. 84) on co-operating causes of injury.

Distinguished in Jones v. Swift, 30 Wash. 469, 70 Pac. 1109, holding negligence in knocking barrels and boards into manhole by driving against them not excused because same were not securely fastened.

7 L. R. A. 681, QUILL v. INDIANAPOLIS, 124 Ind. 292, 23 N. E. 788.

Notice of hearing on local assessments.

Cited in Charles v. Marion, 100 Fed. 540, holding act which does not provide for notice for hearing to determine actual benefits for local improvements, invalid; Adams v. Shelbyville, 154 Ind. 481, 49 L. R. A. 803, 77 Am. St. Rep. 484, 57 N. E. 114, holding publication of notice to make objection to necessity for construction of public improvement, sufficient; Dugger v. Hicks, 11 Ind. App. 382, 36 N. E. 1085, holding special finding that notices published as provided in statute, sufficient to uphold conclusion of trial court; McEneney v. Sullivan, 125 Ind. 410, 25 N. E. 540, holding notice provided by act for street improvement sufficient; Barber Asphalt Paving Co. v. Edgerton, 125 Ind. 463, 25 N. E. 436, holding published notice for hearing objections to report of cost of work after completion, sufficient; Klein v. Tuhey, 13 Ind. App. 75, 40 N. E. 144, holding publication of notice from September 2 to September 16, both inclusive, is two

weeks' publication; *Pittsburgh, C. C. & St. L. R. Co. v. Fish*, 158 Ind. 527, 63 N. E. 454, holding notice of primary resolution of necessity for improvement not necessary to validity of assessment.

Limitation of public indebtedness.

Cited in *Porter v. Tipton*, 141 Ind. 350, 40 N. E. 802, holding act providing for payment of improvement out of assessments against property owners in ten annual instalments does not contemplate charging cost primarily against city; *Laporte v. Gamewell Fire Alarm Teleg. Co.* 146 Ind. 471, 35 L. R. A. 689, 58 Am. St. Rep. 359, 45 N. E. 588, holding obligations payable only out of fund, and not by municipality generally, not within inhibition against indebtedness; *Braun v. Benton County*, 17 C. C. A. 169, 34 U. S. App. 393, 70 Fed. 370, Affirming 66 Fed. 482, holding gravel-road bonds not county indebtedness; *Joliet v. Alexander*, 194 Ill. 465, 62 N. E. 861, holding certificates for waterworks extension indebtedness of city though payable out of particular fund; *Baker v. Seattle*, 2 Wash. 583, 27 Pac. 462, holding street improvement warrants payable out of street improvement funds no part of indebtedness within constitutional inhibition; *Kansas City v. Ward*, 134 Mo. 186, 35 S. W. 600, holding city agent only to collect park certificates so that they are not indebtedness within constitutional inhibition; *Reynolds v. Waterville*, 92 Me. 327, 42 Atl. 553 (dissenting opinion), majority holding that act providing for city hall commission, scheme to get around inhibition against indebtedness; *Defrees v. Ferstl*, 154 Ind. 693, 57 N. E. 296 (dissenting opinion), to point that no city debt results from street improvement contract until making of estimates from time to time, or of final estimate; *Allen v. Davenport*, 107 Iowa, 111, 77 N. W. 532, holding contract for street improvement for definite sum, when city indebted to full amount, void; *Cason v. Lebanon*, 153 Ind. 575, 55 N. E. 768, holding contract for city improvement not indebtedness of city within constitutional inhibition; *Wilcoxon v. Bluffton*, 153 Ind. 278, 54 N. E. 110, holding school building bonds part of city debt to be included in aggregate amount of indebtedness relative to constitutional inhibition; *Kirsch v. Braun*, 153 Ind. 257, 53 N. E. 1082, holding county not liable on gravel-road bonds, payable only out of assessments on property benefited, not negotiable; *Monroe County v. Harrell*, 147 Ind. 508, 46 N. E. 124, holding gravel-road bonds payable out of assessments on benefited property not indebtedness within constitutional inhibition; *Switzerland County v. Reeves*, 148 Ind. 473, 46 N. E. 995, holding bonds for construction of gravel roads not debt of township, and thus within constitutional inhibition; *New Albany v. McCulloch*, 127 Ind. 505, 26 N. E. 1074, holding municipal corporation not excused from repair of defective sidewalk because indebted to constitutional limit; *Heinl v. Terre Haute*, 161 Ind. 49, 66 N. E. 450, holding debt created by school city not part of indebtedness of civil city, where created without authority of latter; *Swanson v. Ottumwa*, 118 Iowa, 174, 59 L. R. A. 625, 91 N. W. 1048, holding that contract for construction of waterworks did not create indebtedness, within meaning of Constitution.

Cited in note (23 L. R. A. 402, 403, 406) on what constitutes "an indebtedness" within meaning of constitutional and statutory restrictions of municipal indebtedness.

Distinguished in *Austin v. Seattle*, 2 Wash. 674, 27 Pac. 557, holding indebtedness in excess of constitutional limit requires assent of voters to issuance of bonds for local improvements; *Winamac v. Huddleston*, 132 Ind. 217, 31 N. E.

561, holding bonds to build schoolhouse in amount in excess of bonding limit, void.

Validity of local improvement acts.

Cited in *Indianapolis v. Holt*, 155 Ind. 253, 57 N. E. 1100 (dissenting opinion), majority holding local improvement act with opportunity to be heard and to contest if right is not waived, valid; *Adams v. Shelbyville*, 154 Ind. 487, 49 L. R. A. 803, 77 Am. St. Rep. 484, 57 N. E. 114, holding special benefits are the only foundation for special assessments; *Adams v. Shelbyville*, 154 Ind. 481, 49 L. R. A. 803, 77 Am. St. Rep. 484, 57 N. E. 114, holding new law relating to street improvements presumably intended to avoid injustice in old law; *Marion Bond Co. v. Johnson*, 29 Ind. App. 297, 64 N. E. 626, upholding right of property owner to contest amount of improvement assessment on question of special benefits.

Waiver of irregularity in local assessments.

Cited in *Cass County v. Plotner*, 149 Ind. 122, 48 N. E. 635, holding property owner acquiesces in public improvement when he stands by and permits construction to go on without objection; *Richcreek v. Moorman*, 14 Ind. App. 373, 42 N. E. 943, holding lot owner by signing agreement waiving irregularities of assessment for public improvement cannot contest validity.

Distinguished in *Wayne County Sav. Bank v. Gas City Land Co.* 156 Ind. 663, 59 N. E. 1048, holding property owner signing waiver of irregularity as to street improvement assessments, personally liable for deficit after sale of lots on foreclosure of lien; *Edward C. Jones Co. v. Perry*, 26 Ind. App. 559, 57 N. E. 583, holding waiver of irregularity of assessment for street improvement renders lot owner personally responsible for assessment.

Lien for public improvements.

Cited in *Dowell v. Talbot Paving Co.* 138 Ind. 682, 38 N. E. 389, holding lien given city on property benefited by improvement is to enable it to collect money which it may have to advance.

Liability for public indebtedness.

Cited in *Walker v. Monroe County*, 11 Ind. App. 286, 38 N. E. 1095, holding gravel-road bondholder has no right of action against county; *City of Huntington v. Force*, 152 Ind. 370, 53 N. E. 443, holding city not liable for work done on sewers until it has issued bonds therefor and realized from property benefited; *Robinson v. Valparaiso*, 136 Ind. 621, 36 N. E. 644, holding suit by taxpayer to enjoin city from accepting sewer system will not lie, since work to be paid for by assessments on property benefited; *German-American Sav. Bank v. Spokane*, 17 Wash. 332, 38 L. R. A. 264, 49 Pac. 542, holding action cannot be brought against city to enforce street grade warrants until assessments for collecting them enforced.

Distinguished in *Terre Haute v. Blake*, 9 Ind. App. 408, 36 N. E. 932, holding acceptance by city of report of commissioners for taking land for streets renders it liable for damages in excess of benefits.

Reassessment for local improvements.

Cited in *Goodwin v. Warren County*, 146 Ind. 168, 44 N. E. 1110, holding additional cost in construction of public improvement may be reassessed upon benefited lands.

7 L. R. A. 684, KNOX COUNTY v. JOHNSON, 124 Ind. 145, 19 Am. St. Rep. 88, 24 N. E. 148.

Mandamus to compel official action, when issuable.

Cited in *Anniston v. Davis*, 98 Ala. 634, 39 Am. St. Rep. 94, 13 So. 331, holding mandamus lies to compel restoration of deposed councilman; *State ex rel. Dunkleberg v. Porter*, 134 Ind. 67, 32 N. E. 1021, holding mandamus lies to compel issuance by township trustee of certificate of exemption from highway labor.

Effect of failure of public officer to qualify within required time.

Followed in *State ex rel. Taylor v. Warrick County*, 124 Ind. 556, 8 L. R. A. 607, 25 N. E. 10, requiring recognition of county superintendent legally elected and qualified, until ousted by proper proceeding.

Cited in *Minnick v. State*, 154 Ind. 390, 56 N. E. 851, and *Albaugh v. State*, 145 Ind. 358, 44 N. E. 355, holding failure to file bond within time required does not work forfeiture of office; *Minnick v. State*, 154 Ind. 391, 56 N. E. 851, holding delay to qualify, and legal election of another, works forfeiture of right to public office.

Cited in note (16 L. R. A. 140) on vacancy in office by failure to file bond within time prescribed.

Criticized in *State ex rel. Berge v. Lansing*, 46 Neb. 525, 35 L. R. A. 128, 64 N. W. 1104 (dissenting opinion), majority holding act providing failure to file bond within time limited vacates office, self-executing.

Removal of public officers; right to hearing.

Cited in *People ex rel. Murphy v. McAllister*, 10 Utah, 375, 37 Pac. 578, holding power to remove public officer not exercisable without opportunity for hearing.

Appointment to nonvacant public office invalid.

Cited in *State ex rel. Worrell v. Peelle*, 124 Ind. 535, 8 L. R. A. 236, 24 N. E. 440 (dissenting opinion), majority holding appointment to office in possession of legal incumbent subsequently surrendering it to appointee, invalid.

7 L. R. A. 687, PENNSYLVANIA CO. v. MARIEN, 123 Ind. 415, 18 Am. St. Rep. 330, 23 N. E. 973.

Duty to passengers.

Cited in *Girton v. Lehigh Valley R. Co.* 17 Pa. Super. Ct. 150; *Illinois C. R. Co. v. Cheek*, 152 Ind. 670, 53 N. E. 641; *Toledo, St. L. & K. C. R. Co. v. Wingate*, 143 Ind. 131, 37 N. E. 274; *Ohio & M. R. Co. v. Stansberry*, 132 Ind. 536, 32 N. E. 218, — holding railroad under obligation to provide for safe entry and exit of passengers, including depots, platforms, and approaches; *New York, C. & St. L. R. Co. v. Mushrush*, 11 Ind. App. 195, 37 N. E. 954, and *Indianapolis Street R. Co. v. Robinson*, 157 Ind. 420, 61 N. E. 936, holding railroad liable for injuries from neglect to keep depot platform in reasonably safe condition for passengers and others rightfully using same; *Hammond, W. & E. C. Electric R. Co. v. Spyzchalski*, 17 Ind. App. 12, 46 N. E. 47, holding carrier required to exercise highest degree of care in transportation of passenger; *Prothero v. Citizens' Street R. Co.* 134 Ind. 440, 33 N. E. 765, holding when danger constantly apparent, carrier of passengers required to exercise highest degree of care, vigilance, and skill; *Knauss v. Lake Erie & W. R. Co.* 29 Ind. App. 219, 64 N. E. 95,

holding carrier liable for injury to passenger resulting from its negligence, unless passenger was guilty of contributory negligence.

Cited in footnotes to *Herrman v. Great Northern R. Co.* 57 L. R. A. 390, which holds railroad company liable for injury to passenger from unsafe condition of depot premises leased of union depot company or its receiver; *Delaware, L. & W. R. Co. v. Trautwein*, 7 L. R. A. 435, which holds carrier required to keep passageway at station, though other passageway provided; *Redigan v. Boston & M. R. Co.* 14 L. R. A. 276, which denies recovery to licensee falling through open trap door in station platform.

Cited in notes (8 L. R. A. 673; 11 L. R. A. 720) on duty of carrier to use care for safety of passengers in general; (20 L. R. A. 520) on measure of care carrier must exercise to keep platforms and approaches safe; (16 L. R. A. 593) on duty of carrier to maintain safe approaches beyond premises.

Assumption that carrier will perform duty.

Cited in *Kenutcky & I. Bridge Co. v. McKinney*, 9 Ind. App. 217, 36 N. E. 448, holding passenger entitled to assume approaches, platform, and means of entering cars are in reasonably safe condition; *Citizens' Street R. Co. v. Merl*, 26 Ind. App. 291, 59 N. E. 491, holding passenger boarding street railway car entitled to rely upon opportunity being given to enter safely, or of being notified of apparent danger; *Citizens' Street R. Co. v. Merl*, 134 Ind. 611, 33 N. E. 1014, holding passenger boarding wrong car entitled to rely upon opportunity to make change in safety, or of being notified by employees of danger foreseen by them.

Contributory negligence in getting on or off train.

Cited in *Carr v. Eel River & E. R. Co.* 98 Cal. 374, 21 L. R. A. 365, 33 Pac. 213; *Louisville, E. & St. L. Consol. R. Co. v. Bean*, 9 Ind. App. 243, 36 N. E. 443; *Pittsburgh, C. C. & St. L. R. Co. v. Gray*, 28 Ind. App. 592, 64 N. E. 39, — holding passenger attempting to alight from slowly moving train not necessarily negligent; *Kentucky & I. Bridge Co. v. McKinney*, 9 Ind. App. 222, 36 N. E. 448, holding whether person alighting from moving train guilty of negligence is question for jury; *Cincinnati, H. & I. R. Co. v. Revalee*, 17 Ind. App. 665, 46 N. E. 352, holding woman passenger attempting to alight from slowly moving train, and thrown by sudden jolt without warning, not negligent as matter of law.

Cited in note (21 L. R. A. 358) on injuries in getting on and off trains.

Witness; privileged communications.

Cited in *Gurley v. Park*, 135 Ind. 442, 35 N. E. 279, holding physician attending testatrix during last illness not competent to testify from what he "saw and heard" as to patient's soundness of mind; *Post v. State*, 14 Ind. App. 455, 42 N. E. 1120, holding physician incompetent to testify as to facts communicated to or observed by, him, in his professional capacity; *Kern v. Kern*, 154 Ind. 34, 55 N. E. 1004, holding communications between testator and attorney in reference to will, not privileged after death of testator, where both litigants claim under him; *New York, C. & St. L. R. Co. v. Mushrush*, 11 Ind. App. 197, 37 N. E. 954, holding physician not permitted to reveal facts coming to his knowledge while attending injured person, although employed and paid by person causing injury; *Aetna L. Ins. Co. v. Deming*, 123 Ind. 391, 24 N. E. 86, holding taking of deposition of physician to break force of deposition of same witness previously taken by opposite party not waiver of objection to witness as incompe-

tent; *Brackney v. Fogle*, 156 Ind. 538, 60 N. E. 303, holding failure to call attending physician to testify to soundness of mind of testatrix cannot be commented on by counsel nor considered by jury; *City of Warsaw v. Fisher*, 24 Ind. App. 53, 55 N. E. 42 (dissenting opinion), majority holding defendant's counsel in action for personal injury may comment on omission of plaintiff to call physician attending him.

7 L. R. A. 693, *TODD v. OVIATT*, 58 Conn. 174, 20 Atl. 440.

Rights of surviving husband or wife in other's real estate.

Cited in *Ward v. Ives*, 75 Conn. 601, 54 Atl. 730, denying existence of curtesy in lands of which wife has only an estate in remainder expectant upon life estate in another, which did not terminate during coverture.

Cited in note (11 L. R. A. 826) on tenancy by the curtesy in wife's estate.

Distinguished in *Greene v. Huntington*, 73 Conn. 113, 46 Atl. 883, holding statute giving widow dower in real estate of which husband died "possessed," includes equitable remainders in fee, although possession held in trust.

7 L. R. A. 701, *OHIO SOUTHERN R. CO. v. MOREY*, 47 Ohio St. 267, 24 N. E. 269.

Actions; jurisdiction of person.

Cited in *Kinsey v. Burgess Steel & Iron Works*, 4 Ohio N. P. 294, holding corporation organized within state cannot be sued in county where its agents are temporarily transacting business, but in which it has no permanent office or agency; *Long v. Newhouse*, 57 Ohio St. 370, 49 N. E. 79, holding want of jurisdiction of person of defendant cannot be raised in answer after repeated motions attacking complaint; *American Mut. L. Ins. Co. v. Mason*, 159 Ind. 20, 64 N. E. 525, holding filing of answer to the merits, waiver of objections to jurisdiction of the person.

Liability for acts of independent contractor.

Cited in *Fisher v. Tryon*, 15 Ohio C. C. 557, holding liability of owner for negligence of independent contractor depends on whether injury reasonably anticipated, if proper care not used; *Pittsburgh, C. & St. L. R. Co. v. Shields*, 47 Ohio St. 393, 8 L. R. A. 466, 21 Am. St. Rep. 840, 24 N. E. 658, holding inability of master to shift responsibility for acts of servants rests on principle holding owner liable for negligence of independent contractor; *Steinbock v. Covington & C. Bridge Co.* 4 Ohio N. P. 230; *Covington & C. Co. v. Patrick*, 5 Ohio N. P. 375, and *Covington & C. Bridge Co. v. Steinbrock*, 61 Ohio St. 228, 76 Am. St. Rep. 375, 55 N. E. 618, holding legal duty of owner causing burned wall to be removed, to have work protected, cannot be delegated; *Wertheimer v. Saunders*, 95 Wis. 579, 37 L. R. A. 148, 70 N. W. 824, holding landlord, putting on new roof at request of tenant, bound to see due care used to prevent injury from elements; *Reuben v. Swigart*, 15 Ohio C. C. 577, holding owner not relieved from liability for contractor depositing building material in street, under permission granted owner on condition that same be guarded and lighted; *Gable v. Toledo*, 16 Ohio C. C. 524, holding city liable for injury from falling into unguarded excavation in street, made by its authority, although work done by independent contractor; *Morris v. Woodburn*, 57 Ohio St. 335, 48 N. E. 1097, holding owner constructing vault under sidewalk liable for injury arising from defective cover

ing during construction; *Hawver v. Whalen*, 49 Ohio St. 80, 14 L. R. A. 835, 29 N. E. 1049, holding person causing lot to be excavated next to sidewalk cannot shift duty to guard excavation by letting work to independent contractor; *Bonaparte v. Wiseman*, 89 Md. 21, 44 L. R. A. 484, 42 Atl. 918, holding owner liable for damages to adjacent premises from negligence of contractor making excavation for building; *Cameron v. Oberlin*, 19 Ind. App. 147, 48 N. E. 386, holding owner employing person to clear land liable for damage from his negligence in permitting fire to escape to adjacent premises; *Thompson v. Lowell, L. & H. Street R. Co.* 170 Mass. 582, 40 L. R. A. 347, 64 Am. St. Rep. 323, 49 N. E. 913, holding exhibition provided by independent contractor will not relieve employer from responsibility, if of nature likely to cause injury, unless guarded against; *Jacobs v. Fuller & H. Co.* 67 Ohio St. 70, 65 N. E. 617, holding master liable for injury to inexperienced employee put to work on dangerous machine without instructions, though employed by foreman; *Strong v. Pickering Hardware Co.* 9 Ohio C. C. 252, raising question whether owner liable for injury to person falling over board erected across sidewalk during repair of building, though work done by independent contractor; *Davis v. Summerfield*, 133 N. C. 329, 63 L. R. A. 496, 45 S. E. 654, holding that owner cannot escape liability for injury to neighbor's building through excavation, by letting work to independent contractor; *Reilly v. Chicago & N. W. R. Co.* 122 Iowa, 528, 98 N. W. 464, holding railroad company not liable for injury to employee of independent contractor due to latter's negligence; *Hoff v. Shockley*, 122 Iowa, 728, 64 L. R. A. 542, 98 N. W. 573, holding owner not liable for negligence of independent contractor in failing to barricade sand in street.

Cited in note (14 L. R. A. 828) on exceptions to rule that employer not liable for act of independent contractor.

Distinguished in *Leavitt v. Bangor & A. R. Co.* 89 Me. 519, 36 L. R. A. 384, 36 Atl. 998, holding railroad employing person to clear timber from right of way, and furnishing cooking car, not liable for damage from fire set by cooking car; *Independence v. Slack*, 134 Mo. 76, 34 S. W. 1094, holding owner not liable for injury to person falling over stone left in street by independent contractor employed to lay sidewalk; *Clark v. Northern P. R. Co.* 59 L. R. A. 512, holding railroad permitting circus to exhibit on land adjoining switch yard, not chargeable with duty of exercising care to protect public from dangers incident to crossing yard.

Injury to trespassers.

Distinguished in *Clark v. Northern P. R. Co.* 29 Wash. 147, 59 L. R. A. 508, 69 Pac. 636, holding railroad company not liable for injury to minor crossing tracks, as short cut to circus on company's grounds.

7 L. R. A. 705, *SNODDY v. AMERICAN NAT. BANK*, 88 Tenn. 573, 17 Am. St. Rep. 919, 13 S. W. 127.

Validity of negotiable paper given for illegal consideration.

Cited in *Irwin v. Marquett*, 26 Ind. App. 393, 84 Am. St. Rep. 297, 59 N. E. 38, holding check given in payment of bet made at cards void under statute in hands of bona fide holder; *Citizens' State Bank v. Nore* (Neb.) 60 L. R. A. 738, 93 N. W. 160, holding note for medical services by unlicensed practitioner valid in hands of bona fide holder.

Cited in footnotes to *Drinkall v. Movius State Bank*, 57 L. R. A. 341, which holds title to cashier's check acquired by payee's indorsement to gambler in payment for chips to be used in gambling, defective; *Ullman v. St. Louis Fair Asso.* 56 L. R. A. 606, which denies right to abandon partly executed illegal bookmaking contract for specified period, and recover back *pro rata* amount of money paid.

Cited in note (16 L. R. A. 46) on rights of bona fide purchaser of note declared void by statute.

Distinguished in *Bohon v. Brown*, 101 Ky. 362, 38 L. R. A. 505, 72 Am. St. Rep. 420, 41 S. W. 273, holding under statute requiring note taken for patent right to have words "Peddler's note" written across face, note given for patent right, without such indorsement, not void in hands of innocent purchaser, where it does not appear sale was by peddler.

Invalidity of gaming contracts.

Cited in footnotes to *Appleton v. Maxwell*, 55 L. R. A. 93, which denies right of action for money loaned to be used in gambling; *Booth v. People*, 50 L. R. A. 762, which sustains statute making unlawful, options for sale of commodities which have been subject of gambling operations; *Central Stock & Grain Exchange v. Bendinger*, 56 L. R. A. 875, which holds broker liable to refund to principal money illegally taken from agent as margins on gambling transaction; *First Nat. Bank v. Carroll*, 8 L. R. A. 275, which holds guaranty that cattle will sell at specified price in consideration of receiving all above such price, gambling contract; *Jemison v. Citizens Sav. Bank*, 9 L. R. A. 708, which holds speculative dealing in cotton futures by savings bank, *ultra vires*; *Olson v. Sawyer Goodman Co.* 53 L. R. A. 648, which holds void, agreement to debit and credit on accounts due employees, their winnings at card games with each other; *Pope v. Hanke*, 28 L. R. A. 568, which holds comity does not require execution of law against public policy.

Stock gambling contracts.

Cited in footnote to *Baxter v. Deneen*, 64 L. R. A. 949, which holds that equity will not aid party to stock gambling contract to recover margins deposited by broker.

7 L. R. A. 706, *CARTWRIGHT v. DICKINSON*, 88 Tenn. 476, 12 S. W. 1030.

Stock subscription contract.

Approved in *Greenbrier Industrial Exposition v. Rodes*, 37 W. Va. 740, 17 S. E. 306, holding signing and acknowledging statutory agreement for organization of corporation, binding when company incorporated and organized; *Bannister v. Wallace*, 14 Tex. Civ. App. 455, 37 S. W. 250, holding obligor not released from convict bond because of agreement with person presenting same, for others' signatures not obtained.

Cited in footnote to *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.* 12 L. R. A. 307, which holds subscribers liable to creditors where stock paid for by conveyance of land worth only amount assumed by corporation.

Cited in notes (33 L. R. A. 596) as to withdrawal of subscription for shares of corporation; (10 L. R. A. 707) as to notice to agent being notice to principal; (61 L. R. A. 627) on right of corporation to purchase its own shares of stock.

Distinguished in *First Nat. Bank v. Peoria Watch Co.* 191 Ill. 134, 60 N. E.

359, holding subscriber for capital stock surrendered without payment for in full, upon resale not liable; *Hudson Real Estate Co. v. Tower*, 161 Mass. 14, 42 Am. St. Rep. 379, 36 N. E. 680, holding that subscriber to capital stock may withdraw before corporation organized upon giving due notice.

Effect of mistake of law.

Cited in footnote to *Atherton v. Roche*, 55 L. R. A. 591, which denies power to reform deed to daughter and husband and "their" heirs so as to include all heirs of her body.

Increase of capital stock by by-law.

Cited in *Union R. Co. v. Sneed*, 99 Tenn. 6, 41 S. W. 364, holding increase of capital stock by mere resolution of board of directors, void; *Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co.* 72 Fed. 961, holding increase of capital stock by mere resolution of stockholders, void; *Peck v. Elliott*, 38 L. R. A. 622, 24 C. C. A. 432, 47 U. S. App. 605, 79 Fed. 16, holding increase of capital stock by amendment of by-laws, valid where corporation authorized to fix same by by-laws.

Issuance of certificate as affecting stockholder's status.

Cited in *Sherwood v. Illinois Trust & Sav. Bank*, 195 Ill. 118, 88 Am. St. Rep. 183, 62 N. E. 835, holding that issuance of certificate of stock not necessary to status as stockholder.

Subscriptions for unauthorized stock.

Cited in note (38 L. R. A. 616) as to power to increase capital stock of corporations.

7 L. R. A. 711, *SCHROEDER v. GALLAND*, 134 Pa. 277, 19 Am. St. Rep. 601, 19 Atl. 632.

Subcontractor's lien.

Explained in *Nice v. Walker*, 153 Pa. 124, 31 W. N. C. 523, 34 Am. St. Rep. 688, 25 Atl. 1065, holding lien may be filed whenever not expressly or by necessary implication prohibited in contract.

Cited in *Herrell v. Donovan*, 7 App. D. C. 340, and *Wilkinson v. Brice*, 148 Pa. 155, 30 W. N. C. 31, 23 Atl. 982, holding lien invalidated by contractor's stipulation to file no lien; *Ballman v. Heron*, 160 Pa. 385, 34 W. N. C. 139, 28 Atl. 914, holding stipulation to file no lien, in building contract between cotenants, invalidates liens in absence of fraud; *Tebay v. Kirkpatrick*, 146 Pa. 124, 29 W. N. C. 186, 23 Atl. 318, and *Fidelity Mut. Life Asso. v. Jackson*, 163 Pa. 209, 34 W. N. C. 465, 43 Am. St. Rep. 789, 28 Atl. 883, holding agreement to keep building free from liens equivalent to contract not to file or permit filing of same; *Bolton v. Hey*, 148 Pa. 157, 23 Atl. 973, Affirming 10 Pa. Co. Ct. 381, holding contract stipulation for payment upon release of liens, and delivery free of liens, implied agreement not to file same, binding on subcontractor; *Bolton v. Hey*, 168 Pa. 419, 31 Atl. 1097, holding judgment in first action conclusive in second action to enforce lien; *Waters v. Wolf*, 162 Pa. 156, 34 W. N. C. 410, 42 Am. St. Rep. 815, 29 Atl. 646; holding statute June 8, 1891, making contractor's agreement concerning liens immaterial in absence of subcontractor's assent unconstitutional; *Dersheimer v. Maloney*, 143 Pa. 536, 22 Atl. 813, holding subcontractor precluded from lien by stipulation of contractor that owner not accountable in any manner for materials; *Morris v. Ross*, 184 Pa. 243, 38

Atl. 1084, holding prohibition against liens operative in spite of other provisions protecting owner against liens; *Rhine v. Mauk*, 21 Pa. Co. Ct. 345. 14 Montg. Co. L. Rep. 198, holding contractor's stipulation against liens binding though written contract embodying provision not executed at time; *McElroy v. Braden*, 152 Pa. 81, 31 W. N. C. 198, 25 Atl. 235, holding parol stipulation of contractor against liens binding on subcontractors; *Benedict v. Hood*, 134 Pa. 292, 19 Am. St. Rep. 698, 19 Atl. 635, holding change of building plans does not alter obligation of subcontractor's bond to owner for performance without filing liens; *Bohem v. Seabury*, 141 Pa. 597, 21 Atl. 674, holding successor to contracting partnership cannot file lien under contract without showing assignment thereof; *Bevan v. Thackara*, 143 Pa. 200. 28 W. N. C. 477, 24 Am. St. Rep. 529, 22 Atl. 873, holding material man cannot recover for supplies to stable on claim against house, where they were erected under separate contracts of which owner was ignorant; *Commonwealth Title Ins. & T. Co. v. Ellis*, 44 W. N. C. 429, holding stipulation against filing liens by subcontractor "or any person" precludes contractor, though owner otherwise protected against him.

Cited in footnotes to *Smith v. Neubauer*, 33 L. R. A. 685, which authorizes lien for materials furnished to subcontractors as well as to contractors; *Hightower v. Bailey*, 49 L. R. A. 255, which sustains lien to subcontractors or material men irrespective of notice of claim or state of account between owner and principal contractor; *Steger v. Arctic Refrigerating Co.* 11 L. R. A. 580, which holds lien for laying pipes on land of strangers for refrigerating company enforceable against entire plant of company.

Cited in notes (12 L. R. A. 35) on priority of mechanics' lien over subsequent liens; (20 L. R. A. 565) on payment to contractors or subcontractors as affecting liens of subordinate claimants; (13 L. R. A. 703) on legislative intent in New York mechanics' lien law of 1885.

Distinguished in *Evans v. Grogan*, 153 Pa. 122, 25 Atl. 804, and *Loyd v. Krause*, 147 Pa. 403, 23 Atl. 602, holding filing of lien not precluded by contract exempting owner from personal claim, and providing that final payment shall be withheld until "complete release of liens;" *Schmid v. Palm Garden Improv. Co.* 162 Pa. 217, 34 W. N. C. 463, 29 Atl. 727; *Murphy v. Morton*, 139 Pa. 346, 20 Atl. 1049; *Murphy v. Ellis*, 11 Pa. Co. Ct. 303, 1 Pa. Dist. R. 399, holding contract for building and delivery of house free of liens does not preclude material man from filing same; *Taylor v. Murphy*, 148 Pa. 340, 30 W. N. C. 28, 33 Am. St. Rep. 825, 23 Atl. 1134, holding contractor's agreement to "release and discharge" property of liens does not prevent filing of same; *Jarvis v. State Bank*, 22 Colo. 316, 55 Am. St. Rep. 129, 45 Pac. 505, holding subcontractor not precluded from filing lien by contractor's waiver of lien and agreement to defend owner therefrom; *Willey v. Topping*, 146 Pa. 430, 23 Atl. 335, holding material man not affected by contractor's release from liens executed after original contract, though before materials supplied; *Cook v. Murphy*, 150 Pa. 43, 30 W. N. C. 336, 24 Atl. 630, holding supplementary contract does not affect lien under original contract, where not brought to subcontractor's notice; *McCollum v. Riale*, 163 Pa. 608, 43 Am. St. Rep. 816, 30 Atl. 282, holding material man entitled to lien though owner secretly sold property and agreed to build without permitting liens; *Aste v. Wilson*, 14 Colo. App. 326, 59 Pac. 846, upholding subcontractor's right to file lien where contractor has right thereto, though contract prohibits same in favor of subcontractor: *Ditto v. Jackson*, 3 Colo. App. 283, 33 Pac. 81.

holding complaint on foreclosure of mechanic's lien not demurrable where owner's indebtedness to contractor alleged; *Connell v. Ker*, 9 Pa. Dist. R. 146, 17 Lanc. L. Rev. 207, holding builder's contract duly recorded not part of court record on motion to strike off subcontractor's lien; *Richards v. Waldron*, 9 Mackey, 590, holding lien of unrecorded trust deed superior to subsequent mechanics' liens; *Keim v. McRoberts*, 18 Pa. Super. Ct. 170, holding description of building in contract as old or new not binding on subcontractor in filing lien.

Disapproved in *Miles v. Coutts*, 20 Mont. 50, 49 Pac. 393, holding contractor's stipulation against liens does not preclude same by subcontractor not assenting to contract.

Constitutionality of mechanic's lien law.

Cited in *Barrett v. Millikan*, 156 Ind. 514, 83 Am. St. Rep. 220, 60 N. E. 310, holding statute creating mechanics' liens not taking of property without due process of law; *Jones v. Great Southern Fireproof Hotel Co.* 30 C. C. A. 116, 58 U. S. App. 397, 86 Fed. 378, holding statute giving subcontractor lien to extent of contract price irrespective of payments to contractor on terms of contract constitutional; *Mallory v. La Crosse Abattoir Co.* 80 Wis. 186, 49 N. W. 1071 (dissenting opinion), majority holding statute giving material man lien irrespective of contractor's agreement on payment to contractor by owner constitutional.

Contracts.

Cited in *McCaul's Estate*, 28 Pa. Co. Ct. 172, holding compensation for engineer's plans for building dependent upon acceptance by owner, under special terms of contract.

7 L. R. A. 715, *PEOPLE ex rel. KEMMLER v. DURSTON*, 119 N. Y. 569, 16 Am. St. Rep. 859, 24 N. E. 6.

Presumption of constitutionality of statute.

Approved in *McGrath v. Grout*, 69 App. Div. 315, 74 N. Y. Supp. 782, holding that legislature will be presumed to have acted within limits of authority in passing act; *Rathbone v. Wirth*, 150 N. Y. 509, 34 L. R. A. 426, 45 N. E. 15, Affirming 6 App. Div. 284, 40 N. Y. Supp. 535 (dissenting opinion), as to necessity of upholding statute unless clearly and substantially in conflict with constitution; *Bell v. Gaynor*, 14 Misc. 339, 36 N. Y. Supp. 122 (dissenting opinion) as to presumption in favor of constitutionality of act; *New York v. Chelsea Jute Mills*, 43 Misc. 269, 88 N. Y. Supp. 1085, upholding constitutionality of act prohibiting employment of children under fourteen years of age during school terms; *People v. Lochner*, 177 N. Y. 159, 69 N. E. 373, upholding constitutionality of act limiting hours of labor in bakeries; *Tenement House Department v. Moeschon*, 89 App. Div. 536, 85 N. Y. Supp. 704, upholding constitutionality of act requiring tenement house school sinks to be replaced by individual water closets; *People ex rel. Metropolitan Street R. Co. v. State Tax Comrs.* 174 N. Y. 446, 63 L. R. A. 894, 67 N. E. 69, holding right of local self-government not violated by imposing duty of assessing tax on special franchises upon state officers.

Extrinsic evidence of unconstitutionality of act.

Cited in *Waterloo Woolen Mfg. Co. v. Shanahan*, 128 N. Y. 360, 14 L. R. A. 485, 28 N. E. 358, holding that purpose of legislature to appropriate public

money for benefit of individual cannot be determined by court on testimony of expert witness where the act itself states purpose to be enlargement of public canal.

Cited in note (14 L. R. A. 459) as to consideration of extrinsic evidence to show unconstitutionality of statute.

Cruel and unusual punishments.

Approved in *Storti v. Com.* 178 Mass. 553, 52 L. R. A. 522, 60 N. E. 210, holding electrocution not cruel or unusual punishment; *People v. Kemmler*, 119 N. Y. 586, 24 N. E. 9, raising without deciding question of validity of sentence to death by electrocution.

Cited in footnote to *Com. v. Murphy*, 30 L. R. A. 734, which sustains statute imposing imprisonment for life for criminal intimacy with girl under sixteen.

Cited in note (35 L. R. A. 575) as to cruel and unusual punishments.

Conclusiveness of decision against constitutionality.

Cited in note (39 L. R. A. 457) as to decision against constitutional right as a nullity subject to collateral attack.

7 L. R. A. 717, *PEOPLE v. DETROIT, G. H. & M. R. CO.* 79 Mich. 471, 44 N. W. 934.

Fencing track and maintaining gates.

Cited in *Louisville, N. A. & C. R. Co. v. Hughes*, 2 Ind. App. 78, 28 N. E. 158, holding object of statutes requiring railroads to fence is as much to diminish danger of travel as to provide compensation for animals injured.

Cited in footnote to *Pittsburgh, C. C. & St. L. R. Co. v. Crown Point*, 35 L. R. A. 684, which denies power of town to compel railroad company to keep watchman and maintain gates at crossing at own expense.

Cited in note (39 L. R. A. 619) on municipal control over nuisances created by railroads on highways.

7 L. R. A. 720, *LANG v. SALLIOTTE*, 79 Mich. 505, 44 N. W. 938.

When arbitration permissible.

Cited in *McCord v. Flynn*, 111 Wis. 87, 86 N. W. 668, holding submission of controversy involving specific performance of contract to convey interest in land in compensation of services not void under statute forbidding submission as to claim to estate in fee or for life.

Cited in note (17 L. R. A. 211) on submission to arbitration.

7 L. R. A. 722, *HANFORD v. ST. PAUL & D. R. CO.* 43 Minn. 104, 44 N. W. 1144.

Waters; title and rights of riparian proprietor.

Cited in footnote to *Webb v. Demopolis*, 21 L. R. A. 62, which holds riparian owner's title extends to low-water mark on navigable river.

Cited in notes (12 L. R. A. 677) on title to soil under navigable rivers; (12 L. R. A. 636) on qualified property in water front; (40 L. R. A. 647) on private contracts respecting wharves.

Separation of riparian rights from shore lands.

Cited in *Bradshaw v. Duluth Imperial Mill Co.* 52 Minn. 62, 53 N. W. 1066, holding sale of submerged land by riparian proprietor disassociates shore land

from riparian right; *Gilbert v. Eldridge*, 47 Minn. 214, 13 L. R. A. 413, 49 N. W. 679, holding where land platted beyond shore line, conveyance of inland block with reference to plat does not carry with it right to submerged blocks and streets; *Concord Mfg. Co. v. Robertson*, 66 N. H. 20, 18 L. R. A. 690, 25 Atl. 718, holding abutter's private right of use and occupation in public water is severable from estate in upland; *Northern P. R. Co. v. Scott & H. Lumber Co.* 73 Minn. 32, 75 N. W. 737, holding riparian rights originally belonging to shore block marked on plat, may be severed therefrom and attached to submerged land; *Duluth v. St. Paul R. Co.* 49 Minn. 209, 51 N. W. 1163, holding riparian proprietor may convey fee in' land above shore line, and reserve private rights in land under water originally appurtenant to estate; *Gibson v. Kelly*, 15 Mont. 424, 39 Pac. 517, holding riparian proprietor may maintain action for recovery of land between high and low water mark from one in possession without right.

Cited in note (40 L. R. A. 394) on separation of riparian rights from upland. Distinguished in *State v. St. Paul & D. R. Co.* 81 Minn. 424, 84 N. W. 302, holding riparian rights are incident to shore property, having no separate existence until severed from paramount estate by act of owner; *Lake Shore & M. S. R. Co. v. Platt*, 53 Ohio St. 267, 29 L. R. A. 55, 41 N. E. 243, holding alvean rights are incapable of separation from riparian title to which they are incident.

Riparian rights follow conveyance of riparian estate.

Cited in *Minneapolis Trust Co. v. Eastman*, 47 Minn. 304, 50 N. W. 82, holding conveyance of submerged land above low-water mark carries with it right to subsequent alluvial deposits; *Mills v. Evans*, 100 Iowa, 716, 69 N. W. 1043, holding riparian owner on navigable lake may construct pier below high-water mark.

Cited in footnote to *Prior v. Swartz*, 18 L. R. A. 668, which holds riparian right to build wharves not destroyed by statute designating land for planting oysters.

Distinguished in *St. Anthony Falls Water Power Co. v. St. Paul Water Comrs.* 168 U. S. 367, 42 L. ed. 504, 18 Sup. Ct. Rep. 157, holding grant of right to maintain dams and sluices in river subject to rights of navigation, and right of public to divert waters for public use.

7 L. R. A. 729, *GARDNER v. BUNN*, 132 Ill. 403, 23 N. E. 1072.

Proof of execution of power of attorney or confession.

Cited in *Desnoyers Shoe Co. v. First Nat. Bank*, 188 Ill. 316, 58 N. E. 994, Affirming 89 Ill. App. 585, and *Oppenheimer v. Giershofer*, 54 Ill. App. 41, holding judgment by confession invalid without proof of execution of power of attorney; *First Nat. Bank v. Havens & G. Co.* 61 Ill. App. 225, stating proof of execution of power of attorney was filed in compliance with rule announced in main case; *Epstein v. Ferst*, 35 Fla. 514, 17 So. 414, holding judgment entered without proof of execution of confession of judgment invalid; *Matzenbaugh v. Doyle*, 156 Ill. 335, 40 N. E. 935, Affirming 56 Ill. App. 345, holding authority of attorney to execute cognovit and of clerk to enter judgment should fully appear from papers, and cannot be supported by evidence *aliunde*.

What must be filed.

Cited in *People v. Whitehead*, 90 Ill. App. 620, holding there must be filed with clerk declaration, original warrant of attorney, affidavit verifying it, and plea confessing amount for which judgment is entered; *Snyder Bros. v. Bailey*, 165

Ill. 453, 46 N. E. 452, holding clerk authorized to enter judgment on declaration, warrant of attorney valid on its face, proof of its execution and plea of confession.

Cited in note (13 L. R. A. 800) on proof necessary to authorize entry of judgment confessed on warrant of attorney.

Strict construction of power.

Cited in *Graves v. Whitney*, 49 Ill. App. 442, holding authority to confess judgment without process must be clearly given and strictly pursued; *J. W. Butler Paper Co. v. Robbins*, 151 Ill. 624, 38 N. E. 153, holding power conferred by resolution on president of corporation to borrow money and secure its repayment should be strictly construed.

Appearance by attorney as conferring jurisdiction.

Cited in *Ward v. White*, 66 Ill. App. 157, holding jurisdiction of person acquired by entry of appearance by attorney in fact.

Confession statutory proceeding.

Cited in *Pond v. Simons*, 17 Ind. App. 87, 45 N. E. 48, as holding confession of judgment in vacation statutory proceeding in derogation of common law.

Replevin.

Cited in note (55 L. R. A. 281) on right to replevy property from levying officer.

7 L. R. A. 731, *MOORE v. THORP*, 16 R. I. 655, 19 Atl. 321.

Allowance for improvements.

Followed in *Langley v. Langley*, 19 R. I. 506, 36 Atl. 1133, holding cotenant may be allowed value of improvements in case of sale or division of property.

Cited in *Carson v. Broady*, 56 Neb. 654, 71 Am. St. Rep. 691, 77 N. W. 80, holding on partition improvements should be allotted to tenant making them; and on sale proceeds should be divided after deducting sum in which saleable value increased by improvements; *Ward v. Ward*, 40 W. Va. 621, 29 L. R. A. 461, 52 Am. St. Rep. 911, 21 S. E. 746, holding on sale coparcener making improvements should receive amount by which value of property is enhanced and balance should be divided; *Pulse v. Osborn*, 30 Ind. App. 636, 64 N. E. 59, raising, but not deciding, question whether cotenant entitled, upon partition sale, to be recompensed for actual amount of present value due to improvements.

Cited in notes (8 L. R. A. 290) on allowance for improvements; (29 L. R. A. 449, 450, 452) liability of cotenants for improvements.

7 L. R. A. 733, *STATE ex rel. TAYLOR v. EIDSON*, 76 Tex. 302, 13 S. W. 263.

Incorporation as affected by inclusion of farming on vacant land.

Followed in *Ewing v. State*, 81 Tex. 177, 16 S. W. 872, holding incorporation invalid which embraced area of 10 square miles, 8 of which was farming and unoccupied land.

Cited in *State v. Baird*, 79 Tex. 64, 15 S. W. 98, holding incorporation of town will not be dissolved because small strip of agricultural land included within its limits; *McClesky v. State*, 4 Tex. Civ. App. 323, 23 S. W. 518, holding attempt to include unreasonable amount of vacant land will annul attempted incorporation; *Copeland v. St. Joseph*, 126 Mo. 433, 29 S. W. 281, holding inclusion of reasonable amount of agricultural land permissible; *State ex rel. Perrin v. Hoard*.

*94 Tex. 529, 62 S. W. 1054, holding Tex. Rev. Stat. art. 580, prohibiting the inclusion for taxation of lands not used for town purposes embodies rule expressed in main case; Junction City School v. School Dist. No. 6 Trustees, 81 Tex. 152, 16 S. W. 742, holding question whether incorporated territory excessive and unreasonable in its limits depends on facts of each case.

Cited in note (25 L. R. A. 756) on physical characteristics necessary to municipal recognition.

Distinguished as relating to incorporation for general municipal purposes in Pinson v. Vesey, 23 Tex. Civ. App. 93, 56 S. W. 593, which related to incorporation for school purposes only.

7 L. R. A. 734, *STATE ex rel. HENDERSON v. LE SUEUR*, 99 Mo. 552, 13 S. W. 237.

7 L. R. A. 736, *CALLEN v. JUNCTION CITY*, 43 Kan. 627, 23 Pac. 652.

Delegation of legislative power.

Followed in *Huling v. Topeka*, 44 Kan. 579, 24 Pac. 1110; *Emporia v. Randolph*, 56 Kan. 118, 42 Pac. 376; *Eskridge v. Emporia*, 63 Kan. 369, 65 Pac. 694, — holding finding of district judge as to extension of city limits a judicial duty.

Cited in *Hurla v. Kansas City*, 46 Kan. 745, 27 Pac. 143, holding power to approve, disapprove, or modify ordinance extending city limits, not a delegation of legislative power; *Pelletier v. Ashton*, 12 S. D. 372, 81 N. W. 735, upholding right of court to exclude from proposed city limits large tracts of cultivated land; *State ex rel. Godard v. Johnson*, 61 Kan. 841, 49 L. R. A. 674, 60 Pac. 1068 (dissenting opinion), majority holding statute creating court of visitation unconstitutional as commingling legislative, judicial, and executive functions; *Re North Milwaukee*, 93 Wis. 629, 631, 33 L. R. A. 643, 67 N. W. 1033 (dissenting opinion), majority holding determination of what territory should be included in extending city limits exercise of legislative power; *Hutchinson v. Leimbach* (Kan.) 63 L. R. A. 631, footnote, p. 630, 74 Pac. 598, holding act permitting removal of territory from corporate limits of city, upon petition, unconstitutional.

Cited in footnote to *Re North Milwaukee*, 33 L. R. A. 638, which holds void act requiring court to determine whether or not territory should be incorporated as village.

Cited in note (11 L. R. A. 779) on extension of city limits.

Disapproved in *Re North Milwaukee*, 93 Wis. 625, 33 L. R. A. 642, 67 N. W. 1033, holding act of determining the advisability of incorporation and fixing boundaries not determination of question of fact, but exercise of legislative discretion.

General laws.

Cited in *Conklin v. Hutchinson*, 65 Kan. 584, 70 Pac. 587, conceding that provisions for organization of cities must, under state Constitution, be made by general law; *Paul v. Walkerton*, 150 Ind. 570, 50 N. E. 725, to point general laws imposing conditions on annexation of territory, and vesting power in boards or courts to determine question, are valid.

Cited in note (27 L. R. A. 743) on annexation by special law.

Due process of law.

Cited in note (27 L. R. A. 743) on taking property without due process of law.

7 L. R. A. 740, *BROCKWAY v. PETTED*, 79 Mich. 620, 45 N. W. 61.

Liability of surety on liquor bond.

Cited in *Coleman v. People*, 78 Ill. App. 215, holding liability of sureties on liquor dealer's bond continues during time mentioned in bond; *Wright v. Treat*, 83 Mich. 115, 47 N. W. 243, holding surety on liquor bond not discharged by removal from corporation limits, nor because principal notified to file new bond and discontinue business in meantime.

Cited in note (10 L. R. A. 81, 82) as to liquor bonds.

Recital as covenant or promise.

Distinguished in *Monks v. Provident Inst. for Savings*, 64 N. J. L. 89, 44 Atl. 968, holding recital will not constitute covenant or promise unless such was intention of parties, and it must contain all the elements of a contract.

Estoppel.

Cited in *Lyon Bros. & Co. v. Stern, K. & B.* 110 La. 478, 34 So. 641, holding corporation and surety, in action on auctioneer's bond, estopped from asserting that corporation could act as auctioneer.

7 L. R. A. 743, *SANDERS v. BAGWELL*, 32 S. C. 238, 10 S. E. 946.

Effect of material alteration.

Approved in *Richardson v. Fellner*, 9 Okla. 521, 60 Pac. 270, holding note vitiated by material alteration; *Sloan v. Latimer*, 41 S. C. 219, 19 S. E. 491, holding surety discharged by extension of payment with privilege of payment before maturity.

Cited in footnotes to *Gleason v. Hamilton*, 21 L. R. A. 210, which holds mortgage not invalidated by alteration by attorney drawing same without mortgagee's knowledge; *Brown v. Johnson Bros.* 51 L. R. A. 403, which holds maker released by payee's addition of name of other person as comaker; *Rochford v. McGee*, 61 L. R. A. 335, which holds removal of note written below perforated line on application for insurance material alteration rendering it void; *Simmons v. Atkinson & L. Co.* 23 L. R. A. 599, which holds insertion of words "or bearer" and place of payment a material alteration; *Foxworthy v. Colby*, 62 L. R. A. 393, which holds insertion of word "gold" before word "dollars" material alteration.

Cited in note (13 L. R. A. 314) that party producing instrument must account for alterations.

Original consideration as supporting addendum.

Approved in *Harrell v. Parrott*, 50 S. C. 23, 27 S. E. 521, holding new promise to pay increased rate of interest supported by original consideration.

7 L. R. A. 745, *FOWLER v. ALLEN*, 32 S. C. 229, 10 S. E. 947.

Liability of conditional sureties.

Approved in *Greenville v. Ormand*, 51 S. C. 71, 39 L. R. A. 853, 64 Am. St. Rep. 663, 28 S. E. 50, holding absence of sureties on note given to maker for negotiation will not preclude evidence by one who, after payee's refusal to discount it, advanced money thereon; *Carter v. Moulton*, 51 Kan. 15, 20 L. R. A. 311, 37 Am. St. Rep. 259, 32 Pac. 633, holding one of several makers of negotiable note perfect in form, executed by several persons, presumed authorized to deliver; *Sullivan v. Williams*, 43 S. C. 512, 21 S. E. 642, holding sureties on attachment

bond delivered by principals to innocent obligee estopped to show forgery of subsequent signatures.

7 L. R. A. 747, MOYER v. DRUMMOND, 32 S. C. 165, 17 Am. St. Rep. 850, 10 S. E. 952.

"Family" within homestead laws.

Approved in *Scott v. Mosely Bros.* 54 S. C. 378, 32 S. E. 450, holding son caring for widowed mother head of family under homestead law, as against his own creditors; *Holloway v. Holloway*, 86 Ga. 579, 11 L. R. A. 519, 22 Am. St. Rep. 484, 12 S. E. 943, holding widow supporting husband's children by former wife head of family under homestead law, although such support is voluntary; *Re Morrison*, 110 Fed. 735, holding single man residing with and supporting widowed mother and minor brother entitled to homestead exemption in bankruptcy as head of family; *Fant v. Gist*, 36 S. C. 578, 15 S. E. 721, holding man supporting his deceased wife's niece, who spends part of her time out of school with him, entitled to homestead as head of family; *Cross v. Benson* (Kan.) 64 L. R. A. 567, footnote, p. 560, 75 Pac. 558, holding grandchild living with grandparents, and dependent upon them for support, member of their family.

Cited in footnotes to *Bosquett v. Hall*, 9 L. R. A. 351, which refuses homestead exemption because of residence of children strangers in blood; *Wilkinson v. Merrill*, 11 L. R. A. 632, which holds householder not deprived of homestead right by death of entire family.

Cited in note (9 L. R. A. 804) as to homestead exemption.

Exemption in partnership property.

Approved in *Dennis v. Kass*, 11 Wash. 356, 48 Am. St. Rep. 880, 39 Pac. 650, holding partner entitled to exemption out of partnership property when no partnership debts remain unpaid; *Adams v. Church*, 42 Or. 274, 59 L. R. A. 785, 95 Am. St. Rep. 740, 70 Pac. 1037, holding land acquired under timber-culture claim, and conveyed to partnership, not liable for partnership debts contracted prior to issuance of final certificate.

Distinguished in *Ex parte Xarish*, 32 S. C. 438, 11 S. E. 298, holding partners not entitled to exemption out of firm assets until partnership creditors satisfied.

7 L. R. A. 749, WHITAKER v. RICHARDS, 134 Pa. 191, 19 Am. St. Rep. 684, 19 Atl. 501.

Sureties; instrument signed by part only of obligors named.

Cited in *Gleeson's Estate*, 192 Pa. 283, 44 W. N. C. 325, 73 Am. St. Rep. 808, 43 Atl. 1032, holding omission of one of several obligors named in bond to join in execution not defense as to obligors who do sign; *Snyder's Estate*, 7 Kulp, 415, holding no condition implied to execution by each of several obligors in bond that same shall be executed by all persons named in it, before it becomes binding upon any; *Weissport v. Welsh*, 6 Northampton Co. Rep. 246, holding omission of tax collector to sign official bond with sureties not release of parties signing; *Hall v. Kintz*, 13 Pa. Co. Ct. 27, 2 Pa. Dist. R. 617, holding attachment bond signed with firm name and by one partner individually, with name of one surety, sufficient; *Reed v. McGregor*, 62 Minn. 97, 64 N. W. 88, holding surety signing under belief that another person named in bond will sign, but without making signature conditioned on such person signing, is bound; *Winters v. Robison*, 14

Pa. Co. Ct. 265, holding existence of additional seal on bond not sufficient to charge obligee with notice that signature of surety is on condition that another signature be procured; Byrod v. Sweigart, 20 Lanc. L. Rev. 276, holding note signed on condition that it should not be binding unless signed by others named not enforceable unless so signed.

Cited in footnote to Hurt v. Ford, 41 L. R. A. 823, which denies right to make subsequent signature of another person essential to validity of note delivered to payee or his agent.

Cited in notes (45 L. R. A. 325) on conditional execution of contracts; (8 L. R. A. 735) on suretyship.

Distinguished in Yohn v. Shumaker, 28 Pittsb. L. J. N. S. 127, 5 Pa. Super. Ct. 322, 41 W. N. C. 30, holding surety delivering signed obligation to payee, with understanding that he is to procure signature of principal, who refuses to sign, not bound.

7 L. R. A. 750, PEPPER v. CAIRNS, 133 Pa. 114, 19 Am. St. Rep. 625, 19 Atl. 336.

Misappropriation of money by agent.

Cited in Lerch v. Bard, 162 Pa. 318, 34 W. N. C. 540, 29 Atl. 890, holding note not necessarily invalidated for want of delivery, where agent for lender and borrower deposited proceeds to individual account; Kirchner v. Schmid, 7 Misc. 461. 25 N. Y. Supp. 85, holding plaintiff cannot have mortgage canceled which his agent delivered to defendant and received value for; Himes v. Herr, 13 Lanc. L. Rev. 15, holding fact that attorney is usually employed by lender to receive moneys not sufficient authority to collect in particular case.

Declarations of agent as to authority.

Cited in Harvey v. Schuylkill Real Estate Title Ins. & T. Co. 24 Pa. Co. Ct. 599, holding authority of agent not provable by his declarations.

7 L. R. A. 752, PIERCE v. CLELAND, 133 Pa. 189, 19 Atl. 352.

Servitudes; when license revocable.

Cited in Willis v. Erie City Pass. R. Co. 188 Pa. 67, 41 Atl. 307, holding license irrevocable when licensee has expended money upon faith of it; Bryn Mawr Hotel Co. v. Baldwin, 12 Montg. Co. L. Rep. 149, holding conveyance of part of estate implies grant or reservation, as case may be, of apparent servitudes created by vendor in favor of one portion against another, if intended to be permanent; Allegheny Nat. Bank v. Reighard, 32 Pittsb. L. J. N. S. 52, holding common entrance to two buildings on adjoining lots to be in nature of easement usable as long as building stood; Western U. Teleg. Co. v. Pennsylvania Co. 129 Fed. 858, holding that license in writing to occupy lands of railroad company for telegraph line, when ripened by use into interest in realty, becomes nonrevocable.

Cited in notes (10 L. R. A. 487) on effect of executed license; (49 L. R. A. 514) on revocability of license to maintain burden on land, after licensee incurred expense.

Distinguished in Baldwin v. Taylor, 166 Pa. 514, 31 Atl. 250, holding license to adjoining proprietor to use stairway, for temporary purpose, in consideration of conveyance of land, not assignable.

Rights of purchaser of servient estate.

Cited in *Hunter v. Wilcox*, 23 Pa. Co. Ct. 194, and *Geible v. Smith*, 146 Pa. 285, 29 W. N. C. 467, 28 Am. St. Rep. 796, 23 Atl. 437, holding purchaser of real estate takes subject to continuous and apparent servitude, in absence of express reservation.

Equity; jurisdiction.

Cited in *Manbeck v. Jones*, 190 Pa. 175, 42 Atl. 536, Affirming 21 Pa. Co. Ct. 304, holding equity will enjoin obstruction of public highway, before question of right decided at law, when evidence conclusive as to existence of highway, and action for damages inadequate.

7 L. R. A. 755, *BROOKHAVEN v. SMITH*, 118 N. Y. 634, 23 N. E. 1002.

Estoppel.

Cited in *Blumenauer v. O'Connor*, 32 Misc. 20, 66 N. Y. Supp. 137, refusing to order removal of encroaching wall where line practically determined by plaintiff at time of construction; *Bloch v. Sammons*, 37 Or. 604, 62 Pac. 290, holding party innocently misrepresenting title to property intending to influence purchaser estopped to assert contrary title; *Moore v. Brownfield*, 10 Wash. 444, 39 Pac. 113, holding party in honest belief that title in government, inducing another to settle and improve land, estopped to assert title; *Wetmore v. Royal*, 55 Minn. 168, 56 N. W. 594, refusing to correct mistaken date in mechanic's lien record as against purchaser on foreclosure misled thereby; *Hazard v. Wilson*, 22 Misc. 401, 50 N. Y. Supp. 280, holding mortgagee estopped to foreclose against improved acre covered by mortgage of tract where unselected acre released for cash; *Teachers' Bldg. & L. Asso. v. Severance*, 41 App. Div. 316, 58 N. Y. Supp. 464, holding acquiescence in mortgagor's deduction of interest each month for six years estops association to deny right; *Moore v. Nye*, 49 N. Y. S. R. 170, 21 N. Y. Supp. 94, holding mortgagee under deed absolute in form estopped by denial of interest in property to assert title against mortgagor's vendee; *Mattes v. Frankel*, 157 N. Y. 609, 68 Am. St. Rep. 804, 52 N. E. 585, *Reversing* 65 Hun, 206, 20 N. Y. Supp. 145, holding owner of adjoining lots estopped to deny vendee's right of way to lot sold, where pointed out during negotiations, though not included in deed; *Williamson v. Jones*, 39 W. Va. 269, 25 L. R. A. 237, 19 S. E. 436, holding owner causing void judicial sale of land and receiving proceeds cannot attack vendee's title after improvements made; *Morris v. Wheat*, 8 App. D. C. 387, holding party granting as guardian, but warranting in own right, estopped to deny grantee's title; *Re Turfler*, 1 Misc. 71, 1 Power, 402, 23 N. Y. Supp. 135, holding heir assenting to payment in accordance with intent of testator estopped to contest executor's account; *Williams v. Whittell*, 69 App. Div. 348, 74 N. Y. Supp. 820, holding party receiving benefits under sealed agreement not to attack will estopped to assert invalidity for want of consideration; *Crawford v. Ormsbee*, 6 App. Div. 52, 39 N. Y. Supp. 740, holding heir estopped from contesting will, where conveyance was made to him by reversioner on strength of his statement that he would make no claim against the estate; *Dovale v. Ackermann*, 39 N. Y. S. R. 518, 15 N. Y. Supp. 196, holding party obtaining payments through admission that payer not legally liable estopped to assert liability; *Munson v. Magee*, 22 App. Div. 345, 47 N. Y. Supp. 942, holding party acquiescing in apparent valid release of contract estopped to assert invalidity against party incurring expense in reliance thereon; *Dr. David Kennedy Corp. v. Ken-*

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aedy, 26 App. Div. 603, 55 N. Y. Supp. 917, enjoining party selling good will of patent-medicine business employing his name, from receiving mail addressed to him; Dwight v. Williams, 25 Misc. 670, 55 N. Y. Supp. 201, holding creditors estopped where debtor could not assert invalidity of oral contract acted upon by third parties; Tobias v. Morris, 126 Ala. 551, 28 So. 517, holding estoppel for jury where wife made deposit, but permitted husband to give check signature to teller; Krakauer v. Chapman, 16 App. Div. 125, 45 N. Y. Supp. 127 (dissenting opinion), majority holding failure of creditor for two months to notify party authorizing purchaser to draw on him for amount of purchase, that first draft not in full, works no estoppel; Bank of Monongahela Valley v. Weston, 172 N. Y. 267, 64 N. E. 946, holding partner permitting use of firm name as accommodation indorser estopped from denying validity of such indorsement made after dissolution of partnership; McGuire v. Hall, 78 App. Div. 643, 80 N. Y. Supp. 1139, holding owner bound by arbitrary agreement with architect as to cost and exchange value of building, in estimating commissions; Western New York & P. R. Co. v. Rea, 83 App. Div. 579, 81 N. Y. Supp. 1093, holding owner, inducing lessee to believe that premises were owned by her husband and permitting substantial improvements, estopped to deny validity of lease; Horton v. Erie Preserving Co. 90 App. Div. 281, 85 N. Y. Supp. 503, holding subscriber of funds for building of factory estopped from avoiding same for delay in construction, where he permitted building to go on without protest; *Re Turfler*. 1 Power, 402, 1 Misc. 71, 23 N. Y. Supp. 135, holding residuary legatees, assenting to certain payments, estopped from claiming they were made illegally.

Cited in footnote to *Old Times Distillery Co. v. Casey*, 42 L. R. A. 466, which holds right to enjoin use of trade-mark lost by ten years' delay.

Cited in notes (13 L. R. A. 270) on what constitutes equitable estoppel; (13 L. R. A. 271) on doctrine of estoppel *in pais*.

Distinguished in *Marden v. Dorthy*, 160 N. Y. 59, 46 L. R. A. 701, 54 N. E. 726, holding party not estopped even against bona fide mortgagees to deny signature to mortgage where obtained by trick and without negligence; *Card v. Moore*, 68 App. Div. 336, 74 N. Y. Supp. 18, holding parties forming imperfect corporation not estopped, as between themselves, by contract making it party, to deny its existence; *Syracuse Solar Salt Co. v. Rome, W. & O. R. Co.* 67 Hun, 162, 22 N. Y. Supp. 321, holding owner not estopped by silence at foreclosure sale of street railway to assert title to highway against purchaser; *Hey v. Collman*, 78 App. Div. 587, 79 N. Y. Supp. 778, holding claimant of right of way not estopped from asserting title by adverse possession because silent at sale of servient tenement.

Tide lands.

Cited in note. (64 L. R. A. 336) on municipal ownership of tide lands.

7 L. R. A. 759, *WELLS v. SALINA*, 119 N. Y. 280, 23 N. E. 870.

On a subsequent appeal in 71 Hun, 565, 25 N. Y. Supp. 134, plaintiff is held to have right of action as equitable assignee of original claim.

Powers of municipality.

Approved in *People ex rel. Coon v. Wood*, 35 N. Y. S. R. 843, 12 N. Y. Supp. 436, holding town's resolution to pay specified amount per day for prosecution of criminal actions ineffectual to bind it in absence of statutory authority;

People *ex rel.* Bowles v. Burrell, 14 Misc. 220, 35 N. Y. Supp. 608, holding that unauthorized highway commissioners cannot pledge town's credit for repair of highways and bridges, notwithstanding local custom; Queens County Water Co. v. Monroe, 83 App. Div. 110, 82 N. Y. Supp. 610, holding that preliminary requirements of statute authorizing city to acquire land for increasing water supply must be strictly complied with; Water Comrs. v. Westchester County Waterworks Co. 176 N. Y. 251, 68 N. E. 348, holding appraisal of property of waterworks company, based on illegal contract with village, invalid.

Distinguished in Birge v. Berlin Iron Bridge Co. 133 N. Y. 486, 31 N. E. 609, holding act permitting special town meetings to vote on raising and appropriating moneys for bridges did not abolish pre-existing limitation upon amount of taxation; Mulnix v. Mutual Ben. L. Ins. Co. 23 Colo. 80, 33 L. R. A. 832, 46 Pac. 123, holding state not liable on *quantum meruit* for goods received under illegal purchase.

—To borrow money.

Approved in People *ex rel.* Read v. Smithville. 85 Hun, 116, 32 N. Y. Supp. 668, holding town not liable upon indebtedness because vote in incurring same not by ballot as prescribed; Scott v. Twombly, 20 Misc. 653, 46 N. Y. Supp. 1084, holding act authorizing villages to acquire lands for parks does not authorize issuing of bonds; Jamaica Sav. Bank v. New York, 61 App. Div. 471, 70 N. Y. Supp. 967 (dissenting opinion), majority holding that town may borrow money for authorized purpose where supervisors may authorize town to borrow for town purposes.

Cited in note (9 L. R. A. 497) on power of municipal corporations to borrow money.

Limited in New York & R. Cement Co. v. Keator, 62 App. Div. 580, 71 N. Y. Supp. 185, holding that submission of proposition to raise money includes raising by issuing bonds or other obligations.

Distinguished in Birge v. Berlin Iron Bridge Co. 133 N. Y. 486, 31 N. E. 609, holding that special town meeting called for considering question of raising and appropriating moneys may apply for authority to borrow money.

7 L. R. A. 765, CARY LIBRARY v. BLISS, 151 Mass. 364, 25 N. E. 902.

Municipalities as trustees.

Cited in note (16 L. R. A. 695) on authority of legislature to remove municipality from trusteeship.

Public charities.

Cited in Davis v. Barnstable, 154 Mass. 225, 28 N. E. 165, holding gift to promote public education constitutes public charity; St. Paul's Church v. Atty. Gen. 164 Mass. 198, 41 N. E. 231, upholding gift to library, first mentioning limited number of beneficiaries, but finally providing for use by public.

Cited in footnote to People *ex rel.* Atty. Gen. v. Dashaway Asso. 12 L. R. A. 117, which holds promotion of cause of temperance too vague description of purpose for which corporation formed.

Cited in note (13 L. R. A. 218) on power of municipal corporation to take and administer property in trust for charitable uses.

Gifts for benefitting inhabitants of town.

Cited in *Sears v. Chapman*, 158 Mass. 401, 35 Am. St. Rep. 502, 33 N. E. 604, upholding gift for public charity, the whole to be under exclusive control of inhabitants of town; *Boston v. Doyle*, 184 Mass. 380, 68 N. E. 851, holding title to charitable fund given by Benjamin Franklin to town of Boston to be in city of Boston.

Obligations arising out of acceptance of gift.

Cited in *Quincy v. Atty. Gen.* 160 Mass. 434, 35 N. E. 1066, holding direction in charitable gift requiring town to guarantee fund with 6 per cent interest not requiring guaranty of specified interest; *Atty. Gen. ex rel. Spalding v. Nashua*, 67 N. H. 480, 32 Atl. 852, holding by acceptance of gift city agrees to perform conditions attached to it.

Power of courts to modify details of management of charitable trusts.

Cited in *Lackland v. Walker*, 151 Mo. 259, 52 S. W. 414, upholding power of court of chancery to alter administrative details of public charity when reasonably necessary.

Power of majority to bind board.

Cited in footnote to *Honaker v. Board of Education*, 32 L. R. A. 413, which denies power of members of board of education acting separately to bind themselves as board.

Power of state or corporation to take property.

Cited in *Woodward v. Central Vermont R. Co.* 180 Mass. 603, 62 N. E. 1051, holding amendatory act requiring corporation purchaser at foreclosure sale to pay judgments against mortgagor void; *Old Colony R. Co. v. Framingham Water Co.* 153 Mass. 563, 13 L. R. A. 334, 27 N. E. 662, holding legislature may authorize taking of land for public use previously appropriated by legislative authority to different public use.

Cited in footnotes to *Re Brooklyn*, 26 L. R. A. 270, which upholds act authorizing city to acquire property of water company; *Butte, A. & P. R. Co. v. Montana U. R. Co.* 31 L. R. A. 298, which holds railroad land not actually used or necessary subject to condemnation by other railroad; *Diamond Jo Line Steamers v. Davenport*, 54 L. R. A. 859, which authorizes condemnation for public wharf of land used by carrier as landing place; *Denver Power & Irrig. Co. v. Colorado & S. R. Co.* 60 L. R. A. 383, which denies power of reservoir company to condemn land devoted to purpose of railroad unless public necessity requires; *Cleveland, C. C. & St. L. R. Co. v. Ohio Postal Teleg. Cable Co.* 62 L. R. A. 941, which holds burden upon telegraph company to show right of way sought in railroad property will not interfere with railroad's use of right of way.

7 L. R. A. 771, *MASON v. POMEROY*, 151 Mass. 164, 24 N. E. 202.

Second petition for accounting in 154 Mass. 482, 29 N. E. 51.

Continuance of testator's business.

Cited in *Packard v. Kingman*, 109 Mich. 506, 67 N. W. 551, holding it competent for testator to provide for continuance of his business and subject all of his property to such purpose.

Remedy of creditors against trustees and estate.

Cited in *Mayo v. Moritz*, 151 Mass. 485, 24 N. E. 1083, holding creditor could not have whole of trust property sold and proceeds applied to pay his claim;

Odd Fellows Hall Asso. v. McAllister, 153 Mass. 286, holding, even where trustees are entitled to judgment at law is against them as individuals; Mass. 438, 63 N. E. 923, holding executor may be held liable for debt of estate to secure it; Packard v. Kingman, holding trustee may contract for trust estate as if he were owner; O'Malley v. Gerth, 67 N. J. L. 613, 52 Atl. 101, holding trustee liable for torts, irrespective of their right to sue in trust; Wells-Stone Mercantile Co. v. Grover, 7 N. D. 911, holding creditor must generally look to trustee for payment of goods sold to him; Connally v. Lyons, 18 S. W. 799, holding trustee personally liable for debt of trust estate.

Priority of claims.

Followed in Woddrop v. Weed, 154 Pa. 314, 32 W. 832, 26 Atl. 375, holding upon insolvency of trust assets must be distributed *pro rata*.

Cited in American Loan & T. Co. v. Northwestern Nat. Bank, 154 Mass. 344, 44 N. E. 340, holding mere priority of claim against trust fund does not give right to priority of satisfaction; 190 U. S. 538, 47 L. ed. 1170, 23 Sup. Ct. Rep. 711, holding trustee rendered voluntary assignee in unsuccessfully resisted bankruptcy of assignor, on petition filed within four months, not provable against bankrupt's estate.

Creditor's right to proceed against trust estate.

Cited in Broadway Nat. Bank v. Wood, 165 Mass. 100, holding creditor of ostensible firm has no prior right to payment of his claim over creditors of real firm; 7 N. D. 463, 41 L. R. A. 253, 75 N. W. 911, holding Co. v. Aultman, M. & Co. 9 N. D. 522, 84 N. W. 100, holding creditors to proceed against trust estate based on trustee's expenditures.

7 L. R. A. 776, FARRELL v. DERBY, 58 Conn. 251.

Municipal powers.

Cited in Central R. & Electric Co.'s Appeal, 67 N. D. 100 (dissenting opinion), as to possession by municipality of property in operation of those specifically granted, or to attach property.

Distinguished in Goodwin v. East Hartford, 70 N. D. 100, holding towns not liable for expense incurred by statute in exercise of control of highway in employing agents to secure its existence and transferring burden of maintaining it to property owners.

State control of municipal affairs.

Distinguished in State *ex rel.* Bulkeley v. Wilbur, 154 A. 497, 35 Atl. 421 (dissenting opinion), majority holding towns liable for expense of maintenance and construction of highways.

7 L. R. A. 779, WILLIAM ROGERS MFG. CO. v. ROGERS, 58 Conn. 356, 18 Am. St. Rep. 218, 20 Atl. 467.

Specific enforcement of contract.

Cited in notes (8 L. R. A. 626) on right to specific performance where there is adequate remedy at law; (11 L. R. A. 116) on agreements not specifically enforceable.

Rule as to negative enforcement of contracts for personal services.

Cited in *Schwier v. Zitike*, 136 Ind. 213, 36 N. E. 30, holding school board cannot be enjoined from violating contract for personal services as teacher; *E. Jaccard Jewelry Co. v. O'Brien*, 70 Mo. App. 435, refusing to enjoin salesman from entering employment of another firm in violation of contract; *Jones v. Williams*, 139 Mo. 92, 37 L. R. A. 707, 61 Am. St. Rep. 436, 40 S. W. 353 (dissenting opinion), majority holding corporation enjoined from breach of contract giving plaintiff, in considerations of purchase of stock, management and editorship of newspaper; *Chain Belt Co. v. Von Spreckelsen*, 117 Wis. 123, 94 N. W. 78, holding injunction in action to restrain expert mechanic from entering employment of another than plaintiff, properly dissolved.

Cited in notes (11 L. R. A. 550) on special services for professional labor; (12 L. R. A. 497) on assignability of contracts for personal services requiring special skill and knowledge; (20 L. R. A. 167) on power of equity to grant mandatory injunctions.

Engaging in like business.

Cited in *Knoedler v. Glaenger*, 20 L. R. A. 735, 5 C. C. A. 308, 14 U. S. App. 336, 55 Fed. 898, holding, in absence of contract or fraud, vendor of business and good will not debarred from establishing like business in same place.

7 L. R. A. 782, *KE-TUC-E-MUN-GUAH v. McCURE*, 122 Ind. 541, 23 N. E. 1080.

Presumption on appeal that amendment was made.

Cited in *Taylor v. Calvert*, 138 Ind. 84, 37 N. E. 531, holding amendment presumed for purpose of curing immaterial variance.

Distinguished in *Lake Erie & W. R. Co. v. Juday*, 19 Ind. App. 443, 49 N. E. 843, holding action not removable to Federal court where damages demanded are less than \$2,000, though complaint alleges greater.

Jurisdiction.

Cited in *Stacy v. La Belle*, 99 Wis. 524, 41 L. R. A. 422, 67 Am. St. Rep. 879, 75 N. W. 60, holding action *ex contractu* lies in state court against Indian in absence of statute or treaty to contrary.

7 L. R. A. 784, *LOWMAN v. SHEETS*, 124 Ind. 416, 24 N. E. 351.

Statute of frauds — Contract not to be performed within year.

Cited in *Langan v. Iverson*, 78 Minn. 302, 80 N. W. 1051, holding parol agreement upon conveyance of land to pay mortgage not due within year not within statute.

Cited in footnotes to *Lewis v. Tapman*, 47 L. R. A. 385, which holds contract to marry "within three years" not within statute of frauds; *Weatherford. M. W. & N. W. R. Co. v. Wood*, 28 L. R. A. 526, which holds contract to give pass to

man and his family annually for ten years not within statute of frauds; *Brown v. Throop*, 13 L. R. A. 646, which holds parol agreement in March for lease of ice house for one year from April to be left full on surrendering possession valid; *Hand v. Osgood*, 30 L. R. A. 379, which holds oral lease for year with privilege of three at annual rent, void.

Cited in notes (9 L. R. A. 129) on promises not to be performed within a year; (10 L. R. A. 727) on lease within statute of frauds.

— **Effect of part performance.**

Cited in *Murphy v. De Haan*, 116 Iowa, 63, 89 N. W. 100, holding oral contract for labor, to the extent of performance, taken out of statute; *Riley v. Haworth*, 30 Ind. App. 381, 64 N. E. 928, holding oral contract for conveyance of land not taken out of statute by part payment of purchase price.

— **Contracts voidable only.**

Cited in *Cochran v. Ward*, 5 Ind. App. 93, 51 Am. St. Rep. 229, 29 N. E. 795, holding contracts within statute of frauds not void, but power of enforcement merely withheld and recovery of damages for nonperformance prevented.

Distinguished in *Pierce v. Clarke*, 71 Minn. 121, 73 N. W. 522, overruling *Hagelin v. Wacks*, 61 Minn. 216, 63 N. W. 624, holding oral contracts relating to land absolutely void.

Enforceability of contracts void in part.

Cited in *Gibson County v. Cincinnati Steam Heating Co.* 128 Ind. 248, 12 L. R. A. 505, 27 N. E. 612, holding valid part of contract severable from void part enforceable.

Partner's right to dispose of firm property.

Cited in *Huey v. Fish*, 15 Tex. Civ. App. 462, 40 S. W. 29, holding member of nontrading partnership cannot mortgage firm assets without copartner's consent; *Callahan v. Heinz*, 20 Ind. App. 365, 49 N. E. 1073, holding one partner cannot, without consent of others, assign for creditors property used in firm business.

Declarations of possessor as to title.

Distinguished in *Robbins v. Spencer*, 140 Ind. 497, 38 N. E. 522, holding declarations of vendor retaining life estate, made after executing deed, inadmissible against vendee.

Cotenant's liability for conversion.

Cited in *Robinson v. Dickey*, 143 Ind. 208, 52 Am. St. Rep. 417, 42 N. E. 679, holding cotenant's exclusive possession of personalty not conversion.

7 L. R. A. 788, *VALENTINE v. WYSOR*, 123 Ind. 47, 23 N. E. 1076.

Partnership; interests of heirs and devisees in share of deceased partner.

Cited in *Bollenbacher v. First Nat. Bank*, 8 Ind. App. 18, 35 N. E. 403, holding rights of heirs and legatees of deceased partner attach only to surplus of latter's interest after partnership debts are paid.

Right of survivor to control of firm property.

Cited in *McIntosh v. Zaring*, 150 Ind. 312, 49 N. E. 164, holding upon death of partner right to collection of debts and assets is vested exclusively in survivors; *Rand v. Wright*, 141 Ind. 234, 39 N. E. 447, holding on death or retire-

ment of partner, survivors succeed to full right of disposing of partnership property, and closing up of business; *Bollenbacher v. First Nat. Bank*, 8 Ind. App. 16, 35 N. E. 403, holding on death of partner law constitutes survivors trustees to wind up concern for benefit of all persons interested.

Cited in footnote to *Philbrook v. Newman*, 34 L. R. A. 265, which holds good will passes to surviving partners on purchase of interest of deceased.

Distinguished in *Shrum v. Simpson*, 155 Ind. 162, 49 L. R. A. 793, 57 N. E. 708, holding agreement between owner and another for cultivation of land on shares not partnership giving survivor right of possession of property until business settled.

Satisfaction of individual liability of partners.

Cited in footnotes to *Kincaid v. National Wall Paper Co.* 54 L. R. A. 412, which sustains right of partners to appropriate, with other partners' consent, interest in firm to pay individual, in preference to firm, debts; *Hundley v. Farris*, 12 Ind. 12, 12 N. E. 12, holding in preference to firm, debts; *Hundley v. Farris*, 12 of deceased partner's estate; *Re Baldwin*, 58 L. R. A. 122, which holds individual liability of member of banking firm, signing name to certificate of deposit, enforceable against estate in preference to claims against firm.

Purchase by trustees at own sale.

Cited in *Comegys v. Emerick*, 134 Ind. 153, 39 Am. St. Rep. 245, 33 N. E. 899, holding purchase of real estate by executor at his own sale, void; *Tennant v. Dunlop*, 97 Va. 242, 33 S. E. 620, holding surviving partner is trustee as to disposition of firm property, and purchase of deceased partner's interest regarded with suspicion, and jealously scrutinized; *Holladay v. Land & River Improv. Co.* 6 C. C. A. 571, 18 U. S. App. 308, 57 Fed. 785, holding settlement between executor and surviving partner, involving transfer of interest of deceased in firm real estate to survivor, conclusive in absence of fraud or mistake.

Laches.

Cited in *Matthews v. Wilson*, 31 Ind. App. 97, 67 N. E. 280, holding lien against real estate to secure payment of allowance for support of child barred after ten years.

Cited in note (10 L. R. A. 126) on doctrine of laches.

7 L. R. A. 797, *NEWSON v. GALVESTON*, 76 Tex. 559, 13 S. W. 368.

Powers of municipal corporations respecting markets.

Cited in notes (24 L. R. A. 585) on prohibition of sales except at markets; (24 L. R. A. 584) on market regulations and ordinances affecting contracts; (9 L. R. A. 69) on regulation of markets and market houses.

Statutes regulating sale of articles of food.

Cited in footnote to *State v. Layton*, 62 L. R. A. 164, which holds constitutional, act prohibiting manufacture of baking powder containing alum.

7 L. R. A. 799, *WHITE v. WHITE*, 82 Cal. 427, 23 Pac. 276.

When marriage relation exists.

Cited in *Eldred v. Eldred*, 97 Va. 610, 34 S. E. 477, holding presumption of marriage, raised by declaration that it was in certain city, rebutted where license required not issued and banns not published; *Williams v. Herrick*, 21 R. I. 403,

79 Am. St. Rep. 809, 43 Atl. 1036, holding ceremonial marriage to enable woman and children to receive property strong evidence against existence of prior marriage; *Barker v. Valentine*, 125 Mich. 343, 51 L. R. A. 790, 84 Am. St. Rep. 578, 84 N. W. 297, holding marriage presumed between man and woman who continued to cohabit under circumstances of general repute of marriage after death of first wife; *Quackenbush v. Swortfiguer*, 136 Cal. 152, 68 Pac. 590, holding the repute of marriage divided, and sustains finding of no marriage; *Re Richards*, 133 Cal. 527, 65 Pac. 1034, holding evidence by woman of solemnization of marriage with intestate, followed by cohabitation and residence, admissible to determine which of two widows entitled to estate; *People v. Hartman*, 130 Cal. 490, 62 Pac. 823, holding evidence of general repute of marriage admissible in trial for bigamy; *Harron v. Harron*, 128 Cal. 310, 60 Pac. 932, holding divorce cannot be granted from marriage never solemnized, the existence of which was evidenced only by illicit relations, and unsupported statement of woman; *Summerville v. Summerville*, 31 Wash. 416, 72 Pac. 84, holding marriage established by proof of cohabitation as man and wife and testimony as to service supposed by wife to have been performed by clergyman; *Hinckley v. Ayres*, 105 Cal. 360, 38 Pac. 735, holding marriage not proved, where parties living together were not shown to have treated the relation as that of husband and wife.

Cited in footnotes to *Re McLaughlin*, 16 L. R. A. 699, which holds common-law marriage invalid under statute; *Nims v. Thompson*, 17 L. R. A. 847, which holds finding of marriage justified by evidence; *Re Hurlburt*, 35 L. R. A. 794, which holds general reputation in family as to death of member, not derived from deceased members of family, inadmissible.

Cited in notes (14 L. R. A. 364) on cohabitation as proof of marriage where it begins unlawfully; (41 L. R. A. 449) on entries in family Bible or other religious book as evidence.

When reversal allowed because of leading question.

Cited in *Casey v. Leggett*, 125 Cal. 673, 58 Pac. 264; *Kyle v. Craig*, 125 Cal. 113, 57 Pac. 791, holding case will not be reversed because of allowance of leading question, unless discretion abused.

Failure to find on issue.

Cited in *Smith v. Smith*, 119 Cal. 190, 48 Pac. 730, holding omission to find upon facts alleged in answer immaterial, where evidence not sufficient to support finding of facts as alleged.

7 L. R. A. 809, *ASHTON v. DASHAWAY ASSO.* 84 Cal. 61, 22 Pac. 660, 23 Pac. 1091.

7 L. R. A. 812, *BENTON v. SHAFER*, 47 Ohio St. 117, 24 N. E. 197.

Notice of pendency of action.

Cited in footnote to *Mach v. Blanchard*, 58 L. R. A. 811, which holds mortgagee of land restored to mortgagor by default judgment against his grantee, takes subject to having title defeated by opening of judgment.

Cited in note (8 L. R. A. 553) on effect of notice of pendency of suit.

7 L. R. A. 817, MOLETOR v. SINNEN, 76 Wis. 308, 20 Am. St. Rep. 71, 44 N. W. 1099.

Fugitive from justice.

Cited in footnote to *Re Little*, 57 L. R. A. 295, which holds prisoner transferred to other state for trial in Federal court may be turned over to state authorities.

Cited in notes (14 L. R. A. 129) on extradition from sister state, right to try prisoner for other crime than that for which he was surrendered; (25 L. R. A. 722, 723, 724, 727, 728, 731) on privilege of nonresident from suit.

Privilege from arrest or process.

Cited in footnote to *Murray v. Wilcox*, 64 L. R. A. 534, which holds defendant in criminal case attending trial exempt from service of civil process.

7 L. R. A. 819, WEBER v. KANSAS CITY CABLE R. CO. 100 Mo. 194, 18 Am. St. Rep. 541, 12 S. W. 804, 13 S. W. 587.

Violation of ordinance.

Cited in *Veller v. Chicago, M. & St. P. R. Co.* 120 Mo. 654, 23 S. W. 1061, holding driving horse at speed prohibited by ordinance negligence *per se*.

Negligence of defendant.

Cited in *Van Natta v. People's Street R. Electric Light & P. Co.* 133 Mo. 22, 34 S. W. 505, reversing because of instruction imposing upon carrier higher degree of care than required by law.

Recovery defeated by contributory negligence.

Cited in *Corcoran v. St. Louis, I. M. & S. R. Co.* 105 Mo. 406, 24 Am. St. Rep. 394, 16 S. W. 411, holding act of climbing over stationary cars contributory negligence.

Direction of verdict.

Cited in *Weaver v. Benton-Bellefontaine R. Co.* 60 Mo. App. 208, reversing judgment without remanding, on ground trial court should have directed verdict for defendant; *Moore v. Kansas City, St. S. & M. R. Co.* 146 Mo. 580, 48 S. W. 487, holding voluntary choice of dangerous course when safer one was open, contributory negligence as matter of law.

Cited in footnote to *Hopkins v. Nashville, C. & St. L. R. Co.* 32 L. R. A. 354, which sustains practice of demurring to evidence.

When contributory negligence a question for jury.

Cited in *Kreis v. Missouri P. R. Co.* 131 Mo. 545, 30 S. W. 310, holding on conflicting evidence contributory negligence question for jury; *Church v. Chicago & A. R. Co.* 119 Mo. 214, 23 S. W. 1056, holding questions for jury where facts though undisputed would lead sensible men to different conclusions; *Eikenberry v. St. Louis Transit Co.* 103 Mo. App. 451, 80 S. W. 360; *Dawson v. St. Louis Transit Co.* 102 Mo. App. 283, 76 S. W. 689, holding it mixed question of law and fact whether passenger boarding or alighting from slowly moving car guilty of contributory negligence; *Hornstein v. United Railways Co.* 97 Mo. App. 278, 70 S. W. 1105, holding it question for jury whether crossing street car tracks without stopping to see whether car approaching, contributory negligence; *Root v. Des Moines City R. Co.* 113 Iowa, 680, 83 N. W. 904, and *Fulks v. St. Louis & S. F. R. Co.* 111 Mo. 340, 19 S. W. 818, holding that getting upon slowly moving train, especially

at platform, is not negligence as matter of law; Hansberger v. Sedalia Electric R. Light & Power Co. 82 Mo. App. 579, holding question whether person was guilty of contributory negligence in getting upon slowly moving car, for jury; Eberly v. Chicago, B. & Q. R. Co. 96 Mo. App. 369, 70 S. W. 381, holding that where inference to be drawn from evidence is uncertain, question of negligence cannot be passed upon by court; McDonald v. Kansas City & I. Rapid Transit R. Co. 127 Mo. 43, 29 S. W. 848, holding passenger not guilty of contributory negligence *per se* in getting off slowly moving train, under conductor's direction, without looking to see if a train is approaching.

Cited in notes (11 L. R. A. 396) on passenger alighting from moving train; (38 L. R. A. 787) on negligence in getting on or off moving train.

Determination of contributory negligence per se.

Cited in Citizens' Street R. Co. v. Spahr, 7 Ind. App. 31, 33 N. E. 446, holding whether person is guilty of negligence in boarding street car depends upon facts of each particular case; Dewald v. Kansas City, Ft. S. & G. R. Co. 44 Kan. 590, 24 Pac. 1101, holding person jumping from moving train before reaching station guilty of contributory negligence as matter of law; Hughes v. Fagin, 46 Mo. App. 47 (dissenting opinion). majority holding carpenter not guilty of contributory negligence *per se*, in leaning part of his body in elevator shaft while elevator in use above him.

Proceeding after overruling of demurrer to evidence.

Cited in Storck v. Mesker, 55 Mo. App. 32, holding demurrer to evidence waived by defendant by introduction of evidence; Cain v. Gold Mountain Min. Co. 27 Mont. 535, 71 Pac. 1004, holding defendant assumes risk of supplying defects, by offering evidence after refusal of nonsuit; Fuchs v. St. Louis, 167 Mo. 631, 57 L. R. A. 139, 67 S. W. 610, considering whole evidence upon defendant's saving point of court's refusal to find for defendant at close of case.

Street railways.

Cited in note (8 L. R. A. 539) on electric railways in city streets.

Carrier's duty as to safety of passengers.

Cited in Fillingham v. St. Louis Transit Co. 102 Mo. App. 582, 77 S. W. 314, holding carrier's duty as to safety of passenger requires latter to be put off at reasonably safe place.

Proximate cause.

Cited in Shareman v. St. Louis Transit Co. 103 Mo. App. 529, 78 S. W. 846, holding woman's conduct, in stepping off of moving car, without peril to confuse her, proximate cause of injury.

7 L. R. A. 822, DOUGLASS v. MERCHANTS' INS. CO. 118 N. Y. 484, 23 N. E. 806.

Accounting by corporation officers.

Cited in footnote to Eaton v. Robinson, 29 L. R. A. 100, which requires officers to account for salaries voted and paid to deprive stockholders of rights.

Presumption of continuance of contract of employment.

Cited in Mason v. Secor, 76 Hun, 179, 27 N. Y. Supp. 570, holding continuation of employee in service of new partnership raises no presumption of continuation

of former contract of service; *Lichtenhein v. Fisher*, 87 Hun, 398, 34 N. Y. Supp. 304, holding that presumption is of continuance of contract where employee hired for annual compensation continues over term; *Bennett v. Mahler*, 90 App. Div. 27, 85 N. Y. Supp. 669, holding that continuance of service beyond term, under old contract of hiring for year, operated as new hiring for year; *Selley v. American Lubricator Co.* 119 Iowa, 600, 93 N. W. 590, holding salary of official after time of his discharge for good cause by directors, not recoverable.

Corporation by-laws.

Cited in *Fowler v. Great Southern Teleph. & Teleg. Co.* 104 La. 755, 29 So. 271, holding power of board of directors in hiring employee and fixing salary in excess of charter and by-laws not binding on corporation.

Cited in note (25 L. R. A. 48) on effect of corporate by-laws as notice.

7 L. R. A. 824, *BURTON v. TUIITE*, 80 Mich. 218, 45 N. W. 88.

Examination of public records.

Cited in *Aitcheson v. Huebner*, 90 Mich. 645, 51 N. W. 634, holding state tax land book public record subject to inspection by any citizen; *Day v. Button*, 96 Mich. 602, 56 N. W. 3, upholding right to examine records and files in office of register of deeds to make memoranda therefrom; *Burton v. Reynolds*, 110 Mich. 355, 68 N. W. 217, holding general public under proper restrictions has right to information in public offices relating to titles.

Cited in note (27 L. R. A. 82) on right to inspect public records.

7 L. R. A. 826, *PECK v. BANK OF AMERICA*, 16 R. I. 710, 19 Atl. 369.

Notice of what inquiry would disclose.

Cited in *Maas v. German Sav. Bank*, 36 Misc. 157, 72 N. Y. Supp. 1068, holding bank chargeable with knowledge that domestic administrator had been appointed when foreign administrator applied for deposit of intestate; *Spellisay v. Cook & B. Co.* 58 App. Div. 285, 68 N. Y. Supp. 995, holding transfer made by one in his own name as attorney for another is notice that he is not owner; *Hughes v. Drovers' & M. Nat. Bank*, 86 Md. 424, 38 Atl. 936, holding corporation not bound to examine whether transferrer with power to transfer is attempting fraud; *Peck v. Providence Gas Co.* 17 R. I. 279, 15 L. R. A. 647, 21 Atl. 543, holding fact that transfers of stock made through bank is not notice to corporation that executrix under will had pledged, and not sold, them.

Cited in footnote to *Wooten v. Wilmington & W. R. Co.* 56 L. R. A. 615, which holds corporation permitting transfer of stock on books by executor, bound to see that provisions of will carried out.

Cited in note (15 L. R. A. 645) on duty of corporation as to transfer of stock held in trust.

When statute of limitations begins to run.

Cited in *Reynolds v. Hennessy*, 17 R. I. 178, 23 Atl. 639, holding statute of limitations does not begin to run while cause of action is fraudulently concealed from him.

Cited in footnotes to *Sanborn v. Gale*, 26 L. R. A. 864, which holds running of limitation against action for alienation of wife's affections not prevented by agreement of parties to adultery known to husband to deny same; *Smith v. Blachley*, 53 L. R. A. 849, which holds running of limitation against action to recover back

money not prevented by fraud, unless investigation prevented by affirmative efforts; *Mereness v. First Nat. Bank*, 51 L. R. A. 410, which holds running of limitations on demand certificate of deposit, not interrupted by bank's misrepresentations in denial of liability.

Cited in note (8 L. R. A. 687, 688) on statutes of limitation in case of concealed fraud.

7 L. R. A. 831, *JONES v. GLIDEWELL*, 53 Ark. 161, 13 S. W. 723.

Conclusiveness of finding upon appellate court.

Cited in *Freeman v. Lazarus*, 61 Ark. 257, 32 S. W. 680, holding finding of fraud by circuit court, supported by evidence, must stand; *Dunnington v. Frick Co.* 60 Ark. 258, 30 S. W. 212, and *Robson v. Hough*, 56 Ark. 624, 20 S. W. 523, holding same presumption on appeal indulged in as to findings as in verdict of jury.

Frauds vitiating elections.

Cited in *Freeman v. Lazarus*, 61 Ark. 257, 32 S. W. 680, holding excise election in township invalidated by misconduct of election judges; *Atty. Gen. v. McQuade*, 94 Mich. 443, 53 N. W. 944, holding parties, although not participating, cannot profit by election frauds.

Secrecy of the ballot.

Cited in *Ex parte Arnold*, 128 Mo. 261, 33 L. R. A. 389, 49 Am. St. Rep. 557, 30 S. W. 768, holding "election by ballots" means secret ballot.

Distinguished in *Re Massey*, 45 Fed. 635, holding secrecy of ballot does not prevent courts of state from having access to them to enforce criminal law.

Contested elections.

Cited in footnote to *Gillespie v. Dion*, 33 L. R. A. 703, which holds failure to allege election contestant's qualification to maintain proceeding, fatal.

Cited in note (12 L. R. A. 705) on notice to contestee in election contest.

Control of court over examination of witnesses.

Cited in *Hughes v. State*, 70 Ark. 423, 68 S. W. 676, holding that court abused discretion in stopping cross-examination upon material point in prosecution for rape.

7 L. R. A. 836, *MCCULLOUGH v. ANDERSON*, 90 Ky. 126, 13 S. W. 353.

Estates with power of appointment or to dispose of property.

Cited in *Coats v. Louisville & N. R. Co.* 92 Ky. 274, 17 S. W. 564, holding that devise to wife with absolute power of disposition, with remainder over of unexpended remainder, creates life estate; *Dudley v. Weinhart*, 93 Ky. 404, 20 S. W. 308, upholding power of appointment to change or cancel any gift or devise in will; *Payne v. Johnson*, 95 Ky. 184, 24 S. W. 238, holding intention to execute power of appointment must be clear; *Mulvane v. Rude*, 146 Ind. 483, 45 N. E. 659, holding donee of life estate with power of disposition does not take fee; *McCallister v. Bethel*, 97 Ky. 6, 29 S. W. 745, holding devise to A. in trust for B., and at B's. death to his children, if none, to any person to whom B. may devise, passes fee subject to be defeated.

Cited in footnotes to *Cornwell v. Wulff*, 45 L. R. A. 53, which holds absolute power of disposition in instrument conveying land carries full power in land

itself; *Roth v. Rauschenbusch*, 61 L. R. A. 455, which holds fee simple by devise to one absolutely and forever, not cut down by subsequent direction as to disposition of any remainder on devisee's death.

Cited in notes (9 L. R. A. 168) on devise of life estate to wife; (10 L. R. A. 757) on devise to wife for life with power to sell or dispose of estate.

7 L. R. A. 840, *BATT v. MALLON*, 151 Mass. 477, 25 N. E. 17.

Notice as to title to land.

Cited in note (8 L. R. A. 211) on constructive notice by possession as to title to land.

7 L. R. A. 843, *CODY v. NEW YORK & N. E. R. CO.* 151 Mass. 462, 24 N. E. 402.

Negligence of passenger attempting to leave car.

Cited in *Jones v. Baltimore & O. R. Co.* 4 App. D. C. 173, holding negligence of passenger leaving moving train question for jury; *Washington & G. R. Co. v. Hickey*, 5 App. D. C. 471, holding negligence of passenger jumping from street car to avoid imminent collision, for jury; *Gannon v. New York, N. H. & H. R. Co.* 173 Mass. 42, 43 L. R. A. 834, footnote p. 833, 52 N. E. 1075, which holds carrier liable for injury to passenger while impulsively trying to escape from car in which oil lamp caught fire.

Cited in footnote to *Tuttle v. Atlantic City R. Co.* 54 L. R. A. 582, which authorizes recovery for fall while trying to escape from derailed car.

Cited in note (8 L. R. A. 84) on causal connection broken by intervening agency.

7 L. R. A. 845, *GERMAN NAT. BANK v. COORS*, 14 Colo. 202, 23 Pac. 328.

Zona fide purchaser of commercial paper.

Cited in *Mater v. American Nat. Bank*, 8 Colo. App. 330, 46 Pac. 221, holding innocent holder for value may recover on note, although conditions as to extension of time at foot, were wrongfully detached by another; *Tourtlotte v. Brown*, 1 Colo. App. 417, 29 Pac. 130, holding notice of defenses that would defeat commercial paper in the hands of the holder must be affirmatively established.

7 L. R. A. 847, *PORTER v. PIERCE*, 120 N. Y. 217, 24 N. E. 281.

Sunday, in computing time.

Cited in *Miner v. Tilley*, 54 Mo. App. 629, holding, in computing time in which act may be done, Sunday not considered if last day; *Bowles v. Brauer*, 39 Va. 468, 16 S. E. 356, holding in computing statutory time Sunday is included unless last day, when act may generally be done on succeeding day; *Craig v. Butler*, 83 Hun, 289, 31 N. Y. Supp. 963, holding payments may fall due on Sunday, but rule of *dies non* extends time of payment.

Cited in notes (14 L. R. A. 122) on extension of time for redemption when last day falls on Sunday; (49 L. R. A. 235) on computation of time for redemption.

Violation of Sunday law.

Cited in footnote to *Sullivan v. Maine C. R. Co.* 8 L. R. A. 427, which holds riding on Sunday for exercise not violation of statute.



ment for collection; *Tyson v. Western Nat. Bank*, 77 Md. 419, 23 L. R. A. 163. 26 Atl. 520, holding check deposited by customer for collection for account of indorsers does not pass title to bank; *Irwin v. Reeves Pulley Co.* 20 Ind. App. 112, 48 N. E. 601, holding bank accepting for collection draft payable elsewhere liable only for ordinary care in selecting correspondent, and not for its default; *National Bank of Commerce v. Johnson*, 6 N. D. 184, 69 N. W. 49, holding certificate of deposit, indorsed and deposited for collection and credit, remains property of depositor; *Citizen's Nat. Bank v. City Nat. Bank*, 111 Iowa, 215, 82 N. W. 464, holding drawee of check not bound to detect forgery of any other signature than that of drawer; *Freeman v. Exchange Bank*, 87 Ga. 47, 13 S. E. 160, holding payee of bill of exchange, indorsing for deposit to credit of himself, retains ownership of proceeds which are subject to garnishment by his creditor; *Blair v. Hill*, 50 App. Div. 36, 63 N. Y. Supp. 670, holding proceeds of check collected for owner by agent and commingled with his own remain property of owner; *Arnot v. Bingham*, 55 Hun, 556, 9 N. Y. Supp. 63, holding note sent to bank for collection only remains property of sender, who can collect proceeds from bank's receiver; *Wilson v. Marion*, 147 N. Y. 594, 42 N. E. 190, holding purchaser of real estate from assignee for benefit of creditors under fraudulent assignment can hold it if ignorant of fraudulent intent of assignor; *Knower v. Central Nat. Bank*, 124 N. Y. 561, 21 Am. St. Rep. 700, 27 N. E. 247, holding creditor of assignor for benefit of creditors to whom assignee paid money can hold it against creditor setting aside the assignment; *Hutchinson v. Manhattan Co.* 9 Misc. 344, 29 N. Y. Supp. 1103, holding title of draft, indorsed generally, but shown to be for collection only, remains in indorser; *Wolff v. Zeller*, 31 Misc. 257, 64 N. Y. Supp. 129, holding vendor in fraudulent sale may recover chattels from assignee of vendee when sale rescinded before assignment; *Gindre v. Kean*, 7 Misc. 584, 28 N. Y. Supp. 4, holding consignors of goods to *del credere* factor entitled to recover from his assignee for creditors' moneys collected from purchasers subsequent to the assignment; *Asher v. Deyoe*, 77 Hun, 533, 28 N. Y. Supp. 890, holding bank taking mortgage to secure antecedent debt on property purchased with intention of not paying therefor, not entitled to hold such property as against seller; *Bank of Clarke County v. Gilman*, 81 Hun, 490, 30 N. Y. Supp. 1111, holding owner of check for collection and credit remains owner; *O'Conner v. Gifford*, 117 N. Y. 283, 22 N. E. 1036, holding judgment creditor estopped from setting up claim against trustee under will, when he had failed to present claim within six months after publication; *Nash v. Second Nat. Bank*, 67 N. J. L. 267, 51 Atl. 727, holding drawer entitled to proceeds of draft created by collecting to forwarding bank after latter's failure; *Peters Shoe Co. v. Murray*, 31 Tex. Civ. App. 261, 71 S. W. 977, holding drawer of draft not entitled to follow proceeds in hands of assignee of collecting bank.

Cited in footnotes to *Milton v. Johnson*, 47 L. R. A. 529, which denies power of subagent to apply proceeds of debt collected to payment of claim due him from principal agent; *Waterloo Milling Co. v. Kuenster*, 29 L. R. A. 794, which throws upon depositor loss of worthless paper credited to him by bank receiving from other bank for collection; *Northwestern Nat. Bank v. Bank of Commerce*, 15 L. R. A. 102, which holds signature of drawer not guaranteed by indorsing draft "for collection;" *State Bank v. Byrne*, 21 L. R. A. 753, which holds drawee's acceptance of draft presented by collecting bank not payment;

Tyson v. Western Nat. Bank, 23 L. R. A. 161, which holds title by indorsing "for collection;" Beal v. Somerville, 17 L. R. A. 291, title to check passes by depositing for collection; First Nat. Bank, 15 L. R. A. 498, which holds bank receiving bill for gratuitously liable for defaults of reputable correspondent; Armstrong v. Bank, 9 L. R. A. 553, which denies right of receiver or creditor of owner with draft received for collection to demand proceeds of bank; Akin v. Jones, 25 L. R. A. 523, which holds direct New York exchange, draft sent for collection, precludes claim then held in trust.

Cited in note (32 L. R. A. 719) on trust in proceeds of collection bank when insolvent.

7 L. R. A. 861, WADDELL v. UNITED STATES, 25 Ct. Cl. 323

When claim barred.

Cited in Ray v. United States, 50 Fed. 168, and Wayne v. United States, 36 Ct. Cl. 289, holding fund awaiting demand a trust against which statute of limitations does not begin to run until repudiation of trust; Maine v. United States, 36 Ct. Cl. 552, to point no general statute of limitations operates to bar accounting officers in settlement of claims; Maine v. United States, 36 Ct. Cl. 552, holding claimant misled by mistaken action of department in not charging claims not chargeable with laches.

Distinguished in Balmer v. United States, 26 Ct. Cl. 89, held barred within Bowman Act if it could be settled by any department.

Finality of decision.

Cited in Armstrong v. United States, 29 Ct. Cl. 170, holding department disallowing claim final, unless opened for fraud, mistake, or new evidence.

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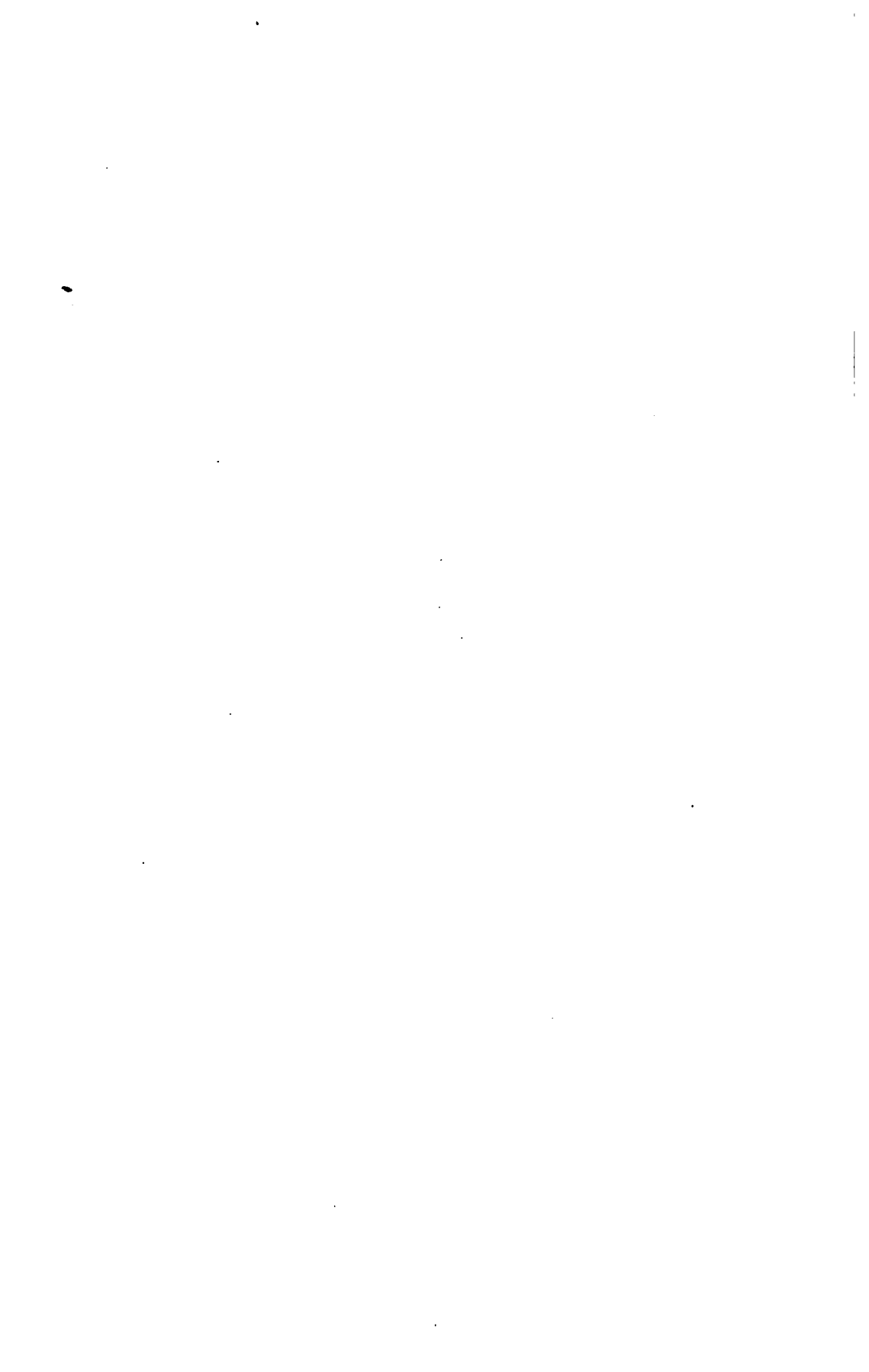














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